THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 26

Case No. 15,244 — Case No. 15,819

WILLIAM S. HEIN & CO., INC.
BUFFALO, NEW YORK
1995

Library of Congress Catalog Number 95-75068
ISBN 0-89941-924-0

Printed in the United States of America.

The quality of this reprint is equivalent to the
quality of the original work

This volume is printed on acid-free paper by
William S. Hein & Co., Inc.

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U. S. v. GRAFF—U. S. v. MORROW

Case No. 15,244—Case No. 15,819

ST. PAUL
WEST PUBLISHING CO.
1896

FEDERAL CASES.

BOOK 26.

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

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

Case No. 15,244.

UNITED STATES v. GRAFF et al.

[14 Blatchf. 381.] [1]

Circuit Court, S. D. New York. Jan. 22, 1878.

CONSPIRACY—PROOF OF—ACTS IN FURTHERANCE—EVIDENCE—INDICTMENT—VARIANCE—TRIAL.

1. G. and O. were indicted for a conspiracy with S. and others to defraud the United States out of the duties on silks and laces to be imported contrary to law. The indictment set forth several acts done by several of the accused to effect the object of the conspiracy. On the trial of G. and O., only one of such acts, an act of O., was proved. Other acts, not set forth, done by the defendants to effect the object of the conspiracy, were proved, to show its character. S. swore to an agreement made by him with O., who was the purser of a steamer, that O. should bring in goods, which S. should sell, for a commission. Under this agreement, O. brought in silks in barrels and cases, which S. disposed of, no duty being paid. S. sent the proceeds to O. W. was employed on O.'s steamer. S. swore that W. introduced him to O.; that he, in W.'s presence, agreed with O. to dispose of silks which O. should bring out in the same way W. brought out his; and that there was, at the time, an agreement between S. and W., whereby W. was bringing, in the steamer, silks which were landed without paying duty, and sold by S. At the trial, letters from W. to S. were admitted as evidence for the prosecution, to explain the nature of the importations by W., and of the agreement between S. and O., and to corroborate the testimony of S. A witness was allowed to describe the marks on the heads of certain barrels, to identify them, without proving the destruction or loss of such heads. A written statement made by O., describing his connection with S. in smuggling silks, was admitted in evidence against O. It was sworn to. When O. made it, he was not under arrest, but he had been told he was charged with being connected with smuggling. He made it freely, without the influence of threat or promise. S., after the discovery of his guilt, fled, and wrote a letter to G., which never reached G. The letter spoke of O. and of the smuggling operations. There was evidence to show the connection of G. with O. and S., in the conspiracy. The letter, by its contents, was an act done in furtherance of the conspiracy, and was admitted in evidence against G. and O.

[Cited in U. S. v. Stone, 8 Fed. 255.]

2. The evidence considered which warranted the jury in finding that G. was a co-conspirator with S. and O.

3. A variance between the indictment, and the evidence, as to the time when the alleged overt act was committed, is immaterial.

4. A party cannot wait until evidence is given, and the case of the other side is closed, and then produce a stipulation, as ground for striking out such evidence.

5. The prosecution put in evidence the manifest of the steamer, written by O., and filed in the custom house. An affidavit endorsed on it, made by the master of the steamer, more than a month after such filing, was offered in evidence by the defence, and excluded.

[This was an indictment against Alvin Graff and Thomas Owen for conspiracy.]

Benjamin B. Foster, Asst. Dist. Atty., for the United States.

Abram J. Dittenhoefer, for defendants.

BENEDICT, District Judge. This case comes before the court upon a motion for a new trial. The defendants were charged with having conspired with one Scott and others, to defraud the United States out of the duties on silks and laces to be imported into New York from Great Britain, contrary to law. The indictment sets forth several acts done by several of the accused to effect the object of the conspiracy. Of the acts so charged, but one was proved—an act of the defendant Owen. Other acts, not set forth, done by the defendants to effect the object of the conspiracy, were proved, for the purpose of showing the character of the conspiracy. To sustain the indictment, Scott was called as a witness and testified to an agree-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

ment between himself and the defendant Owen, according to which Owen was, from time to time, to bring over in the steamship the Queen, such goods as he might desire to import, which goods Scott was to dispose of for him, receiving a commission on the proceeds, as his compensation. In pursuance of this agreement, at frequent intervals during several years, silks were imported without payment of duty, packed in barrels generally, sometimes in large cases. From the steamer the goods went to a certain express office, and thence, in most instances, to a place selected by Scott, where Scott unpacked the barrels, altered the marks on the goods, repacked them, and then sent them to auction houses to be sold. There was no evidence that, in any instance, Scott saw the goods before their arrival at the express office, and there was no evidence that Owen personally took any part in landing the goods, or in their subsequent disposal. There was evidence of the transmission of the proceeds of sales by Scott to Owen.

In the course of the trial, various questions of law were raised and decided, some of which I am now asked to reconsider.

Of these questions, the first one presented on this motion relates to the admissibility of three letters written to Scott by one James Wells, dated respectively March 27th, April 1st, and May 1st, 1874. The admission of these letters as evidence against the defendants was objected to, but the letters were admitted. In order to exhibit the nature of the question raised by this objection, it is necessary to state, that there was evidence showing James Wells, the writer of the letters, to have been an employee on the Queen, of which vessel the defendant Owen was purser. Scott testified, that, in the year 1873, Wells introduced him to Owen, and, at that time, in Wells' presence, Scott agreed with Owen to dispose of silks which Owen then said he was going to bring out to this country in the same way Wells brought out his. In order to explain this direct evidence of an unlawful agreement between Scott and Owen, and to answer the position taken by the defence, that the agreement thus testified to did not relate to goods to be smuggled, Scott further testified, that, at the time of the introduction to Owen, an agreement was subsisting between him and Wells, by which Wells brought out, on nearly every trip of the steamer, silks which were landed without payment of duty, and sold by Scott. The letters under consideration were offered as further evidence to explain the nature of the importations made by Wells, and, so, explanatory of the agreement made between Scott and Owen, and as corroborative of Scott's testimony. The ground of the objection to these letters is, that they were written at subsequent dates, refer exclusively to future transactions, and form no part of the res gestæ, because they are not contemporaneous with the conversation they are introduced to explain. But, I adhere to the opinion, that they are evidence to show the nature of the business in which Scott and Wells were engaged at the time of the introduction to Owen, and for the following reasons: The evidence showed the agreement between Wells and Scott to be a continuing conspiracy. It did not relate to any particular package of goods, nor was it limited to any time. The agreement was to dispose of such goods and all goods that Wells might thereafter import. This agreement, at the time of the introduction of Owen to Wells, as also at the dates of the letters from Wells, was still subsisting and in continuous operation. Letters interchanged between Wells and Scott, in furtherance of that agreement, tend to show its nature and object, whenever written. They show a course of business, pursued, so far as the evidence discloses, without change. Although written subsequently to the introduction to Owen, and speaking of transactions contemporaneous with their writing, they become evidence of the nature of the arrangement existing between Wells and Owen at the time of the introduction to Owen, it having been shown that the arrangement then subsisting continued unchanged in character beyond the period when these letters were written. It may be conceded that these letters are not competent as being the acts of a co-conspirator, nor were they admitted as such. Their admissibility rests upon an entirely different ground, namely, that they tended to show what Owen meant when he said to Scott that his silks would be brought out in the same way Wells brought out his. Furthermore, the letters in question clearly corroborate the testimony of Scott as to the nature of the arrangement existing between him and Wells. I cannot doubt, therefore, that these letters were properly admitted, as tending to show that the arrangement between Owen and Scott related to defrauding the government of duties.

The next question presented on this motion is, whether it was error to permit a witness to describe the marks on the heads of certain barrels, without proof of the destruction or loss of the heads. I am unable to find error in this ruling. The point of inquiry was, whether certain barrels said by Scott to have been received at his place, were the same articles described on the manifest of the steamer the Queen, by certain shipping marks. The witness was allowed to describe the marks upon the barrels he received, for the sole purpose of identifying the articles. To such a question, the rule in regard to parol evidence of the contents of a document, has no application. Evidence of the character under consideration is properly admitted, when the object is to identify an article. Nor is the admissibility of such evidence confined to cases where the character of the article sought to be identified forbids its production

in court. In Com. v. Morrill, 99 Mass. 542, such evidence was admitted to identify a tag. See, however, Reg. v. Farr, 4 Fost. & F. 336.

The next point made is, that error was committed in admitting a written statement of Owen, describing his connection with Scott in smuggling silks. This statement was admitted as against Owen alone. It was made under the following circumstances: On the 2d day of July, 1877, Brackett, a special agent of the treasury, detailed to investigate frauds on the government, required Owen to accompany him to the custom house. There Brackett told Owen that evidence existed of his connection with smuggling operations, and desired him to examine the documents showing such connection. Owen, after seeing the papers in Brackett's possession, expressed a willingness to answer any questions Brackett might put to him concerning the matter. Brackett, thereupon, put to Owen various questions touching his connection with smuggling silks, which questions, and the answers, as Owen gave them, were taken down in a narrative form. The statement, thus reduced to writing, was then read over to Owen, and signed by him. After it was so signed, Brackett administered to Owen an oath that the statement was correct, and certified, upon the statement, that it had been subscribed and sworn to before him, as special agent of the treasury department. At the time of making the statement, Owen was not under arrest. To the admission of this statement, as evidence against Owen, objection was made, upon the ground, that, having been sworn to, it must be deemed involuntary; and the case of People v. McMahon, 15 N. Y. 384, is referred to as authority for the proposition of law, that any declaration made by an accused party, when under oath, and conscious of being charged with crime, is to be deemed involuntary, and, therefore, inadmissible. The case cited must be considered as modified by the subsequent decision of the same court, in the case of Teachout v. People, 41 N. Y. 7, where the reasoning of McMahon's Case is criticised, and so far overthrown as to forbid its being relied upon to furnish the rule applicable here. I am aware of no authority binding on this court, that forbids the admission of a statement like the one under consideration, nor does reason forbid. Certainly, the fact that a confession is made when under suspicion, does not render it involuntary. The contrary has been often decided. Nor can a confession be excluded by reason of the fact that the party making it was, at the time, under arrest upon a charge of having committed the offence. So it has often been ruled. It seems equally clear, that the fact of a statement being made under oath, does not prevent its being taken to be true. The reason why a sworn witness is permitted to decline answering, is, because his answers under oath can be used as evidence against him; and, to say that the administering of an oath to one under suspicion of crime, will, of necessity, cause a mental disturbance that must render unreliable the sworn admission of the crime, and raise the legal presumption that the statement is untrue, is going further than I can go, unless compelled by authority. I know of no authority binding upon the courts of the United States, which compels the holding that an arrest, or a charge of crime, or being sworn, or all three combined, are sufficient to exclude a confession that otherwise appears to have been freely made, without the influence of threat or promise. I agree entirely with the remark made by the court, in Shoeffler v. State, 3 Wis. 823, in admitting a statement given under oath at a coroner's inquest, after suspicion had attached, that a person under accusation, and substantially in custody, may "be pressed with questions in such a manner, and under such circumstances, as to render his answers compulsory." Here, no such facts appear. The accused was in no way pressed. Being confronted with evidence of his guilt, he deliberately acknowledged it, and, his acknowledgment having been written out and read over to him, he then freely signed it, and, thereafter, he swore to the truth of the statement he had so made. Such a statement is, in my opinion, admissible and convincing evidence against the accused. I am aware that statements taken under oath, by committing magistrates of this state, are not admitted in evidence. But, the statute of the state forbids the taking of statements under oath, by committing magistrates, and, by implication, the use of such illegal statements, as evidence, is forbidden. The statement under consideration was not taken in violation of any law. On the contrary, the power to administer the oath is conferred by section 183 of the Revised Statutes; and, as should be remarked, the statement contains information not only respecting Owen, but, also, respecting several other persons. The statements of the confession were pertinent to the inquiry then being prosecuted by the special agent—an inquiry in which, although it was, in no proper sense, a judicial proceeding, the agent was authorized by statute to administer an oath to any one supposed to have knowledge in respect to the matter in hand. For these reasons, I am of the opinion that the statement was properly admitted in evidence against Owen. It is proper to add, that, if the objection taken to the admission of the statement had been well taken, it was obviated by the offer of the district attorney to withdraw the confession before it had been read. Of course, if, when the offer to withdraw the confession was made, the contents of the statement had in any way come to the knowledge of

the jury, the offer would have been without effect. But, the objection to the admission of the confession was passed on by the court at the termination of the day's sitting, and, the next morning, before any publication of the contents of the paper, and without any part of it having been read in the presence of the jury, the district attorney made a formal offer to withdraw the paper. To this the defendants objected, and, in point of fact, the contents of the paper first became known to the jury by its being read by the defendants' counsel. Under such circumstances, the objection taken by the defendants to the ruling of the court upon the admissibility of the paper was rendered inoperative.

The next point made relates to the admission in evidence of a letter written by Scott and addressed to the defendant Graff. This letter was written and mailed by Scott at Troy, after his guilt had been discoverd, and while he was on his way to Canada, in flight. It was addressed to Graff, and enclosed in a second envelope, addressed to one Nowell, a party cognizant of the frauds, and aware that Graff was in some way connected with or knowing to the same. The letter reached Nowell, but was stopped in his hands and never reached Graff. The following are its contents: "Dear Friend. Sold at last. Tell O. C. T. and E. H. O. to land nothing. This is a mystery to me. I suspect a party. Hope there was no trouble to N. & W. Saved by a hairbreadth. S." Prior to the offer of this letter, there was evidence to show that it had been arranged between Scott and Owen, that the letters O. C. T., when used in connection with their smuggling operations, should refer to the defendant Owen. There was, also, evidence for the consideration of the jury, to show Graff's connection with Scott and Owen, in the conspiracy. There being such evidence, the letter of Scott was clearly admissible against both Owen and Graff, if it was an act done in furtherance of the conspiracy. I ruled, upon the trial, that it was such an act, and for that reason admissible. To that ruling I adhere. The letter implies the existence on the steamer of goods intended to be landed in pursuance of the unlawful agreement, and it contains an express direction not to land the goods. The giving this direction was an act done to save from seizure, and to conceal, goods then forfeited to the United States by reason of their having been imported in pursuance of the agreement between those parties. Some goods had been seized, and Scott had fled, but, as to the goods referred to in the letter, the conspiracy was not at an end; for, the letter shows Scott endeavoring to procure action in respect to them, which endeavor, if it had been successful, would have saved from seizure goods that had become forfeited to the government. Any act looking to the concealment of smuggled goods, so as to prevent their seizure, is an act in furtherance of the design to smuggle such goods. Upon this ground, the letter of Scott is admissible, and upon this ground alone was it admitted at the trial.

The next objection to be considered relates to the sufficiency of the evidence to warrant the jury in finding the defendant Graff to be a co-conspirator with Scott and Owen. As before stated, the evidence showed a continuing agreement between Scott and Owen relative to the smuggling of silks. This agreement was shown to have been entered into in 1873, and to have continued in operation up to the time of the seizure in 1876. Of the specific acts charged in the indictment as having been done to effect the object of the conspiracy, only one was proved, namely, the importation, without payment of duty, by Owen, in the year 1875, of 16 pieces of silk, in two barrels, marked (c). The claim in behalf of Graff is, that there was no evidence to show him connected with the conspiracy prior to 1877; and it is, therefore, contended, that he was entitled to an acquittal, because no act specified in the indictment was done subsequent to 1875. The difficulty with this position lies in the assumption that there was no evidence from which the jury had the right to infer that Graff was a party to the conspiracy prior to 1877. Scott testified, that, in June, 1877, he met Graff, by appointment, at Nowell's place, which was the place used for the reception, unpacking and preparing for sale, of the smuggled goods. At that interview, Graff stated that he came "to find out what those large cases contained that Tom Owen brought, because Owen was only paying him the same price for landing a large case as he did for landing a barrel," and, "for landing a barrel, he got five pounds." This inquiry by Graff, while it proves that he was at that time a party to the conspiracy, plainly implies a previous and continued employment by Owen. It might naturally be taken to mean that he landed all Owen's barrels for five pounds per barrel. It shows, further, an intimate connection between Graff and Scott, who was the recipient of the goods smuggled by Owen, and distributor of the proceeds. There was, also, evidence of several meetings between Scott and Graff, at Nowell's place, in 1877, and as early as April of that year, under circumstances indicating a knowledge, on the part of Graff, as to the use to which the place was put by Scott. The further fact appeared, that, at the outset, Scott and Owen understood that Graff would land the goods smuggled by Owen, and that they acted upon that understanding. This is shown by Scott's testimony, that, upon the presentation to him by Owen of an invoice of silks—and, as I understand it, the first invoice after the making of the agreement—in answer to the inquiry when the goods would be landed, Owen replied: "It all depended upon Graff—when

Graff said the word they would be sent to the express office." This declaration of Owen to Scott, made at the time of delivering an invoice, and for the purpose of enabling Scott to know when and where to go for the goods, is evidence to prove the fact, that, at the beginning of the conspiracy, Scott and Owen relied upon some other person, and that person Graff, to land the goods. This fact throws light upon the meaning of the language used by Graff in 1877, when he said that he got five pounds a barrel for landing the goods, and permits the inference that an agreement existed between Graff and Owen, in pursuance of which all Owen's barrels were landed by him for a compensation of so much a barrel. Furthermore, it was made plain by the evidence, that the assistance and connivance of some one on the dock, connected with the steamer, was necessary to effect the landing of the goods without discovery, and it was proved that Graff's connection with the steamer, and position on the dock, were such as to enable him to afford that assistance. From all these circumstances the jury were justified in concluding that Graff had rendered this assistance from the beginning. This view of the evidence renders it unnecessary to consider what would have been the result of a total failure of proof to show that Graff was connected with the conspiracy at the time of the commission of the only act charged in the indictment as done to effect the object of the conspiracy. I may, however, without intending to express an opinion upon the question, remark, that, if such proof be required, the requirement would seem to render it necessary, in order to draw an indictment, that the pleader should know the time when each party to a conspiracy joined himself thereto—a fact impossible to be known, in a case like the present.

The next question relates to the variance between the time when the importation set forth in the indictment, as made by Owen, to effect the object of the conspiracy, is charged to have occurred, and the time proven. It is supposed that the rule applied to an averment describing an act done to effect the object of the conspiracy, is different from that applied to the charge of the conspiracy itself; and expressions used by this court in deciding the case of U. S. v. Donau [Case No. 14,983] are relied on as supporting this position. All that was decided in Donau's Case was, that, in an indictment for conspiracy, it was not necessary that particular acts stated in the indictment to have been done to effect the object of the conspiracy, should be so stated that the court could see, from the face of the indictment, that the object of the conspiracy would be accomplished thereby. In the remarks there ventured in respect to the offence created by the statute, it is nowhere suggested that the time of the commission of such an act must be proved as laid. Nor do I see any reason for applying to this part of an indictment for conspiracy, a rule more strict than the rule applied to the statement of the conspiracy. The reasons which are the foundation of the rule, that a variance between the indictment and the evidence, in the time when the offence was committed, is immaterial, seem as applicable to the statement of the time when the overt act was committed, as to the statement when the conspiracy was formed. In indictments for the common-law offence of conspiracy, it is usual to state the conspiracy, and then show, that, in pursuance of it, certain overt acts were done; but no case has been cited where it has been held that a variance in the time of committing the overt acts was fatal. In high treason, the time at which the overt acts are alleged to have been committed need not be proved as laid; and it is sufficient if they be proved to have been committed at any time within three years before the finding of the indictment. See Archb. Cr. Pl. (17th Eng. Ed.) 723, where the law is so stated; and Charnock's Case, 1 Salk. 288, Rex v. Lord Balmerino, 9 State Tr. 587–605, and Townly's Case, Fost. Crown Law, 7, 8, are cited as authorities.

A different question, in respect to the time of the importation by Owen, arises out of the circumstance, that, before going to trial, the district attorney, in answer to a motion to postpone, gave a written stipulation to admit certain facts in regard to a shipment, by Owen, of two barrels containing silks, marked (c), in which stipulation the shipment is described as having occurred in Liverpool about the middle of June, 1875. Assuming that the stipulation in question should be regarded as having the effect of a bill of particulars, and entitling the defence to insist that the evidence be confined to goods shipped in Liverpool in June, it does not follow that the defence were entitled to have stricken out the evidence given in respect to goods that arrived in New York in December, because, as was conceded by counsel on the argument, the objection to the admission of the evidence was not placed on this ground. When the evidence was admitted, the attention of the court had not been called to the time mentioned in the stipulation, nor were the terms of the stipulation then claimed by the defence to have any bearing on the question of the admissibility of the evidence in respect to the importation of December. After the government had closed its case, and after the announcement had been made, on the requirement of the defence, that no further evidence would be offered to prove the overt act in question, for the first time the attention of the court was called to the time mentioned in the stipulation, and it was then insisted that all the evidence given in respect to an importation in December, must be stricken out and disregarded. But, it was too late then to bring forward the stipulation. A party is not permitted to wait until the evidence is given, and the case of the other side closed, and then, by producing a stipulation, make

foundation for a motion to strike out. Furthermore, the importation set forth in the indictment is described by the vessel, by the character of the goods, by the manner in which they were packed, and by the mark (c). The evidence admitted conformed in all these particulars to the indictment. It is a reasonable presumption that there was but one importation answering a description thus particular; and there has been no attempt to show, by affidavit, or otherwise, either that there were two such importations marked (c), or that the defendants were in any way misled by the difference in dates.

The only remaining question relates to the rejection of an affidavit of the master of the Queen, written on the manifest put in evidence by the government. This manifest, being the document required by law to be made, and proved to have been written by the defendant Owen, and to have been exhibited and certified as required by law, on the arrival of the vessel, was introduced for the purpose of showing an importation of the two barrels marked (c), described in the indictment. Upon inspection of the document, there appears written thereon an affidavit made by the master more than a month after the manifest had been made and filed at the custom house, in which affidavit the master states that certain of the goods mentioned in the manifest as composing the steamer's cargo, and, among them, two packages marked (c), were short shipped at Liverpool. Thereupon, it was insisted, in behalf of the defence, that this affidavit was part of the document, and legally in evidence as part of the case for the prosecution, although expressly excluded by the terms of the offer of the manifest in evidence; or, if not part of the case for the prosecution, that it might be read in evidence for the defence, without further proof. The affidavit was, however, rejected, and the correctness of that ruling is the point now to be considered. The ground taken is, that the subsequent affidavit of the master, written on the manifest, was part of the manifest. It is a self-disserving endorsement, it is said, and, in law, modified and controlled the prior statement of the manifest. In support of this position, reference is made to the case of entries of payment on a promissory note, or of satisfaction on a judgment roll. Lothrop v. Blake, 3 Pa. St. 483. But, a distinction exists between the cases. This manifest is not produced by the master of the vessel, nor by any one deriving title from him, as foundation for any right. The document offered by the government is the legal document required by law to be made, to show the goods on board the vessel, produced from the place of its legal deposit. The subsequent statement of the master, although written on this document, did not become part thereof. It was a mere statement of the master, attached, it is true, to the manifest, but forming no part of the legal document. It was part of another and different transaction, being the evidence adduced to explain to the authorities the discrepancy between the manifest and the officer's return, in pursuance of Rev. St. § 2887. I am unable to see any just ground for insisting that such a statement made ex parte, and without opportunity for cross-examination, is evidence as against the government, in a prosecution like the present.

I have thus considered all the questions to which my attention has been called upon this motion, and the result is, that no good ground for setting aside the verdict has been found. An order will, therefore, be entered, denying the motion. I further add, that I shall be prepared to hear a motion for sentence on Friday next, at the opening of court. In thus fixing a time at which a motion for sentence may be made, it is not intended in any way to trench upon the domain of the prosecuting officer. In criminal cases, judgment is not pronounced unless moved for by the prosecuting officer, and, by omitting to bring up the prisoner, and declining to move for sentence, that officer may, to use the language of the books, "exercise a virtual prerogative of pardon." 10 Petersd. Abr. p. 589, note, tit. "Information." Says the supreme court of the United States, in U. S. v. Murphy, 16 Pet. [41 U. S.] 203, 209: "Even after verdict, the government may not choose to bring the party up for sentence." Nevertheless, it is proper that the time when such a motion will be heard, should be stated in all cases, in order that the making, or the omission to make, a motion for sentence, as the case may be, shall duly appear of record.

Case No. 15,245.

UNITED STATES v. GRAFTON.

[9 Hunt, Mer. Mag. 369.]

District Court, D. Massachusetts.

POST-OFFICE — LETTER POSTAGE — WRITING ON NEWSPAPERS.

The United States against S. G. Grafton, for writing his name on a copy of the Boston Atlas, directed by him to a gentleman in Louisville, Kentucky, and deposited in the Boston post-office. This was selected out of a hundred similar instances, as a test case, there being nothing but the bare name written on the paper, to indicate by whom it was sent, and thus intended to "convey an idea." By agreement of counsel, for the purpose of carrying the question up to the circuit court, SPRAGUE, District Judge, decided that the mere writing of a name on a paper was not a violation of the law; that it was not within the meaning and spirit of the prohibition.

According to arrangement, Mr. Dexter, for the United States, took exception to this opinion, and in this way the whole subject will be brought before the circuit court.

A. D. Parker, for defendant.

Case No. 15,246.

UNITED STATES v. GRAHAM.

[Hoff. Op. 60; Hoff. Dec. 67.]

District Court, N. D. California. Oct. 31, 1859.

MEXICAN LAND GRANTS—LOCATION—EXCEPTIONS TO SURVEY.

[A Spanish land grant stated that the land granted was longitudinally one league and latitudinally one-half league, a little more or less. Under the grant a formal judicial measurement was made and possession given, the record of which was attached to the expediente. The act of possession recited that the measurement was commenced from south to north, in which direction they measured 5,000 varas, and placed as a landmark a certain water mill on the south, from whence, west to east, they measured 3,000 varas, where a landmark was set. It further recited that the grantee took possession "for one league longitudinally and 3,000 varas latitudinally." Two of the attesting witnesses to this proceeding testified that only two lines were run, and one of the witnesses stated the commencement and termination of each of the lines, and identified a pine tree as the point of beginning of the east and west line, and also stated the point of beginning of the north and south line. The magistrate testified to the running of four lines, in contradiction of the act of possession signed by him. The extension of the grant to the lines sworn to by such officer would disregard entirely the measurements provided for and referred to in the proceeding, and would include a much greater extent of land than called for in the grant or mentioned in the act of possession. Such grant will also include densely timbered lands almost valueless at the time of the grant, and would exclude valley lands where the greater part of the improvements were situated at the time of the grant. These timber lands had become of considerable value at the time of the suit. *Held*, that the boundaries of the survey should be located in accordance with the testimony of the attesting witnesses.]

[This was a claim by Isaac Graham and others for the rancho of Zayante, one league by one half league, in Santa Cruz county, granted April 22, 1841, by Juan B. Alvarado to Juan José Crisostomo Majors. Claim filed June 4, 1852, confirmed by the commission June 26, 1855, and by the district court. Case unreported. It is now heard upon exceptions to the survey.]

HOFFMAN, District Judge. This case comes up on exceptions filed to the survey, both by the United States and the claimant. In the grant the land is described as "that formerly occupied by Mr. Moss, known by the name of 'Zayante,' bordering on the village of Branciforte and the mission of Santa Cruz." The third condition states that the land of which mention is made is longitudinally one league, and latitudinally one-half league, a little more or less, as explained by the diseño attached to the expediente. Under this grant a formal judicial measurement was made, and possession was given, the record of which is found attached to the expediente in the case. The diseño is not found in the expediente, but a map is produced which the officer identifies as that according to which he gave the possession. This diseño, in a rude but intelligible manner, indicates the tract of country out of which the quantity granted was to be taken; but no boundaries are delineated, nor is the village of Branciforte or the mission of Santa Cruz laid down upon it. The act of possession, therefore, furnishes the only means of ascertaining the true location of the small tract which was granted. The record of that proceeding, after reciting the usual formal preliminaries, sets forth "that the measurement was commenced, holding the cord from south to north, in which direction they measured 5,000 varas; and placed as a landmark (mohonera) the water mill on the south, from the river San Lorenzo, where the monte begins, from whence from west to east 3,000 varas (including the potreros on the other side of the river), where they set a pine tree for a landmark, giving to the land the form and dimensions shown in the diseño,—the said measures declaring that the land was 'un sitio de gañado mayor.' At the aforesaid rancho, and on the same day, the citizen Juan José Majors, accompanied by the judge of the peace and the attesting witnesses, said that the land of the rancho having been surveyed as stated in the foregoing proceedings, he took bodily and real possession of the said sitio de gañado mayor, for one league longitudinally and 3,000 varas latitudinally as belonging to him, being the same expressed in the title," etc. The record then states that the grantee "entered on the land, pulled up grass and shrubs, and cast stones to the four winds, and performed other ceremonies and acts of possession, in consequence of which he said that he took the said land."

It will be observed that the language of this record, especially in the important part which describes the measurements, is somewhat obscure, owing, probably, to the fact that Bolcoff, the magistrate by whom the possession was given, was a Russian, and imperfectly acquainted with the Spanish. It is to be observed, too, that the diseño produced is not attached to the expediente, nor found on the record of the judicial measurement. Its identity with that formerly attached to the expediente, and used when the possession was given, is sworn to by Bolcoff, whose testimony, we shall hereafter see, is not wholly reliable; and if the statement in the record, that there was "given to the land the form and dimensions shown in the diseño," or, more correctly translated, "leaving the diseño drawn or sketched (dibujado) in the same form as the land was measured," means that the land as measured was delineated on the diseño, then it would seem that the diseño produced is not the one marked on that occasion, for no such lines are upon it. It is also to be observed that the original expediente is not put in evidence in the case, but it is stated in the brief on the part of the United States that by that expediente it appears that the land was first granted to Joaquin Buelna by Figueroa in

1834; that it was denounced by and granted to Moss in 1839, and was finally petitioned for and granted to Majors in 1841. In the briefs filed on the part of the claimants, these facts are not denied, and it is testified by José Bolcoff that he gave three judicial possessions of the land,—the first to Buelna, the second to Moss, and the third to Majors. As the land granted to the latter is described in the grant as that formerly occupied by Moss, it would seem that the grant and judicial possession given to him would furnish important evidence to remove any doubts as to the location of the tract intended to be granted to Majors. If, therefore, I considered it necessary, to enable me to arrive at a satisfactory determination of the questions now presented, I should not hesitate to direct the expediente to be filed. But it has appeared to me that, notwithstanding the obscurities alluded to, the record of judicial possession discloses the location and dimensions of the tract whereof Majors was put in possession with sufficient certainty to enable me to determine the present controversy.

It appears, from the record, that only two lines were measured, viz. one longitudinally from south to north, 5,000 varas in length, and one latitudinally from west to east, 3,000 varas in length. The commencement of the north and south line is not stated, but its termination, viz. a water mill, is distinctly mentioned as a boundary mark established by the judicial officer. This mill is marked on the diseño, and its position is undisputed. The latitudinal line is described in the record as commencing where the monte begins, —beyond the river San Lorenzo,—which is probably the meaning of the words, "desde del Rio de San Lorenzo." But, at all events, it is clearly described as running from where the monte begins, from west to east 3,000 varas, to a pine tree which was established as a mohonero, and including the potreros on the other side of the San Lorenzo. There can, therefore, be no doubt that the land of which possession was given was a tract 5,000 varas long and 3,000 varas wide, on the northern boundary of which was the mill, and on the eastern a pine tree. Two of the assisting witnesses have testified in the case. Both depose that only two lines were run, and Perez states, with precision, and in entire conformity to the act of possession, the commencement and termination of each of those lines. He identifies a pine tree on the edge of the monte as the point of beginning of the east and west line, and also the pine tree which, as stated in the act of possession, was established as a boundary mark at its termination. He also states the point of beginning of the north and south line, and assigns to it a position on the map corresponding nearly exactly with that of the point at which Bolcoff swears he commenced to run the north and south line.

To meet this testimony, and to establish, if possible, that the rancho was surveyed so as to include on the west side the valuable timber lands, which are the real subjects of dispute; the claimants have examined José Bolcoff, the magistrate who gave the possession. This witness states that he marked a large pine tree as the commencement of the line between the rancho and that of San Agustin; "that this pine tree is situated near the center of the largest cluster or grove of trees represented on the map (the diseño); that the boundary line runs from thence north-northwest to the mill, represented on said map by a cross and circle, near which, and to the north of it, an oak tree was marked as a corner; thence he ran the line southwest, including the corral viejo, and crossing the arroyo de San Lorenzo, to a point on the sierra, where a large redwood tree was marked as a corner; thence south-southeast, a straight line to another redwood tree, marked as a corner; thence a straight line north-northeast to the place of beginning." But it is clear, from the evidence, that the four lines thus described by Bolcoff were not run by him. The two witnesses who assisted at the measurement testify that only two lines were run,—one for the length, and the other for the width,—and their statement is corroborated by Majors, the grantee, who describes the lines run in nearly the same terms as Perez, except that he thinks the latitudinal line was 3,700 varas long. But, as to the fact that only two lines were run, and the points at which each begun and ended, the witnesses are entirely agreed. But the testimony of Bolcoff is still more emphatically contradicted by the act of possession, signed by himself, and produced by the claimants. In that record it is distinctly stated that two lines were run, one 5,000 varas long to the molino or mill, and the other 3,000 varas long, from the beginning of the monte to a marked pine tree, and the dimensions of the tract are again stated in the subsequent part of the record, which describes the entry of the grantee on the land.

If, then, it were legally permissible to contradict by parol a record of this description, and to show that the tract whereof possession was given was different and much larger than that described in the act of possession, the evidence in this case is insufficient to raise even a doubt on the subject. The claimant himself seems to be aware that the measurement, as stated by Bolcoff, could confer no rights to all the land included within it, but that the dimensions of the tract must be as stated in the grant (viz. a league by half a league, more or less), or as stated in the act of possession (5,000 varas by 3,000 varas). The survey for which he contends embraces only a tract of that extent, and it is made to extend to and include the timber lands on the west only by neglecting entirely the call for the molino, which Bolcoff admits he marked as a corner, and which is stated as a boundary mark in the act of possession; and by adopting as the controlling bound-

aries lines of which no mention is made in the act of possession, the location of which rests on the testimony of Bolcoff alone, but which in fact were never run. That the molino or the oak tree near it was established as a corner on the northeast is clear from all the testimony. To the conclusive evidence afforded by the act of possession, and the testimony above referred to, may be added that of Weeks, who swears that he drew the diseño produced by the claimant; that "at the southeast corner of the rancho is the place called the 'rincon,' where we used to saw lumber. At the northeast corner is the place where we had a small grist mill. A line run from the rincon to the place where the grist mill was would be on the east side of the river San Lorenzo, and would be on the eastern side of the rancho." Wright, a surveyor, who ran out some of the lines of the rancho, at the request of the claimants, and assisted by Bolcoff, testifies that they started at the place of beginning pointed out by the latter, and which seems to be the same as that mentioned by Perez as the commencement of the south and north line; thence he ran to a pine tree, pointed out to him by Bolcoff, and which also corresponds with the pine tree mentioned by Perez, as the termination of the west and east line; and thence to an oak which had the appearance of having been marked, at the root of which was a stone, which Bolcoff said was placed there by his order. "This spot is indicated as a corner on the map, and is near the point marked 'Molino.'"

On the claimants' own showing, as well as from all the testimony in the case, it is clear that the eastern boundary of the land whereof the grantee received the possession, was a line drawn from the oak tree near the molino to the pine tree mentioned in the act of possession as the termination of the east and west line, and identified by Perez and Wright. If, then, the rancho extends to this line on the eastward, it cannot also extend on the west to the crest of the hills without disregarding entirely the measurement of the line run for width by the judicial officer, nor without including in the survey a much greater extent of land than is called for in the grant or mentioned in the act of possession. We have already seen that the crest of the hills on the west is nowhere mentioned as a boundary, either in the grant or the act of possession; nor have I been able to discover on what ground it is claimed that that line should form the western boundary, unless it be the statement of Majors. This witness testifies that, "after the measurement was made, Bolcoff waived his hand around, saying: 'I give you possession of all the land embraced within the hills all around.'" "That," the witness adds, "would embrace eight or ten leagues of land."

In the second deposition taken, after the return of the survey to this court, the same witness states that "Bolcoff raised his hands, and said he gave possession to the tops of the hills all around." The difference between these two statements is of some importance, for "the lands embraced within the hills all around" might very reasonably be deemed to be bounded by their base and not by their crest. But both of these statements are contradicted by the act of possession. That record, as has so often been mentioned, states explicitly the longitudinal and latitudinal dimensions of the tract, and the boundary marks established, and states that the grantee took possession of a piece of land one league long by 3,000 varas wide. The expression "sitio de gañado mayor" is evidently used inaccurately, for the measurements previously recited and the words which immediately follow show what were the dimensions of the tract so denominated. The sentence reads: "The lands of the said rancho having been surveyed, as stated in the aforesaid proceedings, he (the grantee) said that he took bodily and real possession of the said sitio de gañado mayor, for one league longitudinally and 3,000 varas latitudinally."

There are some considerations of a more general nature which tend to confirm the conclusions drawn from the terms of the act of possession. The rancho was petitioned for and granted under the name of "Zayante." The tract delineated on the diseño is represented as lying on both sides of that stream, although the potreros on the west of the San Lorenzo are also laid down. But the tract, as located under the survey the court is asked to adopt, would lie almost entirely to the west of the Zayante, and would be divided nearly in the middle by the San Lorenzo. Had such been the situation of the land solicited, it is natural to suppose it would have been called "San Lorenzo" and not "Zayante." Such a location would, moreover, exclude the principal portion, not only of the tract delineated on the diseño, but of the buildings and improvements represented upon it, especially those at the southeastern corner, and the molino, or mill, on the northeast. Again, the rancho, as held by the first grantee, Buelna, is stated by the latter to have been bounded on the west by the San Lorenzo. Although, when the judicial possession was given to Majors, the subsequent grantee, this boundary was not observed, yet the distance to which it was to extend beyond the San Lorenzo was accurately determined, and a tree was marked at the western end of the latitudinal line, the rancho remaining as before,—principally located on the west of that stream. Again, it is unreasonable to suppose that, in 1841, the grantee would have desired more than one-third of a rancho which was only one league long by half a league, more or less, broad, to be located on the sides of a densely-timbered and almost valueless sierra, while valley lands, on the other side of a creek, from which the rancho derived its name, and where

a great part of his improvements were situated, was excluded.

On the whole, it appears to me that the survey should be made so as to embrace a tract of the average length of 5,000 varas and the average width of 3,000 varas; that the eastern line should be run from the tree near the molino, identified by the witnesses, to the pine tree mentioned in the act of possession, as a boundary mark at the end of the west and east line, and so far beyond said tree as is necessary to make the length of said line 5,000 varas; that the southern line should be run so as to pass through the point mentioned by Perez and Majors, and identified by Wright as the point of beginning of the longitudinal line; that the western line should pass through the point mentioned in the act of possession as the place where the monte begins, and identified by Perez and Wright; and that thence it should be run in a general northerly direction, and so as to include the potreros on the west side of the San Lorenzo, provided that, by so doing, the average width of the tract included between such western boundary and eastern boundary, hereinbefore described, shall not be greater than 3,000 varas.

Case No. 15,247.

UNITED STATES v. GRANT et al.

[7 Chi. Leg. News, 116.]

Circuit Court, N. D. Ohio. Dec. Term, 1874.

INTERNAL REVENUE—DISTILLER'S BOND—DEFENSE—DIVISION OF OPINION.

Suit on distiller's bond, with defense of a similar character as in the last case [Case No. 15,394], with the further defense that the collector in this case had actually seized or distrained property of the distiller, or principal in the bond, to pay these taxes, and that instead of holding and selling it to the best advantage, he had surrendered it to a receiver of a state court, who had sold at a sacrifice, and with large expenses, to the prejudice of these sureties.

Mr. Willey, U. S. Dist. Atty., and Mr. Sherman, Asst. U. S. Dist. Atty.

Prentiss & Vorce, for defendants.

Held by EMMONS, Circuit Judge, that there was the same answer to this defense, as had been made to the defenses in the other case of U. S. v. Hosmer [Case No. 15,394], but that, inasmuch as the facts in this case, to wit, of an actual seizure or distraint, went beyond the reported cases, opportunity should be afforded the defendants to take the opinion of the United States supreme court. Judgment for plaintiff, with division of opinion to be certified up.

Case No. 15,248.

UNITED STATES v. GRASSIN.

[3 Wash. C. C. 65.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1811.

NEUTRALITY LAWS—AUGMENTING FORCE OF WAR VESSEL—REPAIRING GUN CARRIAGES.

1. Indictment, for an illegal augmentation of the force of a French privateer, by raising or otherwise altering the gun carriages.

2. The offence consists, in increasing, or augmenting, (or being concerned in so doing,) the force of any belligerent vessel, which was armed at the time of her arrival in the United States, by adding to the number or size of her guns prepared for use, or by the addition to her force, of any equipment solely applicable to war.

3. Raising or lowering the carriages, or cutting away the decayed wood in them, and replacing them with sound wood, by which they are rendered fit for use, is increasing the force of the vessel, by an equipment solely applicable to war, and is expressly within the words and meaning of the act of congress.

The defendant [Alexis Grassin], the commander of a French cruiser, called the Diligent, belonging to a subject of France, a Mr. Guyon, domiciliated at New-York, arrived at this port in April or May last. The defendant reported himself to have come in, in distress, and applied to the custom-house, and obtained a permit to land her cargo, guns, &c., and to repair. The cargo, and other articles mentioned in the application for a permit, were placed under the care of a custom-house officer; but the eight gun carriages hereafter mentioned, were not enumerated in that paper, though the eight guns were. It appeared, in evidence, that this vessel was fitted out in France—that she was chased by a British ship of war, and in order to lighten herself, threw all her guns overboard, except one long six-pounder. She afterwards fell in with a British letter-of-marque, from which she took out eight 12-pound carronades, with their carriages; and after keeping them mounted on deck for three or four days, they were put into the hold, where they remained when she came to this port. Before the repairs of the vessel were completed, these gun carriages were sent on shore, to a Mr. Seguin, the carpenter employed in repairing the vessel, who added about from 4½ to 7½ inches of new wood to them, so as to raise them, in order to fit the port holes, as was contended, and proved, by witnesses on the part of the prosecution, but contradicted by the defendant's witnesses; viz. Seguin and his workmen, who swore, that the carriages were not raised, but merely, that the decayed parts were cut away, and replaced by new wood. The carriages, being thus altered, were returned on board the Diligent, but being discovered by some of the custom-house officers, they were relanded, and

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

the Diligent sailed without them. It was very fully in proof, that the guns upon the carriages, as they were originally, could not be fought through the port holes of the Diligent, and that it was necessary to raise them; although, one of the mariners swore, that they could be fought, and that they were fired to bring vessels to, during the few days they were mounted. It appeared, that the defendant was sick and confined to his room, during the greatest part of the time that these repairs were making; and that the owner was here nearly the whole time, and acted in relation to the repairs.

WASHINGTON, Circuit Justice (charging jury). The first question is, whether an addition made to gun carriages, either by raising, or otherwise altering them, is an offence, within the fourth section of the act of congress of June 5, 1794 [1 Stat. 383]. It is admitted, that the addition of entire new gun carriages is an augmentation within the law; but the alteration of old carriages is denied to be so. To the court, it seems, that nothing can be more plain than the meaning of this section. The offence consists, in increasing, or augmenting, or procuring, or being knowingly concerned, in increasing, or augmenting, the force of any belligerent vessel, which was armed at the time of her arrival within the United States, by adding to the number or size of her guns, prepared for use; or by the addition thereto, (that is to her force,) of any equipment, solely applicable to war. Suppose, then, that a vessel should arrive here, armed with twenty muskets, in complete order, and an equal number in her hold, but without locks, or otherwise useless—we ask, what would be her force, in guns prepared for use? The answer is obvious twenty muskets; since the other twenty, not being prepared for use, can constitute no part of her force. But, if the other twenty are prepared for use, by adding locks, is not her force, then, forty guns prepared for use? The locks are an equipment solely applicable to war, and then the whole case is made out. For, the force of the vessel has been increased or augmented, by the addition to the guns prepared for use, by an equipment solely applicable to war. In like manner, if the vessel has but one cannon mounted and prepared for use, and other cannon, say eight, in her hold, dismounted, or on carriages too rotten, or too high, or too low to be used, her force is but one cannon. If, by raising or lowering the carriages, or replacing the decayed, by sound wood, they are rendered fit for use, her force then becomes increased or augmented to nine cannon, prepared for use, and this, by an equipment solely applicable to war.

The second question is, whether the gun carriages of this vessel were so altered, as to increase, or augment her force? One witness has sworn, that the guns could be effectually used on the gun carriages as they were. You will judge, from the height of the port holes, and of the carriages, whether this was possible. That witness is contradicted on this point, by others examined in support of the indictment. Whether they were raised or not, is for you to determine; the witnesses being precisely at variance as to this point. But, it is proved by the defendant's witnesses, that the carriages were decayed, and were repaired by cutting away those parts, and substituting sound wood. It is, therefore, of no consequence, whether the sound wood which was put on, raised the guns or not; if, by the addition or substitution of it, for that which was decayed, these guns were prepared for use, so as to augment the force of the vessel, beyond what it was at her arrival. If nothing was done but what might well have been done without; it could not be said, that her force was augmented, by the addition of the equipment—quite otherwise, if the addition or alteration was necessary, in order to prepare the eight carronades for use. On this point, therefore, you must decide according to the evidence.

The third point is peculiarly a subject for your consideration, being a question of fact merely. It is, whether the defendant procured, or was knowingly concerned, in the addition or alteration that was made in the gun carriages? Prima facie, every presumption is against the commander of a vessel, in such a case. It is scarce credible, that such important operations in respect to the armament of a vessel, should be undertaken by any person, without the orders of the commander. In addition to this, the omitting to mention these carriages, in the application to the custom-house for a permit to land, is calculated to excite suspicion, that some alterations were intended; because, if they had been mentioned, they would have been placed under the care of a custom-house officer, whose duty it would have been, to prevent such alterations from being made. That the defendant knew of these alterations, is strongly contended for upon the evidence of the marshal; who swore, that after the arrest of the defendant, he stated to him that the intention was only to remove the decayed timber, and to substitute new. But, whether he spoke of his own intention, or of those who during his sickness had acted in the business, is by no means clear. In this case, the general presumption above mentioned is a good deal weakened, from the circumstance, that the owner was in Philadelphia during the whole time that these repairs were going on, and that during the greatest portion of that time, the defendant was sick and confined to his room. His knowledge of what was going on, were this fully proved, would not be sufficient to fix him with the offence, unless he was in some way concerned in it. Upon this point, it is proper you should be satisfied. We have only to add, that if from the publications which were spoken of at the

bar, you have received impressions unfavourable to the defendant, on account of acts done by him, unconnected with the offence for which he is now tried, we feel the fullest confidence that you will not suffer them to influence your feelings or your judgment; for, even if the charges made against him were proved, which in this case they were not, and could not be, they have nothing to do with the issue you are sworn to try.

The jury could not agree in this case, and frequently applied to the court to discharge them. The court informed the jury that they had not the power legally to discharge them, without the assent of the district attorney, and the defendant's counsel. At length, after keeping the jury together for some time, this assent was granted by both sides, the court agreeing to try the cause again this term, and the jury were accordingly discharged.

Case No. 15,249.

UNITED STATES v. GRATIOT et al.

[1 McLean, 454.] [1]

Circuit Court, D. Illinois. June Term, 1839.

PUBLIC LANDS—POWER TO LEASE MINES—TERMS OF LEASE—STATE SOVEREIGNTY.

1. Congress have power to authorize the president to lease lead mines.

2. These mines being designated in the law of 1807 [2 Stat. 449] as being within the Indiana territory, may still be leased under the law, though the territory has been divided and afterwards organized into two states.

3. The term "territory," in this respect, is used as descriptive of the locality of the mines, and not to limit the exercise of the power to any subdivisions of it.

4. The lease being for smelting ore is within the law. It is unnecessary for the lease to require the lessee to perform all the operations of mining.

5. Such a power exercised by the federal government, does in no respect interfere with state sovereignty.

6. It was a prudential and proper regulation to limit, in the lease, the price of land.

At law

Mr. Forman, Dist. Atty., for the United States.

Mr. Breese, for defendants.

Before McLEAN, Circuit Justice, and POPE, District Judge.

McLEAN, Circuit Justice. This action is brought on a lease of a lead mine, and by the pleadings and in the argument, the question is raised as to the power of congress to authorize the leasing of lead mines, or any part of the public lands.

It is insisted that this is a government of limited powers, and that unless specially given, no power can be exercised by it. No one can dispute the position, that the powers of the federal government are limited, and that it can exercise none, as principal powers, which are not delegated to it. But it is impossible in a constitution to specify in detail, every power which, of necessity, must be exercised by every government. Congress have power, by the constitution, to establish post offices and post roads, and under this delegation of power, the post office department, in its numberless details, is regulated, and severe punishments inflicted for a depredation upon the mail or a wilful obstruction of its conveyance. There is no express power authorizing congress to regulate the duties of post master, or the duties of the post master general; or to punish for stealing a letter from the mail; and yet no one has ever doubted, the power of the federal government to act on these subjects. It necessarily results from the exercise of the main power, to establish post offices and post roads. It would be in vain to establish, unless there be power to protect and sustain, that which is established. Hence there are powers of a secondary or dependent character, which result from a principal power, that may be exercised though not specifically given in the constitution. The constitution was adopted by practical men, and it was designed for practical purposes. And that refinement of construction which refuses to the federal government powers essential to its existence, must be discarded. A power is not to be repudiated, because the constitution does not, in terms, give it. But, on the other hand, powers are not to be exercised by implication, which are not dependent on, and do not result from, a principal power clearly given. There is danger from either extreme.

In the third section of the sixth article of the constitution it is declared "that congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state." And in the fifth section of the act of March 3, 1807, it is provided that the several lead mines in the Indiana territory, together with as many sections contiguous to each, as shall be deemed necessary by the president of the United States, shall be reserved for the future disposal of the United States; and any grant which may hereafter be made for a tract of land containing a lead mine, which had been discovered previous to the purchase of such tract from the United States, shall be considered fraudulent and null, and the president of the United States shall be, and is hereby authorized to lease any lead mine which has been, or may hereafter be, discovered in the Indiana territory, for a term not exceeding five years. In other acts of congress, before and subse-

[1] [Reported by Hon. John McLean, Circuit Justice.]

quent to this one, reservations are made of lands containing salt springs, live oak, &c. and salt springs have been leased under a similar authority to that which is given to lease lead mines.

If, under the constitution, congress have power to make all needful rules and regulations respecting the territory of the United States, there would seem to be no ground to doubt, that they may authorize the public lands to be sold or leased as they may deem needful. And they may make donations of the same for objects of national interest. This, it is admitted, may all be done so long as the land remains within a territory of the United States; but it is contended that it is incompatible with state sovereignty, to exercise the power within a state. Since the passage of the above act the states of Indiana and Illinois have been formed, within the limits of the Indiana territory, as they were established in 1807. And the lead mine in question is within the state of Illinois. A doctrine somewhat similar to this was at one time advanced, with some prospect of embodying in its favor, a strong public feeling. It was indeed not only asserted that the laws of the United States, which regulated the sale of the public lands within a state were void; but that the lands rightfully belonged to the state. This doctrine was well calculated to enlist in its behalf local feelings and interests; but the sober sense of public sentiment gave little encouragement to so novel and dangerous an error. The constitutional provision in regard to the power of congress over the public lands, applies without reference to the local political jurisdiction, within which they are situated. This position will not be controverted by any one successfully, who admits the constitution of the United States to be the paramount law. This power over the public lands does not extend to the exercise of a political jurisdiction. It is a special and limited jurisdiction, that applies exclusively to regulations respecting the lands. And this jurisdiction is as clearly given in the constitution, as any one of the enumerated powers delegated to the federal government. Where a political jurisdiction is derived, as within the District of Columbia, and over sites for forts and arsenals, the constitution has made provision for a cession of such jurisdiction. And the power over the public lands is specifically given by a cession or delegation from the states, to the federal authority. How the exercise of this power is incompatible with state sovereignty, I cannot perceive. When we speak of state sovereignty, we do not speak of a sovereignty without limitation. A state cannot declare war, impair the obligations of a contract, coin money, emit bills of credit, or do many other things which belong to sovereignty. State sovereignty is absolute and unconditional, where no limitations are imposed. But the power of a state over the public lands is necessarily inhibited by the delegation of the power to the federal government. The states having given up the power, cannot exercise it. Over an organized territory of the United States, congress have the exclusive power of legislation. The above constitutional provision in regard to the public lands, was not necessary to give congress the power to adopt all needful regulations respecting them within a territory of the United States. The provision was intended to secure the exercise of the power over the property of the Union within the states. Unless this was the intention, it must have been adopted without any sensible or necessary object.

The act authorizing the president to lease lead mines, refers to them as situated in the territory of Indiana: but this is merely descriptive of the locality of the mines; and does not limit the exercise of the power to the boundaries of Indiana as they might afterwards be changed. The lead mines within the original limits of the territory were the mines which the law authorized the president to lease; and no subdivision of the territory, or change from a territorial to state governments, can affect the exercise of the power. Congress, in the exercise of their discretion, determined that to lease lands which contain lead mines is a needful regulation; and I should like to know where the power exists to declare that this is not a needful regulation. There is nothing in the compact of cession of these lands which forbids it; and it does not, in any respect, infringe upon the rights of the state. But it is said that this is a lease, for smelting lead ore, in which the price is regulated, and not for working the mine.

This objection to the lease cannot be sustained. Digging the ore and smelting it, may be included in the same lease, or these operations may be the subject of distinct leases. In either case the lease is within the law, as it is literally a lease of a lead mine. Not indeed requiring the lessee to carry on all the operations of mining, but one of its important branches, or all of them, as shall be deemed best under all the circumstances of the case. The limitation imposed on the price of the manufactured article is a very proper regulation in the lease; as it prevents monopolies, and other consequences injurious to the public, by a combination of the lessees. The argument is not sustainable, that if the United States may do this, they may engage in any other traffic, within a state, and regulate prices at pleasure. This consequence does by no means follow.

The government has a right to prevent trespasses upon the public lands, and to admit settlers on such terms as it shall think proper. It has a right to lease lead mines, and to include such parts of the adjacent land as are necessary to the working of the mines. And it has a right to stipulate with the lessee, as one of the conditions of his lease, that he

shall sell the ore he digs, or the lead he manufactures, at a fixed price. I can see no possible objection to such a regulation. It is one that any individual, on leasing a farm, may make. He may stipulate with the lessee that he shall sell his grain at a fixed price, and that the lessor shall have the option of buying it. Such a contract, being voluntary, is binding; and so is the contract in question. For many years the government rented salt springs, in Illinois, Ohio, and perhaps in other states; and it is believed to have been the practice to fix in these leases the price at which the salt should be sold. Such a provision instead of aiming to monopolize, is calculated to guard against a monopoly. Its effects instead of being injurious must be beneficial to the community. But, however this may be, it is clear to my mind, that such a regulation in no respect interferes with the sovereignty of the state, or any local law which the state has power to pass. I am, therefore, of the opinion that the lease is within the law, and is binding on the lessees and that the demurrer must be overruled.

The district judge being of a different opinion from the one here expressed, the points were certified to the supreme court for a decision, under the act of congress. This case was taken to the supreme court and the above views were sustained by that court. 14 Pet. [39 U. S.] 526.

Case No. 15,250.

UNITED STATES v. GRAVES et al.

[2 Brock. 379.] [1]

Circuit Court, Virginia.[2] May Term, 1828.

REVENUE COLLECTOR'S BOND—STATUTORY LIEN—SURETIES—PERSONAL ESTATE—FORTHCOMING BOND.

1. The act of congress respecting delinquent collectors and their sureties, created a lien on the land of the parties to the official bond; but the lien cannot be enforced until all the personal estate is exhausted, and on a joint judgment obtained against all the parties to the bond, the personal estate of all, liable to the execution must be exhausted, before the land of any one of them can be reached; in other words, the land of one surety, who has no personal estate, cannot be subjected to the payment of any part of the judgment, while there is personal estate in the hands of another surety, who has paid his aliquot part of the debt.

2. The process act of the United States, gives the same remedy to the United States, against the lands of delinquent collectors, that the state of Virginia gives against the lands of those against whom she has obtained a judgment.

3. A forthcoming bond which is forfeited, is a satisfaction of the judgment on which the execution issued; and no further proceedings can be founded on that judgment. The forthcoming bond is substituted for the original judgment, and the recourse of the plaintiff is against the parties to that bond. But, quære—Does the giving such bond operate a discharge of the debt, or does it merely arrest further proceedings upon the original judgment, until the forthcoming bond shall be found to be unproductive?

4. As to the equitable relations between sureties and their principal, and sureties and sureties, see the following opinion:

At law.

MARSHALL, Circuit Justice. In the year 1813, Thomas B. Ellis was appointed collector of the internal taxes of one of the districts of Virginia; and gave bond for the performance of his duty with Charles H. Graves, James Wilson, Nathaniel Cocke, and Bartholomew D. Henley, as his sureties. Having failed to account for the moneys he had collected, his bond was put in suit; and, on the 5th of April, 1820, a judgment was rendered against Graves, Wilson, and Cocke, the surviving obligors. On a settlement at the treasury, it appears that the actual deficiency is $7000. The bill alleges that Thomas B. Ellis is dead, insolvent; that the sureties, except the defendant, Graves, have paid, or are ready to pay their aliquot parts of the debt, and that Graves was, when the suit was instituted, seised of two tracts of land, which he has since conveyed away to satisfy creditors. This suit is brought against the said Graves, and the other obligors, or their representatives, and against the purchaser of the land, said to have been in his possession, for the purpose of subjecting it to the payment of his portion of the debt. The answer of Graves insists that Ellis left a considerable estate, both real and personal: that an execution was issued on the judgment which was levied on six negroes, the property of some of the defendants, and a forthcoming bond given, which was forfeited: that at the rendition of the judgment, the defendant was in possession of personal estate sufficient to satisfy it. It insists on the want of due diligence on the part of the United States, and resists the lien claimed for them. The purchasers insist that the lien, if any was created by the act of congress, does not bind the land in their hands; that the lien is conditional, dependent on a deficiency of personal estate; that the personal estate of those against whom the judgment was rendered, was, at the time, and is now, sufficient to satisfy it; and the plaintiffs have a plain remedy at law. They deny the insolvency of Graves, and also that of Ellis. They deny also the continuance of the lien created by the judgment; but the plaintiffs do not rely on this. The executor of Ellis denies that his estate is sufficient to satisfy the judgment. In June, 1826, this court directed an account of the property in possession of the defendant Graves, or in the possession of others in trust for his use. The report dated 15th of May, 1827, shows that Graves has taken the oath of an insolvent debtor; but that some real and some inconsiderable articles of personal property were contained in his schedule, and that deeds have been made, of other real estate, which was in his pos-

[1] [Reported by John W. Brockenbrough, Esq.]
[2] [District not given.]

session, when the bill was filed. If this real estate is chargeable with that part of the debt which ought to be paid by Graves, some farther account must be taken. If it is not so chargeable, the account would be useless. It is therefore proper, now to examine the question of lien which has been made by the defendants who are purchasers.

The act of congress (4 Bior. & D. Laws, p. 627, § 6 [3 Stat. 83]) declares "that the amount of all debts due to the United States, by any collector of internal duties &c." [3] The first part of this section, unquestionably charges the lands and real estate of the collector and his sureties, with the amount of all debts due to the United States from the institution of the suit. The effect of this lien is, I think, as little to be doubted, as its existence. It does not, indeed, pass the estate, but it binds the land as effectually as a mortgage can bind it. A mortgage binds by force of law, and a lien, created by statute, has all the force that the law can give it. It commences with the suit, and as its object is to secure the land as a fund from which the debt may be satisfied, it terminates only when that object is accomplished. Had the enactment terminated with that part which creates the lien, the plaintiff's case would be relieved from the most serious difficulty which opposes the relief claimed by the bill. But the section proceeds with a provision for the execution of the lien. That provision is, that the land may be sold in the manner prescribed by the act in a particular state of things, which is also prescribed. Although, then, the creation and the continuance of the lien be certain, the inquiry remains, whether that state of things exists in which it may be enforced?

In pursuing this inquiry, it may be useful to consider the subject on which the law was to operate. In every state of the Union, I believe, except Virginia, lands may be taken in execution for the payment of debts. Consequently, in every state except this, the forms of executions are such, that lands may be seized to satisfy them; and these forms are adopted for the courts of the United States. These laws, however, varied in the different states. I am not acquainted with the different regulations which prevailed, but believe, that in some instances, the land could not be sold till the personal estate was exhausted; in some, perhaps, it might be seized immediately; and, in some, it might at a valuation; but in all, I believe, an alienation, pending the suit, would convey a secure title to the purchaser. This section, then, has two objects. First, to overreach any intermediate conveyance between the issuing of the original writ, and the service of the execution; the second, to prescribe an uniform course of proceeding against lands, under all judgments obtained by the United States, against delinquent collectors and their sureties. In a state where land may be taken in execution, and may, in pursuance of the act of congress, be sold at public auction, no reason can be assigned for coming into a court of equity, unless there be some fraudulent alienation before the original writ was issued. If the land may be taken in execution and sold under the judgment, there is no ground for the interposition of equity.

Under what circumstances may this execution and sale take place? The law answers, "when there is a want of goods and chattels, or other personal effects of such collector, or his sureties, to satisfy any judgment which shall, or may be, recovered against them, respectively." This want of goods and chattels, is a state of things that must exist, before the land can be sold to satisfy the judgment. Congress intended that the personal estate should be first exhausted. If the suit had been instituted against only one of these obligors, it will not be contended that his land might be sold, while personal estate remained to satisfy the judgment. An officer who should sell the land in the first instance, would violate the law, would probably be restrained by the court, and would certainly expose himself to the action of the injured party. It may well be doubted, whether the title he could make would be valid.

Is any distinction to be taken between a judgment against one obligor, and a judgment against all of them? I can perceive no reason for such a distinction. The judgment is one entire thing which affects all equally; the execution also, is entire, and affects, equally, the property of all. If it possess an intrinsic quality, which postpones its capacity to reach land until the personal estate liable to it shall be exhausted, that intrinsic quality adheres to it, and applies to its operation, when emanating on a judgment against several, as completely as when emanating on a judgment against one. On a joint judgment, then, the personal estate of all liable to the execution, must be exhausted before land can be sold, unless there be something in the language of the act of congress which shall re-

[3] "That the amount of all debts due to the United States, by any collector of internal duties, whether secured by bond or otherwise, shall, and hereby is declared to be, a lien upon the lands and real estate of such collector, and of his sureties, if he shall have given bond, from the time when a suit shall be instituted for recovering the same; and for want of goods and chattels, or other personal effects, of such collector or his sureties, to satisfy any judgment which shall or may be recovered against them, respectively, such lands and real estates may be sold at public auction, after being advertised for at least three weeks, in not less than three public places within the collection district, and in one newspaper printed in the county, if any there be, at least six weeks prior to the time of sale; and for all lands or real estate, sold in pursuance of the authority aforesaid, the conveyance of the marshals, or their deputies, executed in due form of law, shall give a valid title against all persons claiming under such collector, or his sureties, respectively." 2 Story's Laws, p. 1381, c. 55 [3 Stat. 83]; Act Aug. 2nd, 1813, repealed; Act 1815, c. 237.

quire a different construction. I find nothing in that act which varies the general principle; nothing which may enable a court or its officer, for the sake of equality, to seize the lands of one of the debtors, while personal estate remains, which is liable to the execution, although that personal estate may belong to another, who has paid his aliquot part of the debt. If this construction be correct, then the United States do not, under this act of congress, possess the power to sell at discretion, for the purpose of equality, or for any purpose, the land of one of the parties against whom judgment has been obtained, while the execution may be satisfied by the personal property of others. A court of equity cannot give this right, in states where the judgment is to be satisfied out of land, by legal process. Can a different rule exist in the state of Virginia?

The act of 1789 (1 Story's Laws, p. 67 [1 Stat. 93]), rendered perpetual by the act of 1792 (1 Story's Laws, p. 257 [1 Stat. 275]), adopts the forms of writs and executions then in force, in the states respectively. Although, in Virginia, lands could not be taken in execution by creditors, generally, they were liable to executions issued on certain judgments rendered in favour of the commonwealth. When, then, the act of congress declared that the lands of their debtors might be sold, in certain cases, to satisfy the debt due to the United States, the process act adopted the form of execution used by the commonwealth in the state of Virginia. Could this be doubted, the process act provides for the case of subjecting the forms of writs and executions, "to such alterations and additions as the said courts" (of the United States,) "respectively, shall, in their discretion deem expedient." Process Act of 1792, § 2 (1 Story's Laws, p. 258 [1 Stat. 275]). There is, then, I think, the same remedy at law against the lands of delinquent collectors and their sureties, in Virginia, as in other states. Were this otherwise, were it understood that the process act did not adopt, for the United States, the execution against lands which might be issued by the commonwealth, on judgments in favour of itself, and that the omission of the court to make the necessary alteration in, and addition to, the form of the execution, rendered an application to equity necessary, still equity could interpose so far only, as to remedy the omission, and carry the intention of congress into execution, in Virginia, as in the other states: that is, to subject the lands of those, against whom judgment has been rendered, where there is a deficiency of personal estate. It is not alleged that such deficiency exists in this case, and, therefore, no foundation is laid for proceeding at law against the lands.

Has any thing occurred which authorizes a court of equity to interpose, and subject lands, which were not liable at law, to the payment of this debt? The execution which issued on the original judgment, was levied, and a forthcoming bond given, which was forfeited. The bond was returned to court, and execution was awarded on it. It is contended on the part of Graves, and those who claim title to lands, held by him when the original suit was instituted on the part of the United States, that these proceedings discharge the lien created by issuing the original writ. The state courts, by whose decisions on this point, this court is bound, have, undoubtedly, determined that a forthcoming bond, when forfeited, is a satisfaction of the judgment on which the execution issued,[4] and that no farther proceedings can be founded on that payment. The forthcoming bond is substituted for the judgment, and the recourse of the plaintiff is against the parties to that bond. The forthcoming bond being considered as a satisfaction of the judgment, Graves, and those who claim under him, contend that it is necessarily a discharge of the original debt, and, consequently, of the lien created by the act of congress. As the opinion has been already expressed, that this lien cannot be enforced against the real estate, while personal estate remains, and as the personal estate cannot be considered as exhausted until the forthcoming bond shall be shown to be unproductive, it is not necessary at present to decide this very doubtful question. I certainly think it a doubtful question; for the bond, though a technical, is not actual satisfaction; and, though it arrests all further proceedings on the judgment, I am not entirely convinced that it extinguishes the original claim.[5] Be this as it may, the fact that it prevents a sale of the land under the judgment, cannot empower a court of equity to enforce the lien, until the impossibility of obtaining satisfaction from the bond, shall be shown. Whether equity can, even in that state of things, afford the aid which is requested, is a point on which I have not formed an opinion.[6]

The relief prayed in the bill is supported on a distinct ground from that which has

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[4] But a forthcoming bond is no satisfaction of a judgment, until the forfeiture. Cabell, J., in Cooke v. Piles, 2 Munf. 153; Roane, J., in Lusk v. Ramsay, 3 Munf. 454.

[5] And, therefore, where a judgment was rendered against a surety alone, on a bond executed by principal and surety, and the surety gave a forthcoming bond which was forfeited, the forfeiture of the bond, the court said, did not discharge the principal in the original bond from his liability to the claim of the obligee: and the surety could not, on the ground of the forfeiture, maintain his motion against the principal obligor. He was entitled to a judgment for the amount paid by him as surety, and a forfeited forthcoming bond was certainly not a payment. Randolph's Adm'x v. Randolph, 3 Rand. [Va.] 490.

[6] As to the effect of a forthcoming bond upon the original judgment see the cases cited above, and Taylor v. Dundass, 1 Wash. [Va.] 92; Downman v. Chinn, 2 Wash. [Va.] 189; Jett v. Walker, 1 Rand. [Va.] 211; and 1 Rob. Prac. 597.

been considered. It has been contended, that sureties who pay the debt, may assert the claim of the United States upon the principal, and that the equitable right which sureties have against each other for contribution, may induce the court to decree, in this suit, against those who will be ultimately bound to the parties, who shall pay more than their just proportion of the debt. Though both these propositions are true, I do not think that either of them can avail the plaintiffs, or those for whose benefit the principle is advanced. The United States can impart to a surety, no other right than the United States could assert for themselves. Having no right to enforce the lien in the present state of things, they cannot impart this right to sureties. The same consideration restrains this court from decreeing, in this cause, on the principle of contribution. The right to contribute grows out of the equitable relations of the parties with each other. If a claim exists against several defendants, and, from any circumstance, one ought to pay more than another, or if one defendant would have a right to proceed against another for any sum he may be decreed to pay, the court will adjust the equity between the parties, and decree in the first instance, according to their ultimate liabilities. But in this case the plaintiff has a right to a decree against any of the parties brought before the court. If the decree against one person gives him a right upon another, against whom the plaintiff could not sustain a suit in the first instance, then I think the court ought not to settle this controversy between the defendants, unless it could entertain a suit between the parties, brought for the purpose of settling their equities. If the decree which the plaintiff asks against the lands which form the subject of the present controversy, cannot be made for the benefit of the United States, then I think it cannot be made in the name of the United States for the benefit of a surety.[7] If the judgment against such surety gives him claims upon others, those claims must be asserted in a court which has jurisdiction of them. I do not think that the bill, so far as it asserts the right of the United States, to enforce their lien upon the lands of any of the defendants, can be sustained at present.

The counsel for the United States, having admitted that the estate of Ellis had been exhausted by process in a distinct suit, and that the debt might be satisfied from the forthcoming bond, it is ordered that the bill be dismissed without prejudice.

[7] In Hubbard v. Goodwin, and Kennedy v. Same, 3 Leigh, 522, decided in 1832, Tucker, P., said, that the practice of decreeing between co-defendants had never been extended to any case in which the plaintiff was not entitled to a decree against either or both of the defendants; and the practice should not be extended farther. See, also, Morris v. Terrell, 2 Rand. [Va.] 6; Templeman v. Fauntleroy, 3 Rand. [Va.] 434, 441–443, and authorities there cited; and Toole v. Stephen, 4 Leigh, 581.

Case No. 15,251.

UNITED STATES v. GRAY.

[2 Cranch, C. C. 675.] [1]

Circuit Court, District of Columbia. May Term, 1826.

DISORDERLY HOUSE—EVIDENCE OF GENERAL CHARACTER.

1. In a prosecution for keeping a disorderly house, the general character of the house is in issue, and may be given in evidence.

[Disapproved in Henson v. State, 62 Md. 235. Cited in brief in Breckinridge v. American Cent. Ins. Co., 87 Mo. 64. Cited in Grove v. Little, 11 Leigh, 192.]

2. A house kept for the meeting of men and women for illegal and obscene purposes, or for the purpose of enticing young girls there for debauchery, is a disorderly house.

Indictment [against Henry Gray] for keeping a disorderly house.

Upon the trial, THE COURT (CRANCH, Chief Judge, doubting,) said the general character of the house was in issue, and permitted the attorney of the United States to give evidence of its general reputation.

THE COURT also (nem. con.) instructed the jury that if they should be satisfied, by the evidence, that the defendant kept a house for the meeting of men and women for illegal and obscene purposes, or for the purpose of enticing young girls there for debauchery, the indictment was supported; and that it was not necessary that the United States should prove all the circumstances laid in the indictment by way of aggravation.

Case No. 15,252.

UNITED STATES v. GRAY.

[3 Cranch, C. C. 681.] [1]

Circuit Court, District of Columbia. Dec. Term, 1829.

WITNESS—SLAVE—DISCRETION OF COURT.

A slave is not a competent witness against a free mulatto not in a state of "servitude by law," in a prosecution for larceny, in Washington county, unless at the discretion of the court, under the circumstances stated in the act of Maryland of 1717, c. 13, and then the slave should not be forced or permitted to testify against her mother.

Indictment [against Charity Gray] for larceny. The prisoner's daughter, who is a slave, was offered as a witness for the United States.

Mr. Key, for the prisoner, objected that a slave is a witness against a slave only, or a free negro or mulatto, "during his servitude

[1] [Reported by Hon. William Cranch, Chief Judge.]

by law," and cited the Acts of Maryland of 1717, c. 13, and 1751, c. 14.

CRANCH, Chief Judge, mentioned the following cases in this court: U. S. v. Swann [Case No. 16,425], a free mulatto, at December term, 1803, where the court, being of opinion that a slave could not be a witness against her, refused a subpœna for the slave. U. S. v. Terry [Id. 16,454], at June term, 1806, where this court permitted a slave to be sworn for the prisoner. U. S. v. Shorter [Id. 16,283], a free negro, at December term, 1806, same point decided on the authority of the case of U. S. v. Terry [supra]. U. S. v. Hill [Case No. 15,365], a freeborn mulatto, December term, 1808. Mr. Jones, for the United States, offered a slave as a witness. The court (Duckett, Circuit Judge, absent,) having more carefully considered the Acts of Maryland of 1717, c. 13, and 1751, c. 14, § 4, was of opinion that a slave is not a competent witness against a freeborn mulatto not under a state of temporary servitude by law. U. S. v. Bruce [Case No. 14,676], a slave, at December term, 1813, where a slave was admitted under the act of 1751, c. 14.

CRANCH, Circuit Judge, was of opinion that the slave was not a competent witness.

THRUSTON, Circuit Judge, was of opinion that, under the third section of the act of 1717, c. 13, the court, in its discretion, might admit the witness, but that the daughter ought not to be forced or permitted to testify against her mother.

MORSELL, Circuit Judge, was of opinion that the slave was a competent witness against a free negro.

Verdict for the prisoner.

Case No. 15,253.

UNITED STATES v. GRAY.

[3 Haz. Reg. U. S. 227.]

District Court, D. Massachusetts. Oct. 7, 1840.

POST OFFICE—CONVEYING LETTERS CONTRARY TO LAW.

William C. Gray, of Lowell, was put on trial for conveying three letters in his express by the Lowell cars, in August, 1839, and thereby rendering himself liable to a penalty of fifty dollars, under the act of congress (chapter 275) passed in 1825 [3 Story's Laws, p. 1985; 4 Stat. 102].

In his charge, DAVIS, District Judge, instructed the jury that Gray, by his arrangement with the company, came within the meaning and intent of the law; but whether he did convey the letters as alleged was a question of fact to be determined by the jury, from a consideration of the circumstances proved.

When the jury retired, THE COURT adjourned till Saturday, when the jury returned with a verdict for the defendant.

Case No. 15,254.

UNITED STATES v. GREATHOUSE et al.

[4 Sawy. 457; 2 Abb. U. S. 364.] [1]

Circuit Court, N. D. California. Oct. 17, 1863.

TREASON — "ENEMIES" — LEVYING WAR — OVERT ACTS—GIVING AID AND COMFORT—LETTER OF MARQUE — PUNISHMENT — INDICTMENT — JURY — DISREGARD OF INSTRUCTIONS.

1. Although juries in criminal trials have the power to disregard the instructions of the court on questions of law, and in case of acquittal their decision is final, yet it is their duty to take the law from the court, and apply it to the facts of the case.

[Cited in U. S. v. Taylor, 11 Fed. 473; Sparf v. U. S., 15 Sup. Ct. 284, 156 U. S. 51, 715.]

[Cited in Territory v. Kee (N. M.) 25 Pac. 926; State v. Burpee, 65 Vt. 3, 25 Atl. 964.]

2. Treason having been defined by the constitution, congress can neither extend nor restrict the crime; its power over the subject is limited to prescribing the punishment.

3. The term "enemies," as used in the constitutional clause defining treason (Const. art. 3, § 3), applies only to subjects of a foreign power in a state of open hostility with us; it does not embrace rebels in insurrection against their own government.

4. To constitute a "levying of war" within the meaning of the constitutional clause defining treason (Const. art. 3, § 3), there must be an assemblage of persons with force and arms to overthrow the government or resist the laws.

5. If war is levied against the United States, all who aid in its prosecution, whether by open hostilities in the field, or by performing any part in the furtherance of the common object, however minute or however remote from the scene of action are guilty of treason.

6. In treason there are no accessories; all who engage in rebellion at any stage of its existence, or who designedly give to it any species of aid and comfort, in whatever part of the country they may be, are principals in the commission of the crime.

7. An indictment under section 2 of the act of July 17, 1862 [12 Stat. 589], need not use the phrase "levying war" specifically; it is sufficient to follow the language of the act.

8. The true construction of the act of July 17, 1862, for the punishment of treason is, that congress intended: 1. To preserve the act of 1790 [1 Stat. 112], which prescribes the death penalty in force for the prosecution and punishment of offenses committed previous to July 17, 1862, unless the parties accused are convicted under the act of the latter date for subsequent offenses; and, 2. To punish treason thereafter committed with death, or fine and imprisonment, in the discretion of the court, unless the treason consists in engaging in or assisting a rebellion or insurrection; in which event, the death penalty is to be abandoned, and a less penalty to be inflicted.

9. The purchase of a vessel, and fitting her up for service with arms and ammunition, and the employment of men to manage it, in pursuance of a design to commit hostilities on the high seas, in aid of an existing rebellion against the United States, are overt acts of treason.

10. It is not essential to constitute giving aid and comfort that the effort to aid should be successful, and actually render assistance. Overt acts, which, if successful, would advance the in-

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 2 Abb. U. S. 364, contains only a partial report.]

terests of the rebellion, amount to aid and comfort.

[Cited in Young v. U. S., 97 U. S. 39.]

11. Belligerent rights conceded to the Confederate States cannot be invoked for the protection of persons entering within the limits of a state which has not seceded, and secretly getting up hostile expeditions against the government.

12. A letter of marque, issued by an insurrectionary government erected by some of the states or the people thereof, in rebellion against the authority of the United States, constitutes no defense to a judicial trial for treason in levying war under such letter, so long as the legislative and executive departments have not recognized the existence of such government, and its authority to issue letters of marque.

[Cited in The Ambrose Light, 25 Fed. 421.]

On the fifteenth day of March, 1863, the schooner J. M. Chapman was seized in the harbor of San Francisco, by the United States revenue officers, while sailing, or about to sail, on a cruise in the service of the Confederate States, against the commerce of the United States; and the leaders of the expedition, consisting of Ridgeley Greathouse, Asbury Harpending, Alfred Rubery, William C. Law, Lorenzo L. Libby, with several others, were indicted, under the act of congress of July 17, 1862, for engaging in, and giving aid and comfort to, the then existing rebellion against the government of the United States.

The indictment alleged in substance: (1) The existence of a rebellion against the United States, their authority and laws; (2) That the defendants traitorously engaged in, and gave aid and comfort to, the same; (3) That in the execution of their treasonable purposes, they procured, fitted out and armed a vessel to cruise in the service of the rebellion, on the high seas, and commit hostilities against the citizens, property and vessels of the United States; and that the vessel sailed on such cruise.

The cause came on for trial at the October term of 1863. A nolle prosequl was entered as to Law and Libby, and they became witnesses for the prosecution. The trial lasted several weeks. The testimony showed that Harpending, a native of Kentucky, and Rubery, a native of England, had for some time contemplated the fitting out of a privateer at San Francisco, for the purpose of taking several of the mail steamships plying between that port and Panama, and other vessels. With this object in view, Harpending had gone across the country to Richmond, Virginia, and procured from Jefferson Davis, the president of the Confederate States, a letter of marque, authorizing him to prey upon the commerce of the United States, and to burn, bond, or take any vessels of its citizens; and also a letter of instructions directing him how to act, and containing the form of the bond, in case any prize taken should be bonded. Upon his return to San Francisco, he and Rubery made arrangements for the purchase of such a vessel as would suit their purpose; but these arrangements afterward failed, on account of the dishonor of the drafts drawn for the purchase-money by Rubery, and the consequent want of funds. They, also, made a voyage to Cerros Island for the purpose of examining into its fitness as a depot and as a rendezvous, whence to attack the Panama steamers. In January or February, 1863, Harpending made the acquaintance, at San Francisco, of William C. Law, a ship captain; broached to him the project of fitting out a privateer; stated what had been done; exhibited his letter of marque and instructions; solicited him to enter into the enterprise, and assist in procuring a vessel; and said, among other things, that, if he had succeeded in carrying out his previous arrangements, he could easily have taken three of the mail steamers. Law agreed to take part in the scheme; and soon afterward pointed out the schooner J. M. Chapman, a vessel of about ninety tons burden, and a fast sailer, as well adapted for the intended cruise. Several meetings in reference to the subject took place between Harpending, Rubery, Law and the defendant Greathouse, who had been introduced by Harpending to Law as a capitalist; and the result was that Greathouse purchased the schooner, and furnished money to procure arms, ammunitions and stores, and to engage a mate and a crew. The next morning Law took charge of the schooner; moved it to a wharf at the city front; informed Libby of the project, and induced him to go as mate, and engaged four seamen and a cook. All this time Greathouse gave out that he was acting in the interest of the "Liberal Party" in Mexico, and under this pretext, arms and ammunition were purchased, consisting of two brass rifled twelve-pounders, shells, fuse, powder, muskets, pistols, lead, caps and knives. These were packed in cases marked "oil-mill" and "machinery," and shipped as quietly as possible; and there was also shipped a number of uniforms, such as are usually worn by men on vessels of war. A large amount of lumber was also purchased and shipped, with which to construct berths, a prison room, and a lower deck. While these preparations were going on, and every thing was being made ready to get off, the relations in which the participants were to stand in respect to one another were arranged. It was settled that Greathouse, in consideration of the material aid he had furnished, should be first, and that Law should be sailing-master, and second in charge. There was some discussion as to the share each was to have in the fruits of the expedition; and though nothing definite was settled, it was understood that Greathouse was to have the largest share, Harpending the next, Law next, Rubery fourth, and Libby fifth. The plan of the cruise was to sail from San Francisco on Sunday, March 15th, 1863, to the island of Guadalupe, which lies some three hundred miles off the coast of California; there land Harpending and the fighting men, who were to be shipped on the night of Saturday, March 14; thence proceed

to Manzanillo, and discharge such freight as might be taken; then return to Guadalupe, and fit the schooner for privateering purposes; then proceed again to Manzanillo, where the men were to be enrolled and their names inserted in the letter of marque, a copy of which was thereupon to be forwarded to the government of the Confederate States. It was their plan first, to capture a steamer bound from San Francisco to Panama, on its arrival at Manzanillo, land its passengers, and with the steamer thus taken, capture a second steamer; next to seize a vessel from San Francisco, then engaged in recovering treasure from the wreck of the steamer Golden Gate; thence they were to go to the Chincha Islands, and burn United States vessels there; thence to the China Sea, and finally into the Indian Ocean. In pursuance of this plan, and to prevent suspicion, the schooner was "put up" for Manzanillo. A partial cargo was shipped on board, and Law cleared at the custom-house for that port, signing and swearing to a false manifest. On the night of March 14, in accordance with the plan arranged, all the participants went on board. Fifteen persons, who had been employed by Harpending as privateersmen, were placed in the hold in an open space left for them among the cargo directly under the main hatch. The only person absent was Law, who remained on shore with the understanding that he should be on hand before morning. It afterward appeared that he had become intoxicated, and did not get down to keep his appointment until after the schooner had been seized.

During the evening, Rubery had heard rumors that the vessel was to be overhauled, and as the morning approached and Law did not appear, he proposed sailing without him. At daylight, Law being still absent, Libby cast off the lines and began working the schooner out from the wharf into the stream. The mainsail was partially hoisted; but no sooner had the wharf been left, than two boats were observed putting off from the United States sloop-of-war Cyane, then lying at anchor in the bay. As they headed for the schooner, Libby, pointing at them, said to Greathouse that they were after them. Rubery then insisted on running up the sails; but Libby replied that there was no wind, and it would be useless. In a few minutes afterward, the schooner was boarded and seized by the officers of the United States, and the enterprise nipped in the bud. Scarcely had the seizure been effected, when Law made his appearance on board and was arrested with the others. The revenue officers of the United States had been aware of the intended enterprise from an early period, and maintained a constant watch night and day on the vessel. They knew the character of the cargo, which had been carefully noted by the watchmen; were aware of the shipment of arms, and saw the cases with their false marks. On the Saturday afternoon when the schooner was cleared for Manzanillo, they increased the watch, chartered a steam-tug, and put policemen on board. They also made arrangements for the reception and confinement of prisoners at the United States fortifications on Alcatraz Island, and procured the two boats with their crews from the war-ship Cyane, to act in conjunction with them on a given signal. In the evening, the revenue officers themselves went on board the tug, proceeded to a wharf next that at which the J. M. Chapman lay, and watched the men going on board. When the schooner cast off its lines at daylight and headed out into the stream, the boats from the Cyane put off and boarded it according to previous arrangement; and at the same time the tug steamed up. Greathouse and Libby were on deck; the others were below. Fifteen men were found in the hold under the hatch, besides two sailors, who had been placed there over night to prevent them from leaving the vessel. A search being instituted for papers, a number of scraps, some torn, some chewed, and some partially burned, were found strewn about the hold. The two sailors confined testified that some of the party had employed the time intervening between the boarding of the vessel and the opening of the hatchway in destroying papers. Loaded pistols and bowie-knives were found stowed away in the interstices between the packages of the cargo. In the baggage of Harpending and Rubery were found, among other papers, a proclamation to the people of California to throw off the authority of the United States; a plan for the capture of the United States forts at San Francisco, and particularly Alcatraz; also, the form of an oath of fidelity to their cause, with an imprecation of vengeance on all who should prove false. It was shown that some of these papers were in the handwriting of Harpending; and Rubery admitted that he and one of the defendants had spent some time in preparing the oaths. After the seizure and arrest, the prisoners were taken to Alcatraz and confined. The schooner was unloaded, and the arms and munitions examined. An army officer testified that, in his opinion, the schooner might have destroyed a Panama steamer; but naval officers expressed a doubt whether this could have been done. The defense offered no testimony; but claimed, among other things, that a state of war existed between the United States and the Confederate States; that the latter were entitled to, and had in fact received from the former, belligerent rights; that privateering on the part of either side was a legitimate mode of warfare, and made those engaged amenable only to the laws of war; that at least, the defendants could not then be held to have committed any offense of which the court could take jurisdiction. They also claimed that the schooner had not started on her voyage, but had left the wharf with the intention of anchoring in the stream and waiting there for the captain and papers; that whatever the ultimate intention might

have been, there had, in fact, been no commencement of the cruise, and that, at any rate, no offense could have been committed until the schooner had reached Manzanillo, and been ready to commence hostilities. They finally insisted that there could be no treason and no conviction under the indictment, for the reason that "aid and comfort" had not been actually given.

William H. Sharp, U. S. Atty., and Thompson Campbell, for the United States.

Delos Lake and Alexander Campbell, for defendants.

Before FIELD, Circuit Justice, and HOFFMAN, District Judge.

FIELD, Circuit Justice (charging jury). Before proceeding to give any instructions in this case, it may be proper to briefly call attention to your appropriate and only province in the determination of the issues presented. There prevails a very general, but an erroneous opinion, that in all criminal cases the jury are the judges as well of the law as of the fact—that is, that they have a right to disregard the law as laid down by the court, and to follow their own notions on the subject. Such is not the right of the jury. They have the power, it is true, to disregard the instructions of the court, and in case of acquittal their decision will be final—for new trials are not granted in criminal cases where a verdict has passed in favor of the defendant; but they have no moral right to adopt their own views of the law. It is their duty to take the law from the court and apply it to the facts of the case. It is the province of the court, and of the court alone, to determine all questions of law arising in the progress of a trial; and it is the province of the jury to pass upon the evidence and determine all contested questions of fact. The responsibility of deciding correctly as to the law rests solely with the court, and the responsibility of finding correctly the facts, rests solely with the jury. The separation of the functions of the court from those of the jury, in this respect, is essential to the efficacy and safety of jury trials. Any other doctrine would lead only to confusion and uncertainty in the administration of justice. "I hold it," says Mr. Justice Story, "the most sacred constitutional right of every party accused of crime, that the jury should respond as to the facts, and the court as to the law. * * * This is the right of every citizen, and it is his only protection." You will therefore, in this case, gentlemen, take the law from the court, and follow it. If the court err, the responsibility will not be shared by you.

The defendants are indicted for engaging in, and giving aid and comfort to, the existing rebellion against the government of the United States. The indictment is framed under the second section of the act of congress of July 17, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes;" and it charges the commission of acts, which, in the judgment of the court, amount to treason within the meaning of the constitution. Treason is the only crime defined by the constitution. That instrument declares that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." The clause was borrowed from an ancient English statute, enacted in the year 1352, in the reign of Edward III., commonly known as the "Statute of Treasons." Previous to the passage of that statute there was great uncertainty as to what constituted treason. Numerous offenses were raised to its grade by arbitrary constructions of the law. The statute was passed to remove this uncertainty, and to restrain the power of the crown to oppress the subject by constructions of this character. It comprehends all treason under seven distinct branches. The framers of our constitution selected one of these branches, and declared that treason against the United States should be restricted to the acts which it designates. "Treason against the United States," is the language adopted, "shall consist only in levying war against them, or adhering to their enemies, giving them aid and comfort." No other acts can be declared to constitute the offense. Congress can neither extend, nor restrict, nor define the crime. Its power over the subject is limited to prescribing the punishment.

At the time the constitution was framed, the language incorporated into it, from the English statute, had received judicial construction, and acquired a definite meaning; and that meaning has been generally adopted by the courts of the United States. Thus Chief Justice Marshall, in commenting upon the term "levying war," says: "It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context. It is, therefore, reasonable to suppose, unless it be incompatible with other expressions of the constitution, that the term 'levying war' is used in that instrument in the same sense in which it was understood, in England and in this country, to have been used in statute 25 of Edward III., from which it is borrowed."

The constitutional provision, as you per-

ceive, is divided into two clauses, "levying war against the United States," and "adhering to their enemies, giving them aid and comfort." The term "enemies," as used in the second clause, according to its settled meaning, at the time the constitution was adopted, applies only to the subjects of a foreign power in a state of open hostility with us. It does not embrace rebels in insurrection against their own government. An enemy is always the subject of a foreign power who owes no allegiance to our government or country. We may, therefore, omit all consideration of this second clause in the constitutional definition of treason. To convict the defendants they must be brought within the first clause of the definition. They must be shown to have committed acts which amount to a levying of war against the United States. To constitute a levying of war there must be an assemblage of persons in force, to overthrow the government, or to coerce its conduct. The words embrace not only those acts by which war is brought into existence, but also those acts by which war is prosecuted. They levy war who create or carry on war. The offense is complete, whether the force be directed to the entire overthrow of the government throughout the country, or only in certain portions of the country, or to defeat the execution and compel the repeal of one of its public laws.

It is not, however, necessary that I should go into any close definition of the words "levying war," for it is not sought to apply them to any doubtful case. War has been levied against the United States. War of gigantic proportions is now waged against them, and the government is struggling with it for its life. War being levied, all who aid in its prosecution, whether by open hostilities in the field, or by performing any part in the furtherance of the common object, "however minute or however remote from the scene of action," are equally guilty of treason within the constitutional provision. In treason there are no accessories; all who engage in the rebellion at any stage of its existence, or who designedly give to it any species of aid and comfort, in whatever part of the country they may be, stand on the same platform; they are all principals in the commission of the crime; they are all levying war against the United States.

In Ex parte Bollman and Ex parte Swartwout, 4 Cranch [8 U. S.] 127, Mr. Chief Justice Marshall, in delivering the opinion of the supreme court of the United States, said: "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied—that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose—all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." And in commenting upon this language, on the trial of Burr, the same distinguished judge said: "According to the opinion, it is not enough to be leagued in the conspiracy, and that war be levied, but it is also necessary to perform a part; that part is the act of levying war. That part, it is true, may be minute; it may not be the actual appearance in arms, and it may be remote from the scene of action, that is, from the place where the army is assembled; but it must be a part, and that part must be performed by a person who is leagued in the conspiracy. This part, however minute or remote, constitutes the overt act, of which alone the person who performs it can be convicted." 2 Burr's Trial, 438, 439. The indictment in the present case, as I have already stated, is based upon the second section of the act of July 17, 1862. The constitution, although defining treason, leaves to congress the authority to prescribe its punishment. In 1790, congress passed an act fixing to the offense the penalty of death. By the first section of the act of July, 1862, congress gave a discretionary power to the courts to inflict the penalty of death, or fine and imprisonment, providing that in either case the slaves of the party convicted, if any he have, shall be liberated. The second section of the act declares "that if any person shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof, or shall give aid or comfort thereto, or shall engage in or give aid and comfort to any such existing rebellion or insurrection, and be convicted thereof, such person shall be punished by imprisonment for a period not exceeding ten years, or by a fine not exceeding $10,000, and by the liberation of all his slaves, if any he have, or by both said punishments, at the direction of the court." The fourth section provides that the act shall not be construed in any way to affect or alter the prosecution, conviction or punishment of any person guilty of treason before its passage, unless convicted under the act.

There would seem, upon a first examination, to be an inconsistency between the first and second sections of this act—the first section declaring a particular punishment for treason, and the second declaring, for acts which may constitute treason, a different punishment. It appears from the debate in the senate of the United States, when the second section was under consideration, that it was the opinion of several senators that the commission of the acts which it designates might, under some circumstances, constitute an offense less than treason. The constitution, as you have seen, declares that "treason against the United States shall consist only in levying war or in adhering to their enemies, giving them aid and comfort." Rebels not being ene-

mies within its meaning, an indictment alleging the giving of aid and comfort to them had been, as was stated, held defective. But if such ruling had been made, it was made, we may presume, not because the giving of aid and comfort to rebels was not treason, but because the parties giving such aid and comfort were equally involved in guilt with those in open hostilities and should have been indicted for levying war; for every species of aid and comfort which, if given to a foreign enemy, would constitute treason within the second clause of the constitutional provision—adhering to the enemies of the United States—would, if given to the rebels in insurrection against the government, constitute a levying of war under the first clause. The second section of the act, however, relieves the subject from any difficulty so far as the form of the indictment is concerned. It is not necessary now to use specifically the term "levying war;" it will be sufficient if the indictment follows the language of the act, as the indictment does in the present case. But we are unable to conceive of any act designated in the second section which would not constitute treason, except perhaps as suggested by my associate, that of inciting to a rebellion. If we lay aside the discussion in the senate, and read the several sections of the act together, the apparent inconsistency disappears. Looking at the act alone, we conclude that congress intended: 1. To preserve the act of 1790, which prescribes the penalty of death, in force for the prosecution and punishment of offenses committed previous to July 17, 1862, unless the parties accused are convicted under the act of the latter date for subsequent offenses; 2. To punish treason thereafter committed with death, or fine and imprisonment, in the discretion of the court, unless the treason consist in engaging in or assisting a rebellion or insurrection against the authority of the United States, or the laws thereof, in which event the death penalty is to be abandoned, and a less penalty inflicted. By this construction. the apparent inconsistency in the provisions of the different sections is avoided, and effect given to each clause of the act. The defendants are therefore in fact on trial for treason, and they have had all the protection and privileges allowed to parties accused of treason, without being liable, in case of conviction, to the penalty which all other civilized nations have awarded to this, the highest of crimes known to the law.

The indictment charges that on the sixteenth of March, 1863, and long before and since, an open and public rebellion by certain citizens of the United States, under a pretended government called the Confederate States of America, has existed against the United States and their authority and laws; that the defendants, in disregard of their allegiance to the United States, did on that day, and divers other times before and since, at the city of San Francisco, "maliciously and traitorously" engage in, and give aid and comfort to the said rebellion; that in the prosecution and execution of their "treasonable and traitorous" purposes, they procured, prepared, fitted out and armed a schooner called the J. M. Chapman, then lying within the port of San Francisco, with the intent that the same should be employed in the service of the rebellion, to cruise on the high seas, and commit hostilities upon the citizens, property and vessels of the United States; and that they entered upon the said schooner and sailed from the port of San Francisco upon such cruise in the service of said rebellion. In other words, the indictment alleges: 1. The existence of a rebellion against the United States, their authority and laws; 2. That the defendants traitorously engaged in and gave aid and comfort to the same; 3. That in the execution of their treasonable and traitorous purposes, they procured, fitted out, and armed a vessel to cruise in the service of the rebellion upon the high seas, and commit hostilities against the citizens, property and vessels of the United States; 4. That they sailed in their vessel from the port of San Francisco upon such cruise in the service of the rebellion.

The existence of the rebellion is a matter of public notoriety, and like matters of general and public concern to the whole country, may be taken notice of by judges and juries without that particular proof which is required of the other matters charged. The public notoriety, the proclamations of the president, and the acts of congress are sufficient proof of the allegation of the indictment in this respect. The same notoriety and public documents are also sufficient proof that the rebellion is organized and carried on under a pretended government, called the Confederate States of America.

As to the treasonable purposes of the defendants there is no conflict in the evidence. It is true the principal witnesses of the government are, according to their own statements, co-conspirators with the defendants and equally involved in guilt with them, if guilt there be in any of them. But their testimony, as you have seen, has been corroborated in many of its essential details. You are, however, the exclusive judges of its credibility. The court will only say to you that there is no rule of law which excludes the testimony of an accomplice, or prevents you from giving credence to it, when it has been corroborated in material particulars. Indeed, gentlemen, I have not been able to perceive from the argument of counsel that the truth of the material portions of their testimony has been seriously controverted.

It is not necessary that I should state in detail the evidence produced. I do not pro-

pose to do so. It is sufficient to refer to its general purport. It is not denied, and will not be denied, that the evidence tends to establish that Harpending obtained from the president of the so-called Confederate States a letter of marque—a commission to cruise in their service on the high seas, in a private armed vessel, and commit hostilities against the citizens, vessels and property of the United States; that his co-defendants and others entered into a conspiracy with him to purchase, and fit out, and arm a vessel, and cruise under the said letter of marque, in the service of the rebellion; that in pursuance of the conspiracy they purchased the schooner J. M. Chapman; that they purchased cannon, shells and ammunition, and the means usually required in enterprises of that kind, and placed them on board the vessel; that they employed men for the management of the vessel; and that, when everything was in readiness, they started with the vessel from the wharf, with the intention to sail from the port of San Francisco on the arrival on board of the captain, who was momentarily expected. Gentlemen, I do not propose to say anything to you upon the much disputed questions whether or not the vessel ever did, in fact, sail from the port of San Francisco, or whether, if she did sail, she started on the hostile expedition. In the judgment of the court they are immaterial, if you find the facts to be what I have said the evidence tends to establish.

When Harpending received the letter of marque, with the intention of using it, if such be the case (and it is stated by one of the witnesses that he represented that he went on horseback over the plains expressly to obtain it), he became leagued with the insurgents—the conspiracy between him and the chiefs of the rebellion was complete; it was a conspiracy to commit hostilities on the high seas against the United States, their authority and laws. If the other defendants united with him to carry out the hostile expedition, they, too, became leagued with him and the insurgent chiefs in Virginia in the general conspiracy. The subsequent purchasing of the vessel, and the guns, and the ammunition, and the employment of the men to manage the vessel, if these acts were done in furtherance of the common design, were overt acts of treason. Together, these acts complete the essential charge of the indictment. In doing them, the defendants were performing a part in aid of the great rebellion. They were giving it aid and comfort.

It is not essential to constitute the giving of aid and comfort that the enterprise commenced should be successful and actually render assistance. If, for example, a vessel fully equipped and armed in the service of the rebellion should fail in its attack upon one of our vessels and be itself captured, no assistance would in truth be rendered to the rebellion; but yet, in judgment of law, in legal intent, the aid and comfort would be given. So if a letter containing important intelligence for the insurgents be forwarded, the aid and comfort are given, though the letter be intercepted on its way. Thus Foster, in his treatise on Crown Law, says: "And the bare sending money or provisions, or sending intelligence to rebels or enemies, which in most cases is the most effecutal aid that can be given them, will make a man a traitor, though the money or intelligence should happen to be intercepted; for the party in sending it did all he could; the treason was complete on his part, though it had not the effect he intended."

Wherever overt acts have been committed which, in their natural consequence, if successful, would encourage and advance the interests of the rebellion, in judgment of law aid and comfort are given. Whether aid and comfort are given—the overt acts of treason being established—is not left to the balancing of probabilities—it is a conclusion of law.

If the defendants obtained a letter of marque from the president of the so-called Confederate States, the fact does not exempt them from prosecution in the tribunals of the country for the acts charged in the indictment. The existence of civil war, and the application of the rules of war to particular cases, under special circumstances, do not imply the renunciation or waiver by the federal government of any of its municipal rights as sovereign toward the citizens of the seceded states.

As matter of policy and humanity, the government of the United States has treated the citizens of the so-called Confederate States, taken in open hostilities, as prisoners of war, and has thus exempted them from trial for violation of its municipal laws. But the courts have no such dispensing power; they can only enforce the laws as they find them upon the statute-book. They cannot treat any new government as having authority to issue commissions or letters of marque which will afford protection to its citizens until the legislative and executive departments have recognized its existence. The judiciary follows the political department of the government in these particulars. By that department the rules of war have been applied only in special cases; and notwithstanding the application, congress has legislated in numerous instances for the punishment of all parties engaged in or rendering assistance in any way to the existing rebellion. The law under which the defendants are indicted was passed after captives in war had been treated and exchanged as prisoners of war, in numerous instances.

But even if full belligerent rights had been conceded to the Confederate States, such rights could not be invoked for the protection of persons entering within the limits of states which have never seceded, and secretly getting up hostile expeditions against

our government and its authority and laws. The local and temporary allegiance, which every one—citizen or alien—owes to the government under which he at the time lives, is sufficient to subject him to the penalties of treason.

These, gentlemen, constitute all the instructions I have to give. My associate, Judge HOFFMAN, will submit some further observations to you. The case is one of much interest—not because it is the only case for treason tried in the state, but because of the great importance of the principles involved. As you will weigh carefully the evidence, and be guided by the instructions of the court, you will have no difficulty in reaching an intelligent and just verdict.

HOFFMAN, District Judge (charging jury). At the request of the presiding judge, I have prepared some observations which, in my judgment, it is not important that I should read. The ruling of the court on the principal point involved, a ruling in which I entirely concur, renders immaterial much of what I am about to say to you. As, however, the presiding judge deems it proper that our views should be made known on all the points debated at the bar, I will read what I have prepared, premising that if in anything I shall go beyond the charge just delivered, what I say is to be taken as the expression of my individual opinion. The charge of the presiding judge is to be exclusively received as the opinion and instructions of the court.

The defendants in this case are indicted under the second section of the act of July, 1862. The indictment in substance charges them with having engaged in, and given aid and comfort to the existing rebellion, by fitting out, arming and equipping a vessel, with intent that she should cruise in the service of the so-called Confederate States, under a letter of marque issued by the pretended authorities of those states, against the vessels and commerce of the United States. And that she did in fact sail from this port in such service, and under a letter of marque, on the alleged cruise.

In the constitution of the United States it is declared that the crime of treason shall consist only in levying war against the United States, and in adhering to their enemies, giving them aid and comfort. The last branch of this definition has always been admitted to apply only to cases of adhering, and giving aid and comfort to, foreign public enemies. It was therefore held that an indictment charging the defendant with having given aid and comfort to domestic rebels was bad, and that the acts should be charged as "a levying of war against the United States." It appears, however, to have been considered by congress that some acts might be committed which would constitute an "engaging in the present rebellion, and giving it aid and comfort," which would not amount to a levying of war, or to the crime of treason, within the meaning of the constitution. Under this idea, the act of 1862, in its first section, re-enacts the former statute against treason eo nomine, but modifies, in some respects, the penalty, while the second section denounces, as if it were a different offense, the "engaging in, and giving aid and comfort to, the existing rebellion." We have not been able to concur in the view which congress seems to have taken of the offenses created by these sections.

Every act which, if performed with regard to a public and foreign enemy, would amount to "an adhering to him, giving him aid and comfort," will, with regard to a domestic rebellion, constitute a levying of war. And, conversely, every act which, with regard to a domestic rebellion, will constitute "a levying of war," will, with regard to a foreign enemy, constitute "an adhering to him, giving him aid and comfort." "Every species of aid or comfort," says East, "which, when given to a rebel within the realm, would make the subject guilty of levying war, will, if given to an enemy, whether within or without the realm, make the party guilty of adhering to the king's enemies;" and for this he cites numerous authorities. 1 East, Crown Law, 78. That this must be so is evident on grounds of reason alone. As the framers of the constitution restricted the crime of treason to two classes of cases only, the one "adhering to the public enemy, giving him aid and comfort;" the other "levying war against the United States," what motive can be suggested for attaching any less guilt to him who aids and comforts a rebellion, than to him who aids and comforts a public enemy? A moment's consideration of the magnitude and power of the present rebellion, its aim not merely to change the form of government, or to resist the laws, but to dismember the country, and to destroy forever our integrity as a nation, and to inflict a fatal blow on the cause of human progress and civilization, will convince us that the dangers to be apprehended are as great, and the guilt of the actors as deep, when aid and comfort are given to a domestic rebellion, as when given to a public enemy. If, then, every species of aid and comfort given to the present rebellion constitutes a levying of war, it follows that in the two sections of the act referred to, congress has denounced the same crime; and that a party amenable to the second section for having "engaged in the rebellion and given it aid and comfort," must also be guilty of treason by levying war against the United States.

As, then, the offenses described are substantially the same, though a different penalty is attached to their commission by the sections referred to, it was held by the court, under the first indictment, which was in terms for treason, that the smaller penalty could alone be inflicted, that the prisoners could not be capitally punished, and could

therefore be admitted to bail. On the same grounds, it was considered that under the present indictment, which pursues the language of the second section, the offense charged was treason; that both the offense as described and the overt acts charged amounted to that crime, and that the accused were entitled to all the privileges secured by the constitution or allowed by law to parties on trial for treason; and this, notwithstanding that in consequence of the legislation referred to, the penalty of treason could not be inflicted. In determining, therefore, whether the defendants can be convicted under this indictment, it will be proper to consider whether their acts constitute in law "a levying of war;" for "an engaging in a rebellion and giving it aid and comfort," amounts to a levying of war; while at the same time we may also inquire whether their acts are such as would, if done with regard to a public enemy, constitute an adherence to him, "giving him aid and comfort."

With regard to levying of war, it is said by Mr. Chief Justice Marshall, that "when war is actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform a part, however minute or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." That war has actually been levied, and is now desolating a large portion of our country, is not disputed. The question then is, have the defendants leagued themselves with the rebellion, and in furtherance of the common design, performed a part, however minute, toward its accomplishment?

You have heard the testimony adduced to establish the treasonable designs long since entertained and attempted to be put in execution by the accused; that in furtherance of this design a letter of marque was procured from the authorities of the so-called Confederate States; that a vessel was purchased, arms and ammunition placed on board, and a crew engaged for the enterprise, who, if not actually apprised of all the designs of the leaders, were selected by them for the purpose of using them as the crew, and with the full assurance that they would be willing or could be compelled to embark in the enterprise; that a false manifest and bills of lading were prepared, the vessel cleared, and the men mustered in her hold, armed and ready to set sail; that she started from the wharf, was pursued, and after an abortive attempt to escape and continue on her voyage, and some preparations for resistance, she was captured. The intention with which all these things were done is not doubtful. They were done with the view of arming and fitting out the vessel to sail as a privateer against the commerce of the United States, and thus to take part in, and on the ocean to carry on the war, which, in other portions of the country, is now being levied against the United States. They were done in furtherance of the common purpose of the rebels elsewhere engaged, and in league with them to accomplish the objects of the rebellion.

If you believe, from the evidence, that these acts were done with the purpose and intention I have stated, they are sufficient, in the opinion of the court, to constitute a "levying of war" against the United States within the meaning of the constitution. Much stress was laid by the defendant's counsel on the fact that it was stated by Libby to have been the design of the parties to proceed to Manzanillo, and there to fill up the letter of marque, enroll the names of the crew, and dispatch a copy of the letter of marque, with the names of the crew attached, to the authorities of the Confederate States. But it has appeared to us that that circumstance is immaterial. The letter of marque seems to have been issued in blank, that is, the name of the vessel, her tonnage, and other particulars usually inserted, were left to be filled up when the vessel was procured. Obtained, as this letter must have been, in advance of the procurement of any vessel or enlisting of a crew, it could have been issued in no other form so as to serve its purpose. But it was in the hands of the defendants, ready to be filled up at any moment. There is no proof that after Law saw it, it may not have been filled up whenever those who held it saw fit to do so. Its importance in this case does not consist in any authority it gave to levy war on the United States, to confer which, had it been issued by a belligerent power, the observance of every formality might be necessary; but as showing that the defendants were in league with the rebellion, and that they were co-operating with those actually levying war in other parts of the country, for the attainment of a common object.

But the indictment charges, not "a levying of war," but "an engaging in the rebellion, and giving to it aid and comfort." Although, as before observed, these charges amount to a levying of war, yet it will be convenient to consider for a moment whether the overt acts proved against these defendants are such as would, if done in aid of a public enemy, constitute "an adherence to him, giving him aid and comfort." For you will perceive that the terms employed are those heretofore used with respect to treason, by aiding a public enemy; and they are now, for the first time, applied to acts done in aid of a domestic rebellion. The nature of the acts constituting the offense, with reference to a public enemy, may therefore properly be considered in this inquiry; for it is evident that congress referred, by this section, to such acts as would, if done in aid of a public enemy, have constituted "an adherence to him, giving him aid and comfort."

It is perhaps not easy, by a general definition, to describe all the acts which would

amount, in judgment of law, to a giving of aid and comfort to an enemy. The text writers, as we have seen, describe it on general terms as including all such acts as would, if given to a rebel within the realm, amount to "a levying of war." What constitutes a levying of war has already been considered; but in the point of view in which I am now treating the question, it is necessary to examine what acts have been held to be "a giving of aid and comfort" to a public enemy, and to see whether the acts committed by the defendants in respect of this rebellion are of the same nature.

Among the cases mentioned by the writers of "an adhering to the enemy, giving him aid and comfort," are the following: Raising men in England with intent to dethrone the king, and sending them abroad to the enemy (the French). Taking treasonable papers in a boat to go on board a vessel bound to France, where they were to be used for treasonable purposes; and, indeed, every species of treasonable correspondence with the enemy, although the intelligence may not have reached him. And, in general, the mere sending of money, provisions or intelligence to the enemy, is giving him aid and comfort, though on the way they should happen to be intercepted, and never reach him. So, too, it has been held that cruising on the king's subjects under a French commission, France being then at war with England, is an adhering to the king's enemies, though no other act of hostility was laid or proved. It was not denied at the bar that a similar act, under a letter of marque issued by the authorities of the so-called Confederate States, would constitute both a levying of war and an "engaging in the rebellion, giving it aid and comfort."

But it was contended that in this case the voyage was not commenced by the sailing of the vessel; and, second, that if it were, it was not a cruise against the commerce of the United States and in aid of the rebellion, inasmuch as the intention was not to commit hostilities immediately, but to proceed to a neutral port, and from thence enter upon the execution of the treasonable design.

First. As to whether the vessel can be deemed to have sailed upon her voyage? The sailing of a vessel, or the commencement of voyage, depends upon what acts are done and the intention of the parties who do them. In general, a voyage is deemed to have been commenced when the vessel in readiness for sea quits her wharf or other place of mooring without the intention of returning to it. But the inference to be drawn from this fact may undoubtedly be rebutted by proof of an intention not to commence the voyage at that time. If, for example, a vessel which has been fully laden and cleared at the custom-house, and is about to sail, should, by orders from her owners, be detained, the fact that, to save wharfage or from other considerations of convenience, her master has taken her into the stream, and there brought her to an anchor, would not justify us in considering her as having sailed, or the voyage as having commenced, notwithstanding that she has no intention of returning to the wharf or to her former moorings. On the other hand, if a vessel quits the wharf with the intention of proceeding on her voyage, the latter will be deemed to have commenced, notwithstanding that she expects and intends to wait until a pilot can be procured or discharged, or until the tide turns, or other cause of temporary delay be removed.

In the case at bar, the only testimony on the point, and that on which the defendants rely, is the statement made by Libby. It appears, from his account, that the guns, ammunition and other cargo being on board, and the vessel cleared, it was determined to set sail as soon as the tide served on Sunday morning. The men who were to form the crew were thereupon taken on board during the middle of Saturday night, and secreted in the hold. Law, who was to act as captain, or rather sailing-master, left the ship in the evening, promising to return during the night, and assist in getting the men on board. As the night wore on, and he failed to make his appearance, some doubts of his fidelity appear to have been entertained. Rubery suggested the expediency of going without him, but this was overruled by Greathouse and Libby, the latter observing that the vessel was fast aground, and could not immediately depart.

About daylight, the tide having sufficiently risen, the lines were cast off, and the vessel hauled alongside of a schooner which lay near. Her jib was then hoisted and she ran out into the stream; but the tide being strong, the mainsail was loosed and hoisted one-half or two-thirds of the way up, when boats were observed leaving the United States ship Cyane, apparently in pursuit. Becoming satisfied that such was the case, Libby and Greathouse took hold of the main halliards to pull the sail further up, but desisted from the attempt on finding it impracticable to escape, there being no breeze. The vessel was almost immediately afterward boarded by the United States officers.

It is contended that, under these circumstances, the vessel cannot be deemed to have sailed or commenced her voyage, as there was no intention immediately to depart. To arrive at the intention of the parties, we must consider all the circumstances.

That the vessel was ready for sea—that every preparation for the enterprise was completed—is admitted, except that Law had not come on board with the translation of certain documents relating to the cargo, which it was thought desirable to have. The presence of so large a number of men in the hold rendered any delay dangerous, if not impracticable. How long they would have waited for Law does not appear. His failure to join the vessel during the night, according to agreement, had already awakened suspicion, and

though the suggestion to sail without him was not acceded to, yet it may have been overruled as much in consequence of Libby's remark, that the vessel was hard aground and must wait until the tide rose, as from any fixed resolution not to sail without him. This conversation occurred during the night, but when daylight came, and the tide served, the vessel, in accordance with the previous design of the parties, cast off her lines, set her sails and hauled into the stream. It is impossible to know how long she would have waited for Law. Every hour that elapsed must have tended to strengthen their suspicions of his treachery and furnished additional motives for instant departure. Bue even assuming that they would have for a short time delayed proceeding on the voyage, in the hope that he would join them at the last moment, we do not consider that such a contingent and indefinite intention which, from its nature, was liable to be abandoned at any moment, is sufficient to justify you in saying that the voyage was not commenced. The case seems in no respect to differ from that of a vessel which leaves her moorings for the purpose of going to sea, but with the intention of suspending her voyage for a short time while she awaits the arrival of a pilot, who is momentarily expected. There may have been an intention to suspend, for a brief period, the prosecution of a voyage already commenced, but it was not the postponement of the commencing of the voyage. If, therefore, from the evidence, you believe the facts to be as I have detailed, our opinion is that they are sufficient in law to constitute a sailing of the vessel and a commencement of the voyage.

But it is contended that, assuming the vessel to have sailed, she did not sail on a voyage which can be considered "a cruise to commit hostilities upon the commerce of the United States." The determination of this point also depends upon the acts and intentions of the parties. It is stated by both Law and Libby, that the scheme or design of the expedition was to proceed from this port to the island of Guadalupe, where the men, the arms and ammunition were to be landed. The vessel was then to proceed to Manzanillo, and deliver her other cargo. Here her letter of marque was to be filled up, her crew formally enrolled, and a copy of the letter and crew list sent to the authorities of the Confederate States. From Manzanillo she was to return to Guadalupe, construct a deck and some houses for her crew, take on board her guns and ammunition, and proceed to depredate upon our commerce.

It is contended that, as hostilities were not immediately to commence, and as the voyages to Guadalupe, thence to Manzanillo, and thence back to Guadalupe, were to be peaceful, the vessel cannot be regarded as having been "engaged," when sailing from this port, "on a cruise to commit hostilities against the United States," nor until her letter of marque was filled up as being "in the service of the Confederate States." But it can hardly be contended that the mere postponement of actual hostilities can deprive the voyage of the character stamped upon it by its main purpose and design. If, for example, it had been determined not to attack any vessel before reaching a certain latitude, or until a treasure-laden steamer should be fallen in with, which it was known would not sail until the expiration of some weeks, such a determination could not alter the nature of the voyage as a cruise against the commerce of the United States. Nor could an intention to stop at one or more ports before commencing hostilities have any such effect, where it appears that such preliminary voyages are subordinate to the main design, and are undertaken in furtherance of and as conductive to the paramount object for which the vessel was bought, armed, equipped, and caused to sail.

Cases might occur where the guilty design is intended to be carried into execution at a remote time and place, and subsequent to other peaceful voyages first to be accomplished. If, for example, the design were to sail from this port to Hongkong, and deliver a cargo; thence to proceed, with a like object, to Calcutta; thence to Liverpool, and thence to Halifax, where the vessel is to be fitted up as a privateer, it might perhaps be difficult to affirm that at the time of leaving this port her cruise as a privateer had commenced. On the other hand, the mere intention to touch at a neighboring port, to take in water or other supplies, could not affect the character of the voyage as determined by its principal object and intention.

It is not easy to draw a precise line of discrimination between the cases. In general, it may be stated that when the preliminary acts are to be performed in furtherance of the principal intent, when they are done to carry out that intent, and as the best means of accomplishing it, the nature of the voyage will be fixed by the main design which is thus in process of execution. But when the execution of the guilty design is to be postponed to a distant time and place, when previous independent acts, in themselves innocent, are to be first performed, the mere existence of a remote ulterior intention to enter upon the execution of a criminal enterprise will not stamp a guilty character upon otherwise innocent proceedings. The test seems to be: Was there a single enterprise to be carried out by such means as would best promote its accomplishment, or was there a series of distinct and independent enterprises designed, the last one of which, in point of time, was to be of guilty nature?

On this point we are fortunately not without authority. By the second and third sections of the act of congress of May 10, 1800 [2 Stat. 70], it is made a criminal offense for any American citizen voluntarily to serve on board a vessel of the United States "employed or made use of in the transportation or carrying of slaves from one foreign place to an-

other;" or on board any foreign vessel "employed in the slave trade."

In the case of U. S. v. Morris, 14 Pet. [39 U. S.] 464, it was proved that the defendant, an American citizen, was voluntarily serving on board the schooner Butterfly. There were found on board this vessel, when captured, the usual equipments of vessels engaged in the slave trade, leagers capable of containing two hundred or three hundred gallons of water, plank suitable for a slave deck, etc. But she had also on board a full cargo, adapted either to the traffic in negroes, or to lawful trade with the coast of Africa. No slaves were found on board, and it was proved that from the situation and condition of the vessel no slaves could have been transported in her at any time during the voyage in which she was then engaged; and that it would have been necessary to discharge her cargo before the slave deck could have been fitted up, or slaves taken on board, and that the vessel was short of water, and had no supplies for any negroes who might be taken on board. Under these circumstances, the question was raised, whether the vessel could be regarded "as employed and made use of in the carrying and transportation of slaves," under the second section of the act, and "as employed in the slave trade," under the third section. The supreme court of the United States held the affirmative of both propositions.

In the case of U. S. v. The Catharine [Case No. 14,755], it appeared that the outward voyage to the coast of Africa was undertaken under the American character and ownership, but that it was planned and undertaken under an arrangement that the ownership and national character should be changed, on her arrival on the coast, and before any slaves should be taken on board, and that she was then to be employed in the transportation of slaves. It was held that from the moment of her departure she was to be considered as "employed in the slave trade;" that the penalty was incurred, and the forfeiture attached at the very inception of the voyage; that the vessel became tainted with the offence, wherever she might go, and into whatever hands she might fall, and the forfeiture attached upon all interests concerned.

It will be perceived that in these cases the question as to the real nature of the voyage arose in a manner closely resembling that in which the same question is presented for our consideration. In both it was held that it was to be determined by its objects and by the intentions of the parties. If a vessel which has no slaves on board, but has a cargo which must necessarily be discharged before slaves can be taken on board, or a deck for their reception fitted up, is nevertheless to be considered as "employed and made use of in the carrying and transportation of slaves," because that was the object and design of the voyage, it would seem to follow that a vessel equipped, manned and armed as a privateer, and sailing with that intention, is to be deemed to be engaged or employed on a privateering cruise from the inception of the voyage, notwithstanding she has committed no hostilities and does not design to commit any until certain preliminary arrangements have been consummated.

It is unnecessary to repeat what has already been said in regard to the letter of marque. The question is not whether the commission, or letter of marque, was in all respects regular or formally executed. Emanating from the rebel government, it could, of course, confer no authority to levy war on the United States, or to destroy or rob the vessels of her citizens. The question is, was the vessel sailing under the letter and in the service of the rebel government? Whatever remained to be done, if indeed anything remained, could be done as well at sea as on land. Harpending or Greathouse could at any moment, and when about to capture some rich prize, or on the point of being themselves captured by an American cruiser, have filled up the blanks with all that was required; and the fact that a copy of the document had not been dispatched to the rebel authorities, would neither impair any protection to which the letter of marque, it was supposed, would have entitled them, or relieve them from the guilt of cruising under a letter of marque to commit hostilities against the United States.

If these views be correct, it follows that the defendants were engaged on a cruise under a letter of marque from the rebel government against the vessels and property of the United States, and have thus (supposing such a cruising to have been necessary to constitute the offense charged, which it is not,) given aid and comfort to the rebellion within the meaning of those terms as usually applied to the public enemy, but in this act applied to the existing rebellion.

If, therefore, you find that the facts, on the assumed truth of which these observations are based, are proved beyond a reasonable doubt by the evidence, our opinion is that they constitute a levying of war against the United States, and "an engaging in giving aid and comfort to the rebellion," within the meaning of the second section of the act of 1862, and as charged in the indictment.

I have endeavored, gentlemen, to consider the questions involved in this cause in the calm spirit of judicial inquiry, and unaffected by the excitements of the hour or the fierce passions necessarily aroused by the stupendous contest in which the country is engaged. For the accused, personally, I feel a deep regret, and especially for one of them, who appears to have been animated rather by a zeal for the cause which he has unhappily espoused than by the more unworthy motive of enriching himself by the plunder of his fellow-citizens. It is deeply to be regretted that the courage and willingness to sacrifice himself for the benefit of his associates, slight glimpses of which have been revealed by the evidence, have been wasted on an en-

terprise which is as indefensible in morals, or even under any political theory ever proclaimed by the advocates of secession, as it is criminal in law.

The jury found the defendants guilty. Sentence imposing both fine and imprisonment was pronounced upon them. Rubery was subsequently pardoned by President Lincoln, at the request of "our good friend," John Bright, of England. The other defendants were subsequently, during the attendance of Mr. Justice Field upon the supreme court, at Washington, brought before District Judge Hoffman, sitting in the circuit court, on habeas corpus, and released from imprisonment upon taking the oath prescribed in the proclamation of President Lincoln, issued after their sentence, and upon giving bond for their future good behavior. [Case No. 5,741.]

Case No. 15,255.

UNITED STATES v. GREEN.

[2 Cranch, C. C. 520.] [1]

Circuit Court, District of Columbia. Dec. Term, 1824.

FORGERY—REQUEST TO LEND MONEY.

A written request to lend money may be the subject of forgery at common law.

Indictment [against James Green] for forging "a certain paper writing purporting to be a request or order upon one R. Woodward for the loan of money, and to be signed by one John Duley, with the name of the said John Duley thereunto affixed, the tenor of which paper writing is as follows, to wit: 'Georgetown, October 19, 1824. Mr. R. Woodard, Sir, would you Be so kind as To lend me ten or 15 Dollars And Eye will call And settle with you on the 20th. John Duley.'—with intent to defraud the said R. Woodward, otherwise called Roswell Woodward, against the form of the statute in that case made and provided, and against the peace and government of the United States." The defendant pleaded guilty. But THE COURT, having some doubt whether it was forgery either at common law or under the Maryland act of 1799 (chapter 75, § 2), took time to consider. That act has the words, "any warrant or order for payment of money."

THE COURT (THRUSTON, Circuit Judge, absent), decided that this was not a warrant or order for the payment of money, and therefore not within the statute of Maryland; but that the indictment was good as an indictment for forgery at common law, upon the following authorities: Rex v. Ward, 2 Ld. Raym. 1461, and the cases there cited, namely Rex v. Stocker, 5 Mod. 137, 1 Salk. 342, 371 (which was an indictment at common law for forging a bill of lading, and which was adjudged bad on demurrer because the charge was in the alternative,—namely, that he forged or caused to be forged; but no exception was taken to it because the offence was not forgery at common law); Rex v. Ferrers, 1 Sid. 278 (forging an acquittance for 7 lbs.); Farr's Case, T. Raym. 81 (a warrant of attorney); Dudly's Case, 2 Sid. 71 (the entry of a marriage in the register of marriages); Savage's Case, Style, 12 (letters of credence for collecting money); Rex v. Deakins, 1 Sid. 142 (for counterfeiting a protection in the name of Sir Anthony Ashley Cooper, as a member of parliament, when he was not); Reg. v. Yarrington, 1 Salk. 406 (for forging a letter); Rex v. Ward, 2 Ld. Raym. 1466 (for forging an indorsement on the back of a certificate).

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,256.

UNITED STATES v. GREEN.

[3 Mason, 482.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1824.

HABEAS CORPUS—RETURN—ATTACHMENT—INFANT—RIGHT OF CUSTODY.

1. Upon a habeas corpus to restore an infant to the custody of her parent, the court will look into all the facts stated in the return, and will not discharge the defendant, simply because he declares the infant not to be in his possession, power, or custody, if the conscience of the court is not satisfied that all the material facts are disclosed.

[Cited in U. S. v. Williamson, Case No. 16,726; Ex parte Des Rochers, Id. 3,824; Ex parte Everts, Id. 4,581; Re McDonald, Id. 8,751; King v. McLean Asylum of the Massachusetts General Hospital, 12 C. C. A. 139, 64 Fed. 327.]

[Cited in Shattuck v. State, 51 Miss. 50; State v. Scott, 30 N. H. 278.]

2. An attachment is the usual process to bring a party into court, where he has not made a true return; and if he is present in court, no such process is necessary; but the court may pass an order directing him immediately to answer interrogatories.

[Cited in U. S. v. Anonymous, 21 Fed. 768; Re Barry, 42 Fed. 123.]

3. A father is not, of course, upon a habeas corpus, entitled to the custody of his infant child, if brought into court, but the court will exercise its discretion on the subject, and place the infant where it will be most for its benefit.

[Cited in Re Can-Ah-Couqua, 29 Fed. 690; Re Barry, 42 Fed. 118.]

[Cited in Jones v. Darnall, 103 Ind. 573; 2 N. E. 229; Re Lally (Iowa) 51 N. W. 1156; Weir v. Marley, 99 Mo. 484, 12 S. W. 801; Sturtevant v. State, 15 Neb. 463, 19 N. W. 619; Giles v. Giles, 30 Neb. 627, 46 N. W. 917; Clark v. Bayer, 32 Ohio St. 308; Heinemann's Appeal, 96 Pa. St. 114; Hoxsie v. Potter, 16 R. I. 377, 17 Atl. 130; Nugent v. Powell (Wyo.) 33 Pac. 27.]

Habeas corpus upon the petition of Aaron Putnam, a citizen of New York, against Timothy Green, a citizen of Rhode Island, to bring up the body of Eliza A. Putnam, an infant daughter of Putnam, about ten years old, alleged to be wrongfully detained in the custody of the defendant, who was her grandfather. Upon the execution of the writ, a special return was made by the defendant, alleging, that the infant was the

[1] [Reported by William P. Mason, Esq.]

child of his daughter Mary, who married Putnam, and had since deceased; that in 1817, Putnam became embarrassed, and brought his wife and the said infant to reside at his house in North Providence, where they lived for two years; that they were subsequently removed to Connecticut, and again came back to his house with the consent of Putnam; that the wife died in his family in 1820, and upon her death-bed requested her parents to keep and bring up the said infant as their own; that they promised accordingly so to do: that the infant had ever since, until within a few months, resided in his family, and she was then placed by them in the Friends' Seminary at Providence for education; that he called at that seminary this morning to see her, and then understood she was not there, and the superintendent did not know where she was, or how she went away; that the infant never had been under any restraint, but was at all times at perfect liberty in his family; that she had a great unwillingness to go away and live with her father; and "that neither at the coming of the writ to him, nor at any time since, has the said Elizabeth (the infant) been, nor is she now in his power, possession, custody, or control."

Upon this return, Elisha Williams, for the petitioner (Putnam), moved for an attachment against the defendant, grounded upon the insufficiency of the return. He argued, that the defendant had not answered the exigency of the writ; that the return was evasive and did not state all the facts within the knowledge of the defendant, who had spirited away the infant to avoid the process; that an attachment in such cases was the proper process. 5 Term R. 89; 10 Johns. 328.

Cozzens & Hunter, for defendant e contra, argued, that the return was full and direct, and not evasive; that it was in the very terms of those returns, which courts of law had held sufficient; that a writ of habeas corpus only issues in cases of coercive restraint of a party in the custody of another. Here, there was no restraint, and the defendant had stated his inability to produce the infant in the fullest terms. He ought therefore to be discharged from farther inquiry and process. 5 Term R. 89; 3 Bac. Abr. "Habeas Corpus," p. 436; 13 Johns. 418.

STORY, Circuit Justice. In cases of this nature the court will look into all the facts stated in the return, and ascertain if they contain a satisfactory statement, upon which the party ought to be discharged. It will not discharge the defendant, simply because he declares, that the infant is not "in his power, possession, control, or custody," if the conscience of the court is not satisfied, that all the material facts are fully disclosed. That would be to listen to mere forms against the claims of substantial justice, and the rights of personal liberty in the citizen. In ordinary cases, indeed, such a declaration is satisfactory, and ought to be decisive, because there is nothing before the court upon which it can ground a doubt of its entire verity, and that in a real and legal sense the import of the words "possession, power, or custody," is fully understood and met by the party. The cases of Rex v. Winton, 5 Term R. 89, and of In re Stacy, 10 Johns. 328, show with what jealousy courts watch the terms of returns of this nature. See, also, Ex parte Eden, 2 Maule & S. 226. In those cases there was enough on the face of the return to excite suspicions that more was behind, and that the party was really within the constructive control of the defendant. Upon examining the circumstances of this case, I am not satisfied, that the return contains all those facts within the knowledge of the defendant, which are necessary to be brought before the court, to enable it to decide, whether he is entitled to a discharge, or, in other words, whether he has not a power to produce the infant, and control those in whose custody she is. There is no doubt, that an attachment is the proper process to bring the defendant into court. But suppose he were here, the next step would be to require him to purge his supposed contempt, and to answer interrogatories. That is the very object of the present motion. But an attachment can be necessary only when the party is not present in court. The defendant is now personally present, and the court may directly make an order, that he shall answer farther interrogatories to be drawn up at the bar. It is wholly unnecessary to go a circuitous route, when there is a direct path open before us. I shall therefore make an order to this effect. Order accordingly.

Upon this order the defendant answered a series of interrogatories put by leave of the court in writing to him. These, however, being still unsatisfactory to the plaintiff,

E. Williams, in his behalf, moved for an attachment, which motion was opposed by Cozzens & Hunter, for defendant. Upon this motion, a wide discussion arose as to the right of the father to have the custody of the infant under the circumstances of the case.

STORY, Circuit Justice. As to the question of the right of the father to have the custody of his infant child, in a general sense it is true. But this is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for his interest to be under the nurture and care of his natural protector, both for maintenance and education. When, therefore, the court is asked to lend its aid to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all the circumstances, and ascertain whether it will be for the real, permanent interests of the infant; and if the infant be of sufficient discretion, it will also

consult its personal wishes. It will free it from all undue restraint, and endeavour, as far as possible, to administer a conscientious, parental duty with reference to its welfare. It is an entire mistake to suppose the court is at all events bound to deliver over the infant to his father, or that the latter has an absolute vested right in the custody. The case of Rex v. De Manneville, 5 East, 221, is not inconsistent with this doctrine; but on the other hand supposes its existence. The court there thought it for the interest of the child to give the custody to the father. The judges thought there was no reason to suppose the father would abuse his right, or injure the child. Lord Eldon, in De Manneville v. De Manneville, 10 Ves. 52, avowed his approbation of the doctrine, and said, he had, exercising the authority of the king, as parens patriæ, removed children from the custody of their father, when he thought such custody unsuitable. The case of In re Waldron, 13 Johns. 419, is directly in point; and to the same effect is Rex v. Smith, 2 Strange, 982. My judgment follows these cases without hesitation.

The cause lay over until the next morning, when the parties entered into a specific agreement, as to the custody of the infant, which, being sanctioned by the court, was by the consent entered of record. Whereupon further proceedings were stayed.

Case No. 15,257.

UNITED STATES v. GREEN.

[9 Reporter, 235.] [1]

Circuit Court E. D. Wisconsin. 1879.

CRIMINAL LAW — FRAUDULENT PENSION CLAIM — —INDICTMENT—SUFFICIENCY.

In an indictment for presenting for payment a false and fraudulent claim against the government (section 5438, Rev. St.), it is not sufficient to charge the offence in the words of the statute; but the facts constituting the offence must be alleged with such particularity as to apprise the accused with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defence and plead the judgment in bar to a subsequent prosecution.

Indictment under section 5438, Rev. St., for presenting for payment to the pension agent in Milwaukee, a false and fraudulent claim for pension money. The defendant was convicted. [The case is now heard upon motion in arrest of judgment.]

G. W. Hazleton, for the Government.
J. G. Jenkins, for defendant.

DYER, District Judge. Objection is made to this indictment as not stating any offence, the argument being that no offence is described with such certainty as the law of criminal pleading requires. The reply of the learned district attorney is, that it states the offence substantially in the language of the statute, and that this is sufficient. It will be observed that the gist of the offence, as we find it defined in the statutes, is the presentation for payment of a false or fraudulent claim. The indictment alleges no facts which constitute the fraud; it is not shown how the fraud was perpetrated, nor wherein the claim was false, except that the defendant presented a claim which he represented to be due to him by virtue of a pension certificate which had been theretofore procured upon false and fraudulent proofs, and by unlawful and fraudulent devices, and without authority of law. What the false and fraudulent proofs and unlawful and fraudulent devices were, is not stated. The question is: Are these allegations sufficiently certain, and do they contain statements of fact which will support a conviction? It is a general rule that in an indictment for an offence created by statute it is sufficient to describe the offence in the words of the statute. In U. S. v. Simmons, 96 U. S. 360, in pointing out the precise scope and limitation of this rule, and after stating the rule, Justice Harlan says in the opinion: "But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defence and plead the judgment as a bar to any subsequent prosecution for the same offence;" and here, I think, we strike the fatal point in this indictment. For, after careful and serious consideration, such as a case of this nature requires, I am unable to see how defendant could plead his present conviction under this indictment, and a judgment thereon, in bar of a second prosecution for the same offence. It is alleged only that he presented to the pension agent a claim for pension moneys under a pension certificate, which was procured by false and fraudulent proofs, and unlawful and fraudulent devices. The fraud should have been by apt allegation, more particularly identified; it should have been alleged what the proofs and devices were, and wherein they were fraudulent, and it is, in my judgment, immaterial when the proofs were made or devices resorted to,—whether at the time of presenting the claim, or a time anterior, and when made as the basis for obtaining the pension certificate. If the fraudulent devices had consisted of an act done when payment was demanded, it would, I think, be clear that the nature of the devices of particular fraud practised at the time should be alleged; and if this is so, it seems also essential that they should be alleged, though they were, in fact, practised at and before the time of obtaining the pension certificate. It was stated upon the argument that what is alleged in the indictment in regard to fraud in obtaining the

[1] [Reprinted by permission.]

pension certificate, relates to the evidence of the offence, and not the offence itself; but it is not the presentation of the claim for payment which makes the offence; it is the presentation for payment of a false or fraudulent claim, and as no fraud can be committed but by deceitful practices, the particular deceitful practices by which the fraud is alleged to have been committed, or which make the claim fraudulent, should be to such extent set forth so as to make the fraud appear upon the face of the indictment. This may be to a certain extent alleging the evidence of the offence, but it is rather the statement of essential facts which constitute the fraud, and therefore make the presentation for payment of the claim a criminal offence. The point is one that cannot be made clearer by elaboration. I rest my judgment upon the fact that the allegations of the pleading are not sufficient, within the rule stated by the supreme court, to apprise the defendant with that certainty which the law requires of the nature of the accusation against him, to the end that he may prepare his defence and plead the judgment as a bar to any subsequent prosecution for the same offence. Judgment arrested.

Case No. 15,258.

UNITED STATES v. GREENE et al.

[4 Mason, 427.] [1]

Circuit Court, D. Maine. Oct. Term, 1827.

FEDERAL JURISDICTION—CITIZENSHIP—UNITED STATES.

The United States may sue in the district court as indorsees of a promissory note against the maker thereof, although the maker and payee were citizens of the same state, the restriction contained in the 11th section of the judiciary act of 1789, c. 20 [1 Stat. 78], not being intended to apply to suits brought by the United States, or if so intended, being repealed by the act of 1815, c. 253 [2 Story's Laws, 1530; 3 Stat. 244].

[Cited in Towne v. Smith, Case No. 14,115; U. S. v. Hewes, Id. 15,359; U. S. v. Tetlow, Id. 16,456; Dollar Sav. Bank v. U. S., 19 Wall. (86 U. S.) 239.]

[Cited in Farrar v. Gilman, 19 Me. 441.]

[In error to the district court of the United States for the district of Maine.]

The action was brought by the United States as indorsees of a promissory note made by the defendants [Elijah D. Greene and others] at Eastport on the 10th of February, 1826, whereby for value received they promised to pay the president, directors, and company of the Bank of Passamaquoddy or order, three months after date, the sum of twenty-three hundred and thirty-three dollars and thirty-three cents; and afterwards the bank, by its cashier, indorsed the same to the United States. There was also a count for money had and received. The defendants pleaded to the jurisdiction, averring that the bank of Passamaquoddy is established in, and composed of, citizens of the state of Maine, and that the defendants at the commencement of the action were and still are citizens of the same state, and that by the 11th section of the judiciary act of 1789, c. 20, the district court has no cognizance of such a suit brought by the United States as assignees. There was a demurrer to this plea, and upon argument, the district court decided against its jurisdiction, and dismissed the suit. [Case unreported.] From this judgment the present writ of error was brought to the circuit court.

The cause was argued at the last term by Hobbs & Longfellow, for defendants, and by Mr. Shepley, Dist. Atty., and Mr. Daveis, for the United States.

The cause was then continued for advisement, and at the present term, the opinion of the court was delivered as follows:

STORY, Circuit Justice. It is quite unnecessary in the present case to consider, whether the plea to the jurisdiction be drawn with perfect technical accuracy or not, as it is well settled, that sufficient matter must appear upon the record to support the jurisdiction of the court, otherwise the suit must be dismissed.

The question then is, whether, upon the matter apparent on the record, the district court possessed jurisdiction of the suit; and this question must be decided exclusively by the true construction of the acts of congress conferring and limiting the jurisdiction of the national courts. The 9th section of the judiciary act of 1789 (chapter 20) declares, that the district courts shall have cognizance "of all suits at common law, where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars." The present case falls completely within this description; it is a suit by the United States at common law, and the matter in dispute exceeds 100 dollars. There would be an end of all controversy, therefore, if the legislative provisions stopped here. The other parts of this section confer all the other jurisdiction belonging to the district courts generally; and (the observation is material) it gives no right to any individual to sue in those courts, with the single exception of causes, "where an alien sues for a tort only, in violation of the law of nations, or a treaty of the United States." The 10th section of the act, however, gives to the district courts of Kentucky and Maine the additional jurisdiction of all other causes, except of appeals and writs of error, which are made cognizable in the circuit courts. It may be remarked, in passing, that this section has now become inoperative by the establishment of distinct circuit courts in each of these states. Then comes the 11th section, upon which alone the difficulty arises. It provides, that the circuit courts shall have original cognizance "of all suits

[1] [Reported by William P. Mason, Esq.]

at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the state, where the suit is brought, and a citizen of another state." And afterwards comes the following clause: "And no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that, whereof he is an inhabitant, or in which he shall be found at the time of serving the writ; nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note, or other chose in action in favor of an assignee, unless such suit might have been prosecuted in such court to recover the contents, if no assignment had been made, except in cases of foreign bills of exchange." The terms of this latter clause are exceedingly broad and strong, "nor shall any district or circuit court have cognizance," &c.; and, if they are to be understood without any limitation whatsoever, they clearly extend to the present case. Yet there are considerations, which might induce one to pause and to inquire, whether such could have been the legislative intention. Whether congress could have intended to exclude the United States from suing in their own courts in cases in which the government became legally possessed, by assignment, of notes or other choses in action, whatever might be the sum in controversy. The arguments urged at the bar on this subject are not without great weight. In the first place, this limitation is found in a section, whose main object is to fix the jurisdiction of the circuit courts. It deals, indeed, with process in the district courts also, but not so much to ascertain their jurisdiction, as to prescribe when and where process shall be served and be returnable. In the next place, the clause respecting assignments of notes and choses in action manifestly proceeds upon the supposition, that but for such restriction, suits might be brought by private indorsees, or assignees, in the courts, to which it refers. The language is not such as would naturally be used, if suits by the government in the district courts generally had been in contemplation. The restriction would then pertinently and properly have found its place, not in the 11th, but in the 9th section of the act. Now, no private indorsees or assignees can sue in any cases in any district courts, excepting such as exercise circuit powers, for no private persons but aliens can sue at all therein, and they in certain classes of torts only. The legislature cannot be presumed to make, in the same act, a universal restriction to be applied to all the district courts, when, from the nature of its own prior provisions, it cannot, even potentially, be applied to more than two, viz. Kentucky and Maine. The fair construction of the terms, under such circumstances, is to restrain their generality; to look to the primary and leading intention of the provisions, and to restrict the words to obvious cases. Effect may thus be given to the whole language, without breaking in upon a very important national policy. In this view of the subject, the words, "any district or circuit court," include only such courts as private indorsees or assignees might generally and ordinarily sue in, but for the restriction, that is to say, circuit courts properly so called, and district courts exercising the jurisdiction of circuit courts. The clause would thus correctly apply to the district courts named in the 10th section, and exclude those in the 9th section.

The argument thus pressed upon the court is fortified by various considerations of a different nature. It is a general rule in the interpretation of legislative acts not to construe them to embrace the sovereign power or government, unless expressly named or included by necessary implication.[2] Here the jurisdiction is clearly given by the words of the 9th section, and it is incumbent upon those who assert that it is restrained by another section, to establish the fact beyond all doubt. To show that the subsequent words may be so applied, is not sufficient; it must be shown, that they were actually used for such a purpose. Now the case of the government is neither within the policy nor the mischiefs contemplated by the clause. It was foreseen, that if no restriction of this nature were interposed, the jurisdiction of the courts of the United States might, by fraudulent or friendly assignments, be extended to almost all classes of contracts between citizens of the same state. This would be a manifest evasion of the constitution in its limits upon the judicial power. This was the mischief to be remedied. But the case of the government is not within the mischief. It is not presumable, that the government would countenance a fraud of this nature. It could have no interest, and no means to accomplish it. It could have no temptation to withdraw private suits from their proper forum; and it could not be betrayed into such a course by any of its agents without immediate detection. On the other hand, the constitution meant to preserve to the government itself the right to sue in its own courts in all cases, and thus secure the power of enforcing its own just demands. The act of 1789 (chapter 20) may be presumed to have intended to confer this jurisdiction in all cases except of a very small nature. In the ordinary course of its operations, the government must become possessed of various pecuniary interests by assignment, of notes and bills and other choses in action, not merely by purchase, but, as in the case before the court, by assignment from its own insolvent debtors, who

[2] See Com. Dig. "Parliament," R, 8, 16; Co. Litt. 90b; 1 Bl. Comm. 261; Inhabitants of Town of Stoughton v. Baker, 4 Mass. 522, 528; U. S. v. Hoar [Case No. 15,373]; Bac. Abr. "Prerog." E, 5; Ball. Lim. p. 18, c. 2.

might be incapable of giving any other security for their debts to the public. Some of such assignable securities, or rights of property, might be wholly of an equitable nature. And it could scarcely escape the notice of congress, that in several states in the Union no state courts of equity existed at that period, or were likely to be created. So that in the case of some assigned equitable interests, upon the rigid construction of the act of 1789 now contended for, the government would be wholly without remedy in any court, whatsoever. And even in respect to assignments of choses in action of a legal nature, the remedy would often be imperfect, dependent upon local jurisprudence, and in many instances wholly inadequate for the public exigencies. The importance, nay the vital necessity of a prompt and efficient means of collecting the public debts and revenues, could not be overlooked by the national legislature; and no just jealousy could arise from its choice of its own tribunals to preserve the public faith, and sustain the public interests. The argument, indeed, in this aspect, goes to the extent of creating an implied exception of assignments to the government, not only in the district, but in the circuit courts. Its just force is not, however, diminished by this consideration.

There is another suggestion, which is not without influence in the interpretation of the restrictive clause. It manifestly was intended to apply to assignments, which are cognizable in equity, as well as at law. Now the district courts generally have no jurisdiction over equity causes. Suits of this nature can be brought only in the circuit courts, or in district courts exercising the same powers. The restrictive clause, then, while it furnishes an appropriate limitation to equity suits in the latter courts, can have no possible operation on the former, for no such suits can be brought therein. It is true, that effect may be given to the whole clause as to all courts, reddendo singula singulis, by applying it pro tanto to the jurisdiction of each respectively. But the question will still remain, whether this be the natural or just construction. If upon the common rule of construing statutes the government is not deemed to be included within general words, what reason is there for setting aside that rule in the present case? Does not every reason of sound policy point the other way? In cases of the statute of limitations, however broad the terms of the statute, the government is never held bound, unless expressly named. Yet the policy of such an exemption is not more apparent than it is in the present case. The train of reasoning, urged at the bar with such an impressive effect, and of which the foregoing is but an imperfect outline, would, upon the language of the act of 1789, alone suspend my mind in no inconsiderable doubts. I have never been able to persuade myself that congress could, in the clause under consideration, have had the case of the government in contemplation. Neither the mischief to be provided against, nor the public policy to be promoted, seems to embrace such a case. If ever there was a case, in which the general words of a statute would justify a court in interposing a limitation of meaning upon them, I can scarcely imagine one stronger than the present. Yet the words are so direct and positive, that I am not sure that I should have been brought to sustain the jurisdiction, if the act of the 3d of March, 1815, c. 253 [2 Story's Laws, 1530; 3 Stat. 244], had not relieved my doubts. That act (section 4) provides, "that the district courts of the United States shall have cognizance, concurrent with the courts and magistrates of the several states, and the circuit courts of the United States, of all suits at common law, where the United States, or any officer thereof, under the authority of any act of congress, shall sue, although the debt, claim, or other matter in dispute shall not amount to one hundred dollars." The interpretation of this section has been settled by the supreme court, in Post Master General v. Early, 12 Wheat. [25 U. S.] 136, a case of no inconsiderable difficulty. It was decided that it conferred general jurisdiction, unlimited by amount, upon the district courts, and by consequence upon the circuit courts, of all suits at common law, where the United States, or any officer thereof under any act of congress, shall sue. Supposing, therefore, the restriction of the 11th section of the act of 1789 to apply to suits of the government in whatever courts instituted, this restriction, not being incorporated into the act of 1815, leaves its general words in full force. The latter silently operates a repeal of all antecedent limitations, which it does not recognise and continue, upon the known principle, that the general authority given by a subsequent statute must be presumed to have intentionally superseded every prior statute inconsistent with its provisions.

Upon this view of the matter I am of opinion, that the jurisdiction of the district court is well founded upon the first count, founded on the negotiable note. But there happens to be another count in the declaration for $3000, money had and received, against which no objection to the jurisdiction can be urged, since it does not purport to be founded upon any assignment, and the court cannot presume it. It is, however, proper to state, that the existence of this court was never brought to the notice of the district court, and was first suggested upon the argument here. The dismissal of the suit would, for this cause alone, be unmaintainable; but as the other was the real ground of controversy, I have felt it my duty to examine and decide it. Judgment reversed.

Case No. 15,259.

UNITED STATES ex rel. DAVIS v. GREENE COUNTY COURT.

[5 Dill. 288, note.] [1]

Circuit Court, W. D. Missouri. 1879.

JUDGMENT — MANDAMUS TO COMPEL PAYMENT — SPECIAL TAX—GENERAL WARRANT.

A general warrant was refused where relator had compelled the levy of a special tax which was then in process of collection.

Before DILLON, Circuit Judge, and KREKEL, District Judge.

In the case of United States, on the relation of Davis, against Greene county court, the circuit judge said, substantially: The relator asked for a mandamus to compel this county court to give a general warrant upon the general funds of the county. The relator had at a former term obtained, at his own instance, a mandamus for the levy of a special tax to pay his judgment, which tax was duly levied by the county court, and is now in process of collection. He anticipates that the levy will prove fruitless, but such result is not yet ascertained, and, without waiting therefor, he asks an additional remedy by getting a general warrant, to be paid in its order of presentation, according to the statute of Missouri. This, we hold, in the exercise of our discretion in these proceedings, we will not do, on the ground that while the people are burdened with the special tax, a general tax should not also be required to pay the warrant prayed by the relator.

Case No. 15,260.

UNITED STATES v. GREENWOOD.

[1 Cranch, C. C. 186.] [2]

Circuit Court, District of Columbia. Nov. Term, 1804.

JUDGMENT—SECURITY—TRIAL.

1. After verdict, in assault and battery, the court will permit the defendant to give security to abide the judgment.

2. If the jury, after retiring, come into court to ask questions of a witness, the counsel will not be permitted to interrogate the witness.

Assault and battery. The defendant was surrendered before trial by his bail and committed; after verdict he offered to give security for fine and costs, and for abiding the judgment.

Mr. Jones, for the United States, objected on the ground of his being in custody. But THE COURT overruled the objection.

The jury, after retiring, were brought into court at their request, for the purpose of asking some questions of a witness. THE COURT refused to suffer the counsel to interrogate the witness.

(Judge Fitzhugh's Notes.)

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

[2] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,261.

UNITED STATES v. GREER et al.

[Hoff. Land Cas. 72.] [1]

District Court, N. D. California. Dec. Term, 1855.

MEXICAN LAND GRANT— GENUINENESS OF GRANT —JUDICIAL POSSESSION.

No objections urged to the confirmation of this claim.

Claim for about three leagues of land in San Mateo county, confirmed by the board, and appealed by the United States.

[This was a claim by Maria Louisa Greer and others for the Cañada de Raymundo, two and a half by three-quarter leagues. Granted August 3, 1840, by Juan B. Alvarado to John Coppinger. Claim filed February 3, 1852. Confirmed by the commission, November 29, 1853. Now heard upon appeal by the United States.]

S. W. Inge, U. S. Atty.

Jeremiah Clarke, for appellees

HOFFMAN, District Judge. No argument was submitted on behalf of the appellants, nor was any objection suggested to the validity of this claim. The transcript has been submitted to the court without any observations from either side. On examining the decree of the commissioners, it appears to be sustained by the evidence. No doubt exists as to the genuineness of the grant or the performance of the conditions. The only objections which can be urged against the claim are the want of a judicial possession, and the fact that the land is within the ten littoral leagues. These objections have heretofore been considered and overruled. There seems, therefore, to be no ground for reversing the decree of the board. The claim must therefore be confirmed.

UNITED STATES (GREGORY v.). See Case No. 5,803

Case No. 15,262.

UNITED STATES v. GREINER.

[18 Leg. Int. 149; 24 Law Rep. 91; 3 West. Law Month. 430; 4 Phila. 396.]

District Court, E. D. Pennsylvania. July Term, 1861.

TREASON—SEIZING FORT—ACTS OF SUBORDINATE —COURTS—DISTRICT WHERE TRIABLE—SECURITY TO KEEP PEACE—ALLEGIANCE.

1. Shortly before the late revolutionary secession of Georgia, a volunteer military company in her service, by order of her governor, took possession of a fort within her limits, over which jurisdiction had been ceded by her to the United States, and garrisoned it until her ordinance of secession was promulgated, when, without having encountered any hostile resistance, they left it in the possession of her government. A member of this company, who had participated in the

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

capture and detention of the fort, afterwards visited Pennsylvania at a period of threatened, if not actual, hostilities between the Confederated States, of which Georgia is one, and the United States. He was arrested in Pennsylvania under a charge of treason. It was *held* that if the courts of the United States for Georgia had been open, or if there had been a reasonable probability that they would soon be able to exercise their jurisdiction, the accused should, upon the charge of treason, have been committed, under the 33d section of the judiciary act of 24th September, 1789 [1 Stat. 91], to stand his trial in the circuit court of the United States for the Southern district of Georgia, which court alone could have jurisdiction of the case. This act of congress would then have required that a warrant should be seasonably issued for his removal to that district by the marshal. Such a warrant of removal was not asked for on behalf of the United States; and it was admitted that their courts for Georgia were not open, and were not likely to be able to exercise their jurisdiction within any definable period. Under such circumstances, the constitution and laws of the United States gave no authority to commit the accused, or to require him to give bail to answer the charge of treason, at an uncertain future day in Georgia.

2. But though his immediate purpose in visiting Pennsylvania was apparently neither belligerent nor treasonable, the motive of his visit was, on account of his prior hostile relations to the United States, liable to just suspicion. He was required, therefore, to give security to keep the peace, and be of good behavior in all cases arising under the constitution and laws of the United States.

3. When a body, large or small, of armed men is mustered in military array for a treasonable purpose, every step which any one of them takes, by marching or otherwise, in part execution of this purpose, is an overt act of treason in levying war.

4. Their occupation of a fortress, in order to take it from the dominion of a government to which they owe allegiance, is treason in every one of them concerned in the capture, or subsequent detention of the post, though they may encounter no hostile resistance in the capture or the detention.

5. A private soldier, or subordinate officer, serving under the command of a military superior, cannot excuse a treasonable act on the ground of compulsion, unless he was forced, under a personal fear of death, into the service, and quitted it as soon as he could.

6. This doctrine applies wherever, and so long as, the duty of allegiance to an existing government remains unimpaired. Though a revolution is impending, the allegiance continues to be due, so long, at least, as the courts of justice of the government are open to maintain its peace, and afford the citizen that protection which is the foundation of his duty of allegiance.

7. The accused owed a twofold allegiance, to the United States, and to the state of Georgia. His duty of allegiance to the United States was coextensive with the jurisdiction of their government, and was, to this extent, independent of, and paramount to, his duty of allegiance to the state. It continued to be thus paramount so long, at least, as the courts of the United States could exercise their jurisdiction within the state. Though these courts have been closed since the capture of the fort, there was, at its date, no such conflicting enforced allegiance to the state, as made him a public enemy of the United States, in contradistinction to a traitor.

8. The provision of the constitution that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court, is inapplicable to preliminary hearings and commitments.

Charles A. Greiner was brought under a charge of treason, before a commissioner of the United States. At the suggestion of the commissioner, the examination, on account of the importance of the case, was taken before the district judge of the United States. At the close of the examination, the United States district attorney, George A. Coffey, Esq., moved that the defendant be committed or held for trial at the next actual session of the United States circuit court for the Southern district of Georgia. The district attorney admitted that the United States courts did not now sit, nor their process actually run, in Georgia; but he argued at length, that the judge was bound to presume that those courts would sit in Georgia within a reasonable period; and that this was at present a legal presumption, in view of the avowed purpose of the government to re-establish its authority there.

CADWALADER, District Judge. The questions in this case are more important than difficult. On the 2d of Jany. last, an artillery company of the state of Georgia, mustered in military array, took Fort Pulaski, in that state, from the possession of the United States, without encountering any forcible resistance. They garrisoned the post for some time, and left it in the possession of the government of the state. The accused, a native of Philadelphia, where he has many connections, resides in Georgia. He was a member of this artillery company when it occupied the fort, and, for aught that appears, may still be one of its members. He was not its commander. Whether he had any rank in it, or was only a private soldier, does not appear, and is, I think, unimportant. He is charged with treason in levying war against the United States. The overt act alleged is that he participated, as one of this military company, in the capture of the fort, and in its detention until it was handed over to the permanent occupation of the authorities of the state.

The primary question is whether, if his guilt has been sufficiently proved, I can commit him for trial, detain him in custody, or hold him to bail to answer the charge. The objection to my doing so is, that the offence was committed in the state of Georgia, where a court of the United States cannot, at present, be held, and where, as the district attorney admits, a speedy trial cannot be had. The truth of this admission is of public notoriety. The constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to a speedy trial by a jury of the state and district wherein the crime shall have been committed. The only statute which, if the courts of the United States for the state of Georgia were open, would authorize me to do more than hold this party to security of the peace and for good be-

havior, is the 33d section of the judiciary act of the 24th September, 1789. That section, after authorizing commitments, &c., for trial before any court of the United States having "cognizance of the offence," enacts that if the commitment is in a district other than that in which the offence is to be tried, it shall be the duty of the judge of the district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender to the district in which the trial is to be had. The district attorney of the United States does not ask me to issue such a warrant for this party's removal to Georgia for trial. Therefore I can do nothing under this act of congress. It does not authorize me to detain him in custody to abide the ultimate result of possible future hostilities in Georgia, or to hold him to bail for trial in a court there, of which the sessions have been interrupted, and are indefinitely postponed.

The next question is, whether I should, under the act of 16th July, 1798 [1 Stat. 609], require this party to give security to keep the peace and be of good behavior in all cases arising under the constitution and laws of the United States. His counsel suggests that he was acting under the compulsion of military orders from the governor of Georgia, which the law of the state bound him to obey; that the fort, when taken, was not so garrisoned or occupied that an array of military force was required for its capture; that it was taken without actual resistance on the part of the person or persons who had occupied it for the United States; that the period was one at which motives of hostility against the United States are not imputable to the governor of Georgia, or to those who acted under his orders; that the capture and subsequent detention of the fort may have been to prevent its riotous occupation or destruction by a mob; and that the accused party therefore was not guilty of levying war against the United States, or of any other offence against their laws. If these views are incorrect, if either the capture or the detention of the post was treasonable, there can, I think, be no dispute that security of the peace and for good behavior should be required.

In explanation of Mr. Greiner's visit to Philadelphia, it has been shown that his wife and child have been here from the commencement of last winter, at a boarding house, at which he arrived a few days ago, and that he has lived there openly, with them, from that time until his arrest on Tuesday last. The district attorney states that he has made sufficient inquiry, and asks no time for further inquiry, into the circumstances of this visit, or as to occurrences during Mr. Greiner's sojourn here. He appears, nevertheless, to have declared his intention to return to Georgia, where he is engaged, as he states, in agricultural pursuits. However favorably this case may thus, in one aspect of it, have been presented, there is a different aspect in which it ought also to be considered. The crisis is one of impending or threatened, if not of actual hostilities, in which different sections of the country are, or may soon be, arrayed in arms against each other. Mitigating circumstances, which might induce the pardon of an act of treason, cannot so qualify the offence as to alter its legal definition. That a person who has participated in a treasonable aggression upon a fortress of the United States, should, at such a period as this, pass and repass the frontier of the seceded states without being justly liable to the most vigilant suspicion, cannot be supposed possible. The reasons are obvious. Should he, for example, transmit intelligence to Georgia concerning military preparations here, or take part, however indirectly, in procuring supplies or other assistance for those in arms against the United States, he would commit an act of treason for which he would be triable here. Those who stand in his relation to two hostile sections of a country are, unfortunately, the persons most frequently concerned in such criminal enterprises. In their punishment, public policy may sometimes require a severity sadly disproportional to the actual measure of guilt in their intentions. I have, therefore, during the two days of the hearing, considered carefully the question whether it would be my duty, if the courts of the United States for Georgia were open, to commit him under the charge of treason, and issue a warrant for his removal thither for trial. If this question is answered affirmatively, he should not be discharged without giving cautionary security under the act of 1798. I have heard his counsel fully upon this point. But I have declined hearing the district attorney upon it, because I have no doubt whatever that sufficient probable cause to support a prosecution for treason has been shown. Any such aggravated breach of the duty of allegiance to an existing government as may tend to its total or partial subversion is, in a general sense, within the political definition of treason. Under the government of the United States, the legal catalogue of specific offences embraced in this definition is, however, limited by the constitutional provision that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." Under other governments, including that of England, the catalogue of treasons is more extended. But the two species of treason mentioned in the constitution are described in it in language borrowed from that of the English statute of treasons. The phrase "levying war," as used in the constitution, is therefore understood and applied in the United States in the same sense in which it had been used in England. Chief

Justice Marshall consulted Coke, and Hale, and Foster, in order to ascertain the constitutional meaning of this phrase. 2 Burr Trial, 402, 409; 4 Cranch [8 U. S.] 471, 472, 477, Append. According to these writers, the occupation of a fortress by a body of men in military array, in order to detain it against a government to which allegiance is due, is treason on the part of all concerned, either in the occupation or in the detention of the post.

The words of Sir E. Coke are: "If any, with strength and weapons invasive and defensive, doth hold and defend a castle or fort against the king and his power, this is levying of war against the king." 3 Inst. 10. Sir M. Hale has copied this language almost precisely. 1 P. C. 146. Sir M. Foster says: "Holding a castle or fort against the king or his forces, if actual force be used in order to keep possession, is levying war. But a bare detainer, as, suppose, by shutting the gates against the king or his forces, without any other force from within, Lord Hale conceiveth will not amount to treason. But, if this be done in confederacy with enemies or rebels, that circumstance will make it treason, in the one case under the clause of adhering to the king's enemies—in the other under that of levying war." Discourse 1, c. 2, § 11. In the year 1776, the powers of government under the British East India Company were vested, at Fort St. George, in the president and council of Madras. Neither the president nor the council could rightfully administer the local government independently of one another. The president adopted certain arbitrary and illegal measures for suspending a majority of the council from participation in its proceedings. They, in turn, assuming the administration of the government, deposed and imprisoned him, and took and detained possession of the fort. As their intent, in this usurpation of power, was only to substitute themselves for the regular local government, and exercise its functions in subordination to the East India Company, they were convicted of a misdemeanor only. But the court of king's bench were of opinion that "if the assumption of the government, and taking possession of the fort, had been with an intent to draw it from the dominion of the crown of Great Britain, it would have been high treason." 21 How. State Tr. 1283. See 3 C. Rob. Adm. 31. The present case is much more simple. In the fort in question there was, in legal strictness, no more division of power, or deduction from the jurisdiction of the United States, than there is in the District of Columbia. [Cohens v. Virginia] 6 Wheat. [19 U. S.] 426, 427; [Kendall v. U. S.] 12 Pet. [37 U. S.] 619. The jurisdiction of the United States was, under the constitution, as exclusive and independent of state control as if the land on which the fort was erected, and which had been ceded by the state of Georgia, had not been within her limits. If indeed the purpose of taking possession of it, as a defenceless post, had been to keep it for the United States, the act, whether excusable or not, would not have been treasonable. But the crisis was one of impending revolution or insurrection. The threat of revolutionary measures had already proceeded from the government of the state. The detention of this post for her government by this hostile force was, therefore, I think, levying war against the United States. If the treasonable intent had at first been legally doubtful, the subsequent unqualified surrender of the fortress to the state would, if the doubt were not removed by it, render the case a proper one, at all events, for the consideration of a jury.

That no hostile resistance was opposed by the former occupants of the fort, is, I think, unimportant. When a body, large or small, of armed men, is mustered in military array for a treasonable purpose, every step which any one of them takes in part execution of this purpose, is an overt act of levying war. This is true, though not a warlike blow may have been struck. The marching of such a corps, with such a purpose, in the direction in which such a blow might be struck, is levying war upon land. The mere cruising of an armed vessel with a hostile purpose, is levying maritime war, though the cruiser may not encounter a single vessel. This doctrine, which is conceded throughout the opinion of Chief Justice Marshall in Burr's Case [Cases Nos. 14,692a–14694a], had been established previously by English authorities. 1 Hale, P. C. 152; Fost. Crown Law, 218; 2 Salk. 635; 13 How. State Tr. 485; 4 Cranch [8 U. S.] 476, Append.

The allegation that the accused was, or may have been, acting under the orders of the governor of Georgia, or of some other commanding or superior officer, is likewise unimportant. In the cases of the highlanders of Scotland, whose clans were, without any independent will of their own, mustered by their chiefs into the military service of Charles Edward when he invaded England in 1745, the legal character of such a defence was fully considered. The previous doctrine then recognized, and re-established, was that the fear of having houses burned, or goods spoiled, was no excuse, in the eye of the law, for joining and marching with rebels; that the only force which excuses on the ground of compulsion is force upon the person and present fear of death, which force and fear must continue during all the time of military service with the rebels, and that it is incumbent in such a case on every man who makes force his defence, to show an actual force, and that he quitted the service as soon as he could. Fost. Crown Law, 14, 18 How. State Tr. 391. And see Fost. Crown Law, Discourse 1, c. 2, § 8. If any other excuse were allowable, it would, in the language of Sir M. Foster, "be in the power of any leader in a rebellion to indemnify all his followers." This doctrine is applicable wherever and so long as the duty of

allegiance to an existing government remains unimpaired. When this fort was captured, the accused, in the language of the supreme court, owed "allegiance to two sovereigns," the United States and the state of Georgia. See [Moore v. State of Illinois] 14 How. [55 U. S.] 20. The duty of allegiance to the United States was co-extensive with the constitutional jurisdiction of their government, and was, to this extent, independent of, and paramount to, any duty of allegiance to the state. [Cohens v. Virginia] 6 Wheat. [19 U. S.] 381, and [Ableman v. Booth] 21 How. [62 U. S.] 517. His duty of allegiance to the United States continued to be thus paramount so long at least as their government was able to maintain its peace through its own courts of justice in Georgia, and thus extend, there, to the citizen that protection which affords him security in his allegiance, and is the foundation of his duty of allegiance. Though the subsequent occurrences which have closed these courts in Georgia may have rendered the continuance of such protection within her limits impossible at this time, we know that a different state of things existed at the time of the hostile occupation of the fort. The revolutionary secession of the state, though threatened, had not then been consummated. This party's duty of allegiance to the United States, therefore, could not then be affected by any conflicting enforced allegiance to the state. He could not then, as a citizen of Georgia, pretend to be a public enemy of the United States in any sense of the word "enemy" which distinguished its legal meaning from that of "traitor." Future cases may, perhaps, require the definition of more precise distinctions, and possible differences, under this head. The present case is, in my opinion, one of no difficulty, so far as the question of probable cause for the prosecution is concerned.

The evidence for the prosecution has consisted of the direct testimony of one witness to the alleged overt act, and of admissions made voluntarily by the accused party since his arrest. The constitution provides that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. The admissions here proved were not such confessions, and, upon the trial of an indictment, would not, in connection with the testimony of the single witness to the overt act, suffice to warrant a conviction. But the provision of the constitution, and the language of the first section of the act of April 30, 1790, on the subject, apply only to the trial of indictments, and are inapplicable to proceedings before grand juries, or to preliminary investigations like the present. This appears to have been the opinion of Chief Justice Marshall (1 Burr Tr. 196), and likewise of my judicial predecessor in this district ([Charge to the Grand Jury] 2 Wall. Jr. 138). Judge Iredell had, indeed, been previously of a different opinion. 1 Whart. State Tr. 480. His impression had probably been derived from the opinions which, under the statutes 1 Edw. VI. c. 12, § 22; 5 Edw. VI. c. 11, § 11; and 7 Wm. III. c. 3, had prevailed in England. See Fenwick's Case, 13 How. State Tr. 537, and 26 How. State Tr. 731. As the point has never been directly decided in the United States, it may not be amiss to mention a difference between the language of the English statutes and the words of the constitution. Those statutes enacted that no person should be indicted or convicted of treason, unless, &c. The constitution, omitting the word "indicted," uses the single word "convicted." This difference in language, to which the attention of Chief Justice Marshall was doubtless directed, though he does not mention it, seems to be decisive of the question. The intention of the framers of the constitution must have been to restrain the application of the prescribed rule of evidence to the trial of the indictment. A person should not, however, be indicted or imprisoned under a charge of treason when there is no rational probability that the charge, if true, can be proved by two witnesses on the future trial.

In the present case, I require security of the peace and for good behavior.

The above opinion having been read, the district attorney made a formal application to the effect of a suggestion which he had made in his previous argument. The suggestion had been that, although the accused party could not be sent at this time to Georgia for trial, he might be committed here for trial in the proper court of the United States for Georgia when it should hereafter be open, and that he might, in the meantime, be detained here in custody, or admitted to bail to answer the charge hereafter in Georgia. The formal application was a motion that he be held to bail, or committed for trial "at the next actual term or session of the circuit court of the United States for the Southern district of Georgia." After the argument of this motion, the judge retained his former opinion, saying:

I cannot commit this party for trial under any other jurisdiction than that conferred by the 33d section of the act of 1789. Under this act I can commit him to no other custody than that of the marshal. I cannot, under the act, commit him to the marshal's custody for any purpose other than that of removal to Georgia. If it appeared probable that the proper court there would be open within a definite reasonable period, the necessity of the case might authorize a limited corresponding delay, either in the issuing or the executing of a warrant of removal; perhaps in executing it, rather than in issuing it. But no such probability appears. Most of the cases which have been cited as to putting off trials for criminal offences, and keeping prisoners under arrest, are precedents to regulate the practice of courts to which the prisoners are committed for trial, and not the

practice of magistrates ordering the removal of prisoners to proper places for trial. The judiciary system of the United States is founded upon the constitution. The warrant of removal must be issued seasonably under the judiciary act, with a view to a probable speedy trial under the constitution in the proper district. The district attorney still declares that he does not wish that a warrant of removal be issued. The order of commitment, as he asks it, without such a warrant, would be a dangerous precedent. It would sanction the imprisonment, for indefinitely long periods, of persons at great distances from their homes and their friends, where bail might not be found. Under charges for capital offences bail might be refused as well at the time of commitment, as also afterwards on habeas corpus. Though I have no doubt myself upon the point, yet as my refusal of the application will not be liable to revision, I am desirous of consulting on the subject with Judge GRIER, who, I am confident, will, at my request, sit with me, and hear the district attorney's arguments repeated.

GRIER, Circuit Justice, after having heard these arguments, remarked that his opinion coincided on all the points of the case, and particularly the point upon which it had been asked, with the district judge's opinion, which he had previously read.

The district judge then said: The decision upon this hearing, though Judge GRIER kindly sits with me, must be exclusively my own. His concurrence in my former opinion, to which I adhere, confirms me in a satisfactory belief of its correctness. The district attorney's motion is not granted.

Mr. Greiner, upon entering, with two sureties, into a recognizance in $10,000 to keep the peace and be of good behavior in all cases arising under the constitution and laws of the United States, was discharged from custody.

Case No. 15,263.

UNITED STATES v. GRIFFITH.

[2 Cranch, C. C. 366.] [1]

Circuit Court, District of Columbia. May Term, 1822.

EVIDENCE — CONTRACTOR'S ACCOUNT — AUTHENTICATION — COPIES OF BONDS — HOW CERTIFIED.

1. A contractor's account, adjusted by the proper accounting officers of the treasury, and certified and authenticated according to the 11th section of the act of March 3, 1817, c. 45 [3 Stat. 366], is evidence not only of money advanced to the contractor, but of money disbursed by officers of the army for provisions, in consequence of the contractor's failure to comply with his contract.

2. The third auditor is not authorized to authenticate copies of bonds and other papers.

3. His power under the act of March 3, 1817, extends only to "transcripts from the books and proceedings of the treasury in regard to the accounts of the war department."

4. Copies of bonds must still be certified by the register, and authenticated under the seal of the department, under the act of March 3, 1797 [1 Stat. 512].

Debt for $60,000, the penalty of the defendant's bond to the United States, conditioned to perform the covenants of an agreement between him and the acting secretary of war, dated November 5, 1817, for the supply of rations to the troops of the United States in certain places; by the 5th article of which, the commanding general or person appointed by him, at each post or place, in case of absolute failure or deficiency in the quantity of provisions contracted to be delivered and issued, has power to supply the deficiency, by purchase, at the risk and on account of the defendant; and by the 10th article, all advances of money to the defendant on account of supplies, &c., and all such sums of money as the commanding officer, &c., may cause to be disbursed in order to procure supplies in consequence of any failure on the part of the defendant in complying with the requisitions therein contained, shall be duly accounted for by him by way of set-off against the amount of such supplies, and the surplus, if any, repaid to the United States, immediately after the expiration of the term of that contract, with interest. The breach assigned was that the defendant [Camillus Griffith] had not accounted for $120,000 advanced to him for such supplies, and $50,000 disbursed by the commanding officers in order to procure supplies in consequence of the defendant's failure to comply with the requisitions of the contract. In order to support the issue on the part of the United States,

Mr. Swann, U. S. Dist. Atty., offered in evidence an account between the United States and the defendant, adjusted by the proper accounting officers of the treasury, who reported a balance due to the United States, amounting to $89,778.41, including $47,334.81, for amount of payments made by sundry officers for the purchase of provisions in consequence of the defendant's having failed to make the necessary supplies according to his contract.

Mr. Taylor, for defendant, objected that these items of disbursement by the officers, were not sufficiently proved by the account settled at the war department. That the account is not evidence of those items, but only of the moneys advanced to the defendant by the United States.

THE COURT stopped Mr. Taylor, and said that the point had been decided by this court at the last term in Washington (see U. S. v. Vanzandt [Case No. 16,611]), to wit, that the account settled at the treasury was evidence; and that the defendant could not give evidence of claims which had not been present-

[1] [Reported by Hon. William Cranch, Chief Judge.]

ed to the proper officer of the treasury for settlement, and disallowed.

THE COURT (THRUSTON, Circuit Judge, absent), at May term, 1822, decided that the third auditor could not authenticate a copy of the bond; his power of authentication, under the act of March 3, 1817 (3 Stat. 366), extending only to "transcripts from the books and proceedings of the treasury in regard to the accounts of the war department," and that copies of bond must still be certified by the register, and authenticated under the seal of the department, according to the act of March 3, 1797 (1 Stat. 512).

Case No. 15,264.

UNITED STATES v. GRIMES.

[See Case No. 3,393.]

UNITED STATES (GRIMES v.). See Case No. 5,828.

Case No. 15,265.

UNITED STATES v. GRIMES.

[Hoff. Land Cas. 137.] [1]

District Court, N. D. California. June Term, 1856.

MEXICAN LAND GRANT—PERFORMANCE OF CONDITIONS—LOCATION.

No objections to the confirmation of this claim.

Claim for four and a half leagues of land in Sacramento county, confirmed by the board, and appealed by the United States.

[This was a claim by Hiram Grimes for the Rancho San Juan, situated in Placer and Sacramento counties. Granted December 24, 1844, by Manuel Micheltorena to Joel P. Dedmond. Claim filed April 13, 1852. Confirmed by the commission May 8, 1855, and now heard upon appeal by the United States.]

William Blanding, U. S. Atty.

A. C. Whitcomb, for appellee.

HOFFMAN, District Judge. The claimant in this case derives his title by deed from Joel P. Dedmond, the original grantee. The grant issued to Dedmond by Governor Micheltorena on the twenty-fourth of December, 1844, is duly proved, and the expediente containing the petition, diseño and other usual documents, is found in the archives. With regard to the performance of the conditions there is some discrepancy in the testimony. But the witness O'Brien is shown not to have been in the country at the time he swears that no house existed, and his character would seem to be such as to entitle his testimony, even if uncontradicted, to but little weight. But the testimony of Buzzell, Wyman and Leahey, witnesses to whom Hicks, who was sworn on behalf of the United States, expressly refers as best acquainted with the facts, shows beyond all reasonable doubt that a house was built and a portion of the land cultivated as required by the conditions; and the rancho seems to have been in the possession of Dedmond and his grantees Sinclair and Grimes, up to the present time. The location of the land is said by the commissioners to have been established with sufficient, though not with great, precision. In the grant it is described as bounded on the west by the place belonging to Señor Grimes, on the south by the American river, on the east by the foot of the Sierra Nevada, and on the north by vacant lands, being in extent from east to west three leagues, and from north to south one league and a half. The claimant has put in evidence the expediente in the case of E. Grimes, whose land El Paso is one of the boundaries of the rancho now claimed. It appears by this expediente that the location and boundaries of El Paso are defined with unusual precision, a point of beginning being distinctly stated, and the courses and distances of all the lines given. There would seem, therefore, with the boundary line which separates El Paso from the Rancho of San Juan now claimed, accurately established, with the American river and the foot of the Sierra as the limits on the south and east, and the extent of the land from north to south and from east to west expressly stated, to be no difficulty in locating this with all the accuracy necessary. This claim was confirmed by the board. No new testimony has been taken in this court, nor has any argument been offered or suggestion made to the court of any reason for reversing the decision of the commissioners. I think that a decree confirming the claim should be entered.

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

Case No. 15,266.

UNITED STATES v. GRISWOLD.

[5 Sawy. 25;[1] 10 Chi. Leg. News, 50.]

District Court, D. Oregon. Oct. 9, 1877.

QUI TAM ACTION—ARREST—AFFIDAVIT.

1. The action provided for in sections 3490–3493, of the Revised Statutes, to recover a penalty and damages for making a false claim against the United States is a qui tam one, and may be commenced by any person who will, without the previous authority or consent of the district attorney of the United States, and therefore the complaint in such an action need not be subscribed by such district attorney, but the same is sufficiently "subscribed by the party or his attorney" within the meaning of sections 79 and 81 of the Oregon Civil Code, when it is "subscribed" by the attorney of the person who brings such action.

[Cited in U. S. v. Griswold, 24 Fed. 364.]

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

2. In such an action the United States is the plaintiff, and the defendant may be arrested and held to bail without an undertaking on the part of the plaintiff to the defendant for damages in case the arrest "be wrongful or without sufficient cause," as provided in section 107 of the Oregon Civil Code.

3. If the facts necessary to authorize such an arrest sufficiently appear in the complaint in such action and the same is verified by the oath of the informer or person bringing the same, it is an affidavit within the meaning of section 3492 aforesaid, and an order for the arrest of the defendant may be made thereon.

[This was an action by B. F. Dowell, who sues as well for himself as for the United States, against William Griswold, for certain penalties for the violation of an act of congress in presenting certain false claims. On June 2, 1877, an order was issued for the defendant's arrest, with bail fixed at $10,000, and on June 4th, the arrest was made, and bail given accordingly. The defendant now moves that the complaint against him be stricken out, and that he be discharged from arrest.]

Addison C. Gibbs and B. F. Dowell, for plaintiff.

H. Y. Thompson, for defendant.

DEADY, District Judge. This action is brought by B. F. Dowell, as well for himself as the United States, upon section 3490 of the Revised Statutes, to recover from the defendant the sum of forty thousand and ninety-six dollars and sixty-six cents alleged to be due the United States; for that the said defendant caused to be made and presented for payment at the treasury of the United States false and fictitious claims, purporting to be claims for supplies furnished on account of the Oregon Indian war of 1854, to the amount of nineteen thousand and forty-eight dollars and eighty-three cents; and also used false vouchers, rolls, etc., and combined with another for the purpose of obtaining the payment of such claims, by means of which he received from the treasury of the United States the said sum of nineteen thousand and forty-eight dollars and eighty-three cents in payment of the same. The complaint was verified by the oath of the informer, and signed by Messrs. Gibbs, and Stearns, and B. F. Dowell, attorneys of this court, as "attorneys for the plaintiff," and was filed May 30, 1877.

On June 2, the district judge, upon the application of "Mr. Addison C. Gibbs, of counsel for the plaintiff," under section 3492 of the Revised Statutes, and upon said complaint so verified, made an order for the arrest of the defendant, and fixed his bail thereon at the sum of ten thousand dollars, to be given in the manner and with the effect provided in sections 108, 109 of the Oregon Civil Code. Upon this order a writ of arrest was issued by the clerk, upon which the defendant, on June 4, was arrested and gave bail as therein provided. Afterwards the defendant moved to strike the complaint from the files, because it was not signed by the district attorney nor any one authorized to represent the United States, and for his discharge and the exoneration of his bail because there was no affidavit filed prior to the issuing of the writ, nor undertaking filed before the arrest was made.

By the Revised Statutes (section 5438) it is declared to be a crime punishable by fine and imprisonment to make or present for payment any false or fictitious claims against the United States or to that end, to make or use any false voucher, etc., or to combine with any person to obtain payment from the United States of any such claim. Section 3490 provides that if any person not in the military or naval forces of the United States shall do or commit any of the acts prohibited by section 5438, aforesaid, such person "shall forfeit and pay to the United States the sum of two thousand dollars," together with "double the amount of damages which the United States may have sustained by reason of the doing or committing such act," to be recovered in one action with the costs thereof. Section 3491 gives the district court within whose jurisdictional limits the person doing or committing such act shall be found, jurisdiction of such action; and provides that the same "may be brought and carried on by any person, as well for himself as the United States," * * * "at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent." Section 3492 makes it the duty of the several district attorneys to be diligent to ascertain any violations of said section 3490 by persons found within their respective districts, "and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages;" and provides that "such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of two thousand dollars, and twice the amount of the damages sworn to, in the affidavit of the person bringing the suit." Section 3493 provides that "the person bringing said suit and prosecuting it to final judgment shall be entitled to receive one half the amount, * * * he shall recover and collect; and the other half shall belong to and be paid over to the United States;" and such person shall "receive to his own use all the costs the court may award against the defendant," as in actions between private parties; but he "shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States."

These sections of the Revised Statutes are substantially taken from the act of March 2, 1863 (12 Stat. 696), entitled "An act to prevent and punish frauds upon the United

States." The action, improperly, called a "suit"—thereby authorized to be "brought and carried on by any person as well for himself as the United States," is the action called at common law, qui tam, because the plaintiff therein described himself as one "qui tam pro domino rege quam pro se ipso in hac parte sequitur"—who as well for the king as for himself sues in this matter. When, as in this case, a statute imposed a penalty for the commission of an act, and also gave such penalty in part to whoever would sue for it, and the remainder to the king or other public use, the action to recover such penalty, if brought by a private person, was brought in his own name and subject to his control. Although a judgment obtained therein was for the benefit of the king or other public use as well as the plaintiff, yet the action was, to all intents and purposes, the private action of the latter. 3 Bl. Comm. 160; 1 Bac. Abr. "Actions Qui Tam."

The fact that this action is required to be brought in the name of the United States and that it cannot be withdrawn or discontinued without the consent of the district attorney and the judge, it is still otherwise under the control of the informer. It is still an action which by the express authority of the statute may "be brought and carried on"—commenced and conducted—"by any person, as well for himself as the United States." The power to commence and conduct this action, necessarily implies the right to do so, and to employ attorneys for that purpose, irrespective of the district attorney. The statute has authorized Dowell to bring this action and conduct it at his own cost. Although the United States is the plaintiff, Dowell is its authorized representative, and not the district attorney, who is not authorized or required to act or interfere in the matter, otherwise than as expressly provided by the statute. For all purposes, except the discontinuance of the action, the attorney employed by the informer to commence and conduct the same is the attorney of the United States therein. Neither does the fact that the district attorney is required to be diligent to enforce the statute against persons violating it, make him the attorney of the United States in this action. Although it is his duty "to be diligent in inquiring into any violations" of the statute and to bring actions therefor in the name and for the benefit of the United States, he may not, and therefore congress has provided this alternative, that every person who will may do the same thing, "as well for himself as the United States;" and whichever—the informer or the district attorney—first commences an action for a particular violation of the statute, thereby excludes the other from so doing. 3 Bl. Comm. 160.

Neither does the provision in section 771 of the Revised Statutes which makes it the duty of the "district attorney to prosecute in his district * * * all civil actions in which the United States are concerned," authorize or require him to act as attorney for the plaintiff in this action. This section is general in its terms and necessarily qualified and restrained by the sections above cited, which relate to the commencement and conduct of this particular action. For that matter the United States is concerned in all qui tam actions, whether brought in its own name or that of a private person, because it is entitled to a share of the penalty or forfeiture that may be recovered therein. But the rule of law is, and the practice always has been, that a qui tam action is the action of the party who brings it, and the sovereign, however much concerned in the result of it, has no right to interfere with the conduct of it, except as specially provided by statute.

As has been shown this is a qui tam action. The statute authorizing it imposes no restraint upon the power of the party bringing it, except that he shall bring it in the name of the United States and shall not dismiss it without the consent of its district attorney and the judge. Subject to these qualifications he may proceed as if the action was in name as well as fact his own, which certainly implies the right to select and employ counsel to commence and conduct it.

The complaint being subscribed by attorneys of this court as attorneys for the plaintiff, the presumption is that they were employed by the person who brings this suit to conduct it. This being so, such attorneys are the attorneys of the plaintiff, and the complaint is duly subscribed by the attorney of the party plaintiff within the requirement of section 79 of the Oregon Civil Code, and is therefore not liable to be stricken out. When the statute authorized Dowell to bring and conduct this action in the name of the United States it necessarily authorized him to employ attorneys for that purpose, and thereupon the persons so employed became and are the attorneys of the United States for that purpose. The motion to discharge the defendant from the arrest, or, more properly, to vacate the writ of arrest (see Civ. Code Or. § 128), is based upon the assumption that by virtue of sections 914 and 915—particularly the latter—the law of the state (section 107, Civ. Code) regulates and controls the allowance and issuing of a writ of arrest, and therefore the writ in this case was improperly issued, because there was no prior undertaking or affidavit as provided in said section 107.

As to the affidavit, the complaint contains all the facts necessary to authorize an arrest, and it is verified by the oath of Dowell. Such a complaint is an affidavit, and may be used in the case whenever an affidavit as to such facts is required. In U. S. v. Walsh [Case No. 16,635], which was an action upon a statute for a penalty, this court held: "Where the cause of action is sufficiently set forth in the complaint, and the cause of ac-

tion and arrest are identical, there is no necessity for an additional or separate affidavit to authorize an arrest." Here the cause of action and arrest are identical, and the verified complaint, as to the facts stated therein, is an affidavit. Neff v. Pennoyer [Id. 10,083].

Before proceeding to consider the objection as to the undertaking, it is proper to state that section 915, supra, upon which counsel for the motion seems to rely, does not appear to apply to the case of an arrest. Briefly, it provides that plaintiffs in the United States courts shall be entitled to the remedies by "attachment or other process, against the property of the defendant," allowed by the laws of the state for the courts thereof, such plaintiff first furnishing the preliminary affidavits or proofs and security required by such state laws. As will be seen, the operation of this section is confined to the remedy by attachment or other process—probably like process—only against the property of the defendant, and not against his person.

Section 914, supra, requires in effect, that the mode of proceeding in this action "shall conform as near as may be" to the mode of proceeding in like cases in the state courts. This is a general direction, and only intended to secure uniformity in the practice in the national and state courts, in civil actions at law, as far as practicable. Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 300. But when congress has specially prescribed the mode of proceeding it does not apply. Now section 3492, having specially provided that the defendant in this action might be arrested, and held to bail by the district judge, without requiring the plaintiff, or any one for it. to give any undertaking or security for costs or damages, the most reasonable inference is that it was not intended that any should be given. Besides, it is a settled rule of construction, that the general words of a statute do not include the government or affect its rights, unless such purpose be clear and indisputable upon the face of the act. Jones v. U. S., 1 Nott & Hunt. [1 Ct. Cl.] 383; U. S. v. Weise [Case No. 16,659]; Brightly, Fed. Dig. 843. This was a well established rule of the common law, founded upon considerations of public policy, and, therefore, it was said, that an act of parliament did not bind the king, unless particularly named therein. 1 Bl. Comm. 185. Under this rule, a statute of the state requiring a plaintiff to give an undertaking for costs and damages before procuring an arrest, does not include the United States.

The motions are denied.

[NOTE. Subsequently, upon an amended complaint, the plaintiff recovered judgment for $35,228 and costs. Case unreported. This judgment was reversed in error by the circuit court, and a new trial granted. Case unreported. On the second trial the plaintiff had judgment for the same amount as on the first. Case unreported. For the subsequent history of the case, and the efforts of the plaintiff to enforce his judgment, see 8 Fed. 496, 30 Fed. 604, 762.]

Case No. 15,267.

UNITED STATES v. GROTENKEMPER.

[2 Bond, 140.] [1]

Circuit Court, S. D. Ohio. Oct. Term, 1867.

INTERNAL REVENUE—PENAL ACTION—VERDICT—POSSESSION OF SPIRITS—FRAUD—TRANSPORTATION BONDS.

1. This suit is prosecuted for the recovery of a penalty of $4 on each gallon of spirits alleged to be fraudulently removed or sold by defendant under that clause of section 9 of the act of July 13, 1866 [16 Stat. 101], imposing such penalty; and the verdict in this case can not be for the alternative penalty of $500 provided for in that clause.

2. The only question for the jury is, whether the defendant had possession of the spirits, and sold or disposed of them, having knowledge of a fraud connected with them, and with the design of evading the tax to which they were subject.

3. The question whether the facts proved warrant the inference of fraud, charged by the United States, is exclusively for the jury.

4. Under said section of the statute referred to, to constitute the fraud charged, an intent to evade the payment of the tax must appear to the satisfaction of the jury, but such intent can only be inferred from the circumstances in proof.

5. If the jury find there was any fraudulent concert of action between the distiller, or other persons, and the defendant, in bringing the spirits into market without the payment of the tax, the fraud charged in the declaration is sustained.

6. Giving transportation bonds for the removal of spirits from a distiller's warehouse to a bonded warehouse, class B, did not authorize the sale of the spirits without the payment of the tax, and such sale would be in fraud of the law.

[This was an action by the United States against Henry Grotenkemper for penalties for violation of internal revenue laws.]

Durbin Ward, Dist. Atty., and Lewis H. Bond, for the United States.

John P. Jackson and Edgar M. Johnson, for defendant.

LEAVITT, District Judge (charging jury). There are some legal questions involved in this case which are important, and on which it is the duty of the court to state its views. This I shall endeavor to do with as much brevity as possible. If it were not for these questions of law, I should commit this case to the jury without comment or remark, leaving it to them to draw their own conclusions upon the facts in evidence. The declaration, as you are aware, is the statement of the plaintiff's cause of action, and is to be the guide of a jury in passing upon a case submitted to them. If the plaintiff in an action is entitled to a verdict, it can only be upon the grounds specifically set forth in his declaration.

In this case, the United States charge substantially in the declaration, in two different counts, that large quantities of whisky were shipped from a distillery in Kentucky un-

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

der what are termed "transportation bonds," and that the defendant came unlawfully and fraudulently into the possession of the whisky, and sold or disposed of it, knowing the legal tax had not been paid, and with intent to defraud the government. That is the substance of the first count. The second count charges the defendant with being in possession of the spirits, knowing they were subject to tax, and that the tax had not been paid. The period of time within which it is alleged these fraudulent transactions occurred, was from the 1st of July to the last of December, 1866. The district attorney concedes that the government can claim nothing but for frauds committed within the days named.

It is not my practice to detain a jury with a minute detail or exposition of the evidence in a case submitted to them. While it is incumbent on the court to state the law applicable to the case, it is the province of the jury to weigh and pass upon the facts in proof. I may remark here, that as to the main facts in this case, there is no controversy between the counsel for the parties. It appears that a distiller, whose name is Darling, was carrying on his business in the summer of 1866, at Prestonville, in the state of Kentucky. Connected with his distillery, as required by law, he had a bonded warehouse, designated, under the law and the regulations of the internal revenue department, as of the class A. The statute requires every distiller, immediately upon the distillation of spirits, to deposit them in that warehouse, and they then passed from his control to the custody and supervision of a government officer. It was the right of the distiller, however, upon a permit from the collector of the district, and giving bond with good sureties, the condition of which was not the payment of the tax on the spirits, but their prompt delivery to a warehouse of the class B, to be designated in the bond, to have the same removed to such warehouse. When the spirits were thus deposited, they could not be legally removed from the warehouse, or sold, without the payment of the tax imposed by law. The defendant Grotenkemper had, at the time, a bonded warehouse, of the class B, in the city of Cincinnati. Darling, the Kentucky distiller, shipped largely to the city during the summer of 1866. Some of these shipments were consigned to the defendant, and were deposited in his bonded warehouse, but the larger portion of the spirits, as I understand the evidence, was shipped to, or found its way to the warehouse of Harper & Son, commission merchants of Cincinnati. The amount of these various shipments will be ascertained by the jury, by reference to the abstract made by Hudnall, former collector of the revenue district in Kentucky, in which the distillery was located. These abstracts were made under the direction of the court, and may be safely relied on by the jury.

The claim of the government is, that by some fraudulent concert of action, the large quantity of spirits consigned to Harper & Son, though in their actual possession, was really sold by Grotenkemper, without the payment of the legal tax, and that the United States has thus been defrauded to that extent. The government has no available remedy on the transportation bonds, for the reason that the distiller Darling and his sureties are wholly insolvent. The tax, therefore, must be lost, unless the defendant can be held liable. It is claimed, by the district attorney, that there were 44,500 gallons of spirits shipped by Darling to Harper & Son, all of which was fraudulently sold by the defendant without the tax having been paid. The penalty claimed, and for which it is contended the defendant is liable, is four dollars on every gallon of these spirits. And for the recovery of this penalty this suit is prosecuted.

The suit is based on section 9 of the act of July 13, 1866. It is a long section, broad and comprehensive in its provisions, embracing various acts of commission and omission as frauds, and subjecting persons and property to heavy penalties and forfeitures. Without reciting the entire section, I will only refer to the clause on which this action is brought. It is in these words: "And any person who shall have in his custody or possession any such goods, wares, merchandise, or articles subject to tax, as aforesaid, for the purpose of selling the same with the intent of evading the payment of the taxes imposed thereon, shall be liable to a penalty of $500, or not less than double the taxes fraudulently attempted to be evaded." The jury will observe, that under this clause the penalty is in the alternative, being either a fixed sum or double the amount of the tax. The intention of this was doubtless that the government might proceed for the comparatively light penalty of $500, or the more severe penalty of the double tax, according to the circumstances and aggravation of the case. In this case the claim of the United States is the higher penalty, and if the jury find that the frauds charged are proved, their verdict must be for that penalty, and nothing more or less.

The important, indeed the only, question for the jury is, whether the defendant had the possession of the spirits in controversy, and sold or disposed of them, with the knowledge of any fraud connected with them, and with the intent of evading the tax to which they were subject. In the judgment of the court, to justify a verdict for the United States, the facts must warrant the conclusion that the spirits were infected with fraud, that defendant had some participation in the fraud, and sold or disposed of them with the intent to evade the tax. Whether the evidence warrants the conclusion of fraud, is a question exclusively for the jury, and is referred to them.

The district attorney claims, that if the spirits were distilled and removed from the distiller's warehouse for the purpose of sale, with the fraudulent intent of evading the tax, the defendant is liable to the penalty claimed, though he had no knowledge of, or participation in, the fraud. But as the clause of the statute to which I have referred, makes an intent to evade the payment of the tax a necessary element of the fraud as a basis of the penalty provided, I can not concur in the view urged by the attorney for the United States. Within the scope and operation of the clause referred to, if the defendant had no knowledge of any fraud, actual or intended, in connection with these spirits, it is not readily perceived that in selling or disposing of them he had the intent to avoid paying the tax on them.

In considering the question whether the defendant is implicated in any fraud in connection with these spirits, it will be the duty of the jury to weigh all the circumstances proved. Ordinarily, fraud is only made out by proof of such facts as lead with reasonable certainty to the conclusion of its existence. To illustrate my meaning, I will say, that if the jury believe there was concert of action between Darling the distiller, Harper & Son the warehousemen, and the defendant, by which the spirits were to be offered in market, and disposed of without payment of the tax, and were so disposed of by the defendant, the legal inference of fraud on his part would follow.

The counsel for the defendant have urged, that when the distiller gave bond for the transportation of the spirits from his warehouse A, to bonded warehouse B, and the proper permit for its removal obtained, that it then became what is termed free whisky and was legitimately in market without the actual payment of the tax, the reliance of the government being on the transportation bond as security for the tax. But there is no law which warrants this view. The transportation bond is conditioned for the delivery of the spirits at the bonded warehouse named, and upon such delivery the collector of the proper district looks to the payment of the tax before the spirits can be sold or removed. If, as in this case, the parties to the transportation bond are all pecuniarily worthless, and if the distiller on the execution of the bond was at liberty to offer his whisky in market without paying the tax, it is obvious that a wide door for frauds upon the revenue would be opened. If, therefore, the defendant, knowing the fraud intended by the distiller, co-operated in it upon the false and illegal theory that the spirits were legitimately in market without payment of the tax, he can not thereby be relieved from the imputation of the fraud charged. Even if a construction had been given to the law, by officers of the revenue department, sanctioning such a course, it would be no justification of an intended or accomplished fraud. It is in accordance with the plain intention of the statute, that spirits should in no case be offered for sale without the payment of the tax, and any sale without such payment is in violation of law. The distiller has his option to pay the tax on its removal from his bonded warehouse, or give a transportation bond for its removal to a bonded warehouse, class B. If the latter course is pursued, the spirits can not be removed from the warehouse, or any disposition made of them until the tax is paid. Any other course would inevitably lead to the grossest frauds, and can not for a moment be tolerated. It would afford every facility for collusion between the fraudulent distiller and a dishonest and corrupt collector of the revenue. They had only to procure a transportation bond with parties fictitious or irresponsible, and the spirits would go into the market without the payment of the tax, and without any possible means of indemnifying the government for the loss of the tax.

But while this is the view of the court on this legal question, it is my duty to instruct the jury, that if this defendant came into the possession of the spirits, and removed or sold the same, without any knowledge of its fraudulent character, or any reasonable grounds of suspicion of fraud, he can not be held liable in this form of action. To incur the liability sought to be enforced by the government in this proceeding, it must appear, to the satisfaction of the jury, that the spirits were in the possession of the defendant, and were removed or sold by him, with the intent to evade the payment of the tax. This is in accordance with the language of the statute, and the averment in the declaration. As I have remarked before, the question of intent is exclusively for the jury, to be arrived at by a due regard to the evidence.

It seems unnecessary for the court to extend its remarks. I close by reminding the jury that the case before them is important, as it affects the financial interests of the government, and the pecuniary interests of the defendant. If the jury find for the United States, their verdict must be for a large sum. It must be, in the aggregate, four dollars on each gallon of spirits removed or sold by defendant, claimed by the United States as being 44,500 gallons. The importance of the case will require of the jury their calm and deliberate consideration, and if they find the evidence fairly implicates the defendant in the frauds charged, they will not hesitate to render a verdict accordingly, without reference to consequences. It deeply concerns the interests of the government, as well as our national character, that these frauds on the revenue should be exposed, and the laws efficiently executed.

The jury reported that they were unable to agree, and were discharged.

Case No. 15,268.

UNITED STATES v. GRUSH.

[5 Mason, 290; 1 U. S. Law Int. 214.] [1]

Circuit Court, D. Massachusetts. May Term, 1829.

FEDERAL JURISDICTION—HIGH SEAS—ARM OF SEA—BOSTON HARBOR.

1. The words "high seas" in the crimes act of 1825, c. 276, § 22 [3 Story's Laws, 2006; 4 Stat. 121], mean the uninclosed waters of the ocean on the sea-coast outside of the fauces terræ.

[Cited in The Harriet, Case No. 6,099; U. S. v. Wilson, Id. 16,731; Miller's Case, Id. 9,558; The Helen Brown, 28 Fed. 112; U. S. v. Peterson, 64 Fed. 146; U. S. v. Rodgers, 150 U. S. 254, 14 Sup. Ct. 111.]

[Cited in Baker v. Hoag, 7 N. Y. 561, 562.]

2. The state courts have jurisdiction of offences committed on arms of the sea, creeks, havens, basins, and bays, within the ebb and flow of the tide, when those places are within the body of a county; and in such cases the circuit courts of the United States have no jurisdiction under the said statute.

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867; Waring v. Clarke, 5 How. (46 U. S.) 481; U. S. v. Plumer, Case No. 16,056; U. S. v. Steam Vessels of War (Porter v. U. S.) 106 U. S. 612, 1 Sup. Ct. 539.]

[Cited in Com. v. Peters, 12 Metc. (Mass.) 395; Baker v. Hoag, 7 N. Y. 561, 562; Mahler v. Norwich & N. Y. Transp. Co., 35 N. Y. 356.]

3. Where an arm of the sea or creek, haven, basin, or bay is so narrow that a person standing on one shore can reasonably discern, and distinctly see, by the naked eye, what is doing on the opposite shore, the waters are within the body of a county

[Cited in Rowe v. Smith, 51 Conn. 270; People v. Board of Sup'rs Richmond Co., 73 N. Y. 396; Chase v. American Steamboat Co., 9 R. I. 421.]

4. In such waters it seems, that the admiralty and common law courts have concurrent jurisdiction.

5. The county of Suffolk, in which the city of Boston is included, extends to all waters between the circumjacent islands, down to the Great Brewster, and Point Allerton.

[Cited in State v. Conley, 39 Me. 92.]

Indictment against the prisoner [Thomas Grush] for an assault on one Neil Lemon with a dangerous weapon, and with an intent to kill, founded on the act of congress of 1825, c. 276, § 22 [3 Story's Laws, 2006; 4 Stat. 121]. The indictment contained several counts, in some of which the offence was alleged to be committed on the high seas, and in others in Massachusetts Bay. The prisoner pleaded not guilty, and was convicted of the offence by the jury.

A motion for a new trial, on the ground of the want of jurisdiction of the court, was made, and also a motion in arrest of judgment, on the ground, that in the caption of the indictment, there were not after the words in the margin, "District of Massachusetts," the letters "SS." These motions were argued by the prisoner's counsel and the district attorney.

For the prisoner it was contended, by Mr. Parker, that the locus in quo was neither on the high seas, nor in Massachusetts Bay, nor out of the jurisdiction of the commonwealth of Massachusetts, but in the harbour and port of Boston, in the county of Suffolk. That the Massachusetts statute of 1790 (volume 1, c. 4, p. 383) spoke of the Light-House or Light-House Island in the harbour of Boston. This was the outer light-house. The Massachusetts statute of 1819 (volume 2, c. 69, p. 517) spoke of Hallway Rock in Boston Bay and Long Island Head in Boston harbour. That in the Laws of the United States (2 Story's Ed., p. 1175; Act 1810, c. 64 [2 Stat. 611], in the 2d and 5th sections) the Greater Brewster was declared to be at the entrance of the harbour of Boston. That the force of these expressions would be apparent, by an inspection of the charts in the case. In considering Bevans's case, the place where the ship was anchored was such, that no person, standing on the main land in any direction, could testify to any events on the opposite main land, supposing the island removed. He could not find that George's Island had been ceded to the United States, although the United States government were erecting a sea-wall there at great expense.

Upon the other question, (the omission of the "SS.,") for his part he was quite willing that all the unmeaning forms of indictment should be suppressed; and this case might afford a convenient opportunity to set a useful example. He was willing that the exception should not prevail, if the indictment could be supported without it. But it was his duty to his client to place it before the court for consideration. If practice be indicative of the law, it might be confidently asserted, that the "SS." had been uniformly retained in the Massachusetts state courts, and had never before been omitted in the United States courts in this district. It was used in the New York state courts. See Davis' Justice, pp. 234–237; "Dutchess County, ss.," same book, 221, and the following pages, and 240, 241. It was used by magistrates in acknowledging deeds, in taking depositions, and in the caption of all warrants. It was prescribed as a necessary part of the form in Mass. St. 1784, c. 8; also the civil writs of the United States uniformly retained it. In England, it seemed sometimes to be used, sometimes omitted. In Tremain's Pleas of the Crown, there was no omission of it. In 4 Chit. Cr. Laws, p. 17, "County of ——, to wit," was used. See pages 36, 58–61. In page 249, "West Riding of Yorkshire, to wit;" 248, "Cambridgeshire, to wit;" 343, "England, to wit." In Russ. & R. 179, reserved for the opinion of the twelve judges (Rex v. Goff), the report stated that the indictment had the common caption, "County of Hants, to wit." That

[1] [Reported by William P. Mason, Esq. 1 U. S. Law Int. 214, contains only a partial report.]

the practice in this country seemed to be universal, to retain it; it was sometimes omitted in England. That one would draw an inference from Hob. 171, 172, that like Lord Coke's &c., there was much matter of excellent learning in a "viz." He also referred to 7 Dane, Abr. c. 218, art. 5, and the various cases there cited.

On the part of the United States it was contended, by Mr. Dunlap, that in relation to the question respecting the jurisdiction of the courts of the United States, raised in this prosecution (which was instituted before he came into the office of attorney of the United States), it certainly was one of great importance, affecting the sovereignty of one of the states of the Union. He referred the court to the following authorities: 1 Hale, P. C. 424; 2 Hale, P. C. 15-54; East, P. C. 804; 1 Leach, 388; 2 Leach, 1093; U. S. v. Smith [Case No. 16,337]; [U. S. v. Wiltberger] 5 Wheat. [18 U. S.] 76, 93; [U. S. v. Pirates], Id. 200; Constable's Case, 5 Coke, 106. In relation to the statutes of the state of Massachusetts and of the United States, referred to on the other side, he said that it was evident that they were intended to indicate geographical, and not legal boundaries. They never were intended to fix the boundaries of the jurisdiction of the United States and the state courts. The admiralty jurisdiction of the courts of the United States was to be ascertained by legal principles and decisions establishing what were the high seas. He stated a case much stronger than the present, where the state tribunals had declined jurisdiction, a case in which he was the counsel for the defendant. According to the best of his recollection, these were the facts: A man of the name of Butler stole a watch on board the steam-boat from Nahant, when she was inside of Pudding Point Gut, and below Apple Island, clearly within Boston harbour. The case was submitted to Judge Dawes, the judge of the municipal court (than whom no man was better acquainted with the ancient and acknowledged limits of the jurisdiction of the criminal courts of the county of Suffolk), and the grand jury. No bill was found, and it was for the supposed want of jurisdiction, for the thief was caught in the act, taken in the mainour. If the United States tribunals had not jurisdiction, where the fauces terræ were five or six miles apart, and where witnesses on either side could not reasonably discern what was going on upon the other side, most offences committed on board of vessels in that vicinity must go unpunished; for it would be, in many cases, where a vessel was in motion at the time, impossible to ascertain whether she was within the boundaries of Essex, Norfolk, Plymouth, or Suffolk. Even in the case of Suffolk and Middlesex, separated only by Charles river, whose course, banks, and channel were known, it had been found necessary to provide by the Massachusetts Statute of 1794, c. 31, § 1, that the criminal jurisdiction of the two counties should be in common over the waters of that river.

As to the other point, Mr. Dunlap said he had drawn the indictment, and was responsible for all its errors, if there were any. The indictment is headed thus:

"*United States of America,*
"*District of Massachusetts.*

"At a Circuit Court," &c.

It was contended by the counsel for the prisoner, that there should have been after the word "Massachusetts" the letters "SS." Mr. Dunlap contended, that they were unnecessary in all cases, and would have been decidedly improper in this case. How these letters "SS." had been preserved since the reign of George the Second, in this country, was surprising. In that reign both abbreviations and Latin were prohibited in indictments, which were required to be in English. 1 Chit. Cr. Law, pp. 175, 176. That the "SS." the want of which was complained of, formed an abbreviation of two Latin words, and that this abbreviation was no longer to be found in the English indictments of the present day, though not uncommon in indictments in this country, especially in inferior tribunals, where the errors and the jargon of former times were implicitly copied and preserved. That the "SS." of the ancient indictments in England, and the "to wit" of many of the modern, were, it was believed, in all cases unnecessary. Chitty says, in his work (volume 1, p. 194), the county is stated in the margin thus: "Middlesex," or "Middlesex, to wit." In the form given by Lord Hale (2 Hale, P. C. 166) cited by Chitty (volume 1, p. 277), the "SS." or "to wit" were omitted, and the county was stated in the margin simply thus: "Norfolk." That in that standard book of precedents, the Crown Circuit Companion, a few of the precedents had the "to wit," but the greater portion did not have them, but had the name of the county, city, or district, without any prefix or addition. That the very first four forms given by Chitty, of commencements of indictments, did not contain the words "to wit" (2 Chit. Cr. Law, c. 1), and the sixth chapter of the same volume, heads all indictments for treason upon St. Edw. III., thus: "Middlesex." That in this case the "SS." was not only unnecessary, but its insertion would have been decidedly improper. Perhaps it would not have vitiated the indictment, but it would have been slovenly pleading. The heading of the indictment did not say simply "Massachusetts," in which case the "SS." might serve to signify and supply the omission of the words "District of," but the venue was put down, as every thing against a prisoner should be, so that he could understand it, in plain English, at full length—"District of Massachusetts." There was nothing then for the "SS." or "to wit" to operate upon or supply, and it would have

been an unmeaning, slovenly expletive. It was believed, that no established precedent could be produced from any book of authority, either in the darkness of past ages or the light of the present, where the venue in the margin of the indictment had the "SS." or "to wit" added, when the whole venue was written out, "County of Suffolk," "County of Middlesex," "City, Borough, and Town of Westminster, in the County of Middlesex," and the like. That the flourish at the head of the indictment,

"*United States of America,* }
"*District of Massachusetts,*" }

was, in fact, no part of the indictment, and would be of no consequence, provided the subsequent language, commencing "At a circuit court of the United States for the first circuit, holden at Boston, within and for the district of Massachusetts," &c. &c. should be so explicit as to require no reference to the venue named in the margin. 1 Chit. Cr. Law, cc. 4, 7. That in relation to the allowance of nice, literal, mere formal exceptions, the observations of Lord Hale, Lord Mansfield, Lord Kenyon, Lord Ellenborough, and this court, were referred to. 1 Chit. Cr. Law, c. 4, p. 170; 2 Hale, P. C. 193; 1 East, 314; 5 East, 160; 2 Maule & S. 386; 1 Leach, 383; U. S. v. Smith [Case No. 16,338]. That the allowance of exceptions of this nature carry us back into the dark ages, when lawcraft, like priestcraft, pressed like an incubus upon the common sense of the people, and when the common rules of life, to direct the conduct of men in their various relations to each other, which should be as plain as "the way to the parish church," were intricate and shadowed with, and darkened by mystery, affectation, and pedantry. That the cases referred to by the prisoner's counsel in Davis's Justice, and the fourth volume of Chitty's Criminal Law, were all cases of warrants from justices of the peace and Bow-street police court offices, where nicety in pleading was not required, and where absurd excrescences in forms lingered longer than any where else. But in most of these cases, where the "SS." was used, the venue was not set out in full. That the only case of an indictment, where the venue had been put down at length, and where the to wit had been added, which had been found, was the case in Russell & Ryan's Cases in Crown Law (179), and then it was not made a point in any way, and probably got in accidentally by slovenly pleading.

Before STORY, Circuit Justice, and DAVIS, District Judge.

STORY, Circuit Justice. It is agreed between the parties, that the place where the vessel, (the Pacific,) on board of which the offence was committed, lay at anchor at the time of the commission of the offence, was between Lovel's Island, George's Island, and Gallop's Island, which belong to the city of Boston, as part of its territorial limits. The tide ebbs and flows between these islands into what is called the inner harbour of Boston; and at all times of the tide there is a great depth of water there, the bottom or channel never being dry; and vessels at anchor there are constantly afloat in the stream. The distances between these islands is about one eighth of a mile. Hale's map of Boston, and Wadsworth's chart of the harbour of Boston and the adjacent coasts and headlands are admitted in evidence, as accurate delineations of the same. The nearest headlands on the main land on each side are the town of Hull on the southern, and Point Shirley on the northern side of the harbour of Boston, and the distance between these headlands is about five or six miles. There are a number of islands between these headlands, with narrow inlets and passages for vessels between them. The main channel into the inner harbour of Boston flows also between them, in no instance exceeding one mile in breadth. Nantasket Roads, as it is called, or the outer harbour of Boston, where vessels, going from and coming to the port, are accustomed to lie at safe anchorage, is on the side contiguous to Hull. There are several islands farther out towards the ocean; and particularly the Great Brewster, on which the principal light-house stands. The extreme point of the main land, jutting from the southern coast opposite to this light-house, is called Point Alderton, and the distance between them is about one mile and a quarter. Processes from the state courts of the county of Suffolk have been at all times, without objection, served as far down as where the Pacific lay; and even down to the light-house on the Great Brewster; but not below. Vessels are accustomed to anchor where the Pacific lay. The towns of Boston and Chelsea constitute the county of Suffolk. Such are the material facts.

The statute, on which the present indictment is founded (Act 1825, c. 276, § 22 [3 Story's Laws, 2006; 4 Stat. 121]) declares "that if any person or persons upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state, on board any vessel, &c., shall with a dangerous weapon, or with intent to kill, &c. commit an assault on another such person shall on conviction thereof be punished," &c. There cannot, I think, be any doubt as to what is the true meaning of the words, "high seas," in this statute. Mr. Justice Blackstone, in his Commentaries (1 Comm. 110), uses the words "high sea" and "main sea" ("altum mare," or "le haut meer") as synonymous; and he adds, "that the main sea begins at the low water mark." But though this may be one sense of the terms, to distinguish the divided empire, which the admiralty possesses between high water and low water mark, when it is full sea, from that which the common law possesses, when it is ebb sea

(see, also, Constable's Case, 5 Coke, 106); yet the more common sense is, to express the open, uninclosed ocean, or that portion of the sea, which is without the fauces terræ on the sea coast, in contradistinction to that, which is surrounded, or inclosed between narrow headlands or promontories. Thus Lord Hale says (De Jure Maris, Harg. Tracts, c. 4, p. 10): "The sea is either that, which lies within the body of the county, or without. That arm or branch of the sea, which lies within the fauces terræ, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county, and therefore within the jurisdiction of the sheriff or coronor;" and for this he cites Fitzh. Abr. Corone, 399; 8 Edw. II. And then he adds: "The part of the sea, which lies not within the body of a county, is called the main sea, or ocean." See Selden's Fortescue De Laud. Angliæ, c. 32, p. 67, etc., notes; and Hale de Port, pt. 2, c. 7; Harg. Law Tracts, p. 88; Vatt. bk. 1, c. 33, § 279 et seq.; The Twee Gebræders, 3 C. Rob. Adm. 336. In U. S. v. Wiltberger, 5 Wheat. [18 U. S.] 76, 94, Mr. Chief Justice Marshall, in delivering the opinion of the court, manifestly inclined to the same interpretation of the words "high seas," in our Penal Code. If (says he) "the words be taken according to the common understanding of mankind, if they be taken in their received and popular sense, the 'high seas,' if not in all instances confined to the ocean, which washes a coast, can never extend to a river about half a mile wide in the interior of a country." The other words descriptive of place in the present statute, give great additional weight to this suggestion; for if "high seas" meant to include other waters, why should the supplemental words, "arm of the sea, river, creek, bay," &c. have been used? Lord Hale, following the exact definition given in the Book of Assizes (22 Ass. 93) says: "That is called an arm of the sea, where the sea flows and reflows, and so far only as the sea flows and reflows." Harg. Law Tracts, pt. 1, c. 4, p. 12; Id. pt. 2, c. 7, p. 88; 1 Hale, P. C. c. 32, p. 424; 2 Hale, P. C. c. 3, pp. 13–16, 64; Com. Dig. "Navigation," B. Both he and Lord Coke constantly limit the "high seas" to those waters of the ocean, which are without the boundary of any county at the common law; and we shall presently see, that narrow arms of the sea are deemed to be within the boundary of some county of the realm. But the waters of the ocean upon the open sea-coast are admitted on all sides to be without limits of any county, and are within the exclusive jurisdiction of the admiralty up to high water mark, when the tide is full; and are deemed by the crown writers, generally, as the high sea or main sea. 2 Hale, P. C. 13–16, 54; 1 Hale, P. C. 424; 3 Inst. 57, 113; 2 East, P. C. 802; 1 Bac. Abr. "Coroner," B; 2 Bac. Abr. "Courts of Admiralty," A; Com. Dig. "Admiralty," E, 7, "Navigation," A.

From this view of the subject, I am entirely satisfied, as well upon the language of the authorities, as the descriptive words in the context, that the words "high seas" in this statute are used in contradistinction to arms of the sea, and bays, creeks, &c. within the narrow headlands of the coast, and comprehend only the open ocean, which washes the sea-coast, or is not included within the body of any county in any particular state. And upon the facts admitted in the present case, the place, where the offence was committed, is not the "high seas," in this sense of the terms. It is, in my judgment, "an arm of the sea," in the proper definition of that phrase. But an arm of the sea may include various subordinate descriptions of waters, where the tide ebbs and flows. It may be a river, harbour, creek, basin, or bay; and it is sometimes used to designate very extensive reaches of waters within the projecting capes or points of a country. My own opinion is, that arms of the sea, whether of the one description or the other, are within the admiralty and maritime jurisdiction of the United States. But if they are within the body of any county of a particular state, the state has also concurrent jurisdiction therein. See Rex v. Bruce, 2 Leach, 1093; Ryan & R. 243. I do not now go over the grounds of this opinion, having upon other occasions gone into them somewhat at large. But to bring a case within the purview of the present statute, it is not sufficient, that the place, where the offence is committed, is within the admiralty jurisdiction of the United States, whether it be an arm of the sea, creek, or bay, &c.; but it must, by the very words of the statute, also be a place "out of the jurisdiction of any particular state." And it is out of the jurisdiction of the state, in the sense of this statute, if it be not within the body of some county within the state.

This leads me to consider what is the proper boundary of counties bordering on the sea-coast, according to the established course of the common law; for to that I shall feel myself bound to conform on the present occasion, whatever might have been my doubts, if I were called to decide upon original principles. The general rule, as it is often laid down in the books, is, that such parts of rivers, arms, and creeks of the sea, are deemed to be within the bodies of counties, where persons can see from one side to the other. Lord Hale uses more guarded language, and says, in the passage already cited, that the arm or branch of the sea, which lies within the fauces terræ, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county. Hawkins (P. C. bk. 2, c. 9, § 14) has expressed the rule in its true sense, and confines it to such parts of the sea, where a man standing on the one side may see what is done on the other. And this is precisely the doctrine, which is laid down by Stanton, J., in the passage in Fitzh. Abr. Corone, 399; 8 Edw. II.; on which Lord Coke and the common lawyers have laid so

much stress as furnishing conclusive authority in their favour. 4 Inst. 140, c. 22; Staunf. P. C. lib. 1, p. 51b; De Lovio v. Boit [Case No. 3,776]. It is there said: "It is no part of the sea, where one may see what is done on the one part of the water, and the other, as to see from one land to the other." And Mr. East, in his treatise on Common Law (2 East, P. C. c. 17, § 10, p. 804), manifestly considers this as the better opinion.

In applying the law to the state of facts presented in the present case, I confess, that there does not seem to me any reason to doubt, that the place where the offence was committed was within the county of Suffolk. It is not necessary to decide, whether it be a bay, or haven, within the statute, though it might, perhaps, indifferently fall within each denomination, for it is a narrow arm of the sea, and also a place of safe anchorage for vessels. See Hale, De Port. Maris (Harg. Law Tracts) pt. 2, c. 2, p. 46; Com. Dig. "Navigation," B, C, D, E. It appears to me, that where there are islands enclosing a harbour, in the manner in which Boston harbour is enclosed, with such narrow straits between them, the whole of the waters must be considered as included within the body of the county. It is certain, that the islands themselves are within the county of Suffolk; and whether they are inhabited or not, can make no difference in the principles of law. Islands so situated must be considered as the opposite shores, in the sense of the common law, where persons, standing on one side, may see what is done on the other. There can be no doubt, from the proximity of Gallop's, Lovel's, and George's Islands to each other, that any person, on either of their shores, could see what was done on the other. I do not understand by this expression, that it is necessary, that the shores should be so near, that all that is done on one shore could be discerned, and testified to with certainty, by persons standing on the opposite shore; but that objects on the opposite shore might be reasonably discerned, that is, might be distinctly seen with the naked eye, and clearly distinguished from each other. Indeed, upon the evidence before me, I incline strongly to the opinion, that the limits of the county of Suffolk, in this direction, not only include the place in question, but all the waters down to a line running across from the light house on the Great Brewster to Point Alderton. In the sense of the common law, these seem to me the true fauces terræ, where the main ocean terminates.

Upon the whole, my opinion is, that the court, upon the facts, has no jurisdiction, and that a new trial ought to be granted. This renders it unnecessary to consider, whether the other point, made in arrest of judgment, can be maintained. I allude to the objection, that, in the caption of the indictment, after the usual beginning, "United States of America, District of Massachusetts," the letters "SS." are omitted. The point has, however, been argued; and, as at present advised, it strikes me to be clearly not maintainable as a valid objection.

The district judge concurs in this opinion; and therefore a new trial must be granted. Notice must be given to the proper prosecuting officers of the state, that the prisoner may be dealt with according to law in the state courts.

Case No. 15,269.

UNITED STATES v. GUERRERO.

[Hoff. Land Cas. 94.] [1]

District Court, N. D. California. Dec. Term, 1855.

MEXICAN LAND GRANT — GENUINENESS — OCCUPATION.

The validity of this claim fully established.

Claim for a league and three-fourths of land in San Francisco county, confirmed by the board, and appealed by the United States.

[This was a claim by Josefa Harro de Guerrero and others, heirs of Francisco Guerrero, for El Corral de Tierra, granted October 16, 1839, by Manuel Jimeno, and May 1, 1844, by Manuel Micheltorena, to F. G. Palomares. Claim filed April 6, 1852, confirmed by the commission April 18, 1853, and now heard upon appeal by the United States.]

S. W. Inge, U. S. Atty.

Halleck, Peachy & Billings, for appellees.

HOFFMAN, District Judge. It appears from the expediente on file in the archives that on the eighth of December, 1838, the grantee petitioned Governor Alvarado for the place called "Corral de Tierra," of the extent of one and a half leagues long and three-fourths of a league wide. After the usual informes or reports from the officers to whom the petition was referred, the governor ad interim, M. Jimeno, on the sixteenth of October, 1839, made a concession of the land as solicited, but of the extent of only one square league. And the expediente having been sent to the departmental assembly, it was by that body approved on the twenty-second of May, 1840. In April, 1842, the grantee presented another petition to Micheltorena, the then governor, soliciting an extension or additional grant of a small piece of land, about three-fourths of a league, lying between the rancho of El Corral de Tierra and that of Tiburcio Vasquez. After the usual references for information, the governor, on the first of May, 1844, ordered the title to issue. And the title bearing that date is produced by the claimants, as also that previously obtained for one square league. After receiving the second grant, the grantee, on the second of April, 1841, petitioned the departmental assembly for its confirmation, and the expediente contains a favorable report of the com-

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

mittee on vacant lands, to which it was referred, dated June 9th, 1846. The expediente contains no evidence of the final passage of the resolution of approval as reported by the committee, but the original title produced by the claimant has attached to it the usual certificate of approval by the departmental assembly on the twelfth of June, and signed by the governor, Pio Pico, and José Matias Moreno, secretary. The genuineness of the documents produced by the claimants is established by proof, and is corroborated by the production of the expediente, and by the notorious and continued occupation of the land by the grantee and his family since 1839, the date of his first grant.

We see no reason to doubt the entire validity of this claim, and we think it should be confirmed. A decree affirming the decision of the board must therefore be entered.

Case No. 15,270.

UNITED STATES v. GUINET et al.

[2 Dall. 321;[1] Whart. St. Tr. 93.]

Circuit Court, D. Pennsylvania. May 11, 1795.

BREACH OF NEUTRALITY LAWS—EVIDENCE.

[1. The conversion of a merchant ship into a vessel of war, with intent to commit hostilities against a friendly nation, is an original fitting out of a vessel with such intent, within the meaning of the act of congress.]

[2. On a prosecution for fitting out a vessel to cruise against a friendly nation, there was evidence that defendant, who claimed to be merely an interpreter for the owner, carried orders from the latter to the ship carpenter, told the pilot at what time guns should be taken on board his boat, to be carried to the vessel, and had in his possession an account stating charges for supplies of cannon, ball, muskets, and commissions for services, and that the whole matter was conducted in a secret and mysterious manner. *Held*, that this justified a finding that he was actually concerned in the fitting out of the vessel.]

[In the circuit court of the United States of America in and for the Pennsylvania district of the middle circuit. The grand inquest of the United States of America for the Pennsylvania district upon their respective oaths and affirmations do present: That John Etienne Guinet, late of the city of Philadelphia, yeoman, and John Baptist Le Maitre, late of the same, yeoman, on the first day of December, in the year of our Lord one thousand seven hundred and ninety-four, within the port of Philadelphia, being a port of the United States, to wit, in the said district of Pennsylvania, knowingly and unlawfully were concerned in furnishing, fitting out, and arming a certain ship or vessel called Les Jumeaux, then lying and being within the port aforesaid, to wit, by advising, superintending, and directing the furnishing, fitting out, and arming the same, and by advancing money to pay in part for the said furnishing, fitting out and arming the same, with intent that the same ship or vessel should be employed in the service of the French republic, being a foreign state, with whom the said United States are and then were at peace, to cruise and commit hostilities upon the subjects and property of the king of Great Britain, being a foreign prince, with whom the United States are and then were at peace, and on the subjects, citizens, and property of other foreign princes and states with whom the said United States are and then were at peace, to the evil example of others in like cases offending against the form of the act of the congress of the said United States in such case made and provided, and against the constitution, peace, and dignity of the said United States. W. Rawle, Atty. of the U. S. for Pa. District.] [1]

This was an indictment against Etienne Guinet and John Baptist Le Maitre, for a misdemeanor in fitting out and arming Les Jumeaux (The Twins) in the port of Philadelphia, to be employed in the service of the republic of France, against Great Britain, both powers being at peace with the United States. The act on which the indictment was founded [1 Stat. 383] contained the following sections: "Sec. 3. And be it further enacted and declared, that if any person shall, within any of the ports, harbours, bays, rivers, or other waters of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out or arming of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, to cruise or commit hostilities upon the subjects, citizens or property of another foreign prince or state, with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States, for any ship or vessel, to the intent that she may be employed as aforesaid, every such person, so offending, shall, upon conviction, be adjudged guilty of a high misdemeanor, and shall be fined and imprisoned, at the discretion of the court in which the conviction shall be had, so as the fine to be imposed shall in no case be more than five thousand dollars, and the term of imprisonment shall not exceed three years; and every such ship or vessel, with her tackle, apparel, and furniture, together with all materials, arms, ammunitions, and stores, which may have been procured for the building and equipment thereof, shall be forfeited, one half to the use of any person who shall give information of the offence, and the other half to the use of the United States. Sec. 4. And be it further enacted and declared, that if any person shall, within the territory or jurisdiction of the United States, encrease or augment, or procure to be encreased or augmented, or

[1] [Reported by A. J. Dallas, Esq.]

[1] [From Whart. St. Tr. 93.]

shall be knowingly concerned in encreasing or augmenting the force of any ship of war, cruiser, or other armed vessel, which, at the time of her arrival within the United States, was a ship of war, cruiser or armed vessel in the service of a foreign prince or state, or belonging to the subjects or citizens of such prince or state, the same being at war with another foreign prince or state with whom the United States are at peace, by adding to the number or size of guns of such vessel prepared for use, or by the addition thereto of any equipment solely applicable to war, every such person so offending shall, upon conviction, be adjudged guilty of a misdemeanor, and shall be fined and imprisoned at the discretion of the court, in which the conviction shall be had, so as that such fine shall not exceed one thousand dollars, nor the term of imprisonment be more than one year." The indictment was brought upon the 3d section. Guinet only was apprehended; and, being arraigned, he pleaded not guilty.

The material facts that appeared in evidence, upon trial, were these: Les Jumeaux entered at the port of Philadelphia, in the month of ——, laden with sugar and coffee, from Port-au-Prince; and on her arrival she mounted four guns and two swivels. The vessel, it seemed, had originally been a British cutter, employed in the trade to the coast of Guinea; and had ten port-holes on each side, though only four were actually open, at the time of her arrival, to accommodate the four guns, then mounted. Soon after, a Frenchman applied to a ship-carpenter to repair the vessel, which was in a very rotten state; and, after some difficulty, a bargain for that purpose was struck; but the carpenter declared he would only open the number of ports (twenty) which were pierced when she came into port; and in all other respects fit her for a merchant-ship. At the time of repairing her, she was owned in shares by Le Maitre, the original owner, and seven other Frenchmen. The twenty ports being opened, and the other repairs of the vessel proceeding rapidly, the government instituted an enquiry into the subject, in order to ascertain the nature and design of her equipments. On examination, the master warden found the vessel in great forwardness, her twenty ports open, her upper deck changed, &c. and four iron guns on carriages, with two swivels, were lying on the adjoining wharf. He, therefore, desired the carpenter to desist from working any further on the vessel, and made a report on the subject, to the secretary at war; who directed, that all the recent equipments of a warlike nature should be dismantled, and the vessel restored to the state in which she was when she arrived. The master warden, accordingly, caused the port-holes to be shut up, and even refused to allow any ringbolts to be fixed in the vessel. A few days before she left the port a witness said he saw four guns in her hatch-way; the carpenter who repaired her said she carried with her from the wharf, the four guns and two swivels that she had brought in; and, according to the custom-house entry, she sailed from the city in ballast, having nothing in her hold but provisions, water-casks, and wood for the ship's use. It had been said, at one time, that she was to carry flour; at another time that she was to carry passengers; and Guinet had told the ship carpenter that she would be advertised on freight. She sailed in the middle of the day, and some of the workmen went down in her as far as League-Island. It appeared, likewise, that she came to, at Wilmington; that an apprentice to the pilot on board of her, was left behind in order to carry on some guns, cordage, and bedding; that accordingly, he, in company with his master, (who had returned from Wilmington, after piloting the vessel thither) two or three Frenchmen that belonged to the vessel, and two black boys, carried and delivered on board, three or four carriage guns; that the witness (who did not go on board) saw no appearance of other guns, which he could have done, though it was dark, had there been port-holes and the guns run out; that the pilot boat returned to Philadelphia the same night, for the purpose of carrying to the ship some of her crew, and two or three hogsheads; that the hogsheads were put on board the pilot-boat the next day, and being there opened were found to be filled with a number of little kegs, the contents of which were unknown; that at the same time twenty or thirty muskets, a number of lanterns, cans, &c. were put on board; that the whole of this transaction took place in the night time, between 10 and 11 o'clock; and that, during the same night, the pilot-boat, with three or four Frenchmen on board, pushed from the wharf, and sailed down to Wilmington, where the vessel still lay; that the things brought in the pilot-boat being put on board the ship, she got under weigh and proceeded to Reedy-Island; that there were then between thirty and forty persons on board; that the witness could not perceive that she had any guns or gun carriages on deck, though this might be owing to its being dark: that the vessel dropt down to New-Castle; and the pilot-boat was again sent to Philadelphia, by order of an officer (as it would seem) belonging to the vessel, who met the witness there, and between 9 and 10 o'clock at night put one or two trunks and a large box on board the pilot-boat, at South-street wharf; that there were then lying on the wharf six guns without carriages, which Guinet told the witness he must take on board the pilot-boat, at 12 o'clock at night; that the masts were so weak, that the witness was at first afraid to undertake it; that he went, however, to borrow a runner and tackle from an adjoining sloop; that Guinet concluded to postpone heaving the guns into the boat 'till the next evening; and in the intermediate time the marshall seized the

guns and boat, and apprehended the parties.

This was the amount of the general evidence relating to the equipment of the vessel, and the evidence particularly pointed against the defendant, Guinet, was to the following effect: While the vessel was repairing, Guinet was seen frequently attending the people at work; and the master warden, before whom he had attended with the owner, understood that he acted in the character of an interpreter, as the owner could not speak English. The ship-carpenter did not see Guinet till the bargain was struck, and the repairs were considerably advanced; that afterwards when the owner came, which was generally twice a day, he spoke so little English, that Guinet used to translate for him, and on all occasions act as his interpreter; that Guinet sometimes brought orders from the owner to the carpenter; that he never assumed any right of ownership himself, but, on the contrary, once complained to the carpenter, that the owners had not given him so much as a hat for interpreting. In opposition, however, to the idea of his being merely an interpreter, it was proved, that when the marshall seized the pilot-boat, Guinet claimed one of the trunks on board, and declared, that the guns lying on the wharf belonged to him, he having, as he alledged, purchased them, to sell again as merchandize. A runner and tackle was sent on board while the pilot-boat was in the marshall's custody, but it has never been claimed. Guinet denied before the judge, on his examination, that he knew any thing more of the pilot-boat, than that she was going to New-Castle, and he had put his baggage on board to send thither; but the pilot's apprentice being confronted with him, insisted that he was the person who had ordered the six cannon to be taken on board, and that he was acquainted with the transaction. When, likewise, Guinet was apprehended, two papers were found in his possession: one of them was an account, stated in his own hand writing, between Le Maitre and himself, in which were charges for supplying musquets, ball, and cannon; for monies advanced at sundry times on account of the equipments; and for commissions and attendance in superintending the repairs and outfit of the vessel. The other paper was a letter from Messrs. Mendenhall & Co. of Wilmington, to Guinet, dated the 20th of December, 1794, containing the following passage: "Your favor per post is come to hand. We think it not possible to get any 4lb. shot, or any other size here. We think it probable, that we can let one of our boats go down with the things for the ship; they have taken the water casks on board already. The account shall be ready against you call." The deputy collector proved the manifest of the sloop Farmer, which brought up six guns, consigned from Mendenhall & Co. to Guinet; and Guinet acknowledged before the judge, that the guns lying at South-street wharf were those that had been so consigned to him.

Mr. Levy, for defendant. This is the first prosecution that has occurred since an act of congress was passed on the subject. Before the act was passed, an important and interesting controversy had arisen between the executive of the federal government, and the French minister; in the course of which the latter contended, that, if not by the general law of nations, at least by positive compact, the French republic was entitled to repair and equip vessels of war in the ports of the United States; since the treaty, by making it expressly unlawful for the others, had, by necessary implication, made it lawful for her. Treaty, art. 22. As a branch of this controversy, it had, likewise, been insisted, that an American citizen had a right to enter into the service of the French republic; and the position certainly received some countenance, from the refusal of a grand jury in Boston to find bills of indictment against persons who had acted in that manner, and from the acquittal of Gideon Hempfield by a Philadelphia jury. These interpretations and proceedings were, however, disapproved by our executive; who, on the first point, contrary to the avowed sense of the great mass of the people, construed the 22d article of the treaty, to be merely an exclusion of other belligerent nations from the privilege of equipping in our ports, and not a permission to France; and this diversity of sentiment between the government and the citizens, finally produced the act of congress now in question. The section on which this prosecution is founded is, indeed, a severe and penal one; but, in proportion to the rigor of the punishment, will a conscientious jury require the degree of proof to be. It contemplates four descriptions of offence: (1) To fit out and arm, or attempt to fit out and arm. (2) To procure to be fitted out and armed. (3) To be concerned, knowingly, in furnishing, fitting out, or arming any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, to cruise or commit hostilities upon a nation at peace with the United States. And (4) To issue or deliver a commission within the territory or jurisdiction of the United States for any ship or vessel, to the intent that she may be so employed. Two facts, then, are essential to justify a conviction: (1) The vessel must have been fitted out and armed within the port of Philadelphia; and (2) the defendant must, at least, have been knowingly concerned in her equipment.

1. With respect to the first fact, there is no direct proof that the vessel sailed with more guns than she brought with her; and the mere intention to arm and equip her is not criminal. Nor even if cannon, arms and ammunition had been put on board, does it follow, as a necessary consequence, that it

was intended to arm her as a vessel of war in the service of France, to cruise against the friends of America. There is no evidence of such cruising; nor of the design (whether as passengers or mariners) with which the thirty or forty persons were on board the vessel; and military stores may lawfully be sold here, or be exported to foreign countries by American citizens: the act is only punishable when the armament and stores are applied to the use of the vessel in which they are shipped. But the most that can possibly be inferred from the evidence, is an augmentation of the force of the vessel, as she arrived here with guns actually mounted; and then the indictment should have been founded on the 4th, instead of the 3d section, of the act. There is a great difference, in the language and penalties of the two sections, which undoubtedly arose from the very different nature of the cases, to which they respectively apply. For, it is neither so offensive in itself, nor so dangerous to the peace of the nation, that a vessel already armed should add something to its force, as that a vessel should originally be constructed and equipped within our ports, for the purposes of war. Hence, therefore, the bare attempt in the latter case is made criminal; but in the former the unlawful act must be consummated. The words of the 4th section refer to ships of war, cruisers, or other armed vessels: all the writers on the subject state, that there are four kinds of armed vessels, three with commissions, and one without commission, to wit—vessels of war, privateers, letters of marque, and all other armed vessels; and this vessel must be included in the last description, not being embraced by the others.

2. With respect to the second essential fact, there is not sufficient evidence to shew, that the defendant was knowingly concerned in the illegal outfit of the vessel. He acted only as an interpreter; which, notwithstanding the generality of the word, concerned, cannot fairly be included in the definition of an offence, that calls for proof of a serious intention to furnish and outfit the vessel. There was no crime in being owner of the guns at South-street wharf; and the object in ordering them to be put on board the pilot-boat does not appear. The transaction with Mendenhall & Co. rather proves that the guns were not intended for this vessel, as it would have been easier, more expeditious, and safer, in that case, to send them on board from Wilmington, with the water-casks, and other articles, which were actually sent by them. The account found in the defendant's possession, relates to the disbursements of a factor for his principal:—It is not shewn how it arose; whether before or after the articles were received; and after a vessel illegally equipped has sailed, it cannot be an offence within the act, to pay drafts in discharge of the tradesmen's bills. Presumptions unfavorable to innocence, ought not to be encouraged in a case so highly penal.

Mr. Rawle, Dist. Atty., entered into a description of the principles and advantages of an honorable neutrality; and relied upon the good-sense and patriotism of the jury, to prevent their being seduced by a retrospective view of the popular prejudices that had formerly prevailed. He then contended (1) that the offence had been committed; (2) that the defendant was knowingly concerned in committing it; and (3) that the indictment was founded on the proper section of the act of congress.

(1) There is evidence, that the vessel sailed from the wharf with the guns that she brought into port; that four other guns with military stores were afterwards put on board of her, and that she had a crew of thirty or forty persons. It is arming a vessel, when arms are put on board, she being on her passage; and it cannot be material, that those arms should be arranged in a particular manner. As to the design of the equipment, there is no proof of an actual cruise; but the jury will decide, whether it was any other than that charged in the indictment. There is no attempt to prove that she had a cargo, or carried passengers; on the contrary, it is in evidence that she sailed in ballast; and the subdivisions of interest in the vessel are in the nature of all ownership of privateers.

(2) The defendant was knowingly concerned. As furnishing arms, knowing them to be designed for an unlawful purpose, constitutes the crime; and as an interpreter was the necessary instrument on the occasion; even if the defendant had appeared in no other character, this would have been sufficient to convict him. But he was not merely an interpreter;—he appears to have interfered on various other occasions; and his account is conclusive evidence of a confidential and important agency in accomplishing the illegal outfit of the vessel. It might afford some color of defence, to say, that he only attempted to send the cannon on board from South-street wharf, if this account did not demonstrate that he was concerned in the equipment from the beginning. There is nothing to justify an idea, that it arose from paying drafts, after the vessel had sailed; but on the contrary several items are for money advanced; and the charge for commissions, &c. has relation to the very moment of commencing the repairs. The agency proved by the account is corroborated by the purchase of cannon from Mendenhall & Co. which is evidently connected with the general plan for equipping this vessel.

(3) The indictment is well laid; the 2d section is the only one to which the case is applicable. The 4th section refers only to the augmentation of the force of the vessel, which on her arrival in our ports, was, in fact, a vessel of war, either public or private. If, therefore, a man of war or privateer adds

to the number or size of her guns, or makes any equipment solely applicable to war, it is an offence against this section. But if a vessel, having guns on board, and yet being neither a man of war, nor a privateer, enters our ports, she cannot legally be equipped for the purposes of war. Without this construction, the act of congress would be nugatory; as it might be evaded by bringing a single gun in the vessel. In the present case, it appears that Les Jumeaux had been employed in the Guinea-trade; that she arrived here with a cargo of sugar and cotton; and being converted from a merchant vessel, carrying a few guns for self defence, into a privateer armed for hostilities, it is clearly an original outfit within the meaning of the law. The distinction is justified by this further consideration, that the 3d section makes arming the vessel, with intent to employ her in hostilities, the offence; whereas the 4th section refers nothing to the intent with which the force of the vessel is augmented, as it only contemplates the case of vessels originally fitted for war by the nation to which they belong.

PATERSON, Circuit Justice. This is an indictment against John Etienne Guinet, for being, knowingly, concerned in furnishing, fitting out, and arming Les Jumeaux, in the port and river Delaware, with intent that she should be employed in the service of the French republic, to cruise, or commit hostilities, upon the subjects of Great Britain, with whom the United States are at peace; and it is the province of the jury to enquire, whether the proof exhibited on the trial, has fully maintained the charge contained in the indictment.

Much has been said upon the construction of the 3d and 4th sections of the act of congress; but the court is clearly of opinion, that the 3d section was meant to include all cases of vessels, armed within our ports by one of the belligerent powers, to act as cruisers against another belligerent power in peace with the United States. Converting a ship from her original destination, with intent to commit hostilities; or in other words, converting a merchant ship into a vessel of war, must be deemed an original outfit; for the act would, otherwise, become nugatory and inoperative. It is the conversion from the peaceable use, to the warlike purpose, that constitutes the offence. The vessel in question arrived in this port, with a cargo of coffee and sugar, from the West-Indies; and so appears to have been employed by her owner with a view to merchandize, and not with a view to war. The enquiry, therefore, is limited to this consideration, whether, after her arrival, she was fitted out, in order to cruise against any foreign nation, being at peace with the United States. It is true, she left the wharf with only four guns, the number that she had brought into the port; but it is equally true, that when she had dropped to some distance below, she took on board three or four guns more, a number of muskets, water-casks, &c.; and, it is manifest, that other guns, were ready to be sent to her by the pilot-boat. These circumstances clearly prove a conversion from the original commercial design of the vessel, to a design of cruising against the enemies of France, and of course against a nation at peace with the United States, since the United States are at peace with the whole world. Nor can it be reasonably contended that the articles thus put on board the vessel were articles of merchandize; for, if that had been the case, they would have been mentioned in her manifest, on clearing out of the port, whereas it is expressly stated that she sailed in ballast. If they were not to be used for merchandize, the inference is inevitable that they were to be used for war. No man would proclaim on the house-top, that he intended to fit out a privateer; the intention must be collected from all the circumstances of the transaction, which the jury will investigate, and on which they must decide. But if they are of opinion that it was intended to convert this vessel from a merchant ship into a cruiser, every man who was knowingly concerned in doing so is guilty, in the contemplation of the law.

It will only, then, be necessary to ascertain how far the defendant was knowingly concerned; for, though he were concerned, if he did not act with a knowledge of the real object, he would be innocent. It has been alleged in his defence that he was merely an interpreter; and if, in fact he had appeared in that character alone, we should not have thought it a sufficient ground for conviction. But the jury will collect from the other parts of the transaction, whether this is not used as a mask to cover his efficient agency in the equipment of the vessel. He carried orders from the owner to the ship carpenter; he told the pilot boy at what time the guns should be taken on board his boat, to be carried to the ship; the account found in his possession states charges for supplies of cannon, ball, muskets, and commissions for services; and the whole is conducted in a secret and mysterious manner, under the shade of night. Would he have acted this part as a mere interpreter? If it had been fair mercantile business, involving nothing repugnant to our laws, would it have been so much a work of darkness? This alone casts a gloom over the transaction, that will impress every just and ingenuous mind with an idea of fraud and delinquency. If the defendant has been concerned in the offence, there is no doubt that it is effected as far as it was in his power to complete it. The illegal outfit of the vessel was accomplished; and that an additional number of cannon was not sent to augment her force was not owing to his respect to the laws, but to the vigilance of the public police.

Upon the whole, the jury will consider the

indictment; and give such a verdict as shall comport with evidence and law.

Verdict, guilty.

Case No. 15,271.

UNITED STATES v. GURNEY et al.

[1 Wash. C. C. 446.] [1]

Circuit Court, D. Pennsylvania. April Term, 1806.[2]

PLEADING AT LAW—PLEAS—DUPLICITY.

Double pleading. Action on a bond, for the payment of certain sums of money at Amsterdam. Plea, that the money was paid. Replication, that the sum paid was not accepted in satisfaction by the agents of the plaintiffs; that the sum was not paid on the day appointed; and that damages and interest, due for non-payment, were not paid. Adjudged, that these pleas were bad, for duplicity.

The defendants entered into a bond to the secretary of the treasury, conditioned to perform certain covenants, by which the defendants agreed to pay 500,000 guilders to the bankers of the United States, in Amsterdam, by three instalments, viz.: one sum on the 1st of February, another on the 1st of March, and the residue on the 1st of May; and on failure, then to pay the amount not so paid in Amsterdam, into the treasury of the United States, with damages at the rate of twenty per cent, and interest from the time of demand; in the same manner, as if a bill of exchange had been drawn, which had been protested for non-payment, and returned duly protested. The breach in the declaration is general; plea, that the first instalment was duly paid, and that the residue of the 500,000 guilders was, on the 17th May, paid to the bankers of the United States at Amsterdam. Replication, that the sum which became due on the 1st March, was not accepted by the bankers of the United States, in payment and satisfaction of the said sum, due on the 1st March, and concluding to the country; and the plaintiff, in fact, says, that the said sum was not paid on the 1st of March, and that the damages and interest were not paid; concluding with an averment, or to the country. Special demurrer to the replication, for duplicity.

Mr. Dallas, for the United States.
Rawle & Tilghman, for defendants

BY THE COURT. The replication is certainly double, as either non-payment on the day, or non-acceptance in satisfaction, is an answer to the plea, though perhaps not a legal one; but if not so, both together cannot be. They are perfectly distinct matters, and not the component parts of a plea. But, as this determination would require us to decide upon the validity of the bar set up to the plea, which is attended with great difficulty, we think it best to adjourn the cause to the supreme court, upon a disagreement of the judges; which, however, is not real.

This opinion affirmed by the supreme court, February, 1808. [4 Cranch (8 U. S.) 333.]

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

[2] [Affirmed in 4 Cranch (8 U. S.) 333.]

Case No. 15,271a.

UNITED STATES ex rel. GOODRICH v. GUTHRIE.

[2 Hayw. & H. 140.] [1]

Circuit Court, District of Columbia. Dec. 10, 1853.[2]

MANDAMUS — JUDGES — REMOVAL BY PRESIDENT—SALARY.

The petitioner, Aaron Goodrich, was appointed chief justice of the supreme court of the territory of Minnesota by the president, with the advice and consent of the senate, for the full term of four years. After he had held the office for 18 months, or there abouts, he received notice of the appointment of Judge Fuller by the president, with the advice and consent of the senate, to fill the office of chief justice of the supreme court of the said territory in his place and stead. At the end of the term, holding himself in readiness in the meantime to discharge the duties of the said office, he applied to the court for a mandamus, directed to the secretary of the treasury, to settle and pay his salary for the remainder of the term of four years, after he was refused payment of the same by the accounting officer. The application was denied.

At law.

The petition of Aaron Goodrich [against James Guthrie, secretary of the treasury] respectfully showeth: That by the act of the congress of the United States, approved March 3, 1849 [9 Stat. 403], entitled "An act to establish the territorial government of Minnesota," it was, among other things, enacted that the judicial power of said territory should be vested in a supreme court, district courts, probate courts, and in justices of the peace. That the supreme court should consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and who shall hold a term at the seat of government of said territory annually, and that they should hold their offices during the period of four years. That said territory should be divided into three judicial districts, and that a district court should be held in each district by one of the justices of the supreme court, at such time and place as might be provided by law. That said judges should, after their appointment, respectively reside in the district which should be assigned to them. And it was further enacted, in and by the said act, that the chief justice and associate justices of the said territory should each receive an annual salary of $1800, and that

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

[2] [Affirmed in 17 How. (58 U. S.) 284.]

the said salaries should be paid quarter yearly at the treasury of the United States. That on the 19th day of March, 1849, the president of the United States, by and with the advice and consent of the senate of the United States, appointed your petitioner chief justice of the supreme court of the United States for the territory aforesaid, for the period of four years from the date of said appointment, and that a commission, signed and sealed in due form of law was issued to your petitioner, in which it was certified that your petitioner had been appointed by the president, by and with the advice of the senate, chief justice of the territory aforesaid, for the term of four years from the 19th day of March, 1849, certified copy of which is herewith filed. That your petitioner accepted the aforesaid appointment, and notified the secretary of state of his acceptance, and on the 22d of the same month of March he took the oath of office prescribed by law, and immediately entered upon the discharge of the duties of said office; and your petitioner further showeth that he has constantly ever since resided at the town of St. Paul, which is the seat of government of said territory, and is in the First judicial district, to which district your petitioner was assigned; and that he has performed each and every duty appertaining to said office of chief justice of said territory punctually and faithfully, without interruption, from the time when he entered upon the duties of said office until the latter part of the month of November, 1851, at which time he received a communication dated October 22, 1851, from the Honorable J. J. Crittenden, acting secretary of state, informing your petitioner that the president of the United States had thought proper to confer the appointment of chief justice of the supreme court of the United States for the territory of Minnesota, which your petitioner then held, upon Jerome Fuller; and your petitioner would further show that thereupon he informed the president of the United States, the secretary of state and the secretary of the treasury of the United States, of the determination of your petitioner to continue in the faithful discharge of the duties devolving on him by his appointment, his oath of office, his commission, and the aforesaid act of congress, up to the day of the expiration of the four years from the date of said appointment. And your petitioner further shows that he has been constantly and punctually at chambers and in the hall of justice, ready to discharge the duties of said office up to the 19th day of March of the present year, at which time your petitioner's term of office expired. And your petitioner has made frequent applications at the treasury for the amount of salary due to him during the term of his office as aforesaid, but has been constantly refused, and his claim rejected to any and all that part of said salary which has accrued since the alleged removal of your petitioner from the office aforesaid, and the alleged appointment of another in his place, on the sole ground that your petitioner was no longer chief justice as aforesaid, since the 22nd day of October, 1851. And your petitioner alleges that the president of the United States had no power to remove your petitioner from said office during the said four years from the date of his commission; that consequently there was no vacancy in said office, your petitioner being alive, not having resigned, and being in the full discharge of said duties at the time of said supposed removal; and that the president of the United States had no power to constitute any other person chief justice in said territory during the said four years; and your petitioner further shows that a sufficient appropriation has been made by congress each and every year of the aforesaid four years, for the purpose of paying the salaries of the three judges of the said territory. And your petitioner would further show that there is now due and unpaid to him the sum of $2,550, which the secretary of the treasury unjustly detains. Wherefore your petitioner respectfully prays that your honors, the premises considered, will award the United States writ of mandamus, to be directed to James Guthrie, secretary of the treasury of the United States, commanding him to pay to your petitioner the amount of salary which has accrued since the time of your petitioner's alleged removal, to wit, the 22nd of October, 1851, up to the expiration of the four years for which he was appointed, to wit, the 19th day of March, 1852. A. H. Lawrence, for petitioner."

A. H. Lawrence, for petitioner.
P. B. Key, Esq., for defendant.

On motion of A. H. Lawrence for the relator, and upon reading of the said petition and accompanying documents, it is this 28th day of May, 1853, ordered by the said circuit court, that said James Guthrie, secretary of the treasury of the United States, show cause on the 1st Monday of July, 1853, why said writ of mandamus should not issue, as prayed by said memorialist, and that a copy of this order be served on the said James Guthrie, secretary of the treasury as aforesaid.

Answer to the petition:

"Treasury Department, Comptroller's Office, Dec. 8, 1853. In the matter of the claim of Aaron Goodrich, Esq., for his salary as judge of the territory of Minnesota. This case comes before me as comptroller of the treasury, on an appeal from the decision of the first auditor. I find the following facts exist, to wit: Aaron Goodrich, Esq., presented the following account to the first auditor for settlement, and payment as a public account: 'United States of America, to Aaron Goodrich, Dr. To salary as

judge of the territory of Minnesota, from 1st December, 1851, to 19th March, 1853, at $1800 per year, $2343.00.' He was appointed chief justice of the supreme court of the territory of Minnesota, by and with the advice and consent of the senate of the United States, and commissioned by the president such chief justice on the 19th March, 1849, for the period of four years. Soon thereafter he took the oath required, and entered upon the duties of the office. He was removed by the president of the United States, and Jerome Fuller, Esq., was appointed chief justice to fill the vacancy. He, Jerome Fuller, was commissioned on 21st day of October, 1851, was qualified as required by law, and soon thereafter he entered upon the duties assigned by law. Judge Goodrich was paid his salary as chief justice of said court to the 20th of October, 1851, inclusive. The attorney general of the United States, on the 20th August, 1853, in the case of Grafton Baker, judge of the territory of New Mexico, having said: 'The general rule of law is well settled, that in the case of appointments and removals by the president, when the removal is not by direct discharge, or on express vacating of the office, by way of independent fact, but merely by the operation of a new commission or appointment, then the virtue of the old commission ceases, only when notice of the new commission is given to the out-going officer, either by the president or by the new officer exhibiting his commission to the old one, or by other sufficient notice,'—an inquiry was made to ascertain when Aaron Goodrich was legally notified of his removal and of the appointment of Jerome Fuller as his successor; and it was ascertained by his own statement, under oath, that he was so notified on the 30th of November, 1851. The accounting officers thereupon stated another account on the 23d of November, 1853, and the said Goodrich was paid his salary as chief justice from the 21st of October to the 30th of November, 1851, inclusive. The salary of said Jerome Fuller, as such chief justice, from the 21st of October, 1851, the date of his commission was paid. The said Aaron Goodrich, having presented his account to the first auditor for his salary, from the 1st day of December, 1851, inclusive, to the 19th day of March, 1853, as mentioned above, the said auditor, by report, dated the 6th of December, inst.: 'That Aaron Goodrich is not entitled to the salary now claimed by him,' and accordingly he disallowed and rejected said claim. Mr. Goodrich appealed from that decision to this office, under provision in the 5th section of an act approved Sept. 2nd, 1789, entitled 'An act to establish the treasury department' [1 Stat. 66, 67]. The facts mentioned have been duly considered. The law organizing the territory of Minnesota among other things provides: 'That the judicial power shall be invested in a supreme court, &c.; that the supreme court shall consist of a chief justice and two associate justices, &c.' That the chief justice and associate justices shall be nominated, and by and with the advice and consent of the senate, appointed by the president of the United States. 9 Stat. 406, 407, §§ 9, 11. When the president and senate of the United States exercise a power, which in their opinion has been conferred on them by the constitution or by the law of the United States, the accounting officers have not the authority or right to say officially that the exercise of such power is unconstitutional and illegal, and should be by said accounting officers disregarded and held for naught. There can be only one chief justice in the supreme court in the said territory, and the president of the United States having thought proper to remove Chief Justice Goodrich, and having nominated, and by and with the consent and advice of the senate appointed, Jerome Fuller chief justice, in the room and stead of the said J. C. Goodrich, I am bound as an accounting officer to consider said removal and appointment as legal. In consideration of the facts and the law, my decision is that the United States are not indebted to Aaron Goodrich as chief justice of the supreme court of the territory of Minnesota, and the decision of the first auditor in the premises is confirmed and established. Elisha Whittlney."

Whereupon the said petitioner, by A. H. Lawrence, Esq., his attorney, moved the court for a rule upon the secretary of the treasury, to show cause, if any he can, why a writ of mandamus should not issue, according to the prayer of his petitioner, which motion having been argued, and the court having fully advised, on the 12th day of December, 1853, ordered that the said motion be overruled, and that the prayer of the said petitioner be rejected.

[The case was taken to the supreme court on a writ of error, where the judgment of this court was affirmed, with costs; Mr. Justice McLean, dissenting. 17 How. (58 U. S.) 284.]

Case No. 15,272.

UNITED STATES v. GWYNNE.

[1 McLean, 270.] [1]

Circuit Court, D. Ohio. July Term, 1836.

PAYMASTERS OF ARMY — PAY AND EMOLUMENTS.

Paymasters of the army are entitled to receive the pay and emoluments of majors of infantry, and not majors of cavalry.

[Error to the district court of the United States for the district of Ohio.]

[This was an action by the United States against David Gwynne.]

[1] [Reported by Hon. John McLean, Circuit Justice.]

Mr. Swayne, Dist. Atty., for the United States.

Mr. Hammond, for defendant.

OPINION OF THE COURT. This case is brought into this court by a writ of error, from the district court. And it has been continued from time to time, until the case of Wetmore v. U. S., pending on a writ of error in the supreme court, should be decided. That case was decided at the last term. 10 Pet. [35 U. S.] 647. The action is brought to recover from the defendant, a certain amount of money, alleged to be in his hands, as late paymaster, in the army. The defendant admits that he withheld from the government the sum which they demand, but he alleges that he has justly withheld it, as a part of his compensation as paymaster, which the government officers have refused to allow. This difference arises from the pay allowed to the defendant as paymaster, the same as a major of infantry, and he claims under the law, the same pay as a major of cavalry. In the above case the supreme court decided that the allowance made by the government was correct, and that a paymaster is entitled only to the same pay as a major of infantry. As this decision is binding it is unnecessary to present my own views of the case. And I gladly embrace the opportunity of publishing the opinion of the lamented Judge Campbell, district judge, which was given in the district court, and which arrived at the same result as the supreme court.

CAMPBELL, District Judge. This is an action of debt brought upon a bond for the payment of $20,000, with the condition that the defendant who had been appointed a battalion paymaster, "should well and truly execute and faithfully discharge, according to law, and to instructions received by him from proper authority, his duties as paymaster, and that he and his heirs, executors or administrators, should regularly account, when thereunto required, for all money received by him from time to time, as paymaster aforesaid, with such person or persons as should be duly authorized or qualified on the part of the United States for that purpose; and also refund at any time when thereunto required, any public monies remaining in his hands unaccounted for." The declaration avers a breach of the condition in this, that the defendant had failed to refund to the United States $2,381.39, a balance found to be in his hands, on the final settlement of his accounts as paymaster, at the treasury department. The plea is non est factum. It was agreed by the counsel, at the bar, that the only question to be decided was, whether the defendant as paymaster, during the time he served as such, was entitled to the pay of a major of infantry, or of a major of cavalry. In determining this question, the safest reference will be to the laws on this subject. It may also be necessary to advert to acts of congress long since repealed. By the act of March 16, 1802 [2 Stat. 132], for fixing the military peace establishment of the United States, the appointment of one paymaster of the army, seven paymasters and two assistants, to be attached to such districts as the president of the United States shall direct, to be taken from the line of commanding officers, was authorized; and by the same act each paymaster was to receive in addition to his pay in the line $30 per month. The fourth section of the same act settles the pay of a major of infantry at $50 per month, and four rations per day. By the fourth section of the act of April 12, 1808 [Id. 481], the pay of a major of light dragoons, was fixed at $60 per month, four rations per day, and forage for four horses. Here it may be remarked, that this section is often referred to as establishing the pay of a major of cavalry, by the term major of light dragoons. The first section of the act of May 16, 1812 [Id. 735], requires the president to appoint as many district paymasters, as in his judgment, the service might require; and if such paymasters are taken from the line of the army, they shall respectively receive $30 per month, in addition to their pay in the line; provided, the same shall in no case exceed the pay and emoluments of a "major;" and if not taken from the line, they shall receive the same pay and emoluments of a major of infantry. It is obvious that under this section the compensation of a paymaster, whether taken from the line or from citizens, should be the same; although the terms "major," and "major of infantry," are used. In the expence, duty, and accountability of a paymaster taken from the line, and of one not taken from the line, there could be no difference; and hence it is difficult to understand, why the one should receive the pay of a major of cavalry, which was $60 a month, and the other $10 less. By the act fixing the military peace establishment of the United States, approved March 3, 1815 [3 Stat. 224], it was contemplated to reduce the army to ten thousand men, to consist of such proportions of artillery, infantry, and riflemen, as the president should think proper; and the corps of engineers, as then established to be retained. The same act required the appointment of paymasters to be made from the subalterns of the line. This act is referred to mainly for the purpose of showing that no cavalry were retained in service. On the 24th of April, 1816 [Id. 297], an act was approved organizing the general staff, and making further provisions for the army. The fourth section authorized the appointment of paymaster from the subalterns of the army, or from citizens, as the president might prefer; and entitled them to the pay and emoluments of a major, without indicating expressly whether of a major of infantry or of a major of cavalry. At the time this act was passed there were no cavalry in service, and of course no major of cavalry.

In deciding the question which this case presents, it is proper to be governed by the amount of pay and emoluments allowed to some officer of the designation of major, known to the existing laws of the country. To this rule it seems to me there can be no valid objection. If applied then, it conducts us to majors of engineers, artillery, infantry, and riflemen, to all of whom is allowed the same compensation, to wit, $50 a month, and four rations a day respectively. To fortify this conclusion, it may be remarked that judge advocates, and chaplains, are allowed the same compensation to which majors are entitled. And it will hardly be contended that they can set up any just claim to the pay of a major of cavalry. In making provision for the corps of engineers and military academy, the allowance to the professor of natural and experimental philosophy was established at that of a lieutenant colonel; not a lieutenant colonel of cavalry. So to the professor of mathematics, and to the professor of the art of engineering, the pay and emoluments of a major, but not of a major of cavalry. Although no definite and precise rule is given by which to determine what compensation was to be paid to these professors respectively, yet as the adjunct cavalry is not used, no doubt is left they are to receive the pay and emoluments of a lieutenant colonel and major of infantry; and such is the fact as appears by a tabular statement of what is paid to every person in any wise connected with the service, appended to rules and regulations of the army, revised in 1817.

The deposition of General Scott has received a full share of my attention. He states that since the passage of the act of March 3, 1813 [2 Stat. 819], paymasters have received the compensation of a major of cavalry. In his compilation, to which he refers, in settling official rank, he is governed by the amount of pay and emolument. This rule induces him to place judge advocates, chaplains, and paymasters in the same grade, which as he believes entitles each of these officers to the allowance of a major of cavalry. In this matter there must be some mistake. The general, or other officers of elevated standing, must, as I apprehend, labor under some misapprehension. The table to which I have already alluded, shows beyond doubt, that the compensation granted to judge advocates, chaplains, and paymasters, is that of a major of infantry; and so say the accounting officers of the treasury department.

From the consideration which I have bestowed upon this case, I feel little hesitation in giving it as my opinion, that the defendant is intitled to the pay and emoluments of a major of infantry, and nothing more.

Case No. 15,273.

UNITED STATES v. HADE.

[See Case No. 15,274.]

Case No. 15,274.

UNITED STATES v. HADE.

District Court, N. D. Ohio. 1877.

NATIONAL BANKS — EMBEZZLEMENT BY CASHIER — INDICTMENT BY GRAND JURY.

On motion to quash an information for abstracting and misapplying funds of a national bank, *held*, that the charge of misapplying the funds of a national bank by its cashier is a charge of an "infamous crime," which, under the constitution of the United States, must be instituted by indictment of a grand jury, and cannot be prosecuted by a mere information filed by the district attorney with the assent of the court. The information was quashed.

[Decided by WELKER, District Judge. Nowhere reported; the opinion filed in clerk's office. The statement of the points determined was taken from 10 Chi. Leg. News, 22.]

Case No. 15,275.

UNITED STATES v. HAINES et al.

[5 Mason, 272.] [1]

Circuit Court, D. Massachusetts. May Term, 1829.

SEAMEN—OBEDIENCE—NEW MASTER—REVOLT.

1. The crew of a ship who have signed shipping articles for the voyage under a particular master, without any clause providing for a change of master, are not discharged from the articles by the dismissal of the master by reason of sickness, or any other reasonable cause, and the appointment of a new master; but they are bound to obey the new master.

[Cited in U. S. v. Nye, Case No. 15,906.]

2. If in such case they combine together to refuse all duty on board, and to refuse obedience to the new master, that is an endeavour to make a revolt, within the meaning of the crimes act of 1790, c. 9 (36), § 12 [1 Stat. 115; 1 Story's Laws, 85.]

[Cited in U. S. v. Gardner, Case No. 15,188; U. S. v. Forbes, Id. 15,129; U. S. v. Huff, 13 Fed. 636.]

Indictment against the defendants [Benjamin Haines and others] for an endeavour to make a revolt on board the ship Plato, in Boston harbour, founded on the crimes act of 1790, c. 36 (9), § 12 [1 Story's Laws, 85; 1 Stat. 115]. Plea, not guilty. At the trial it appeared in evidence, that the ship was owned by American citizens, and was bound on a voyage from Boston to Havana, from thence to ports in Europe, from thence to the East Indies, and back to Europe or the United States; and that one Thomas Dimmock was master. The defendants were seamen on board, and had shipped for the voyage under the common shipping articles, in which Thomas Dimmock was described as master, and there was no clause, "or whoever else shall be master for the voyage," in the articles. The ship being ready for the voyage dropped down to the outer harbour of Boston, called "Nantasket Roads," to proceed to sea, about the 10th of June, 1829.

[1] [Reported by William P. Mason, Esq.]

But the master, before actually proceeding to sea, was taken ill with a dangerous disease; and in consequence of his illness it became necessary to substitute another master for the voyage. The new master (who was a competent and suitable master) came on board with some of the owners, while the ship lay in Nantasket Roads, and the necessity of the change of the master was stated to the seamen. They made no particular objection to the new master, whose character did not appear to be known to them; but the defendants and another of the crew (in all seven) contended, that their contract was dissolved by the removal of the master, and they accordingly refused to go on the voyage. Orders were given by the new master to weigh anchor and proceed to sea; which the defendants refused to obey; and those of the crew who were ready to obey, took the starboard side of the ship, and the defendants and those who acted with them took the larboard side. The master and owners then resorted to persuasion, and endeavoured to induce the defendants to return to their duty, and to obey the orders; and each being severally asked, refused, though the legal consequences of their refusal was stated to them. They offered no force to the master or owners, and used no threatening or insulting language. The defendants were then carried on shore, and being apprehended on a warrant, were brought before the district judge, who upon the examination explained the law to them, and urged their return to duty. But they refused, and were committed for trial. The owners, upon the examination, expressed an entire willingness to take them on board again, and to forgive and forget the past, if they would go upon the voyage; but these offers had no effect.

Dist. Atty. Dunlap, for the United States.

S. D. Parker, for defendants.

Two points were made in the defence: (1) That the contract of shipment was dissolved by the appointment of a new master. (2) That the acts of the defendants did not amount to the legal offence charged in the indictment. On the last point, the case of U. S. v. Kelly, 11 Wheat. [24 U. S.] 417, was cited.

Mr. Dunlap, in reply, cited U. S. v. Hamilton [Case No. 15,291], U. S. v. Smith [Id. 16,337], and U. S. v. Hemmer [Id. 15,345], and he contended, that the case U. S. v. Kelly, 11 Wheat. [24 U. S.] 417, was in no respect variant from the doctrine stated in the latter cases.

STORY, Circuit Justice, in summing up to the jury, said: The principal facts in the case are not disputed; and the only question of fact suggested for consideration in the defence is, whether the defendants acted and co-operated together in a common purpose, or separately refused duty without any encouragement or mutual understanding. Upon this the jury will pass their judgment, though as the parties were all present and refused duty at the same time, and separated themselves from the rest of the crew, there would not seem much room to doubt as to their conduct being governed by a common combination and encouragement. A mere refusal to do duty on the part of a single seaman, without any attempt to encourage, or aid, or influence any others of the crew to the same act, would certainly not amount to an endeavour to commit a revolt. There must be some effort or act, to incite or encourage others to disobedience, or some common combination, or understanding, to act together for mutual encouragement or support in such disobedience.

There are two questions of law arising upon the facts. The first is, whether in the case of a dismissal of a master for a reasonable cause without fraud, the contract with the seamen is dissolved, unless the shipping articles contain some clause providing for the substitution of a new master, so that the seamen are not bound to perform the voyage, or to obey the new master. The second is, whether, supposing there was a mutual co-operation and combination of the defendants to refuse duty, and to disobey the new master, that amounts to an endeavour to make a revolt.

We do not think there is any real difficulty in either point.

As to the first, the contract created by the shipping articles is not, by the maritime law, a contract exclusively between the existing master and the seamen for the voyage. It is rather a contract between the seamen and the owner through the instrumentality of the master, as agent of the owner, than on his own account. For the performance of the contract, however, the seamen have the security of the master and the owner, and also of the ship itself, by a lien thereon for their wages. There is an implied right of the owners to substitute any other master during the voyage, and an implied obligation on the part of the seamen to obey the master for the time being. If, indeed, they do not expressly assent to the substitution, as between themselves and the original master, he may not be absolved from his responsibility for the wages antecedently due. But this does not affect the right of the owner to appoint another master. It would be most injurious to the interests of commerce and navigation, if any other rule prevailed. If the shipping contract were dissolved by the mere change of master, in whatever stage of the voyage it might occur, the whole objects of the voyage might be defeated by the delays incident to the shipment of a new crew, and the exposure of the property to extraordinary risks. The master might die, might be disabled, or might misconduct himself in the course of the voyage, so that there

might arise a necessity of appointing a new master. It might occur at sea, or in a foreign port. And if by such an event, the shipping contract was dissolved, there would be an end of all obedience, and of all right to wages, for any subsequent services. The ship might, if the master should die on the sea, be exposed to the most imminent perils. She might even be lawfully deserted, and left to the unbroken power of the winds and waves. There would be an end of all command and all obedience on board. Such a state of things never could have been contemplated by the maritime law; and the very circumstance that the mate in such a case has been adjudged to succeed rightfully to the ordinary command as master, is decisive against its legal existence. In truth, if the law were so, it would be not less disastrous to the seamen themselves. They might be dismissed in a foreign port, at a distance from their homes, in a desert island, or in short at any other place, where the occurrence might take place; and left to work their way to their own country in the midst of every sort of hardship and peril. It is, therefore, not desirable, in any view of the matter, for any party, that such a principle should be recognized as law. We have no difficulty in declaring, that the shipping articles were not dissolved by the change of the master; and that the maritime law still held it obligatory upon all the parties. The new master, succeeding to the old by the authority of the owner, became the lawful master for the voyage; and the seamen were bound to obey him, as such, during the voyage. This, indeed, has been repeatedly adjudged in this court in the cases cited at the bar, and others; and we see no reason to change our opinion.

As to the second point,—assuming that there was a mutual co-operation and combination of the defendants not to do duty, but to disobey the master, the question is, whether it amounts to an endeavour to commit a revolt in the sense of the statute. We are clearly of opinion, that it does. What is a revolt? It is an open rebellion or mutiny of the crew against the authority of the master, in the command, navigation, or control of the ship. If the crew in a mutiny were to displace him from the actual command of the ship, and appoint another in his stead, that would clearly be a revolt. It would be an actual usurpation of his authority on board of the ship, and an ouster of him from the possession and control of it. But there may be a revolt independent of the appointment of another to the command. If the crew should compel the master against his will, by threats or otherwise, to navigate the ship, or manage her concerns, according to their own directions, and prevent him from the free exercise of his own judgment, that would be an effectual usurpation of the command of the ship, and in the sense of the law, a revolt. In short, whenever, by the overt acts of the crew, the authority of the master in the free navigation or management of the ship, or in the free exercise of his rights and duties on board, is entirely overthrown, and there is, intentionally caused by such acts, a suspension, actual or constructive, of his power of command, it is a revolt of the crew. Direct, positive force upon the master is not essential; positive constraint or imprisonment of the master is not essential. A total refusal to perform any duty on board, until he has yielded to some illegal demand of the crew, when it has produced de facto a compliance, or a suspension of his power of command, is a revolt. And any act, or attempt, or combination to produce such a revolt, is an endeavour to make a revolt. These cases are not put as the only ones, in which a revolt may exist. They are put merely as examples and illustrations of the doctrine. If an army by a general combination refuse obedience to all orders of their commander, it is just as much a revolt, as if they had by the same combination compelled him to obey the orders of an usurper. The offence is in each case the same in its essence, though it may differ in the degree of aggravation. In each case there is a total suspension of his power of command by the illegal acts. The doctrine, which is here stated, has been often held in this court, and particularly in the cases of U. S. v. Smith [Case No. 16,337], and U. S. v. Hemmer [Id. 15,345]. We see no reason to doubt it, or to depart from it.

But it is supposed, that the case of U. S. v. Kelly, 11 Wheat. [24 U. S.] 417, inculcates a different doctrine. If it does, we are certainly bound by it. But I feel the utmost moral certainty, that such was not the understanding of the court itself; and though there is some slight foundation in the language used in that opinion for the present argument, a close examination of it will not justify the conclusion, that it is at variance with what we have now asserted as our own opinion. That case was brought before the court for the mere purpose of ascertaining, whether, as the act of congress does not define the offence of endeavouring to make a revolt, it was competent for a court of law to give a judicial definition of the offence. There had been a doubt expressed elsewhere, whether it was not indispensable, that congress should have defined what a revolt was, before the court could proceed to punish it; and that doubt had been followed up by a decision, that such a definition by congress was indispensable, and that decision had led to an acquittal of the person charged with the offence. So that the act of congress, so far as it touched this offence, was reduced to a nullity. My learned brother, Mr. Justice Washington, and the district judge of Pennsylvania, thought it their duty, under such circumstances, to bring the point, when it arose before them, to the supreme court for a final decision. And the supreme court overruled the decision above alluded to, and held

it competent for the court to give a definition of the offence, and punish it under the act of congress. Mr. Justice Washington, in delivering the opinion to the court on that occasion, said, that "the offence consists in the endeavour of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of the commander, with intent to remove him from his command." But this language does not import, that the removal from the command must be by physical force. The court look to the fact, whether there is an overthrow of the master's authority, or a removal of him from his command, intended; and not to the mode by which it is accomplished. The overthrow of authority may be just as complete, the removal from command may be just as effectual, by a universal disobedience to all orders, producing an actual suspension of the master's authority or command, as by actual force, or personal imprisonment, or driving the master on shore. The subsequent language of the court demonstrates, that it had in its view, in this part of the opinion, not only cases of forcible, but of constructive, removal from command; for the court go on to say, "or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their obedience from one lawful commander to some other person." Now these passages show, that the court, by using the disjunctive "or," had in contemplation some classes of cases, not minutely specified in the preceding clause. If no other acts but such as the disjunctive clauses embraced were endeavours to make a revolt, in the sense of the act, the preceding clause was wholly unnecessary. But it was perfectly proper, if the latter clauses were only illustrations of a few cases comprehended under the more general description in the first clause. At all events, no person can say, that the definition contained in the first clause is to be rejected; and in the view we take of its true exposition, there is nothing in it, that trenches upon the opinions held by this court. In truth, I consider the definition given by the supreme court not to have been designed to have more than an affirmative operation; that is, to declare that such acts would amount to the offence, and not negatively, that none others would.

I was one of the judges who concurred in the opinion given in the supreme court; and it was matter of utter surprize to me, when I first learned that such a narrow interpretation of it, as is now contended for, had been contended for at the bar. I have reason to know, that it was equally a surprize upon others of my brethren who concurred in that opinion.

Upon the whole, thinking as we do, that there is no real repugnancy between the opinion of the supreme court and our own, we adhere to the latter, and give it as law to the jury.

Verdict guilty, and sentence accordingly.

Case No. 15,276.

UNITED STATES v. HALBERSTADT.

[Gilp. 262.] [1]

District Court. E. D. Pennsylvania. March 31, 1832.

NEW TRIAL—MASTER AND SERVANT—FAILURE TO DEFACE MARKS OF SPIRIT CASK—PENAL ACTION.

1. In a civil action, brought to recover a pecuniary penalty, the court has full power to grant a new trial, although the verdict was in favour of the defendant.

[Cited in U. S. v. Fox, Case No. 15,155.]

2. The responsibility of a merchant for the negligence or unlawful acts of his clerk, is limited to cases properly within the scope of his employment.

3. Where an empty cask, which had contained foreign distilled spirits, has been purchased for, and removed to the store of, a commission merchant by his clerk, before the marks set thereon under the provisions of the act of March 2, 1799 [1 Stat. 627], have been defaced, the former is not liable to the penalties of the act, if he had no agency in or knowledge of the purchase and removal, nor acquiesced in the illegal proceeding of his agent.

4. The provisions of the act of March 2, 1799, which require certain marks to be set upon casks containing foreign distilled spirits, are not repealed, directly or constructively, by the act of April 20, 1818 [3 Stat. 469], requiring the deposit of distilled spirits in the public warehouses.

By the forty-fourth section of the act of congress of March 2, 1799, regulating the collection of duties on imports and tonnage, it is provided, that on the sale of any empty cask which has been branded or marked by the officers of inspection as containing foreign distilled spirits, prior to the delivery of it to the purchaser or any removal of it, the marks so set thereon are to be defaced in the presence of an officer of inspection or of the customs; and "every person who shall sell, or in any way alienate or remove, any cask, which has been emptied of its contents, before the marks and numbers set thereon shall have been defaced and obliterated in the presence of an officer of inspection, shall for every such offence, forfeit and pay one hundred dollars, with costs of suit." On the 19th April, 1831, twenty-nine empty casks, which had formerly contained foreign distilled spirits, were found at the store and in the possession of the defendant [John Halberstadt,], who was a general commission merchant, having been purchased since they were emptied of their contents, and the marks and numbers set upon them at the time of importation not being defaced or obliterated. On the representation of the collector of the customs, the district attorney brought suits against the defendant, to recover the penalty of one hundred dollars, accruing on the purchase or removal of each cask. On the 27th February, 1832, the first of these suits came on to be tried before Judge Hopkinson and a special jury. The

[1] [Reported by Henry D. Gilpin, Esq.]

facts of the purchase of the empty casks, and of their being removed to the warehouse of the defendant, without the marks being defaced, were not denied. Evidence, however, was given to show that he was in the habit of making large and extensive purchases of empty casks, to be sent to Messrs. H. & H. Canfield, merchants in New York, and correspondents of the defendant; that the casks in question were purchased by Mr. Campion, a clerk of the defendant, not for himself, but for and by the direction of the latter, by whom they were paid for, and from whose store they were to be forwarded to New York; but that the defendant had not given any directions in regard to the particular kind of casks, and knew not that the marks were yet upon them, until notice of the fact was given to him by the officers of the customs, by whom they were found at his store. On this evidence, Judge Hopkinson charged the jury, that although it was apparent the law had been violated, yet as neither the purchase nor removal had been made by the defendant, the fact of his having either directed or acquiesced in the act of his agent must be established, to make him liable to the penalty; and that they must ascertain this fact from the whole evidence, and especially from the whole conduct of the defendant, from all that he had said and done. Under this charge the jury found a verdict for the defendant. On the 30th March, 1832, a motion was made on behalf of the United States for a new trial, on three grounds: (1) That the verdict of the jury was against the weight of evidence. (2) That the verdict of the jury was against law. (3) That the court erred in charging the jury, that the defendant was not liable for the acts of his agent, if he had no direct personal agency, nor acquiesced in the acts on which the suit was founded.

Mr. Gilpin, Dist. Atty., for the United States. The evidence on the trial was sufficient to show that the defendant was the principal person in the whole transaction. He directed his clerk to purchase these casks; he had long been in the habit of purchasing them; he must have seen them as they were placed in his store; he could not have failed to know that the marks were still on them. It is not necessary to establish positive and explicit directions; it was his duty to see, that in employing a person to do a particular act, the law was not violated. A violation of the law produced by his neglect, and when the act was for his benefit, is to be punished as much as if done by his previous authority. The very neglect to disavow the act of an agent, when it must be well known, is an acknowledgment of its being done with the assent of the principal, and is a participation in it. If the act be criminal, this participation makes the principal equally liable with the actual offender; he may be punished criminally; à fortiori, he is subject to a mere action of debt. 1 Story's Laws, 611 [1 Stat. 660]; Parsons v. Armor, 3 Pet. [28 U. S.] 428; Del Col v. Arnold, 3 Dall. [3 U. S.] 333; Com. v. Gillespie, 7 Serg. & R. 469; Bredin v. Dubarry, 14 Serg. & R. 27; Upton v. Gray, 2 Greenl. 373; State v. Heyward, 2 Nott & McC. 312.

Mr. Chew, for defendant. There are three grounds on which this motion should be refused by the court: (1) It is not a case for a new trial. (2) The section on which the suit has been brought is virtually repealed. (3) The violation of it, if culpable, cannot be charged on the defendant.

(1) This is in effect a criminal prosecution; the object is to punish the defendant for a violation of a public law; a verdict in his favour is an acquittal. Under such circumstances the court ought not to grant a new trial. Especially they should not, on the ground of evidence, on any matter of fact. Now even if the view of the law taken by the district attorney is right, it depends for its effect entirely on the view of the controverted facts taken by the jury. It is a question of evidence; and no case can be shown where on such a question, involving a serious penalty, the verdict has been set aside.

(2) This provision is obsolete. The object of marking the casks was solely for the security of the revenue. It was intended to ascertain what articles were entitled to drawback. Until 1818 such a security was necessary; but it was then found ineffectual, and another mode to attain the same object was adopted. Since the act of the 20th April, 1818, casks containing foreign distilled spirits are only entitled to drawback, by being kept in the public stores from the time of importation to that of exportation. It is now entirely immaterial, for any purpose connected with the revenue, whether the marks are erased or not. This is the sole purpose for which the law was made. It never was intended to operate against private frauds. 3 Story's Laws, 1715 [3 Stat. 470]; Sixty Pipes of Brandy, 10 Wheat. [23 U. S.] 421; U. S. v. The Polly and Jane [Case No. 16,063].

(3) It is not pretended that this defendant committed the act alleged to be illegal; he certainly never did it. It is not pretended he even directed it to be done; there is no evidence of such a fact. It was not necessary for any object he is proved to have had. Now admitting that a principal is liable for a criminal act of his agent, in which he participates; yet all the facts being conceded, they do not amount to such participation.

Mr. Gilpin, for the United States, in reply. There is nothing in this case to exclude it from the usual rule for granting a new trial; that is, a misunderstanding of the jury as to the law and facts. If there was an error in the construction given to the law, in regard to the liability of the defendant for his agent's act, which it is contended there was,

then this case falls within a class of cases, where new trials have been repeatedly granted. If there was no such error, no ground exists for a new trial, and it is not asked. Wilson v. Rastall, 4 Durn. & E. [Term R.] 753. As to a repeal of the law, it is certainly not express, for none is to be found. Nor is it inferential; for although it may be true that one object of the marks on casks was to ascertain such as are entitled to drawback, yet many other objects of a public nature and connected with the revenue might be pointed out, and no doubt were intended to be provided for. It is part of the general system for collecting the revenue on wines, spirits and teas; it cannot set aside without changing essentially numerous regulations and provisions: to do this by such a sweeping and sudden repeal, never could have been intended: to effect it by a mere construction of a section of a law, which does not contain the least allusion to such an intention, is going farther than this court can authorise.

HOPKINSON, District Judge. This suit is an action of debt brought to recover the penalty given by the forty-fourth section of the revenue act of March 2, 1799. By that it is enacted, "that on the sale of any cask, chest, vessel or case, which has been or shall be marked pursuant to the provisions aforesaid, as containing distilled spirits, wines or teas, and which has been emptied of its contents, and prior to the delivery thereof to the purchaser, or any removal thereof, the marks and numbers which shall have been set thereon, by or under the direction of any officer of inspection, shall be defaced and obliterated in the presence of some officer of inspection, or the customs;" and any person "who shall sell, or in any way alienate or remove any cask, chest, vessel or case which has been emptied of its contents, before the marks and numbers set thereon, pursuant to the provisions aforesaid, shall have been defaced or obliterated in the presence of an officer of inspection, as aforesaid, shall for each and every such offence forfeit and pay one hundred dollars."

On the trial, a verdict was rendered for the defendant in conformity with the charge of the court, and a motion has been made, on the part of the United States, for a new trial, grounded on the following reasons: (1) That the verdict is against the weight of evidence. (2) That it is against law. (3) That the court erred in charging the jury that the defendant was not liable for the acts of his agent, if he had no direct personal agency in them, nor acquiesced in the acts on which the suit is founded.

The power of the court to grant a new trial in a penal action when the verdict is in favour of the defendant, has been argued at the bar. Upon this subject, in the case of Wilson v. Rastall, 4 Durn. & E. [Term R.] 753, Lord Kenyon says: "It has been said that if we grant a new trial in this case we shall innovate on the practice of those who have gone before us; but that was more easily asserted than proved; for there is not a single instance where a new trial has been refused in a case where the verdict has proceeded on the mistake of the judge. Where, indeed, the jury have formed an opinion on the whole case, no new trial in a penal action has been granted, though the jury have drawn a wrong conclusion; but where a mistake of the judge has crept in and swayed the opinion of the jury, I do not recollect a single case in which the court has ever refused to grant a new trial." The chief justice of course lays all the cases of indictments out of the question, because they are criminal cases; but he considers this a civil action. Judges Buller and Grose concurred in this opinion. The question was moved again in the case of Calcraft v. Gibbs, 5 Durn. & E. [Term R.] 19, and Lord Kenyon repeats his former opinion.

The first objection to the verdict then, if true, would not be a reason for a new trial. But in fact the verdict is in full accordance with the evidence, if the court was right in the law which was given to the jury. This is the only real point on this motion. The evidence was, that the casks in question came to the store of the defendant when he was absent from the city. The witness who testified this fact was the clerk and bookkeeper of the defendant, and he further says, that he does not think the defendant ever saw them. The witness did not know where they came from; they were brought to the store by a porter, under the direction of Mr. Campion; he believes Mr. Campion purchased them, and paid for them, and shipped them to New York. Mr. Campion was acting as clerk to the defendant. He was purchasing casks; but the witness could not say whether for himself, or for defendant, or for both. The defendant followed the commission business. These casks were introduced into the books of defendant as shipped for him to New York. The questions of fact resulting from this evidence were, of course, left to the jury; that is, whether the casks belonged to Mr. Campion or the defendant; for whom were they purchased; who was the real owner of them; whether the purchase was made by Mr. Campion for the defendant, as his agent and on his account; whether the purchase and removal of them in violation of the law occurred without the knowledge, direction or acquaintance of the defendant? I instructed the jury that if in their opinion the defendant had no agency in, or knowledge of the purchase and removal of the casks, nor any acquiescence in the illegal proceedings by his agent, although he might be the owner in whole or in part of the casks, he was not liable to the penalties of the act; but the punishment should be visited on the offender, or the person who actually sold or removed the casks in violation of the law. Such are the words of the act of congress; and unless the acts of an agent, in such a case, can be imputed to his principal, although unauthorized

by him and unknown to him, the instruction of the court was right.

The case relied upon by the district attorney, to sustain his objection to the verdict, seems to me to be all sufficient to support it. It is the case of Com. v. Gillespie, 7 Serg. & R. 469. It was an indictment for selling lottery tickets, not authorised by the laws of the commonwealth. The opinion of the supreme court of Pennsylvania, delivered by Judge Duncan, on the point we are considering, is found in page 477. He says: "The evidence was, that a lottery office was kept in a house rented by Gillespie in this city, for several years, under a sign in the name of Gillespie's lottery office; that Gregory, a young lad, acted as his servant or agent in that office, and sold the ticket produced in evidence, a New York literature lottery ticket, and endorsed in the name of Gillespie; a lottery not authorised by the laws of the commonwealth; that Gillespie occasionally visited Philadelphia. I did not instruct the jury," said Judge Duncan, "that Gillespie was criminally answerable for the act of his agent or servant, but I left them to decide whether, from the whole body of the evidence, Gillespie was concerned in the sale of the ticket." The judge, after stating the evidence, continues: "These were circumstances from which the jury might infer his participation in the sale of the ticket." The judge afterwards proceeds: "If they found he had not participated in the transaction, they were instructed to acquit him." In my charge to the jury I directed them, that the defendant was not liable for the acts of the agent, unless he had some agency in or knowledge of them; which is certainly not so strong as the language of Judge Duncan, that the jury must acquit unless they found the defendant "had participated in the transaction."

On general principles of responsibility of one for the acts of another, the defendant cannot be answerable, penally or even civilly, for acts not done by his direction, by his authority, with his knowledge, or within the scope of his authority. In the case of Parsons v. Armor, 3 Pet. [28 U. S.] 428, referred to by the district attorney, it is said that "the general rule is, that a principal is bound by the acts of his agent no further than he authorises that agent to bind him." It is truly added that "the extent of the power given to an agent is deducible as well from facts as from express delegation." In Paley's work on Agency (page 226): "The responsibility of the master for the servant's negligence, or unlawful acts, is limited to cases properly within the scope of his employment." This is the rule as to a civil liability, and the case given is that of an action brought against the owners of a ship for goods lost by the carelessness of the master: there, judgment was given for the defendant, because it did not appear that the ship was actually employed to carry goods for him, for Lord Hardwicke remarked that "no man could say that the master, by taking in goods of his own head, could make his owners liable." It is no doubt true, as stated by Paley, that "if a man employ an agent in the commission of a fraud, he is clearly liable for it himself, as if a goldsmith, by his servant, puts off counterfeit plate, or a taverner corrupts wine." It is added, that "employers are also civilly liable for frauds committed by their agents, without their authority, if done in their employment;" but by that I understand, not merely that the agent was employed by the principal for some purposes, but in the business in the prosecution of which the fraud was committed. If I employ one as a house servant, and he commits a fraud by forging my name, I am not liable for it. The agency must have some relation with the subject of the fraud. The utmost length to which any of the cases have carried the responsibility of a principal for his agent, is to compel him to make satisfaction civilly for an injury done to an innocent person, by the fraud or misconduct of the agent acting by his authority or in his employment. It is very clear, that this principle does not reach the case of a suit for a penalty under an act of congress, or under the circumstances which have been given in evidence in the case in question. If the defendant kept a commission store, the person who purchased and removed the casks was his clerk; and not employed by him, as far as we know from the evidence, to purchase casks or any thing else for him, much less to do so in violation of the act of congress. There was no error in the court's instruction to the jury, that the penalty could not be visited upon the defendant, unless he had some agency in the illegal transaction, or some knowledge of it. The offender against the law, was the person who purchased and removed the casks, without having the marks and numbers first defaced and obliterated according to the provisions of the act of congress; and he must answer for the offence who alone was guilty of it.

This is sufficient to decide the motion for a new trial, but it may be well to notice another matter that has been set up in the defence, for the purpose of correcting the error on which it is founded. We have seen that the suit was brought on the forty-fourth section of the act of March 2, 1799. It seems to have been the opinion of the defendant, that the provisions above alluded to, ordering that the marks and numbers on the casks shall be defaced and obliterated, are superseded and repealed, by the act of April 20, 1818; "providing for the deposit of wines and distilled spirits in public warehouses;" because it is enacted by the act, "that no drawback shall be allowed of the duties paid on any wines or spirits, unless such wines or spirits shall have been deposited in public or other stores, under the provisions of this act, and there kept, from their landing to their shipment." A constructive repeal of the former provisions is asserted, on the argument that the directions

for obliterating the marks were made, only to prevent frauds in obtaining drawback on wines and spirits not imported, but put into casks in which wines or spirits had been imported, and having the custom house marks and numbers as evidence of such importation. It is altogether a mistake. The provisions of the act of March 2, 1799, are in full force. There is no direct repeal of them, and an argumentative repeal must be much stronger than that now urged, before it should receive any attention. It is plain that other objects may have been in view, other frauds intended to be prevented, by directing the obliterations of the custom house marks from casks which have been emptied of their imported contents, besides the protection of the revenue against fraudulent claims of drawback.

It is not necessary to be more explicit upon so plain a point; but as the error is probably not confined to the defendant, I have thought it expedient to take this occasion to correct it.

The motion for a new trial is refused.

[NOTE. Subsequently, at the trial of another of these cases, Judge HOPKINSON charged the jury that the duty of obliterating these marks was upon the seller of the casks, and not upon the buyer. Under this instruction the jury found a special verdict, upon which judgment was entered for the defendant. Case No. 15,277; affirmed by circuit court, Id. 15,278.]

Case No. 15,277.

UNITED STATES v. HALBERSTADT.

[Gilp. 352.] [1]

District Court, E. D. Pennsylvania. May 29, 1833.[2]

PENAL ACTION — FAILURE TO DEFACE MARKS ON SPIRIT CASK—OWNER—ALIENATION—REMOVAL.

The provisions of the act of March 2, 1799 [1 Stat. 627], making it penal to sell, alienate or remove an empty cask, which had contained foreign distilled spirits, before the marks set thereon have been defaced, refer to a sale, alienation or removal by the owner to a purchaser or alienee, and not to a removal by the person who receives it after a purchase.

This was a second suit, brought by the attorney of the United States for the Eastern district of Pennsylvania, on the representation of the collector of the customs, against the defendant [John Halberstadt], to recover the penalty of one hundred dollars accruing on the purchase or removal of an empty cask, which had contained foreign distilled spirits, before the marks set thereon by the officers of the customs had been defaced. By the forty-fourth section of the act of March 2, 1799, regulating the collection of duties on imports and tonnage, it is provided, that on the sale of any empty cask, which has been branded or marked by the officers of inspection, as containing distilled spirits, prior to the delivery of it to the purchaser or any removal of it, the marks so set thereon are to be defaced in the presence of an officer of inspection or of the customs; and "every person who shall sell or in any way alienate or remove any cask, which has been emptied of its contents, before the marks and numbers set thereon shall have been defaced and obliterated in the presence of an officer of inspection, shall for every such offence, forfeit and pay one hundred dollars, with costs of suit." On the 29th May, 1833, the case came on to be tried before Judge HOPKINSON and a special jury. The facts of the purchase of the empty casks, and of their being removed to the warehouse of the defendant, without the marks being defaced, were admitted as on the former trial, and similar evidence was given to show that the purchase of the casks was made by a clerk of the defendant, but that he had not given any directions in regard to the particular kind of casks, and knew not that the marks were yet upon them, until notice of the fact was given to him by the officers of the customs, by whom they were found at his store. On the part of the United States additional evidence was produced, to show that the defendant had directed and acquiesced in the act of his agent.

Judge HOPKINSON informed the counsel that he did not expect to hear any of the points of law decided on the former trial [Case No. 15,276], again argued. That, while either party might have the benefit of excepting, he should charge the jury as he had done before. 1. That if in their opinion the defendant had no agency in, or knowledge of the purchase and removal of the casks, nor any acquiescence in the illegal proceedings by his agent, although he might be the owner, in whole or in part, of the casks, he was not liable to the penalties of the act; but the punishment should be visited on the offender, or the person who actually sold or removed the casks in violation of the law. 2. That the provisions of the forty-fourth section of the act of March 2, 1799, are in full force and not repealed by the act of April 20, 1818, providing for the deposit of wines and distilled spirits in the public warehouses.

Mr. Gilpin, for the United States.

The decision of the court made on the former trial, in regard to the points of law involved, leaves this principally a question of fact for the jury. The evidence on the part of the United States is materially changed, and is now clearly sufficient to show that the defendant was the principal person in the whole transaction; that he not only directed his clerk to make these purchases, but that he recognised his acts after he had done so. If so, this will afford just ground for the jury to find that the defendant did remove the casks, described in the declaration, without having the marks erased therefrom, which is the offence by which the penalty is incurred.

[1] [Reported by Henry D. Gilpin, Esq.]

[2] [Affirmed in Case No. 15,278.]

Mr. Chew, for defendant.

It is not admitted that the testimony in this case establishes a participation of the defendant in any illegal acts of his clerk; on the contrary, the weight of evidence on this, as on the former trial, is against any such participation. The decision of the court on that occasion has settled the law conclusively as to this case. There is, however, another ground not taken on the former trial. The act of congress refers exclusively to the seller and not to the purchaser of the cask; it was impossible for any but the seller to have any of these marks obliterated; it was his duty. The law is the same with the certificates as with the marks; and it has been decided that certificates must be surrendered on the sale of the casks by the seller. 1 Story's Laws, 611, 612 [1 Stat. 660]; Peisch v. Ware, 4 Cranch [8 U. S.] 347; Sixty Pipes of Brandy, 10 Wheat. [23 U. S.] 421; U. S. v. Chests of Tea, 12 Wheat. [25 U. S.] 486.

Mr. Gilpin, for the United States, in reply.

The removal meant by the act of congress refers to both seller and purchaser. This is evident by the express words of the law. The law states removal as well as alienation. If the seller is only meant, why say more than delivery? The seller can do no more; yet the law says on removal. The act of the seller is complete on alienation and delivery, a removal is for the purchaser. If the penalty only attached to the seller, why not limit the provision of the law to alienation and delivery? This is also shown by an examination of the other parts of the law. The law intends to have certain marks for its use; to have them at certain times, to abolish them at others; all who violate this are punishable. Every person having a cask which is full must have a certificate and the marks upon it, whether he be a purchaser or the original importer. So every person having a cask which is empty, must have the marks erased. In other sections of the law we find wrong removals punished, as in the case of any person concerned in removing goods not having a permit, or not weighed; so, by this law any person removing casks, not as the law requires them, is to be punished in the manner provided. The buyer is bound and is able to know it is wrong, as well as the seller; he is not an innocent sufferer; he can use these casks, he can carry them abroad and refill them. If any person may buy and remove, there is an end to preventing fraud on revenue. Where a party has it in his own power to avoid a penalty and does not do it, it is incurred. Here the buyer could and ought to avoid it, and he does not. 1 Story's Laws, 617 [1 Stat. 665]; Six Hundred & Fifty-One Chests of Tea v. U. S. [Case No. 12,916].

HOPKINSON, District Judge (charging jury). On a careful review of the law, a question has presented itself, which did not occur at the former trial; nor was it suggested on that trial, by the counsel on either side. It is this. Do not the directions of the law apply only to the seller of a cask? Is not he the person on whom it is enjoined to erase the custom house marks, on the sale of any cask, before the delivery thereof to the purchaser, or before any removal thereof? Do these directions apply to the purchaser of the cask, or only to seller? How can the purchaser deface the marks prior to the delivery of them to him, or before they are removed from the possession of the seller? How can he exercise any act of ownership over them until they are delivered to him; or before they are removed from the place where they were in the possession of the seller? It seems to me that the provisions and penalties of the law apply only to the person who sells a cask, without defacing the marks; not to the purchaser of such casks, who may not be presumed to know any thing of their antecedent history, where they came from, or what was in them. But I go on the words of the law. They are as follows: "Every person who shall sell, or in any way alienate or remove any cask, chest, vessel or case, which has been emptied of its contents, before the marks and numbers, set thereon pursuant to the provisions aforesaid, shall have been defaced or obliterated in presence of an officer of inspection; or who shall neglect or refuse to deliver the certificate issued to accompany the cask, chest, vessel, or case of which the marks and numbers shall have been defaced and obliterated in manner aforesaid, on being thereto required by an officer of inspection or of the customs, shall, for each and every such offence, forfeit and pay one hundred dollars with costs of suit." If the purchaser is liable, he is so the moment the cask is removed; even before it comes to his store, or actual possession, or he can know whether it has, or has not, or ever had, any marks upon it, or that they had been defaced. A man sends an order from the country for empty casks; they are sent without defacing the marks; the penalty under such a construction is irrevocably fixed upon him. It is now impossible to comply with the law; the marks cannot be defaced before delivery or removal.

The jury found the following verdict: "We find the facts proven, that the defendant did remove the cask described in the declaration, without having the marks erased therefrom, and having purchased the same from some person unknown to the jury.'"

On this verdict the court subsequently directed judgment to be entered for the defendant.

[The judgment in this case was affirmed in error by the circuit court. Case No. 15,278.]

Case No. 15,278.

UNITED STATES v. HALBERSTADT.

[15 Haz. Pa. Reg. 314.]

Circuit Court, E. D. Pennsylvania. May, 1835.[1]

VIOLATION OF COLLECTION LAWS — REMOVAL OF CASKS IN WHICH SPIRITS HAVE BEEN IMPORTED.

[The provision in the forty-fourth section of the collection act of 1799 (1 Stat. 660), imposing a penalty upon "every person" who "shall sell or in any way alienate or remove" any cask which has been emptied, before the marks and numbers have been defaced in the presence of an officer, and the certificate accompanying the cask delivered up, as required in the preceding part of the section, applies only to the person who sells or alienates such a cask, and not to the purchaser thereof, although the latter does, in fact, remove it.]

[In error to the district court of the United States for the Eastern district of Pennsylvania.]

BALDWIN, Circuit Justice. The case in the district court was an action brought by the United States to recover from the defendant a penalty of one hundred dollars for removing an empty cask which had contained imported spirits, before the marks and numbers which had been put thereon, pursuant to the provisions of the collection act of 1799, had been defaced as directed by the 44th section thereof. The case was submitted to a jury, who found a special verdict "that the defendant did remove the cask described in the declaration, without having the marks erased therefrom, and had purchased the same from persons unknown to the jury," on which judgment was rendered for the defendant. [Case No. 15,277.]

The only question made at the bar is whether the penalty prescribed attaches to the purchaser of such empty cask. The 44th section of the law provides that on the sale of any empty cask which had contained imported spirits, and before the delivery to the purchaser, or any removal thereof, the marks and numbers which shall have been set thereon shall be defaced and obliterated in presence of an officer of the customs, at which time the certificate which ought to accompany such cask shall be returned and cancelled. These are the directory parts of the law, prescribing what shall be done. The clause which inflicts the penalty is: "And every person who shall obliterate, counterfeit, alter, or deface, any mark or number, placed by an officer of inspection upon any cask containing spirits, or any certificate thereof. Or who shall sell, or in any way alienate, or remove any cask which has been emptied before the marks and numbers have been so defaced in presence of an officer, or who shall neglect or refuse to deliver the certificate issued to accompany the cask, of which the marks and numbers shall have been defaced on being required by an officer of inspection of the customs, shall forfeit one hundred dollars." 3 [Bior. & D.] Laws, 177 [1 Stat. 660]. If the penal part of this section is alone considered, the words "every person who shall remove," &c., would comprehend the purchaser as well as the seller of an empty cask; but in construing a penal statute the part which directs the performance of an act must be connected with that which imposes the penalty for its omission, so that it shall be imposed only on the delinquent party. "It is also unquestionably a correct legal principle that a forfeiture can only be applied to those cases in which the means prescribed for the prevention of the forfeiture may be employed." [The Favourite], 4 Cranch [8 U. S.] 363.

The first inquiry is this: What will prevent the forfeiture? next, by whom the acts directed to be done must be performed; and lastly, whether they can be performed by the purchaser. The first act in order of time is notice to some officer of inspection or of the customs, to attend at the time of defacing the marks and numbers. (2) The defacing them in the presence of such officer. (3) Returning and cancelling the certificate. If these acts are done, there can be no forfeiture for the removal of the cask, as every requisition of the law is complied with. Though the law does not designate the seller or owner of the cask as the person who is to do these acts, it does so by necessary implication from the words used, "That on the sale of any cask," &c., "and prior to the delivery thereof to the purchaser or any removal thereof." The defacing the marks and the return and cancelling of the certificate are simultaneous acts, which it will be seen by a reference to the 41st, 42d, and 43d sections must be done by the owner or the seller. The 41st section directs the surveyor, or chief officer of inspections, to give to the proprietor, importer, or consignee a particular certificate, which shall accompany each cask of spirits, the form of which is prescribed. The 42d section directs the inspectors to make entries of all certificates. The 43d section directs that on the sale of any spirits the certificates shall be delivered to the purchaser thereof on pain of forfeiting fifty dollars for each certificate which is not so delivered. And if any cask containing spirit is found unaccompanied with the marks and certificate in the possession of any person, it shall be presumptive evidence that the same is liable to forfeiture. As the certificate then must be in the hands of the owner of the spirits and the cask which contains them until it has been emptied of its contents, and must be delivered up and cancelled upon the sale of the cask, and before its delivery to the purchaser or removal, it must be done by the person who is bound to have the certificate in his possession with the cask. He is also the person who is to give notice to the officer, and deface the marks in his presence.

[1] [Affirming Case No. 15,277.]

This person is therefore the owner or seller, who must retain the certificate till the sale. If of a full cask, he must deliver it to the purchaser; if an empty one, he must cancel it, or it must be done by the officer before delivery or removal. These provisions of the law point to the owner or seller as plainly as if he was especially named. They also necessarily exclude the purchaser, as he can in no event be entitled to the possession of the certificates. He can not return or cancel it; and as the notice to the officer and defacing the marks must precede the delivery or removal, he can have no possession of the cask for such purpose.

There is therefore no one directory provision of this section which the purchaser is enjoined to perform, nor any duty imposed on him, the omission of which can be deemed a violation of the law; but the law does apply directly to the owner or seller on whom every duty is enjoined who has it in his power to perform every act required, and on whom the penalty for omission can and ought to be visited. It would be a severe construction of the penal part of this law to attach the forfeiture to a purchaser when he had not the means of avoiding it in his power. Such construction ought not to be given unless the words are too plain and imperative to be explained or applied according to the principles of justice. Those used in the penal clause are not of this description. They are: "And every person who shall sell or in any way alienate or remove any cask, &c., which has been emptied of its contents before the marks have been defaced as aforesaid," "or who shall refuse or neglect to deliver the certificate, &c., when thereto required by an officer of inspection," shall forfeit one hundred dollars. For what? it may be asked. For selling or in any way alienating or removing the cask in violation of the previous directions which are applicable exclusively to the owner or seller. The prohibition to remove before defacing the marks and the penalty for the removal must have been intended to apply to the same person, not only from the whole scope of the 44th section, but the provisions of the 43d. The latter inflicts a forfeiture of both cask and spirits if a full cask is found in the possession of any person unaccompanied with the marks and certificate. This forfeiture attaches to the articles in the hands of the purchaser. Now, if congress had intended to attach the pecuniary forfeiture to the purchaser of a cask found in his possession empty, with the marks not defaced, a similar provision would have been inserted in the next section. Or, had the penalty been intended to attach to purchaser and seller alike, the clause would have been, "Every person who shall sell or in any way alienate, purchase or remove," and the directory part would have contained a prohibition to the purchaser to receive the cask, in which case the penalty would have been incurred by his disobedience. This omission to provide for the case of any other than the owner or seller of the cask is a clear indication that the sense of congress was to include no others within the penal enactments; more especially when taken in connection with the last providing for the neglect or refusal to deliver the certificate which can in no case apply to the purchaser of the empty cask.

Of the four acts which are the constituents of the offence—selling, alienating, removing, refusing or neglecting to deliver the certificate—there are three which can be done only by the owner or seller. The removing may be done by the purchaser; but, connecting the word "remove" with the context, as well as the two sections, it appears to refer to the same person who sells or alienates. The clause of the 44th section imposing the forfeiture follows the prohibitory clause so closely as to clearly point out their connection and dependence. Every person who removes the cask incurs the penalty for not defacing the marks "prior to the delivery thereof to the purchaser or any removal thereof," or not returning and cancelling the certificate. There is no forfeiture for purchasing or having in possession an empty spirit cask with the marks on it defaced. The law does not look beyond the sale, or prohibit any act after the cask is delivered to the purchaser. Every duty enjoined is antecedent, and a forfeiture is incurred by every omission, but none can be incurred where no duty is enjoined. The removal merely is no offence. It must be a removal before the marks are defaced, as directed by the law. The means of preventing the forfeiture can be used by the seller, but not by the purchasers, and the latter ought not to be visited with the default of the former unless the law would become inoperative by confining it to the owner or seller. Every object in view seems to be fully effected by the imposition of one forfeiture for one offence which is constituted by the one act of removal. By adopting a different construction the forfeiture would attach to the owner, his agent in selling, the laborer who would remove it from its position, the drayman, the purchaser, as well as every person through whose hands the cask might pass from time to time. The words of the law do not admit of such successive and cumulative forfeitures. On the other hand, their import is inconsistent with such intention. The phraseology is peculiar, "or who shall sell or in any way alienate or remove." It is very clear that the person who sells, or in any way alienates or removes, can be no other than the seller, and that none other can have been within the scope of these words, which were evidently used in order to prevent any evasion of the law by the owner in alienating or in any way disposing of,

removing, or parting with the possession of the cask before complying with the law, although he had made no actual sale of it.

This view of the law makes every word operative. It affixes the penalty to the person who can prevent the commission of the offence, and is the delinquent on whom it ought to be imposed. To extend the forfeiture to the purchaser who cannot sell or in any way alienate the cask, is not required by the terms of the law, and would bring within its operation a case not contemplated.

This view of the 44th section is confirmed by the judicial construction of the 43d in the circuit and supreme court. The first clause directs the certificate accompanying a full cask to be delivered to the purchaser. It is therefore held that the clause imposing the forfeiture, if it is found in the possession of any person without the certificate, refers to the person who has possession as purchaser. The forfeiture does not attach if the casks are in possession of a wrongdoer, and is incurred only by a violation of the special provision of the law by a party who has it in his power to comply with its requirements; and all the constituents of the offence must exist in the case. Six Hundred and Fifty-One Chests of Tea v. U. S. [Case No. 12,916]; [U. S. v. Three Hundred and Fifty Chests of Tea] 12 Wheat. [25 U. S.] 487; [Sixty Pipes of Brandy] 10 Wheat. [23 U. S.] 424.

This is considered a highly penal statute, which is not to be extended beyond its express letter by any deduction from its supposed policy, or be so construed as to impose a duty which the party could not perform. [Sixty Pipes of Brandy] 10 Wheat. [23 U. S.] 424, 425. And the part imposing a forfeiture will not be enlarged beyond the provision for the violation of which it is imposed, [The Favourite] 4 Cranch [8 U. S.] 362, or by the acts or omissions of persons over whom the party could have no control, Id. 365.

The same construction has been given to the 51st section, which imposes a forfeiture of any spirits which are removed before the quantity, quality, and proof shall have been ascertained and marked as directed by law. The removal which subjects the owner to a forfeiture must be made with his consent or some person employed by him. [The Favourite], 4 Cranch [8 U. S.] 363; [Sixty Pipes of Brandy], 10 Wheat. [23 U. S.] 424; [U. S. v. Three Hundred and Fifty Chests of Tea] 12 Wheat. [25 U. S.] 490.

In the application of these rules to the penal part of the 44th section it must be referred to a removal made by the owner or seller from his to the possession of another in consequence of a sale or some way or mode of alienation or delivery to a purchaser or alienee, and not to the person who receives it after a purchase.

The judgment of the district court is therefore affirmed.

Case No. 15,279.

UNITED STATES v. HALE.

[4 Cranch, C. C. 83.] [1]

Circuit Court, District of Columbia. May Term, 1830.

FALSE PRETENCES—FALSE TOKEN.

An indictment for obtaining goods from a person, by the defendant, upon a false pretence that he was the master of a vessel, and a man of property and substance, and by exhibiting two letters to himself, written by strangers, and addressed to him by the name of Captain Edward Hale, from which it might be inferred that he was interested in some vessel, whereby the complainant was induced to sell certain goods to the defendant, upon his giving his note for the amount, ($50), at thirty days, does not set forth an offence indictable at common law, for want of such false tokens as the common law recognizes.

The indictment charged that the defendant, on the 5th of February, 1830, "unlawfully, knowingly, and designedly did falsely pretend to one James Green, that he, the said Edward P. Hale, was the captain and master of a vessel, and was a man of property and substance; and to gain credit with the said James Green, and to induce him to sell his furniture to him, the said Edward P. Hale, he, the said Edward P. Hale did exhibit and show to the said James Green, and to one John Muir, then acting as clerk to him, the said James Green, a letter directed to him, the said Edward P. Hale, under the name and style of 'Captain Edward Hale, Washington City,' which said letter is in the words and figures following;" (here the letter was copied into the indictment, dated, "Old Point Comfort, January 24, 1830," and signed, "J. Johnson." From this letter an inference might be drawn that the defendant was interested in a schooner, then in the possession of the writer,) "and one other letter directed to him, the said Edward P. Hale, by the name and style of Captain Edward P. Hale, Washington, D. C., which said letter is in these words and figures, to wit." (Here a copy of the letter is inserted in the indictment, dated "Washington, 16th January, 1830," and signed "Charles W. Muncaster," from which an inference might be drawn that the defendant had advertised a vessel for New Orleans.) "By means of which false pretences, the said Edward P. Hale did then and there obtain credit with the said James Green, and did, then and there, unlawfully, knowingly, and designedly purchase and obtain from him, the said James Green, one bureau of the value of fifteen dollars," (&c., amounting, in the whole, to $50,) "and did then and there pass his note towards the payment of the said articles, for the sum of fifty dollars, in thirty days from the date thereof, with intent then and there to defraud and cheat the said James Green of the said articles of furniture; whereas, in fact and in truth, the said

[1] [Reported by Hon. William Cranch, Chief Judge.]

Edward P. Hale was not then the captain or master of any vessel, and was not a man of property or credit; and whereas, also, the said Edward P. Hale, at the time he so purchased the said articles, as aforesaid, well knew that he was not able to pay the said note, so given for the payment of the said articles as aforesaid, nor did he ever pay the same, or any part thereof, to the said James Green, to the great damage and deception of the said James Green, to the evil example of all others in like cases offending, and against the peace and government of the United States."

Thomas Swann, for the United States.

Upon the trial, THE COURT, on motion of Mr. Coxe, for the defendant, instructed the jury, that the indictment did not set forth an offence indictable at common law, for want of such false tokens as the common law recognizes.

Verdict, "Not guilty."

Case No. 15,280.

UNITED STATES v. HALF BARREL, ETC.

[6 Sawy. 63;[1] 25 Int. Rev. Rec. 335; 5 Sawy. 594.]

District Court, D. California. Sept. 26, 1879.

PENAL ACTION—REUSE OF EMPTIED SPIRIT CASKS —STATUTE.

The use, to contain domestic distilled spirits, of casks, etc., in which foreign distilled spirits, wines, etc., have been imported, is prohibited by section 12 of the act of March 1, 1879 [20 Stat. 342], notwithstanding that the stamps required by law have been effaced, obliterated, and destroyed.

[This was a suit for forfeiture of a half barrel containing 23 wine gallons of brandy. For the former decision of Judge Hoffman, of which this is a re-examination, see Case No. 15,931.]

A. P. Van Duser, Asst. U. S. Dist. Atty.

W. W. Morrow, for claimant.

HOFFMAN, District Judge. I have carefully considered the suggestions contained in the ingenious brief filed by the counsel for the claimant in support of his application for a reconsideration of the decision heretofore rendered by this court. The whole question turns upon the construction to be given to the words in section 12, "casks or other packages such as is hereinbefore mentioned, in which distilled spirits, etc., have been imported." Do they refer to the "pipes, hogsheads, tierces, barrels, casks, or other similar packages" mentioned in section 11, or to "the packages of imported liquors stamped as above required," mentioned in the previous clause of section 12? If the latter be the true construction, the use of imported packages from which the stamps, etc., required by law, have been effaced and obliterated, to contain domestic spirits, is not prohibited. But this construction seems forced and unnatural. The preceding clause of section 12, in substance, directs that wherever the contents of any package of imported liquors, stamped as required by law, shall be emptied or drawn off, the stamps, brands, etc., placed thereon, shall be effaced, obliterated, and destroyed at the time of such emptying. Then follows the clause under consideration, "and no cask or other package, such as is hereinbefore mentioned, in which distilled spirits, wines, or malt liquors have been imported, shall be used to contain domestic distilled spirits," etc. It is urged that the words "such as hereinbefore mentioned" could not have been used to indicate pipes, hogsheads, tierces, etc., mentioned in the eleventh section, because they are superfluous and unnecessary, as the whole meaning would be conveyed by the words, "no package in which distilled spirits have been imported." It is therefore argued that we can only give a meaning to the phrase by construing it as referring to "the package of imported liquors stamped as above required." The rule of construction which requires that effect shall be given and a meaning found, if possible, for every word or phrase of a statute, is undoubtedly sound and reasonable, but it does not permit us to reject an obvious and natural construction, merely on the ground that it renders some words or phrases superfluous and redundant. Such expressions almost invariably occur in statutes, and in other legal documents, and the act under consideration affords a conspicuous example of their use. The enumeration of "pipes, hogsheads, tierces, barrels, casks, or other similar packages," in the eleventh section, seems quite unnecessary. The words "any package" would have sufficed. So, too, the requirement, that the stamps shall be "effaced, obliterated, and destroyed," when the contents of the cask are "emptied" or drawn off, and the language in the thirteenth section in reference to packages "made in imitation of, or intended to be in the similitude of," etc., afford instances of pleonasms which would not be admitted in ordinary writing. But even if the argument derived from the use or redundancies had more force, it would in this case be deprived of it, for the construction contended for is obnoxious to the same objection as that urged against the construction which is attacked. If the words "cask or package, such as is hereinbefore mentioned," refer to the "packages of imported liquors stamped as above required," of the preceding clause, then the succeeding phrase, "in which distilled spirits, wines, or malt liquors have been imported," becomes wholly unnecessary and redundant. The construction proposed thus creates as great difficulties as it removes. But if we accept the obvious and natural construction, and treat the words, "such as is hereinbefore mentioned"

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

(not "described"), as referring to the pipes, hogsheads, tierces, etc., enumerated in the eleventh section, then the words, "in which distilled spirits, etc., have been imported," become necessary and appropriate to restrict their application to the class of objects intended, and meaning and effect is attributed to every word of which the sentence is composed.

The counsel for the claimants seeks to restrict the reference of the words "hereinbefore mentioned" to the "package of imported liquors, stamped as required by law," spoken of in the preceding clause. But the object of that clause is to require that the stamps, etc., on such packages shall be effaced and obliterated when the contents are drawn off. If, then, there be any reference to the casks spoken of in this clause, it must be taken to be, not to stamped imported packages, but packages in the condition in which that clause leaves them, viz., with the stamps removed. It can hardly be supposed that congress meant to refer in so nonchalant a manner to casks in respect to which a violation of law amounting to a felony had been committed, and to provide that after this felony had been consummated, and the emptied casks, with the stamps remaining thereon, refilled with domestic spirits, the only penalty incurred should be the forfeiture of the cask and its contents.

It is further urged, that if the phrase in question be not construed to forbid the refilling of casks with the stamps, etc., remaining thereon, the fraudulent reuse of stamps is nowhere specifically forbidden by the act or by section 3324 of the Revised Statutes, which it adopts, and makes applicable to imported spirits. That object, however, is substantially attained by the requirement, under severe penalties, that the stamps shall be effaced, obliterated, and destroyed when the cask is emptied, and by the prohibition against the purchase or sale of any cask "which has once been used to contain imported liquors, with the stamps, marks, and brands required by law remaining thereon." But, even if these provisions were wanting, the construction contended for would not cure the omission. For by that construction the reuse of stamps on casks refilled with domestic spirits, would alone be forbidden. The equal or more serious offence of reusing them on casks refilled with foreign spirits, would be wholly unprovided for. An equally conclusive answer to the argument under consideration is furnished by the fact that the construction contended for would make the provisions of the act incongruous, if not absurd. By section 3324, Rev. St., the failure to efface and obliterate the stamp when the cask is emptied is declared a felony, and made punishable by a fine of not less than five hundred dollars nor more than ten thousand dollars, and by imprisonment for not less than one year nor more than five years. But under the construction contended for, the refilling of casks with stamps remaining thereon, which of course can only be done where the stamps have not been obliterated and effaced at the time of emptying, is punished merely by a forfeiture of the cask and its contents. The clause in question, if construed as desired, would fail to attain the end supposed to be sought. For no punishment for the reuse of stamped packages would be imposed at all commensurate with the lawmakers' estimate of the gravity of the offense, as indicated in the section of the Revised Statutes which has been cited.

It is further urged that no motive can be assigned for prohibiting the "use to contain domestic spirits" of emptied imported casks with the stamps removed therefrom, inasmuch as the dealer may lawfully use domestic casks made in exact imitation of a foreign package, or a foreign package imported empty, provided that they bear no imitation of the stamps, etc., required by law. The reasons for not prohibiting the use of domestic packages made in imitation of the foreign are obvious. Congress did not think fit to prescribe the forms of packages to be used by distillers, or to restrain them from adopting any form of package which might be most convenient or advantageous. The packages used by some foreign distillers may be similar to our own, or our forms of packages may hereafter be adopted by foreigners. In either case it would be difficult to say which was the imitation. Congress has therefore been content to prohibit the use of imitation packages with imitation stamps and brands thereon. The use to contain domestic spirits of foreign casks imported empty has not been prohibited. This may have been from oversight, or because the course of trade rendered such a prohibition unnecessary. But congress has prohibited, and in my opinion in very unmistakable terms, the use to contain domestic spirits of any package in which distilled spirits have been imported, and, whatever the motive or the policy of the prohibition, the law must be obeyed.

I have thus noticed every important suggestion contained in the brief which has been submitted. The result of my re-examination has been to confirm my belief in the correctness of the opinion heretofore delivered.

Case No. 15,281.

UNITED STATES v. HALL.

[9 Am. Law Reg. 232.]

Circuit Court, E. D. Pennsylvania. 1844.

POST OFFICE—PRIVATE MAIL CARRIAGE—CARRIERS' LIABILITY—NOTICE—SENDER OF LETTERS.

1. If a passenger in a railroad car or steamboat, passing over a post-road, carry letters, without the knowledge or consent of the proprietor of such car or boat, or any of his servants, the owner does not incur the penalty prescribed by the nineteenth section of the act of congress of the 3d of March, 1825 [4 Stat. 107].

2. If the owner of the car or steamboat be not liable, under the nineteenth section of the act, no penalty is incurred by the person who sends such letters, under the twenty-fourth section.

3. But if a person be openly engaged in the business of private letter carrying over the post-roads of the United States, and a railroad company be notified by public advertisement, and by the agent of the post-office department, that the party and his agents are engaged in such business, they will be liable to the penalty prescribed by the nineteenth section, for conveying such agents carrying letters.

4. And the company being liable under this section, the person employing such agents in the transportation of letters over a post-road, becomes liable under the twenty-fourth section.

[Cited in U. S. v. Kochersperger, Case No. 15,541.]

This was an action [by James W. Hall] to recover a number of penalties for a violation of the twenty-fourth section of the act of congress of the 3d of March, 1825. There was a special verdict, by agreement of the parties, which is fully stated in the opinion of the court; and the cause is now heard on a motion to enter judgment upon the verdict in favor of the United States.

George M. Dallas and Henry M. Watts, for the United States.

John Sergeant and O. F. Johnson, for defendant.

RANDALL, District Judge. This action is brought to recover the sum of two thousand dollars, alleged by the United States to have been forfeited by the defendant, for various breaches of the provisions of the act entitled "An act to reduce into one the several acts establishing and regulating the post-office department," approved March 3d, 1825, the nineteenth section of which enacts, "that no stage or other vehicle, which regularly performs trips on a post-road or on a road parallel to it, shall convey letters, nor shall any packet-boat or other vessel which regularly plies on a water declared to be a post-road, except such as relate to some part of the cargo: for the violation of this provision, the owner of the carriage or other vehicle or vessel shall incur the penalty of fifty dollars; and the person who has the charge of such carriage or vehicle, or vessel, may be prosecuted under this section, and the property in his charge may be levied on and sold in satisfaction of the penalty and costs of suit: provided, that it shall be lawful for any one to send letters by special messenger." And by the twenty-fourth section, it is declared, "that every person who, from and after the passage of this act, shall procure and advise and assist in the doing or perpetration of any of the acts or crimes by this act forbidden, shall be subject to the same penalties and punishment as the persons are subject to, who actually do or perpetrate any of the said acts or crimes, according to the provisions of this act." When the cause came on for trial, the parties agreed that the jury should find the following facts in the nature of a special verdict, viz.: "That the above-named defendant did, on the 5th day of July last, enter upon the business of conveying letters out of the mails of the United States of America, between the cities of Philadelphia and New York, for all persons who would pay him at the rate of six and a quarter cents for each single letter; and in pursuance thereof, did establish offices in the said cities of Philadelphia and New York, (as will appear by the printed advertisements annexed,) and that the said defendant has ever since, daily, for forty successive days, been employed by himself and his agents in conveying letters for hire out of the mails of the United States, in certain steamboats and railroad cars, between the said cities of Philadelphia and New York, and of delivering the same to the person or persons to whom said letters were directed, and that the letters aforesaid did not relate to any part of the cargo. That the steamboats and railroad cars aforesaid were owned by the Camden and Amboy Railroad and Transportation Company, and that the said steamboats plied regularly on a water, and the said railroad cars performed regular trips on a road, which said water and road were declared by acts of congress to be a post-road of the said United States. The said defendant was not a member of said company, nor did he own all or any part of said steamboats and railroad cars. While engaged in the conveyance of letters, as aforesaid, the said defendant and his agents paid the said Camden and Amboy Railroad and Transportation Company the usual fare paid by passengers over the road, for conveying him and them between the said cities of Philadelphia and New York. The said Camden and Amboy Railroad Company were not engaged in the business, and did not participate in the profits of conveying the letters aforesaid; but were notified by public advertisements of the said defendant, and by the agents of the post-office department of the United States, that the said defendant and his agents were employed in the said business of conveying letters as aforesaid. And the jurors aforesaid do further find, that, at the time aforesaid, there was a contract under date of the —— day of ——, between the postmaster-general of the United States and the said Camden and Amboy Railroad and Transportation Company, for the transportation of the mails of the United States between the said cities of Philadelphia and New York, in the same steamboats and railroad cars which conveyed the letters of the defendant, as aforesaid. And the said jurors do further find and present, as part of their special verdict, certain acts of the legislatures of Pennsylvania and New Jersey, relating to the said Camden and Amboy Railroad and Transportation Company, together with the charter of the same."

The district attorney moved for judgment in favor of the United States on this verdict,

which the counsel for the defendant resist and contend—first, that if the act of 1825 is so construed, as to give to congress the exclusive power to establish and regulate post-roads, then it is unconstitutional and void; and if not so construed, then the defendant has committed no offence.

The eighth section of the first article of the constitution of the United States declares, among other things, that congress shall have power to establish post-offices and post-roads, "and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Without undertaking now to examine the cases in which the last branch of this section has received a construction in the courts of the United States, and admitting that the phraseology of the act of 1825 is to be construed, as contended for by the counsel of the United States, I do not feel such a "clear and strong incompatibility" between the constitution and the act of congress so construed as will authorize me to declare the act void. Fletcher v. Peck, 6 Cranch [10 U. S.] 87. It is not upon slight implication and vague conjecture that the legislature is to be pronounced to have transcended its power; the presumption is always in favor of the validity of the law, if the contrary is not clearly demonstrated [Cooper v. Telfair] 4 Dall. [4 U. S.] 14. It will, therefore, be necessary to consider the second ground of the defence, viz: that admitting the law to be constitutional, the facts found by the jury do not render the defendant liable to any of its penalties.

It is contended by the defendant, that this, being a penal law, is to be strictly construed, and that, unless the owners of the cars knew that the defendant was carrying letters in violation of the law, they were not liable to the penalty provided by the nineteenth section, and that if the owners were not liable under that section, then the defendant cannot be liable under the twenty-fourth. And U. S. v. Kimball [Case No. 15,531], decided by the district court of the United States for the district of Massachusetts, and subsequently affirmed by Judge Story, in the circuit court of the First circuit, has been relied on as sustaining their positions.

In the case of U. S. v. Fisher [Case No. 15,100], tried before me in June last, the same case was relied on by the counsel for the defence, and a newspaper report of the affirmation of the judgment of the district court was produced. In charging the jury, I expressed myself as not satisfied with the reasons given by the district judge for the conclusion at which he had arrived, and expressed a doubt as to the correctness of the newspaper report of the decision of the circuit court; at the same time, I mentioned to the jury, that if the counsel for the defendant could afterwards show me that the distinguished judge, presiding in the circuit court, had expressed a judicial opinion on the subject, I would cheerfully yield my opinion to his. The letter of Judge Story to the postmaster-general of September 4th, 1844, shows that he adopted the opinion of Judge Sprague. The facts, as given in evidence in the Case of Fisher, are similar, and within the principle decided in the Case of Kimball. The same view of the law has since been taken by the learned judge of the Northern district of New York, (Judge Conkling,) in the case of U. S. v. Pomeroy [Id. 16,065]. I, therefore, cheerfully yield my opinion to such authority, and will make the rule to show cause why a new trial should not be granted in Fisher's Case absolute.

It remains to be considered how far the questions decided in the Case of Kimball are similar to those in the present. Judge Story, in his letter to the postmaster-general, says, "I coincide in the opinion of Judge Sprague, and my own opinion was confined to the very question decided by him."

The questions decided by Judge Sprague, are: (1) That if a passenger in a railroad car or steamboat, passing over a post-road or route, carry a letter without the knowledge or consent of the owner of the car or steamboat, or any of his agents or servants, such owner is not liable to the penalty provided by the nineteenth section of the act of 1825. (2) That such knowledge or assent are not to be presumed from the facts admitted in the case: and, (3) That the person who sends such letter by such passenger is not liable to the penalty provided by the twenty-fourth section of said act, unless the owner of the car or steamboat is liable to the penalty provided by the nineteenth section.

The facts in that case, as reported in the opinion of Judge Sprague, were, that the defendant sent a letter from Boston to New York, by a person who went as a passenger in the car, and who received no compensation for carrying the letter; but the defendant had received compensation therefor, and his stamp, indicating the fact, was upon the letter. The person who carried the letter had no connection with the owners of the car or their agents, except as a passenger. The owners had previously advertised that they would not take passengers who would convey letters contrary to law, and enjoined all persons in their employment not to receive them; neither the owner nor their agents had any knowledge of the conveyance of said letters.

The facts found by the jury, in the present case, differ in many particulars from that. Instead of sending a single letter by a passenger, the defendant entered upon the business of conveying letters out of the mail, established offices for that purpose, and in pursuance of what, in his advertisements, he calls his "independent mail arrangements," was, by himself and his agents, employed "for forty successive days" in carrying letters out of the mails of the United

States. That this was contrary to the spirit of the act of 1825, can hardly be contended. But it is said, that act being highly penal is to be strictly construed, and unless the defendant is also within the letter of the law, he may defy its spirit with impunity. But notwithstanding this rule, the intention of the law-makers must govern in the construction of penal as well as other statutes; they are not to be construed so strictly as to defeat the obvious intention of the legislature; the maxim is not to be applied so as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in the sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in words, there is no room for construction. U. S. v. Wiltberger, 5 Wheat. [18 U. S.] 76. Nothing more is meant by the maxim that penal laws shall receive a strict construction, than that they shall not, by what may be thought their spirit or equity, be extended to offences, other than those which are specially described and provided for. A court is not, therefore, precluded from inquiring into the intention of the legislature. However clearly a law may be expressed, this must ever, more or less, be a matter of inquiry. A court is not, however, permitted to arrive at this intention by mere conjecture, but is to collect it from the object which the legislature had in view, and the expressions used, and which should be competent and proper to apprise the community at large of the rule, which it is intended to prescribe for the government. U. S. v. Hatch [Case No. 15,325]. That the intention of the legislature in passing the act of 1825, was to prevent competition with the government on any of the mail routes, cannot be denied; some of the routes are profitable, and produce a revenue to the post-office department; but others are a burden, and exhaust this profit in their support. If the most profitable routes are to be occupied by private individuals or companies, the consequence must be, that the remote routes, although of equal importance to those interested in them, must be abandoned, or supported from the treasury of the United States; which is well known to be contrary to the general policy of the government. But, whatever be the consequence of such a construction, unless the offence of the defendant is within the obvious prohibition of the legislature, he is not liable to the penalty.

The prohibition in the nineteenth section is against "any stage or other vehicle" carrying letters on a post-road; for the violation of this provision, the owner of the vehicle is made liable to a penalty of fifty dollars, which may be recovered in an action against the person having charge of the vehicle, who is not made personally liable; but a judgment against him authorizes a levy on and sale of the vehicle, although not belonging to him. It is said, however, that this judgment cannot be obtained, or the penalty enforced, unless the consent of the owner to the transmission of the letters was first obtained. That the prohibition implies an act, or that the vehicle is but an instrument, and being but an inanimate object, can give no consent or commit any offence; yet, by the act, it is the vehicle or carriage, and not the owner, that is prohibited.

In the case of U. S. v. The Little Charles [Case No. 15,612], the schooner was seized for a violation of the embargo laws, and the libel dismissed by the district court. An appeal was entered to the circuit court, in delivering the opinion of which, Marshall, C. J., observes: "This is not a proceeding against the owner, it is a proceeding against the vessel for an offence committed by the vessel, which is not less an offence, and does not less subject her to forfeiture, because it was committed without the authority and against the will of the owner. It is true, that inanimate matter can commit no offence. The mere wood, iron, and sails of the ship cannot of themselves violate the law. But this body is animated and put in action by the crew, who are guided by the master, &c.;" and the vessel was condemned and forfeited. See, also, [The Palmyra] 12 Wheat. [25 U. S.] 14, 15.

It is further argued, that the owners of the cars were but common carriers, bound to take the passengers without the privilege of examining or detaining their baggage, that there was perfect innocence of intention on their part, and the infliction of a penalty, under such circumstances, would not be consonant to the general principles of jurisprudence or natural equity. There are, however, many cases under the revenue laws, in which a party, with perfect innocence of intention, and without any idea that he is violating the law, becomes liable or subject to a penalty or forfeiture. This is clearly manifested by the act of 3d of March, 1797, which provides a mode for the remission of the fine or forfeiture, where it has been incurred, "without willful negligence or any intention of fraud, in the person or persons incurring the same." 1 Story, 458 [1 Stat. 506]. The nineteenth section of the act, which inflicts this penalty, says nothing about the guilt or innocence of the owners; it says that no stage or other vehicle shall convey letters; and for the violation of this, the owner is made liable for a penalty. In the case of U. S. v. The Malek Adhel, 2 How. [43 U. S.] 210, which was an appeal from the circuit court for the district of Maryland, affirming the judgment of the district court, which condemned the brig for certain alleged piratical acts, it was admitted that the owners never contemplated or authorized said acts, and the equipments of

the vessel, when she left New York, and ever afterwards, were the usual equipments of a vessel of her class, on an innocent commercial voyage, such as that stated in the evidence. In delivering the opinion of the court, Judge Story observes (page 233): "The next question is, whether the innocence of the owners can withdraw the ship from the penalty of confiscation under the act of congress. Here again, it may be remarked, that the act makes no exception whatsoever, whether the aggression be with or without the co-operation of the owners; the vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner; and this is done from the necessity of the case, as the only adequate means of suppressing the wrong." The same necessity, it appears to me, exists in the present case. Any other construction of the act would, in my opinion, go wholly to defeat its operation and violate its plain import. But the jury have here found that the railroad company were notified by public advertisements, and by the agents of the post-office department of the United States, that the defendant and his agents were employed in the business of carrying letters. Such notice, certainly, would go far to remove any objection to making them liable to the penalty to which, in the cases cited, the owners were subjected, without notice or opportunity to avoid the prohibited act.

It is my opinion, from the facts found by the jury, that the defendant did procure and assist in the doing or perpetration of the acts prohibited by the nineteenth section of the act of 1825, and that by so doing has incurred the penalties claimed by the United States. I feel the less difficulty in coming to this conclusion, as the case has been submitted with a view (whatever may be the result here) of removing it for reconsideration to the supreme court of the United States, whose decision will hereafter insure a uniform course in all the courts of the Union, and where any error or injustice has been committed by this court it will be fully corrected.

Judgment is entered on the verdict in favor of the United States for $2,000.

Case No. 15,282.

UNITED STATES v. HALL et al.

[3 Chi. Leg. News, 260; 13 Int. Rev. Rec. 181.]

Circuit Court, S. D. Alabama. May, 1871.

CONSTITUTIONAL LAW—CITIZENSHIP—FOURTEENTH AMENDMENT—ENFORCEMENT ACT.

1. Under the original constitution and the first eight articles of amendment, congress had not the power to protect by law the people of a state in the freedom of speech and of the press, in the free exercise of religion or in the right peaceably to assemble.

2. It was the purpose of the people, by the first ten amendments, to reserve to themselves and the states the power to secure the rights enumerated therein against the action of congress and not give congress power to enforce them as against the states.

3. By the original constitution, citizenship in the United States was a consequence of citizenship in a state, but by the fourteenth amendment this order of things is reversed, and citizenship in the United States is defined and is made independent of citizenship in a state, and citizenship in the state is a result of citizenship in the United States, so that a person born or naturalized in the United States, and subject to its jurisdiction, is, without reference to state constitutions or laws, entitled to all the privileges and immunities secured by the constitution of the United States to citizens thereof.

4. The privileges and immunities here referred to may be denominated fundamental, which belong of right to the citizens of all free states, and which have been enjoyed by the citizens of the several states which compose the Union from the time of their becoming free; that among these are those which in the constitution are expressly secured to the people either as against the action of the federal or state governments. Included in these are the rights of freedom of speech, and the right peaceably to assemble.

5. The right of freedom of speech, and the other rights enumerated in the first eight articles of the amendment to the constitution of the United States, are the privileges and immunities of citizens of the United States, that they are secured by the constitution, and that congress has the power to protect them by appropriate legislation.

6. The "Enforcement Act," under which this indictment is founded, applies to cases of this kind, and that it is legislation appropriate to the end in view—the protection of the fundamental rights of citizens of the United States.

[This was an indictment against John Hall, Jr., and William Pettigrew.]

John P. Southworth, Dist. Atty., and Alex. McKinstry, for the United States.

Robert H. Smith, Turner Reavis, and Thos. H. Herndon, for defendants.

Before WOODS, Circuit Judge, and BUSTEED, District Judge.

WOODS, Circuit Judge. This is an indictment for a violation of the 6th section of the act of congress, approved May 31, 1870 [16 Stat. 140], entitled "An act to enforce the rights of citizens of the United States to vote in the several states of this Union, and for other purposes." It contains two counts. The first count in substance charges that the defendants did unlawfully and feloniously band and conspire together, with intent to injure, oppress, threaten and intimidate Charles Hays and others, naming them, citizens of the United States of America, with intent to prevent and hinder their free exercise and enjoyment of the right of freedom of speech, the same being a right and privilege granted and secured to them by the constitution of the United States. The second count charges in substance that the defendants did unlawfully and feloniously band and conspire together, with intent to injure, oppress, threaten and intimidate William Miller and others,

naming them, good and lawful citizens of the United States, with intent to prevent and hinder their free exercise and enjoyment of the right and privilege to peaceably assemble, the same being a right and privilege granted and secured to them by the constitution of the United States. A demurrer is filed to this indictment based on the following grounds: (1) That the matters charged in said counts are not in violation of any right or privilege granted or secured by the constitution of the United States. (2) That they are not in violation of any provision of the act of congress, on which the indictment is based, or of any statute of the United States. (3) That each of said counts charges the commission of several and distinct offenses.

Article 1 of amendments to the constitution provides that congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people "peaceably to assemble and petition the government for a redress of grievances." It is not claimed by counsel for the United States that freedom of speech and the right peaceably to assemble are rights granted by the constitution, but it is asserted that they are rights recognized and secured. On the other hand, counsel for defendants assert that while the constitution recognizes the existence of these rights it does not secure them. That the constitution only inhibits congress from impairing them, but that no such restriction applies to the states. In the case of Permoli v. First Municipality, 3 How. [44 U. S.] 600, it was held by the supreme court that "the constitution makes no provision for protecting the citizens of the respective states in their religious liberties. That is left to the state constitutions and laws. Nor is there any inhibition imposed by the constitution of the United States in this respect upon the states." This language may well be applied also to the rights of freedom of speech, and the right peaceably to assemble, which are referred to in the same article of amendment as the right of religious liberty. So in Barron v. Baltimore, 7 Pet. [32 U. S.] 243, the same court held that "the provision in the fifth amendment declaring that private property shall not be taken for public use without due compensation is intended solely as a limitation upon the exercise of power by congress, and is not applicable to the legislation of the states." In Pervear v. Commonwealth, 5 Wall. [72 U. S.] 476, the supreme court held that the provision in the 8th article of amendment that "excessive fines" shall not be "imposed, nor cruel and unusual punishments inflicted," applies to national, not to state, legislation.

The result of these and other authorities to the same effect, is that the right of freedom of speech and the right peaceably to assemble, and other rights enumerated in the first eight articles of amendment are protected by the constitution only against the legislation of congress, and not against the legislation of the states. Nevertheless, it is true that these rights are not secured to the people of the United States. The security may not be perfect and complete. These rights may be impaired by state legislation, yet they are secured against the action of congress. Can it be said, with truth, that the right of trial by jury, the right of the accused to be confronted with the witnesses against him, the right not to be deprived of life, liberty or property without due process of law, are not secured by the constitution of the United States? We think that all rights which are protected against either national or state legislation may fairly be said to be secured rights. If we assume, then, that the right of freedom of speech and the right peaceably to assemble are rights secured by the constitution of the United States, then the first two grounds of demurrer must be overruled, for the indictment alleges that the defendants did conspire together to injure and oppress the parties named with intent to prevent and hinder their free exercise and enjoyment of rights secured by the constitution, to wit: the right of freedom of speech and the right peaceably to assemble, and this the statute declares to be an offense.

The argument of this demurrer has taken a wide range, and questions not distinctly presented by it have been submitted to our consideration. As this discussion has called in question the power of congress to pass the act in which the indictment is founded, we will proceed to consider this objection to the indictment. It is claimed that when congress is prohibited from interfering with a right by legislation, that does not authorize congress to protect that right by legislation; that as the states are not prohibited by the constitution from interference with the rights under consideration, congress, although prohibited itself from impairing these rights, has no grant of power to interfere for their protection as against the states. That the first eight articles of amendment were passed as limitations upon the power of congress, and that the history of the constitution shows that in the adoption of these articles, it was not the purpose of the people to enlarge, but to restrain the power of congress. In the Federalist (article 84), Mr. Hamilton, in replying to the objection that the proposed constitution of the United States contained no bill of rights, says: "I affirm that bills of rights in the sense and to the extent they are contended for are not only unnecessary in the proposed constitution, but would be even dangerous. They would contain various exceptions to powers not granted, and on this very account would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained when no power is given by which restrictions may be imposed.

I will not contend that such a provision will confer a regulating power, but it is evident it would afford to men disposed to usurp, a plausible pretense for claiming that power." The debates in the communities of the several states upon the adoption of the constitution and bill of rights proposed, especially in Massachusetts, New Hampshire and New York, show that the purpose of the people in the adoption of the first eight amendments was to limit, and not enlarge the powers of congress. See 1 Elliott's Debates, pp. 322, 326, 328. We are of opinion, therefore, that under the original constitution and the first eight articles of amendment, congress had not the power to protect by law the people of a state in the freedom of speech and of the press, in the free exercise of religion, or in the right peaceably to assemble. Jealousy of the power conferred on the congress by the original constitution suggested and accomplished the adoption of the first ten amendments to the constitution, and we entirely agree with counsel for defendants that it was the purpose of the people by these amendments to reserve to themselves and the states the power to secure the rights enumerated therein against the action of congress, and not give congress power to enforce them as against the states.

We have thus far considered this demurrer, and it seems to have been argued for the defense, without reference to the recent amendments to the constitution. As we are of opinion that the fourteenth amendment has a vital bearing upon the question raised, it is well that we should look to its provisions. It declares that "all persons, born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside." By the original constitution citizenship in the United States was a consequence of citizenship in a state. By this clause this order of things is reversed. Citizenship in the United States is defined; it is made independent of citizenship in a state, and citizenship in a state is a result of citizenship in the United States. So that a person born or naturalized in the United States, and subject to its jurisdiction, is, without reference to state constitutions or laws, entitled to all the privileges and immunities secured by the constitution of the United States to citizens thereof. The amendment proceeds: "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States." What are the privileges and immunities of citizens of the United States here referred to? They are undoubtedly those which may be denominated fundamental; which belong of right to the citizens of all free states, and which have at all times been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent and sovereign. Corfield v. Coryell [Case No. 3,230]. Among these we are safe in including those which in the constitution are expressly secured to the people, either as against the action of the federal or state governments. Included in these are the right of freedom of speech, and the right peaceably to assemble.

To recur now to the first ground of demurrer: are these rights secured to the people by the constitution of the United States? We find that congress is forbidden to impair them by the first amendment, and the states are forbidden to impair them by the fourteenth amendment. Can they not, then, be said to be completely secured? They are expressly recognized, and both congress and the states are forbidden to abridge them. Before the fourteenth amendment, congress could not impair them, but the states might. Since the fourteenth amendment, the bulwarks about these rights have been strengthened, and now the states are positively inhibited from impairing or abridging them, and so far as the provisions of the organic law can secure them they are completely and absolutely secured. The next clause of the fourteenth amendment reads: "Nor shall any state deny to any person within its jurisdiction the equal protection of the laws." Then follows an express grant of power to the federal government: "Congress may enforce this provision by appropriate legislation." From these provisions it follows clearly, as it seems to us, that congress has the power, by appropriate legislation, to protect the fundamental rights of citizens of the United States against unfriendly or insufficient state legislation, for the fourteenth amendment not only prohibits the making or enforcing of laws which shall abridge the privileges of the citizen, but prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws. Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection. The citizen of the United States is entitled to the enforcement of the laws for the protection of his fundamental rights, as well as the enactment of such laws. Therefore, to guard against the invasion of the citizen's fundamental rights, and to insure their adequate protection, as well against state legislation as state inaction, or incompetency, the amendment gives congress the power to enforce its provisions by appropriate legislation. And as it would be unseemly for congress to interfere directly with state enactments, and as it cannot compel the activity of state officials, the only appropriate legislation it can make is that which will operate directly on offenders and offenses, and protect the rights which the amendment secures. The extent to which congress shall exercise this power must depend on its discretion in view of the circumstances of each case. If the exercise of it in any case should seem to interfere with the domestic affairs of a state, it must

be remembered that it is for the purpose of protecting federal rights, and these must be protected even though it interfere with state laws or the administration of state laws. We think, therefore, that the right of freedom of speech, and the other rights enumerated in the first eight articles of amendment to the constitution of the United States, are the privileges and immunities of citizens of the United States, that they are secured by the constitution, that congress has the power to protect them by appropriate legislation. We are further of opinion that the act on which this indictment is founded applies to cases of this kind, and that it is legislation appropriate to the end in view, namely, the protection of the fundamental rights of citizens of the United States. But it is alleged for further ground of demurrer that this indictment charges the commission of several and distinct offenses. It charges that the defendants did band and conspire together, with intent to injure, oppress, threaten and intimidate, etc. The well-settled rule of criminal pleading is, that the operative words of a criminal statute may all be inserted in the indictment, connected by the conjunctive "and," and that proof of any one of the acts charged will sustain the indictment. This indictment is framed under this rule, and we think this objection to it not well taken.

We are of opinion, also, that this indictment is sufficiently definite and certain. The law describes particularly the offense created by it, and the indictment follows the language of the law. Our conclusion is, therefore, that the demurrer to this indictment must be overruled.

Case No. 15,283.

UNITED STATES v. HALL.

[4 Cranch, C. C. 229.] [1]

Circuit Court, District of Columbia. May Term, 1832.

CRIMINAL LAW — INDICTMENT — VARIANCE — FORGERY.

1. Upon the trial of an indictment under the 11th section of the penitentiary act for the District of Columbia, for uttering as true a counterfeited bank-note, it is not necessary that the note given in evidence should correspond in words and figures with the note set out in the indictment, with the following averment, namely, "which said false, forged, and counterfeited note is as follows, namely," &c., setting out the note verbatim et literatim, with all the words, letters, figures, and numerals, upon the face of the note.

2. But if the forged note be lost after the indictment found and before the trial, the jury must be satisfied that it corresponded with that set out in the indictment in the names of the cashier and president so far as that there was not, in the one, any letter added or omitted which would vary the sound of the name, and that the note which was passed had upon its face the letters "No" prefixed to the number 15,402, as is set forth in the indictment.

The indictment against [Edward] Hall contained two counts:

1st. That he did falsely make, forge, and counterfeit, and did cause and procure, &c., and did willingly aid and assist in falsely making, forging, &c., a certain paper, partly printed and partly written, commonly called a "bank-note," and purporting to be a note of the president, directors, and company of the Bank of the United States, and to be signed by Nicholas Biddle, president of the said bank, and by W. M'Ilvaine, cashier, which said false, forged, and counterfeited note is as follows, namely:

"D 15,402 No. 15,402

"(20) (XX)

"The President, Directors and Co. of the Bank of the United States, promise to pay to Thomas C. Spotswood or bearer on demand twenty dollars. Philadelphia, March 4, 1831. N. Biddle, President.

"W. M'Ilvaine, Cashier."

—with intention to prejudice one Samuel Dixon, against the form of the statute in that case made and provided, and against the peace and government of the United States.

2d. The second count charged that he "did pass, and did utter and publish as true, a certain other false, forged and counterfeited paper partly printed and partly written," &c., describing it exactly as in the first count, "which said false, forged and counterfeited note is as follows," &c., (setting out the note as before,) "with intent to prejudice one Samuel Dixon, he the said Edward Hall at the time he so passed the said false, forged, and counterfeited note, and uttered and published the same as true, then and there well knowing the said note to be false, forged, and counterfeited, against the form of the statute," &c.

No evidence was offered under the first count.

By the eleventh section of the act of congress of March 2, 1831 (4 Stat. 448), "for the punishment of crimes in the District of Columbia," usually called the penitentiary act, it is enacted, among other things, "that every person duly convicted" "of having passed, uttered or published, or attempted to pass, utter, or publish, as true, any such falsely made, altered, or counterfeited paper writing or printed paper to the prejudice of the right of any person, body politic," &c., "knowing the same to be falsely made," &c., "with intent to defraud such person," &c., "shall be sentenced to suffer imprisonment and labor," &c.

At the trial it appeared that the forged note had been purloined from the district attorney, in the court-room, since the indictment was found; and secondary evidence was admitted, without objection.

R. S. Coxe, for defendant, prayed the court to instruct the jury, that if they shall believe, from the evidence, that the note, passed by the defendant, did not correspond, in words and figures, with that set out in the indictment, then the jury ought to find their verdict for the defendant.

[1] [Reported by Hon. William Cranch, Chief Judge.]

But THE COURT (CRANCH, Chief Judge, contra) refused to give the instruction.

MORSELL, Circuit Judge, thought that a variance in an unessential matter, such as a number, or mark, &c., which forms no part of the note, would not be sufficient to exclude it from the jury.

THRUSTON, Circuit Judge, doubted, whether, as this was a prosecution under the eleventh section of the penitentiary act, it was necessary to set out the note in hæc verba, because that section makes no distinction between different kinds of papers, such as notes, receipts, bills of exchange, bonds, &c., and makes it equally penal to forge, &c. any paper writing, to the prejudice of the right of any person, with intent to defraud such person. He also observed that the prayer is too general; and does not provide for the exceptions, such as mere misspelling where it is idem sonans, &c.

CRANCH, Chief Judge, was of opinion that the note produced in evidence should correspond in words and figures with that set out under the averment, "which note is as follows"; and although the note, in this case, is lost, yet the jury must be satisfied that the note passed was such as is set out, and although it might not have been necessary to set out the marks and numbers appearing upon the face of the note, yet, being set out, they ought to be proved as giving identity to the instrument.

THE COURT then, at the prayer of the defendant's counsel, (THRUSTON, Circuit Judge, contra), instructed the jury, that unless they should believe from the evidence that the note passed by the defendant was in fact false and counterfeit, and known by him to be so, and that it corresponded with that set out in the second count of the indictment, in the names of the cashier and president so far as that there was not in the one any letter added or omitted which would vary the sound of the name; and that the note, so passed, had upon its face the letters "No" prefixed to the second 15,402 as is set forth in the said second count, then the jury ought not to find the traverser guilty upon that count.

Verdict guilty, on the second count. Sentence, two years' labor in the penitentiary.

Case No. 15,284.

UNITED STATES v. HALL et al.

[2 Dill. 426.] [1]

Circuit Court, D. Minnesota. 1873.[2]

INTERNAL REVENUE—COLLECTOR'S COMPENSATION—DISCRETION OF SECRETARY OF THE TREASURY AS TO ALLOWANCES.

The discretion of the secretary of the treasury, under the 25th section of the internal revenue act of June 30, 1864 [13 Stat. 231], as to making allowances to collectors, in addition to their fixed and regular compensation, cannot be judicially revised; and the courts cannot make allowance to the collector for items and charges which the secretary has rejected.

[In error to the district court of the United States for the district of Missouri.]

[John] Hall was collector of internal revenue from 1862 until 1866. This is a suit upon his official bond. He claims to be allowed $5,010 for the pay of sixteen deputies and for clerk hire. Section 25 of the act of June 30, 1864 (13 Stat. 231), governs the case. The treasury department rejected the claim. It was proved that Hall had made the payments to the deputies and clerks, that they were reasonable, and that similar claims had before been allowed to him by the department in his accounts. The district court decided against the defendants [case unreported], who bring a writ of error to this court.

Woolfolk & Brown and James Gilfillan, for plaintiffs in error.

C. K. Davis, Dist. Atty., for the United States.

DILLON, Circuit Judge. The act of June 30, 1864 (section 25), fixes the compensation of collectors, and declares that the amount shall be "in full compensation for their services and that of their deputies, * * * provided, that the secretary of the treasury shall be authorized to make such further allowances, from time to time, as may be reasonable, in cases in which, from the territorial extent of the district or from the amount of internal duties collected, or from other circumstances, it may seem just to make such allowances." It is on this proviso that the defendants rely. But I am of opinion that it invests the secretary of the treasury with authority to be exercised according to his discretion or judgment; that the law assumes that this will be justly exercised, of which the collector must take the risk, if he acts without precedent authority from that officer or the proper department; and that the judgment of the secretary of the treasury in respect to the allowances he is therein authorized to make cannot be judicially revised. There is nothing in the cases of U. S. v. Wilkins, 6 Wheat. [19 U. S.] 135, U. S. v. MacDaniel, 7 Pet. [32 U. S.] 1, U. S. v. Gratiot, 15 Pet. [40 U. S.] 336, upon which the defendants rely, in conflict with the above view, since this case turns solely upon the meaning of section 25 of the act of June 30, 1864. If the facts stated in this record be true, the case of the defendants presents strong grounds for relief, but this must come from the secretary of the treasury, under the act, or from congress. The judgment below is accordingly affirmed. Affirmed.

[A writ of error was sued out from the supreme court, where the judgment of this court was affirmed. 91 U. S. 559.]

As to compensation of public officers, see U. S. v. Lowe [Case No. 15,635].

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

[2] [Affirmed in 91 U. S. 559.]

Case No. 15,285.

UNITED STATES v. HALL.

[2 Wash. C. C. 366.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1809.[2]

EMBARGO—BOND—DANGERS OF THE SEAS—EX POST FACTO LAWS—DEFENCE—SUBSEQUENT LAW.

1. Action on a bond, executed according to the provisions of the embargo laws, with condition to reland a cargo laden at Philadelphia, at Portland, the dangers of the seas excepted. The vessel was driven, by stress of weather, from the coast, and put into Porto Rico, where she was ordered by the governor to unlade and sell her cargo. The cargo was sold at Porto Rico, and the vessel, after being repaired, returned to the United States.

[Cited in Dixon v. U. S., Case No. 3,934.]

2. What constitutes a peril of the sea, is a question of law.

3. The accident, which is attributable to a peril of the sea, must happen without fault or negligence in the master, and must occur at sea; or if on land, it must be the immediate and necessary consequence of a peril happening at sea.

4. An ex post facto law is one which, in its operation, makes that criminal or penal, which was not so at the time when the action was performed; or which increases the punishment; or which in relation to the offence or its consequences, alters the situation of a party, to his disadvantage.

[Cited in Kring v. Missouri, 107 U. S. 229, 2 Sup. Ct. 449.]

[Distinguished in City Council of Anderson v. O'Donnell (S. C.) 7 S. E. 526. Cited in Garvey v. People, 6 Colo. 559; Lindsey v. State (Miss.) 5 South. 101; People v. McNulty (Cal.) 28 Pac. 827; Sage v. State (Ind. Sup.) 26 N. E. 669; U. S. v. Cannon (Utah) 7 Pac. 388; Re Wright (Wyo.) 27 Pac. 566.]

5. If a defendant has incurred a forfeiture, and seeks to avail himself of a defence granted to him by a subsequent law, to which he was not entitled at the time when the act for which the penalty is given, was performed; he must take it, subject to such terms and conditions, as the legislature, at the time it passed the beneficial law, or at any future time, might please to prescribe.

Action upon an embargo bond given by the defendant, on the 27th of December, 1807, with condition to reland the cargo taken in for Portland, within the United States, the dangers of the seas only excepted. It appeared in evidence, that the vessel sailed on her voyage, and on the 3d of January, 1808, had proceeded as far as the Nantucket shoals, when she got on them, and the weather became so boisterous and severe, that the men were nearly disabled, by the frost, from navigating the vessel; and they applied to the master to leave the coast, and seek some more southern port. The wind, which opposed their progress to Portland, was favourable for Charleston; and the master determined to steer for that port. On the 10th, the vessel came off Charleston, but the wind was such as to prevent her from approaching it; and the disability of the crew still continuing, the master was compelled to steer her before the wind, and to proceed to the southward. He then determined to proceed to Porto Rico to repair, the vessel having suffered considerably by the weather, and being in a leaky condition. She arrived at Porto Rico on the 17th; and on the 28th, she was ordered by the governor to unload, and was, by the same order, prohibited from taking away her cargo from the island, but was permitted to dispose of it there. The captain accordingly sold his cargo, repaired his vessel, and returned to the United States on the 9th of March. It appeared in evidence, that the vessel, when at Porto Rico, could not have returned to the United States without repairing.

The reality of the necessity, which compelled the defendant to put into Porto Rico, or from returning with his cargo to the United States, was questioned by the district attorney. But if the evidence was believed, he contended, that the prohibition of the governor to bring away the cargo, was not a peril of the sea—as to what are dangers of the sea, he cited Abbot, 202, 205, 203, 204, 207–209, 211; 1 T. Rep. 31. 1 Bac. Abr. 555. Park, 61. Peake, 212, 262. 2 Marsh. 418. Park, 63. Bunb. 37. If the defendant relied upon the act of the 12th of March 1808 [2 Stat. 473], which speaks of unavoidable accidents, it was contended that there must be a loss by unavoidable accident, which did not happen in this case; and, at all events, the enforcing law declares, that this evidence shall not be given, except upon terms which have not been complied with.

Hopkinson, Ingersoll, Levy, and Peters, for the defendants, contended, that what constituted a peril of the sea, was matter of fact for the jury, under direction of the court. Abbot, 165. That the order to land, and the prohibition to carry away the cargo, were a consequence of the vessel being forced into Porto Rico in distress, and were a peril of the sea. That the vessel was incapable of returning from Porto Rico, without repairs, which the defendant was not bound to make, in order to save his bond. But, at all events, the act of the 12th of March was conclusive; and if the enforcing act was to be construed so as to deprive the defendant of the advantage granted by this law, it was ex post facto, and void. But, in truth, the enforcing act, by declaring that if the certificate of relanding shall not be returned in two months from the date of the bond, suit shall be brought, shows that the law can only apply in cases where the bond has been given within two months of the passage of the law. As to the construction of laws, and their invalidity if unjust or impossible, Bonham's Case [8 Coke, 114] Plow. 205, was cited.

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[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

[2] [Affirmed in 6 Cranch (10 U. S.) 171.]

WASHINGTON, Circuit Justice (charging jury). After stating the evidence—the first question is, whether the defendant was prevented, by a peril of the sea, from relanding his cargo at some port in the United States? What constitutes a peril of the sea, is a question of law. Whether the defendant was prevented by such peril from complying with the condition of his bond, is a fact for you to determine. It is true, the question will sometimes become, in process of time, a point of law, which, depending originally on extraneous evidence, had been submitted to the determination of the jury, as a question of fact. In mercantile transactions, particularly, it has often become necessary, in order to arrive at the real intention of the parties, to inquire into the meaning of certain phrases, used in commercial instruments, perfectly well understood by those who use them, but which are otherwise ambiguous, and sometimes unintelligible. When the meaning of those terms is once ascertained, public convenience requires that they should receive a legal definition, and be considered as immutable. Infinite confusion and uncertainty would prevail in legal proceedings, if the construction of commercial any more than of other instruments, should be confided to the jury, who might in one case decide one way, and vary it in some other, so as in truth to afford in none a rule by which men should govern themselves.

What, then, is the meaning of the expression, "perils of the sea?" Without attempting a definition which should include every possible case, it may safely be laid down, that the accident, which is attributable to this cause, must happen without any fault or negligence in the master, and must occur at sea; or if on land, it must be the immediate and necessary consequence of a peril happening at sea; such as tempests, lightning, loss by pirates, injuries sustained by being run foul of by another vessel, and the like. If a peril of the sea has occurred, but is not the immediate cause of the loss, it cannot be fairly brought within the exception; and in this light I view the order of the government of Porto Rico in relation to this cargo. Adverse winds and severe weather, perils unquestionably of the sea, were the immediate cause of this vessel putting into Porto Rico, in a disabled state; and the order of the government to sell the cargo, was the immediate cause of the defendant's disability to comply with the condition of his bond. A peril of the sea was the remote cause, by placing her in a situation to sustain this injury by the operation of a new cause, but was not itself the cause. The order of the government, therefore, is not to be considered as within the exception. But nevertheless, the defendant was, independent of this order, prevented by a peril of the sea from relanding his cargo in the United States, if the evidence be believed by the jury; because, by that evidence, it appears, that by storms and cold weather, the vessel was not only forced into Porto Rico, but arrived there in so disabled a state, that she could not, without danger to the lives of the crew, have returned to the United States. What then was to be done? The answer is plain—The master was bound to repair if he could, because the perils of the sea had interrupted the voyage. He was bound to do all in his power to return with his cargo to the United States, in order to save his bond. This case has, we think, been very correctly likened by the district attorney to that of a bill of lading. In the one, the master obliges himself to land the cargo at a specified port; in the other, at any port in the United States; and the excuse for not doing so, is the same in both. In the one, the master, if forced by stress of weather to seek an intermediate port, must repair his vessel, if he can, in order to carry his cargo safely to the port to which it is destined. This he must do, if he would avoid the claim of the freighter for damages, for a non-compliance with his contract. And if he means to go farther, and entitle himself to his freight, he must carry the goods, though in some other vessel, if it be not in his power to repair his own. The question then is, could the defendant in this case, have repaired his vessel, to the end of complying with his obligation to the United States? For if after repairing, the government which permitted him to do so, prohibited his departure with the cargo, he was not bound to repair at all in relation to this contract; and without repairing, he could not return with his cargo, in consequence of a peril of the sea. If the law obliges him to do what he can, in order to excuse himself for a non-compliance with his engagement, it imposes this obligation, for no other reason than that, by doing so, he may comply. But if, after repairing, he is still prevented from performing what alone the contract contemplates, the law would operate most capriciously and unjustly, were it to punish him for a non-compliance. It is true, the defendant cannot plead the prevention of the government, as a peril of the sea; but he may avail himself of it, as an excuse for not removing a disability which a peril of the sea had produced; and, in this point of view, that order furnishes this defendant a complete defence, if his conduct throughout has been fair, and no fault or negligence is imputable to him.

This opinion would seem to render the consideration of the other points made in the cause, unnecessary. But as it is possible the jury may not think, from the evidence, that this vessel was disabled from returning to the United States without being repaired; —as there may be cases for trial, where no such disability had resulted from the perils of the sea,—and a gentleman concerned in those cases has been heard upon those other

points; it would be improper in the court not to notice them.

The defendant urges, that although the jury should not think his case to be within the exception of perils of the sea, he is nevertheless permitted, by the act of the 12th of March 1808, to excuse himself, by proving that he was prevented, by unavoidable accident, from relanding his cargo in the United States; and that the conduct of the government of Porto Rico comes within this description. On the other side, it is contended, that it is not enough, under this law, to prove unavoidable accident, unless it was accompanied by a loss of the property; which did not happen in this case, the defendant having received the full value of his cargo.

The truth is, that the words of the law will bear either construction. It may be read thus: "Judgment shall be rendered, unless proof be made of relanding, or of loss by sea, or of other unavoidable accident." Or thus: "unless proof be made of relanding, or of loss by sea, or by (viz. loss by) other unavoidable accident." In such a case, it is the business of the court to prefer that interpretation which is most reasonable, and consistent with the intent of the legislature, so far as it can be collected from the whole system The object of the law, was to prevent the cargoes of vessels destined from one port in the United States to another, from going to foreign ports; and to punish those who should violate this policy. But it was not deemed just to involve in the same fate, those who could, and those who could not, comply with the law. Perils of the sea were therefore admitted as an excuse, by the first law. But this did not comprehend other perils, equally insurmountable, and consequently, equally excusable. This law, therefore, enlarges the ground of excuse, and gives to the obligor an additional defence. But why should he be excused, in case of a loss by unavoidable accident, and be guilty, if prevented by the same accident from complying with his engagement? He would not be less guilty in the one case than in the other, because he was more unfortunate.

But we are not left to conjecture as to the meaning of the legislature upon this subject; that body having subsequently given a legislative construction of the words, "other unavoidable accident." The act commonly called the enforcing law, declares, that judgment shall be rendered, unless proof be given of relanding, or loss of the vessel; thus far changing the situation of the party, as to require a loss of the vessel, instead of a loss generally to be proved, or perhaps explaining a loss by sea to mean, a loss of the vessel by sea. How far such a change is to be supported, in a case to which this law applies retrospectively, need not now be decided positively; or how far the other parts of the law can be made to operate against the obligor, will be shortly noticed hereafter. But upon the point we are now considering, it is to be observed, that the law then proceeds to declare, that in such suit, no plea shall be filed, or evidence given of capture. distress, or other unavoidable accident except upon certain conditions. Now, where was the necessity of this prohibition to make such a defence, unless some former law had permitted it? For certainly, if no former law had authorized it, it would have been the duty of the court, as much so as it is made their duty by this law, to overrule such plea, and to exclude such evidence. There is no law, but that of the 12th of March, which allows the defendant to give evidence of unavoidable accident; and consequently, this law must refer to that. This law, then, by declaring that unavoidable accident shall be no defence, admits that before that period it would have been a defence, though not accompanied by a loss of vessel or cargo.

But it is said, that this construction would make unavoidable accident an excuse, though it should be attended by no consequences material to the voyage; as, for instance, injury to the vessel or cargo, which, however, might not prevent the latter from being relanded. This construction could never be supported, because from the first embargo law to the last, the only question was, whether the defendant had been prevented from relanding the cargo by those circumstances which are allowed to excuse him. If, then, under either of the laws, he should prove the accident, without which he could not be excused, it is necessary for him also to prove, that the happening of that accident prevented him from complying with his obligation. And he must go farther, and satisfy the jury that the accident was unavoidable, and clear himself also from all imputation of fault or negligence; which is an answer to the other objection stated by the district attorney to this construction, that it would open a door to fraud and collusion.

But it was said, on behalf of the United States, that if the defendant will avail himself of the new defence allowed by the act of the 12th of March, which was given after he had incurred a forfeiture of the bond, he must take it upon the conditions superadded by the enforcing law. To this it is replied by the defendant, that the enforcing law, in respect to cases occurring before its passage, and coming within its operation, is ex post facto, and void. To a certain extent, this may be true. An ex post facto law is one which in its operation makes that criminal or penal, which was not so at the time the action was performed; or which increases the punishment; or in short, which, in relation to the offence, or its consequences, alters the situation of a party, to his disadvantage.

But a law may be ex post facto, in some respects, and not so in others—may be ex

post facto as to B, and perfectly justifiable as to C. In the former case, the court do not declare the law void, but that it cannot operate against that party. If the enforcing law applies to this case, there can be no doubt that so far as it takes away or impairs the defence which the law had provided the defendant, at the time when the condition of this bond became forfeited, it is ex post facto, and inoperative; for, under the existing law at that time, it was sufficient for the defendant to prove prevention, by any peril of the sea, happening to vessel or cargo; but under the enforcing law, he must prove a loss of the vessel, which may not have happened, and yet a peril of the sea may have totally prevented his relanding the cargo in the United States. But if the defendant has once incurred a forfeiture, and seeks to avail himself of a defence granted him by a subsequent law, to which he was not entitled at the time when the act for which the penalty is given was performed, he must take it, subject to such terms and conditions as the legislature, at the time when it passed this beneficial law, or at any future time, might please to prescribe. In such case, the subsequent law cannot be denominated ex post facto, because it does not in any respect change the condition of the party from what it was when the act was performed. But the enforcing act, in respect to preceding cases, can only be construed to extend to such as admitted of a certificate of relanding being returned to the collector, within two months from the date of the bond; for it cannot be supposed, that the legislature intended to require an impossibility; and every construction should be avoided, if practicable, which would lead to such an absurdity. The enforcing law, therefore, does not extend retrospectively to any case where the bond had been given two months before the law passed; and of course, the defendant, in this case, may avail himself of his defence of prevention by unavoidable accidents, without submitting to the conditions prescribed in the enforcing law. As to the validity of this law, in relation to cases to which it does apply retrospectively, we give no opinion, although unquestionably the court entertains one upon the subject.

Upon the whole, then, if no fault, negligence, or unfair conduct, is imputable to the defendant in going to Porto Rico, and disposing of his cargo, his non-compliance with the condition of his bond is excused, as well by a peril of the sea, which prevented him, as by unavoidable accidents; and in case the jury believe the evidence, and are satisfied of the entire fairness of the defendant's conduct, the verdict ought to be in his favour.

Verdict for defendant.

[A writ of error was subsequently sued out from the supreme court, where the judgment of this court was affirmed. 6 Cranch (10 U. S.) 171.]

Case No. 15,286.

UNITED STATES v. HALLORAN et al.

[14 Blatchf. 1;[1] 22 Int. Rev. Rec. 321; 14 Alb. Law J. 279; 11 Am. Law Rev. 379; 24 Pittsb. Leg. J. 39.]

Circuit Court, S. D. New York. Oct. 3, 1876.

INTERNAL REVENUE — DISTILLERY — MEASURE OF TAXATION—ASSESSMENT—ACTION UPON BOND.

1. Under the 20th section of the act of July 20th, 1868 (15 Stat. 133), the producing capacity of a distillery, and not the amount of spirits produced, is made the measure of taxation.

2. An assessment by an officer is not a condition precedent to a collection of taxes, when the statute prescribes the amount to be paid; and such amount can be recovered in an action of debt.

[Cited in Folsom v. U. S., 21 Fed. 37; U. S. v. Bristow, 20 Fed. 379.]

3. In an action upon a distiller's bond, an erroneous assessment, which did not include the amount actually due, as prescribed by the statute, is not conclusive against the government.

At law.

Roger M. Sherman, Asst. Dist. Atty., for the United States.

Robertson & Close, for defendant Devlin.

SHIPMAN, District Judge. This action was tried by the court upon an agreed statement of facts which is made a part of the record. It is only necessary to give briefly the conclusions of law which I think are applicable to the case. The producing capacity of the distillery of [John] Halloran was duly and truly fixed, by a survey, made in accordance with the provisions of the 10th section of the act imposing taxes on distilled spirits, approved July 20th, 1868 (15 Stat. 129), at 1,530 gallons of spirits per diem, eighty per centum thereof being 1,224 gallons. The government claims to recover of the defendants as follows: A tax of fifty cents per gallon upon 12,240 gallons, the same being 80 per cent. of the admitted producing capacity of said distillery for the ten days during which the distillery was operated in March, 1869, amounting to $6,120; also upon the barrel tax on said quantity of spirits, at 40 gallons per barrel, being 306 barrels, at $4, amounting to $1,225; the per diem tax, which it is admitted amounts to $780; the per diem tax upon the days during which the distillery was admitted to have been suspended $28,—total $8,153. Said Halloran actually manufactured, during said period, $11,134^{50}/_{100}$ gallons of spirits, and no more, which was ascertained and determined by the assessor to be the entire amount which the distiller manufactured, and upon this amount he paid, at the rate of fifty cents per gallon $5,567.20; the amount of barrel tax and per diem tax collected by distraint was $1,496; the amount paid upon barrel tax by Halloran, was $100,

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

—amount paid $7,163.20. Balance of taxes claimed to be due $989.80.

1. The 20th section of the act of July 20th, 1868 (15 Stat. 133), made the producing capacity, under the above recited facts, and not the amount produced, the measure of taxation. "At all events, the distiller was made taxable for a production of spirits not less than 80 per cent. of the producing capacity of his distillery, as determined by the survey, whether that quantity was actually produced by him or not, or whether he used a bushel of grain or not. Eighty per cent. of the estimated, (not the actual,) capacity of the distillery was the smallest amount for which he was made taxable. If he actually produced more, or if the quantity of grain or other materials used for distillation, as ascertained by the assessor, showed a larger production, he was made taxable to the full extent of that production thus shown." The Collector v. Beggs, 17 Wall [84 U. S.] 182; Pahlman v. The Collector, 20 Wall. [87 U. S.] 189.

2. An assessment by an officer is not a condition precedent to the collection of taxes, when the statute prescribes the amount to be paid, and this amount can be recovered in an action of debt. "An assessment is only determining the value of the thing taxed, and the amount of the tax required of each individual. It may be made by designated officers or by the law itself." Dollar Sav. Bank v. U. S., 19 Wall. [86 U. S.] 227. The 20th section of the act of July 20th, 1868, indeed, requires that the assessor shall determine whether the distiller has accounted, in his return, for the product of the materials which he used, and a rule is prescribed by which such ascertainment shall be made. No question is raised, in this case, that the true amount of spirits which was actually made, or which should have been made, was not returned and correctly ascertained by the assessor. It is admitted, that the spirits actually made did not equal eighty per cent. of the producing capacity. Under these facts, the law itself, and the assessor, determined that the measure of the taxation to be imposed upon the distiller was eighty per cent. of the producing capacity. He had become liable to pay upon the eighty per cent., and might have been liable to pay more, in case he had produced beyond the minimum rate, or if the quantity of grain used for distillation, as ascertained by the assessor, showed a larger production.

3. In an action upon the distiller's bond, an erroneous assessment, which did not include the amount actually due, as prescribed by the statute, is not conclusive against the government. It is claimed by the defendant that the assessor had assessed upon the distiller's return, and had found that $1,496 only was due for barrel tax and per diem tax, which amount was collected by distraint, and that the assessment so made and paid is final and conclusive, and the government can have no action for the recovery of any tax for the month of March, even though the tax which was collected was for a less sum than might have been assessed under the law. The principles which have been declared in Dollar Sav. Bank v. U. S., 19 Wall. [86 U. S.] 227, and in Clinkenbeard v. U. S., 21 Wall. [88 U. S.] 65, seem to be decisive upon this point. In the former case, it was held that an action of debt would lie to recover an amount due for taxes which had not been assessed. The latter case decided, that, in an action against a distiller, upon his bond, to recover the amount of an assessed tax, the assessment, though not appealed from, was not res adjudicata, and was not conclusive, and that the defendant was not precluded from showing its erroneous character. The government is not suing upon the assessment of the officer, but has resorted to an action of debt, to recover a tax which has never been assessed in accordance with the statute. The assessment which was made is not such a judgment or decree as to bind the government in this collateral proceeding.

Let judgment be entered in favor of the plaintiffs, for $989^{80}/_{100}$, and interest from the date of the amendment of the declaration.

Case No. 15,287.

UNITED STATES v. HALSTED et al.

[6 Ben. 205.] [1]

District Court, N. D. New York. Oct., 1872.

INTERNAL REVENUE—BOND OF COLLECTOR—PLEADING—EXECUTING BOND IN BLANK.

1. To an action in debt on the bond given by a collector of internal revenue against such collector and his sureties, the defendants joined in pleading non est factum:

2. *Held*, that, under such a joint plea, the defendants must sustain it as to all, or fail as to all.

3. The execution of such a bond by the sureties, with the date left blank, authorizes the principal to fill the blank at his discretion.

At law.

HALL, District Judge. This suit is prosecuted by the United States against John B. Halsted, late a collector of internal revenue for the 29th district of New York, and nineteen others, as his surviving sureties, upon his official bond as such collector, bearing date March 28, 1863. The declaration is in debt upon this bond, and assigns breaches of the condition of the bond, by failure to account for and pay over moneys of the United States which came into the hands of said Halsted, as such collector. The defendants appeared and joined in pleading non est

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

factum and performance. The cause was, by stipulation, referred to P. L. Ely, Esq., as referee, who reported in favor of the United States, and assessed their damages, by reason of the breaches assigned, at $25,450.48.

The defendants excepted to all the material findings of fact reported by the referee, and to his conclusions of law thereupon, and then moved to set aside the referee's report, as against the evidence and the law of the case. The motion to set aside the report was, by stipulation between the counsel for the respective parties, heard, upon the minutes of the testimony taken by the referee, and his report, and the exceptions thereto.

It appears, upon the minutes of the referee, that the "original bond of the defendant John B. Halsted, as collector of internal revenue, * * * executed by him, said Halsted, and the other defendants, bearing date March 28, 1863 (being the bond declared upon)," was put in evidence by the district attorney, without objection; though it was afterwards stated that it was understood that the defendants might thereafter make such objection to the evidence (then) already given (which included said bond) as they should be advised, with the same force and effect as though made at the offering thereof.

The execution of this bond by the several obligors was afterwards sworn to by Alonzo B. Rose, a justice of the peace, and a subscribing witness to the bond. He also testified that his son's signature as subscribing witness to the execution of the bond by all, except one, of the obligors, was genuine, and that his son died in April, 1868; and that the signature of Gilbert Scofield, as a witness to the signature of the one obligor, was also genuine. He subsequently testified that the bond was executed in March, 1863; and that, at the same time, the several sureties signed and swore to the affidavit of justification annexed. Gilbert Scofield testified to the due execution of the bond by the one obligor above mentioned, and also to the genuineness of the signature of Henry W. Rose, the said son of Alonzo B. Rose, whose name appeared as such subscribing witness. On a subsequent examination, Alonzo B. Rose testified to a charge against Halsted, for his services, as fixing the time of the execution of the bond in the last few days of March, 1863.

The defendants Benson Tallman, John E. Lowing, Charles B. Briggs, Marcey W. Wilmer, Alonzo Hopson, David Taggart, Peter Dunn, Joseph Ingham, Benjamin F. Bristol, Lester B. Crigo, Levi Madison, John Renwick, George Wheeler, and William Bristol, were called as witnesses for themselves and their co-defendants, and all admitted that their signatures to the bond declared on, and to the affidavit of justification annexed, were authentic; but they all more or less positively denied the execution of any bond, as surety for Halsted, after the 1st of October, 1862. It appeared, by the evidence, that Halsted was first appointed by the president in the recess of the senate, and prepared and executed, with certain sureties, an official bond, which was disapproved and rejected by the officer, authorized by the treasury department to take his official bond and deliver his commission; and that, a few days afterwards, and in September, 1862, a new bond was executed, and approved and filed at Washington. It also appeared that Halsted, having been confirmed by the senate, in March, 1863, was recommissioned, and then forwarded the bond in suit to the treasury department, and the theory of the defence was, that the bond in suit was the one rejected. But Alonzo B. Rose swore that he was one of the sureties on that bond, and there are other facts proved in the case, which very strongly tend to show that this position cannot be maintained. I am strongly inclined to the opinion, that the bond in suit was not the one so rejected, and that the defendants, who, after the lapse of more than seven years, swore that they executed no bond after the 1st of October, 1862, are mistaken—honestly mistaken—in so testifying, or, rather, are mistaken in their recollection.

At all events, the question is one of fact, and the finding of the referee upon such a question, when there is much evidence on both sides, and ground for serious doubt, should not be disturbed. The finding of the referee, upon that question, must be confirmed.

But aside from this, there are two objections to this defence. The first is, that the defendants have all joined in the plea of non est factum, and that the defendant Halsted confesses its proper execution by himself; and there is no evidence to show that it was not executed by Christopher Post, Isaac V. Quackenbush, Orace V. Whitcomb, and Levi Trusdell, who were living, and were not sworn as witnesses, or by Tabor and Keeton, who are dead. The defendants having put their defence upon the joint plea of non est factum, they must sustain it as to all, or fail as to all. U. S. v. Linn, 1 How. [42 U. S.] 104. The second is, that, at most, the evidence shows the execution of a bond, with a blank date, and the subsequent insertion of a date before its delivery to and acceptance by the officers of the government. The execution of the bond as surety for Halsted, with the date in blank, would have authorized him to fill the blank at his discretion, and the bond is, therefore, valid in the hands of the government.

The motion to set aside the report is denied, and the report confirmed, and judgment final ordered thereon.

Case No. 15,288.

UNITED STATES v. HAMILTON et al.

[1 Cin. Law Bul. 27; 8 Chi. Leg. News, 211; 22 Int. Rev. Rec. 106.] [1]

Circuit Court, S. D. Ohio. Feb. Term, 1876.

CONSPIRACY—WHAT NECESSARY TO CONSTITUTE—CIRCUMSTANTIAL EVIDENCE.

1. To constitute a conspiracy under the 5440th section of the Revised Statutes of the United States, there must have been an agreement between the parties, a unity of design and purpose, and some act for the purpose of effecting the object of the conspiracy must have been done by some one of the parties charged.

2. It is not necessary that the evidence should show the time when, or the place where, or the precise terms of the agreement; but its existence may be established by circumstantial evidence.

3. Circumstantial evidence to convict should be as full and satisfactory as direct and positive proof.

4. After the existence of the conspiracy has been established by independent evidence, the acts and declarations of a conspirator done and made pending the conspiracy, and to effect its object and purpose, may be given in evidence against his co-conspirators. But the acts and declarations of one of the conspirators made and done after the termination of such conspiracy are not admissible, except as against the party who does the act or makes the declarations.

5. The rule as to reasonable doubt and character explained.

6. If two only be charged with a conspiracy, and one be acquitted, the other must also be acquitted. But if they be charged with other persons unknown, and the evidence satisfies the jury that one of them conspired with the unknown person, he may be convicted.

The indictment charged the defendants [H. H. Hamilton and Lewis A. Logan] with conspiring together to defraud the United States of its revenues; also with conspiring together to commit an offense against the United States. In three of the counts the defendants were charged with conspiring together and with persons to the grand jury unknown, to commit the offenses charged.

W. M. Bateman, Dist. Atty., C. Richards, and R. Dyer, for the Government.

Butterworth & Vogeler and Young, Moulton & Johnston, for defendants.

SWING, District Judge. After reading the indictment, and calling the attention of the jury to the several charges contained therein, and to the overt acts set out as having been done in furtherance of the conspiracy, the judge proceeded to define the crime—conspiracy—and also to point out the requirements of the 5440 section of the Revised Statutes, under which the indictment was found, which provides that, in pursuance of a conspiracy, there must have been committed by one or both the accused some overt act, and this overt act must be set out in the indictment and proved as alleged. The court say: "The crime of conspiracy is one seldom established by direct or positive testimony, but from its very nature is usually established by what is known to the law as circumstantial evidence, i. e., by proof of the existence of such facts as authorize the jury to infer the existence of that which constitutes the offense, as that there was a unity of design—a unity of purpose, an agreement, or combination between the accused, to do the thing charged. In this unity of design and purpose, this agreement or combination to do the prohibited acts, consists the crime of conspiracy."

The statute under which this indictment is drawn requires, not only that there should be a conspiracy to commit the offense charged, but that in pursuance of the object of the conspiracy, and to effect the object and purpose thereof, one or more of the defendants shall do some act, and such act shall be distinctly alleged in the indictment and proved as alleged. Therefore the evidence must show: First, the conspiracy, that is, the agreement, the combination, the common design, the common purpose, to do the thing charged, to-wit, to defraud the United States of its revenue, to commit an offense against the United States; and, secondly, if the evidence shows the existence of such conspiracy, it must be shown that one or more of the defendants, in pursuance of such conspiracy, and to effect the object and purpose thereof, did one or more of the overt acts charged in the indictment. If both these propositions are found in the affirmative the defendants are guilty, and such should be the verdict.

It must appear from the evidence that the conspiracy was formed, that it was formed for the purpose charged in the indictment, that at least one of the overt acts charged was done, and that it was done for the purpose, and with the intent to carry into effect the object and end of the conspiracy. If the conspiracy was formed, but not for the purpose charged, the defendants would not be guilty. If the overt acts alleged were done or committed, but not for the purpose and object of carrying into effect the conspiracy, the defendants would not be guilty. There must be the guilty intention to do the thing prohibited and the act done must have been so done to carry that intention into effect. Where these are found, the offense is complete.

It is not necessary the evidence should show you the time when, and the place where, it was made, or its precise terms. Neither is it necessary to establish its existence by direct and positive proof; but it must be established by circumstantial evidence; the existence of such a state of facts and circumstances as will convince the jury that it was entered into between the parties; but the evidence to convict should be as full and satisfactory in the one case as in the other. It is enough in either case that the jury is satisfied beyond a reasonable doubt of the guilt of the ac-

[1] [8 Chi. Leg. News, 211, and 22 Int. Rev. Rec. 106, contain only partial reports.]

cused. The agreement must be first established, and then whatever was said and done by either of the defendants while the conspiracy was pending, and in furtherance of its object and design, became the act and declaration of the other, but not so of acts and declarations made and done after the conspiracy was ended. 3 Greenl. Ev. § 94; 1 Whart. Cr. Law, 702, 703; Egner v. State, 25 Ohio St. 464.

In weighing circumstantial evidence, the jury should adopt for their guidance the following well established rules, which the law, in its justice and humanity, prescribes: First, that the circumstances themselves must be fully established; second, that all the circumstances are consistent with the guilt of defendant; third, that the circumstances should be of a conclusive nature and tendency to prove the guilt of the defendant; fourth, it is essential that the circumstances should, to a moral certainty, convince the jury of the guilt of the defendant.

In the words of Greenleaf, where a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the guilt of the prisoner, but inconsistent with any other rational conclusion. Extract from Starkie, 865. The legal presumption of innocence remains with the prisoner all through the case, and ceases only when the evidence establishes, in the minds of the jury, beyond a reasonable doubt, the guilt of the prisoner. The reasonable doubt referred to, is such a doubt as arises on an examination of the facts in the case, as presented on the trial, and must be such as the juror would rely upon if acting upon matters of the highest concern to himself. And this rule applies to each one of the facts which in the course of the trial it becomes necessary to prove, to establish the guilt of the accused, and for the reason, that where circumstantial evidence made up a number of facts, each forming a link in the chain, if any one of these facts shall not be satisfactorily proven, the evidence is not sufficient to convict. Under the counts which charge the defendants with conspiring together, if one be acquitted, the other also must be acquitted though he be guilty of doing the act charged. But under those counts which charged them with conspiring with persons to the grand jurors unknown, if the evidence satisfies the jury, beyond a reasonable doubt, that although the defendants may not have conspired together, yet if one of them did, in fact, with some third person, not named in the indictment, and unknown, to commit the offenses charged, and either one of such persons did any one of the overt acts charged, the defendant who so conspired may be found guilty; but the same rules before adverted to govern in applying the evidence to such third person and the conspiracy with him.

Evidence of previous good character is to be weighed as other evidence. The purpose of such evidence is to show that the life and character of the defendants has been such as to render it improbable that they would violate the laws of their country. Where circumstantial evidence is relied on to convict, the facts proven being offered to raise a presumption of guilt, the fact that the defendants have borne themselves as honest men, and men of integrity, may be offered as evidence tending to rebut the presumption of guilt arising upon other facts proven in the case; hence the evidence that a defendant has the reputation of being a man of honesty and integrity, should be weighed by the jury as any other fact proven in the case, and its effect must be determined by the jury. The court in this adopts the rule laid down in the case of Stewart v. State, reported in 22 Ohio St. 477.

NOTE. After remaining out for two days, the jury came into court and inquired, whether, if they believed from the evidence that one of the defendants was not guilty, and as to the other they were unable to agree, they could so return their verdict, upon which Swing, J., charged them, that under the three counts, charging them with conspiring with other persons, if they found from the evidence that one of the defendants had conspired, not with his co-defendant, but with other persons to the government and jury unknown, they might find a verdict of guilty as to him and not guilty as to his co-defendant; that under these three counts an acquittal of one was not an acquittal of both. If they were satisfied from the evidence that one of the defendants was not guilty, they might return a verdict of not guilty as to him; and if, as to the other defendant, they were unable to determine as to the fact of his conspiring with persons unknown, whether he was guilty, they might return as to him that they could not agree upon a verdict.

[The jury found a verdict of not guilty as to Hamilton, and guilty as to Logan, in the three counts charging him with conspiring with other persons unknown.][2]

Case No. 15,289.

UNITED STATES v. HAMILTON.

[11 Chi. Leg. News, 336; 8 Reporter, 166;[1] 25 Int. Rev. Rec. 217.]

Circuit Court, D. Oregon. June 5, 1879.

FORFEITURE — PENALTY — AMOUNT OF — VALUE OF VESSEL.

1. A forfeiture of a vessel or its value under section 4143 of the Revised Statutes does not vest either in the government absolutely, but only from the time it elects which to take.

2. The penalty given by said section 4143 is equal in amount to the value of the vessel at the time of the commission of the illegal act which causes the forfeiture; and the amount of such penalty is not affected by any subsequent change in the value of said vessel, or its loss or destruction.

In admiralty.

Rufus Mallory, for plaintiff.

John W. Whalley, for defendant.

[2] [From 22 Int. Rev. Rec. 106.]

[1] [8 Reporter, 166, contains only a partial report.]

DEADY, District Judge. This action is brought to enforce an alleged forfeiture to the plaintiff of the value of the schooner Kate L. Heron under section 4143 of the Revised Statutes.

The complaint alleges that on January 17, 1878, the defendant made application to the collector of the district of Wallamet for the enrollment and license of said schooner in the coasting trade, and that in order to procure the same he then and there took and subscribed an oath, which contained, among others, the statement that the defendant was "the true and sole owner" thereof, and that no subject of any foreign power was "directly or indirectly by way of trust, confidence or otherwise interested therein, or in the profits or issues thereof;" whereas, in truth and in fact said defendant was not the sole owner of said schooner, but only of the one-half thereof, and the other half was owned by one Alexander McKenzie, a subject of Great Britain; that at the time of taking said false oath said schooner, her tackle, apparel and furniture were of the value of the $1,700, wherefore, and by force of the statute in such cases made and provided the "defendant became and was and is indebted to the plaintiff in said sum of $1,700." The defendant demurs to the complaint, because it does not allege the value of the vessel at the commencement of the action, instead of the date of the oath.

The statute under which the forfeiture is claimed provides that: "If any of the matters of fact alleged in the oath taken by an owner to obtain the registry of any vessel, which, within the knowledge of the party so swearing are not true, there shall be a forfeiture of the vessel together with the tackle, apparel and furniture, in respect to which the oath shall have been made or of the value thereof, to be recovered, with the costs of suit, of the person by whom the oath was made;" and by section 4312 of the Revised Statutes it is provided that the regulations concerning the registering of vessels shall apply to the enrollment thereof.

In U. S. v. Grundy, 3 Cranch [7 U. S.] 338, it was held that under section 4 of the act of December 31, 1792 (1 Stat. 289), said section 4143 of the Revised Statutes, being taken therefrom—there was not an absolute forfeiture of either the vessel or its value to the United States, but only a right to elect which of the two it will take; and that until such election is made it has no vested right in either. Upon the authority of this case, as well as upon the plain words of the statute, the value of this vessel was not forfeited to the United States until it elected to take it rather than the vessel by the commencement of this action on April 12, 1879.

But still the question arises, at what time is this value to be estimated—at the date of the illegal act which caused the forfeiture or the time when it was claimed—the commencement of the action therefor? The district attorney contends that the defendant is liable for the value of the vessel at the date of the false statement, for the reason that any other construction of the statute might result in the United States obtaining neither the vessel nor her value. The vessel may be lost or purposely destroyed before the cause of forfeiture is discovered, and therefore could not be taken, while her then value for the same reason would be exactly nothing. Counsel for the defendant contends that the value of the vessel must be estimated at the time of the election to take the same, and that if the vessel is lost before the action for the value is commenced, the right to recover the value is gone also, because the only right which the statute gives the United States is the right to elect between the forfeiture of the vessel and her value, which right does not exist or cannot be exercised when either of them is no longer in esse.

This is a penal statute and therefore not to be construed so as to include "cases other than those which clearly appear to have been intended by the legislature, and are fairly included in the language used to express such intention," however much they may appear to be within the reason or what is called the equity of it: U. S. v. Mattock [Case No. 15,744]; U. S. v. Hartwell, 6 Wall. [73 U. S.] 391. The statute gives the United States the right to recover from the defendant a penalty equal to the value of the vessel concerning which he made the false statement. There is nothing in the language of section 4143 which limits the amount of this penalty to her value at any particular time. But the most reasonable conclusion is that it was intended the penalty should be equal to the value of the vessel at the time of the commission of the act for which it was imposed. If the value at the time the action is brought to recover the penalty must be the measure of its amount it is liable to vary with the market for shipping and the decrease or increase in value of the vessel from use or repairs. It can hardly be supposed that congress intended that this penalty might be increased 50 or 100 per centum, simply because the action to recover it was not brought until the vessel was so increased in value by repairs or additions or a rise in the market value of such property; and it is just as unreasonable to suppose that it was intended the penalty may be diminished by a decrease in the value of the vessel after the commission of the illegal act and before the election to sue for it.

The fact that neither the right to the vessel nor the penalty was vested in the United States, until it elected which to take, does not in my judgment affect this question. Of course, if it elects to take the vessel, it must take it as it finds it, however much depreciated in value; and if it is lost or destroyed before such election, its option in this respect is gone. But the forfeiture of the sum of money equal to the value of a vessel is

not the forfeiture of a specific thing but of a specific amount of money which is not liable to change or vary with the wear and tear or change in the value of the vessel. The amount of the penalty is measured and fixed by the value of the vessel at the time the statute gives the right to recover it—the moment of the commission of the illegal act. In effect this statute declared at the time of making this false statement—a penalty equal to the value of this vessel is forfeited to the United States, provided it elects to take it and sues for it within the time prescribed by law—that is, the then value and not the value at some future time when it might be more or less.

The demurrer is overruled.

Case No. 15,290.

UNITED STATES v. HAMILTON.

[1 Mason, 152.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1816.

CRIMINAL JURISDICTION—FOREIGN PORT.

Larceny committed on board an American ship, in an enclosed dock, in a foreign port, is not punishable under the statute of the 30th of April, 1790, c. 9, § 16 [1 Stat. 112].

[Cited in U. S. v. Morel, Case No. 15,807; U. S. v. New Bedford Bridge, Id. 15,867; U. S. v. Seagrist, Id. 16,245; U. S. v. Rodgers, 150 U. S. 268, 14 Sup. Ct. 116.]

Indictment [against James Hamilton] for a larceny on the high seas against the act of the 30th of April, 1790, c. 9, § 16. Upon the trial it appeared, that the supposed larceny was committed on board the American ship Augusta, while she lay in an enclosed dock, in the port of Havre in France, into which dock the water was admitted only at the will of the owners.

G. Blake, for the United States.

STORY, Circuit Justice. Upon this evidence the indictment is not maintained. The place, where the ship lay, was in no sense "the high seas." The admiralty has never held, that the waters of havens, where the tide ebbs and flows, are properly the high seas, unless those waters are without low-water mark. The common law has attempted a still more narrow construction of the terms.

Verdict for the defendant.

Case No. 15,291.

UNITED STATES v. HAMILTON et al.

[1 Mason, 443.] [1]

Circuit Court, D. Massachusetts. Oct Term, 1818.

SEAMEN—INDICTMENT FOR REVOLT—HIGH SEAS—CHANGE OF MASTER—SHIPPING ARTICLES.

On an indictment for an endeavour to make a revolt in a ship, founded on the 12th section of the act of the 30th of April, 1790, c. 9 [1 Stat. 115], it is not necessary to prove, that it was committed on the high seas. If the master of a ship, after the commencement of the voyage, be by sickness disabled from pursuing it, and a new master is appointed, the shipping contract with the seamen is not dissolved thereby.

[Cited in U. S. v. Bladen, Case No. 14,606; U. S. v. Keefe, Id. 15,509; Joy v. Allen, Id. 7,552; U. S. v. New Bedford Bridge, Id. 15,867; U. S. v. Staly, Id. 16,374; U. S. v. Seagrist, Id. 16,245; Ex parte Byers, 32 Fed. 407.]

Indictment against the defendants for an endeavour to make a revolt on board the American ship Courier, against the statute of the 30th of April, 1790 (chapter 9, § 12). It appeared in evidence, that the defendants were mariners of the ship Courier, and shipped for a voyage "from Boston for a port or ports beyond the Cape of Good Hope, one or more times, and thence to her port of final discharge in the United States." The shipping articles were in the usual printed form, and began as follows:—"It is agreed between the master, seamen or mariners of the ship Courier, Henry Prince, Jr., master, *or whoever else may go as master*, now in the port of Boston, and bound for a port or ports beyond the Cape of Good Hope, &c. &c." The clause in italics was written in an appropriate blank. The ship sailed on her voyage from Boston on the 27th day of September last, under the command of Henry Prince, Jr.; and having proceeded nearly off Cape Cod, was, in consequence of the alarming and sudden sickness of the master, obliged to put back into Salem on the same day. The ship remained there two or three days, waiting for the recovery of Capt. Prince; but his sickness continuing very dangerous, the owners concluded to appoint his father, Henry Prince (who was also a part owner) the master for the voyage. Accordingly, one of the principal owners went on board with the new master, stated the circumstances to the crew, and requested them to unmoor the ship, which then lay in the main stream of Salem harbour, that she might proceed to sea. The seamen utterly refused; and declared, that they considered that their contract bound them only to go with the original master, and that by his inability they were discharged from all further obligations to the ship. Every effort was made to persuade them to return to duty, but they obstinately refused, and remained by themselves in a state of open mutiny. It became necessary, at last, to seek the interposition of a civil officer to arrest some of the leaders; and when he came on board a scene of great confusion ensued, in which the seamen acted together, and opposed with force every attempt to arrest any of them, or to reduce them to obedience; and the officers were obliged to protect themselves by resorting to their muskets and other weapons. Two of the defendants were among the principal ringleaders; and after

[1] [Reported by William P. Mason, Esq.]

a considerable struggle they were carried to prison. On the next day two of the defendants offered to return on board the ship; but Davis, the other one, remained obstinate in his refusal.

S. L. Knapp, for the prisoners, contended: 1st. That the offence was not cognizable in this court, it not being committed on the high seas, but in Salem harbour. 2dly. That the shipping articles were dissolved by the change of the master, and the seamen were not bound to go the voyage under a new master; and he likened it to the case of an apprenticeship, where, by the death of the master, the indentures are dissolved.

G. Blake, Dist. Atty., for the United States, was stopped by the court.

STORY, Circuit Justice. The court do not admit the validity of either of the grounds assumed in this defence. The 12th section of the act,on which this indictment is founded, does not limit the offence to the high seas. It declares, that "if any seaman shall confine the master of any ship or other vessel, or endeavour to make a revolt in such ship, such person or persons so offending, &c. &c." The argument is, that because certain other offences, enumerated in the preceding part of this section, are limited to the high seas, or the seas, therefore the same limitation should be constructively given to this clause. We have no authority to interpose any such limitation, unless the preceding connexion necessarily requires it, which it certainly does not. The clause in controversy is introduced by the disjunctive "or," and contains an enumeration of new substantive offences; and as the mischief is the same, whether the offences be committed in port or on the seas, we see nothing in the language, or in the policy of the law, to justify us in inserting a new restriction into the statute.

As to the other point, it would be sufficient to say, that the very terms of the shipping articles remove the whole ground of argument. The words are, "Henry Prince, Jr., master, or whoever else shall go as master." How then can we say, that the contract is dissolved, when the very case, which has arisen, is specially provided for? But we are clearly of opinion, that even without this clause the same rule must prevail. The shipping contract is not dissolved by the substitution of a new master, in consequence of the sickness or death of the first master, during the voyage. It would be most disastrous to the interests of commerce, and to the interests of seamen themselves, if such a construction should prevail. The contract, though made by the master, is, in fact, a contract with the owners for the voyage; and it is not in the power of either party to put an end to it by the mere substitution of a new master. There is no implied condition, that the contract shall be void, unless the master, who makes the contract, continues to be master during the whole voyage.

The case of apprenticeships does not apply. That stands upon principles of public policy and personal confidence, which do not enter into the general contract of hire, either of mariners or of other persons.

Could it be contended for a moment, that the contract for wages was dissolved by the death of the owner during the voyage? And yet he is as much a contracting party as the master. If the evidence is believed, and it is wholly uncontroverted, there is no doubt of the legal guilt of the prisoners.

Verdict for the United States.

Case No. 15,292.

UNITED STATES v. HAMMOND et al.

[4 Biss. 283.] [1]

Circuit Court, D. Indiana. Jan., 1869.

ESCROW — INTERNAL REVENUE — ACTION ON DISTILLER'S BOND — PLEA.

1. In a suit on a distiller's bond against him and his sureties, one of the sureties pleaded that he signed the bond and delivered it to the principal obligor on condition that it should not be delivered to the obligee till it was signed by one B; that said B never signed it; that the agent of the obligee, when he accepted and approved the bond, had notice of said conditional delivery; and that so the writing was not the surety's deed. *Held*, that as to the surety, the writing was a mere escrow, and that the plea was good.

2. The condition of the bond was that the principal obligor, a distiller, should faithfully comply with all the requirements of law in relation to distilled spirits. And the breach laid was that the principal obligor, having manufactured one thousand gallons of spirits at his distillery, had sold and removed for sale the same therefrom without first paying the taxes thereon as required by law. Plea, that he did not sell or remove for sale said spirits or any part thereof without having first paid the tax thereon as required by law. *Held*, a good plea on general demurrer.

McDONALD, District Judge. This action is debt on a distiller's bond, conditioned for his faithful compliance with all the requirements of the law in relation to distilled spirits. The breach assigned is, that, having manufactured at his distillery one thousand gallons of spirits, he sold and removed for sale the same therefrom without first paying the tax thereon as required by law.

Three pleas have been filed, to the second and third of which, there are demurrers. And the question for decision is, whether these demurrers should be sustained.

1. The second plea is a special non est factum. It is pleaded separately by Samuel F. Day, one of the defendants. This plea alleges that at the time when Day signed the bond, the said Samuel H. Hammond, the principal in the bond, "promised to procure the signature of one James M. Bratton

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

to said bond as co-security thereon; that the same was delivered to said Hammond for the purpose of getting the said Bratton's signature thereto, and not for the purpose of being delivered by said Hammond to the plaintiff until the said Bratton had signed the same; that at the time said Hammond delivered said bond to the plaintiff, the plaintiff had full notice that said bond was not to be delivered by the said Hammond until it was signed by the said Bratton"; that one William Bickell was then and there a deputy collector of the district in which Hammond's distillery was situate, and was "the agent of the plaintiff to accept and approve said bond; and that when said bond was tendered to him for his acceptance by the said Hammond, the said Hammond stated to the said Bickell, agent of the plaintiff as aforesaid, that said Day had signed said bond on condition that the same was not to be delivered until the said Bratton had signed the same."

No oyer of the bond is of record; so that we cannot see whether, in the form in which it was approved, anything on its face indicated that it was then in an imperfect condition. It is certain that the obligor of a bond cannot deliver it to the obligee on any condition so as to make it a mere escrow. A delivery to the obligee estops the obligor to say that it is not his deed. Foley v. Cowgill, 5 Blackf. 18; Moss v. Riddle, 5 Cranch [10 U. S.] 351. It is equally clear that an instrument signed and sealed, and delivered to a stranger to it, on condition that it shall not be delivered to the obligee till the happening of some designated event, is a mere escrow till that event happens. 2 Bl. Comm. 307; 4 Kent, Comm. 454.

But the case at bar differs from the case above supposed. Here the delivery by Day was not a delivery to the obligee of the bond, nor a delivery to a mere stranger to the bond, but a delivery to the principal obligor of the bond. And the question is, will such a delivery on a condition render it a mere escrow till the condition be performed? On this question the authorities are very numerous and very conflicting.

If the plea did not aver that, at the time of the delivery of the bond to the government, the plaintiff had notice of the conditional delivery by Day to Hammond, I should have felt more difficulty in pronouncing it a good defense. Though, even in that case, there are high authorities for holding that the plea would be good. Pepper v. State, 22 Ind. 399; People v. Bostwick, 32 N. Y. 445. But as the plea stands, I feel no difficulty in pronouncing it a good bar to this action.

There is, indeed a class of cases which hold that a delivery of a bond by one obligor to another on a condition can never make it an escrow, but is equivalent to a delivery of it to the principal. Of this class are the cases Taylor v. Craig, 2 J. J. Marsh. 449; Bank of Commonwealth v. Curry, 2 Dana, 143; Smith v. Moberly, 10 B. Mon. 266. And the case of Deardorff v. Foresman, 24 Ind. 481, seems to go almost to the same extent.

But I think that the weight of authorities is strongly against the doctrine maintained in these cases. Even the case of Deardorff v. Foresman, supra, while it seems to hold that that a delivery by a surety to his principal co-obligor on a condition can in no case make the bond an escrow, admits that if the officer who approves the bond, was at the time aware of the condition remaining unperformed, the bond is void as to such surety.

Whatever conclusion ought to be drawn from decisions on this point made by courts of the several states, I consider that the supreme court of the United States has settled the question, and that its authority binds me.

In Pawling v. U. S., 4 Cranch [8 U. S.] 219, it was held that a surety might deliver to the principal obligor a bond as an escrow. In that case the names of other sureties were in the body of the bond; and the surety, when he so delivered it, declared, not in the presence of the officer accepting and approving it, but in the presence of his co-obligors, that he acknowledged the instrument, "but others are to sign it." Under such circumstances, it was held that a jury might well find that the instrument was a mere escrow till the "others" had signed it.

In the case of U. S. v. Leffler, 11 Pet. [36 U. S.] 86, which was an action on a collector's bond, one of the sureties had been permitted to prove on the trial that he "had executed the bond on condition that others would execute it, which had not been done." And this was held to be right.

So in Johnson v. Baker, 4 Barn. & Ald. 440, before the execution of a composition deed, it was agreed in the presence of the surety to it, that it should be void unless all the creditors executed it. The surety thereupon signed it, and it was delivered to one of the creditors to obtain its execution by the other creditors, which never was done. And it was held to be a mere escrow.

So, also, in Leaf v. Gibbs, 4 Car. & P. 466, where a person signed a note with a representation that others were to sign it, who never did, it was held that the party signing it was not liable on it, unless he subsequently waived the signing by others.

The demurrer to the second plea is overruled.

The third plea avers that the said Hammond "did not, on the first day of July, 1868, or upon any other day, at said district or at any other place, sell or remove for sale one thousand gallons of distilled spirits or any other amount whatever, without having first paid the tax thereon, as required by law."

To this plea there is a special demurrer. The cause assigned is that it "does not sufficiently traverse the breach assigned in the

declaration; the said traverse being in general terms, and not a particular traverse of each assignment of breaches."

It is difficult to see what this special cause of demurrer means. There is but one breach assigned in the declaration; and this plea negatives that breach in its very words. The only objection that could be raised to this plea is that it may possibly be faulty as containing a negative pregnant. But the special cause of demurrer assigned would not reach this fault. Whether, if the plea were specially demurred to for this cause, it should be held bad, I need not inquire. I am satisfied it is good on general demurrer. In Pullin v. Nicholas, 1 Lev. 83, which was debt on a bond conditioned to perform covenants, one of the covenants was that the obligor should not deliver possession of certain premises to any but the obligee, or such person as should lawfully evict him. The defendant pleaded that he "did not deliver the possession to any but such as lawfully evicted him." On demurrer, this plea was held good. This case is cited and approved in Steph. Pl. 383; and it seems to be in point on the plea under consideration.

The demurrer to the third plea is overruled.

NOTE. Consult U. S. v. Dair [Case No. 14,913]. For a full discussion of the plea of non est factum, and delivery in escrow, consult Foy v. Blackstone, 31 Ill. 538; Furness v. Williams, 11 Ill. 229; Neely v. Lewis, 5 Gilman, 31; Price v. Pittsburgh, Ft. W. & C. R. Co., 34 Ill. 13; White v Bailey, 14 Conn. 275; Coe v. Turner, 5 Conn. 92; Carr v. Hoxie [Case No. 2,438]; Jackson v. Rowland, 6 Wend. 666.

Case No. 15,293.

UNITED STATES v. HAMMOND.

[1 Cranch, C. C. 15.] [1]

Circuit Court, District of Columbia. July Term, 1801.

DISTRICT OF COLUMBIA — FEDERAL JURISDICTION OVER—LARCENY—COURT OF EXAMINERS.

1. The jurisdiction of the United States over the District of Columbia vested on the first Monday in December, 1800.

2. An indictment at common law, for larceny, can be sustained in Alexandria county, although the punishment has been altered by statute.

3. Judgment cannot be arrested because there was no previous court of examiners.

John Hammond was, at the last term, indicted at common law, and convicted of stealing the goods of Margaret Lefferty, on the 26th of February, 1801. A motion in arrest of judgment was made and continued to this term. The grounds of the motion were these:—(1) That the offence was not committed within the jurisdiction of this court; the theft having been committed on the 26th of February, 1801, and the act of congress which erected this court having been passed on the 27th of February, 1801 [2 Stat. 103]. (2) The indictment does not conclude against any statute. (3) There was no previous court of examiners, according to the laws of Virginia.

Before KILTY, Chief Judge, and CRANCH and MARSHALL, Circuit Judges.

CRANCH, Circuit Judge. As to the first exception, I am of opinion that the jurisdiction over this district, vested in congress on the 1st Monday of December, 1800, the day on which, by law, the district became the seat of government. That the crime was therefore an offence against the United States, and committed within the jurisdiction of this court. The second section of the act of cession, passed by the legislature of Virginia, on the 3d of December, 1789, is in these words, viz., "That a tract of country not exceeding ten miles square, or any lesser quantity, to be located within the limits of this state, and in any part thereof, as congress may by law direct, shall be, and the same is hereby forever ceded and relinquished to the congress and government of the United States, in full and absolute right and exclusive jurisdiction, as well of soil as of persons residing, or to reside thereon, pursuant to the tenor and effect of the 8th section of the 1st article of the constitution of government of the United States." That article has the following words: "The congress shall have power to exercise exclusive legislation over such district, not exceeding ten miles square, as may, by the cession of particular states, and the acceptance of congress, become the seat of the government of the United States." The jurisdiction ceded by Virginia could not vest or take effect until congress should be able, constitutionally, to exercise it; which they could not do, under the article of the constitution referred to by the act of cession, until the district should become the seat of the government of the United States. The act of cession, by referring to the constitution, must be understood to mean, that Virginia ceded a jurisdiction which was to vest, or take effect when the district ceded should become the seat of government. The "tenor and effect" of that section of the constitution is, that congress should immediately, upon taking possession of its permanent seat, have the sole and exclusive jurisdiction over it; and the cession is expressly stated to be according to that "tenor and effect." It seems clear that Virginia did not part with her jurisdiction until congress could exercise it, which, by the constitution, could not be until the district became the seat of the government.

On the first Monday of December, 1800, the District of Columbia, by law, and in fact, became the seat of the government of the United States. The words of the second section of the act of cession could not well be stronger or more effective than they are.

[1] [Reported by Hon. William Cranch, Chief Judge.]

The tract of country which congress should locate, was "thereby forever ceded and relinquished to the congress and government of the United States in full and absolute right and exclusive jurisdiction as well of soil as of persons residing and to reside thereon." Before this right of exclusive jurisdiction could absolutely vest in the United States, it was necessary, by the act of cession, and by the eighth section of the first article of the constitution of the United States, that three events only should happen: (1) That the cession should be accepted by congress; (2) that it should be located and defined; and (3) that the district so accepted, located, and defined, should become the seat of government of the United States. All these events had happened on the first Monday of December, 1800, being the day appointed by law for the removal of the seat of government. On that day, therefore, all the preliminary events having happened, the District of Columbia became vested in the congress and government of the United States, according to the impressive words of the act of cession, "in full and absolute right and exclusive jurisdiction as well of soil as of persons residing or to reside thereon." There can be no doubt in this case, if the fourth section of the act of cession does not control the general expressions of the second section. Let us then consider what is the effect and operation of the fourth section. Here it becomes necessary to recollect the legal rules of construction which are applicable to statutes and grants; one of which is, that the exception from the general terms of a grant shall be construed strictly. Another is, that in the same instrument or the same statute, the same words are supposed to mean the same thing, and different words not necessarily conveying the same idea, are supposed to mean different things. No repugnancy or absurdity shall be presumed, especially in a statute, if the words will bear such a construction as to avoid it. All instruments and statutes shall be so construed, ut res magis valeat, quam pereat.

Statutes being written with much caution, and enacted with great solemnity, every word is supposed to have been maturely considered, and to have an appropriate meaning. An act by which a state parts with a portion of its territory and jurisdiction, is one of the most important acts which a state can perform. It is an act which cannot, like the ordinary acts of legislation, be repealed, and we are therefore to presume that the legislature would be peculiarly cautious in the selection of words to express its meaning. The general expressions of the second section of the act of cession are, in some measure, affected by the proviso contained in the fourth section, which is in these words, viz.: "Provided that the jurisdiction of the laws of this commonwealth over the persons and property of individuals residing within the limits of the cession aforesaid, shall not cease or determine, until congress, having accepted the said cession, shall by law provide for the government thereof, under their jurisdiction, in manner provided by the article of the constitution before recited."

We have before seen that by the second section of the act of cession, the jurisdiction was to vest in congress as soon as they should constitutionally become competent to exercise it, which period has, by subsequent events, been ascertained to be the first Monday of December, 1800. If the expression in the proviso, "jurisdiction of the laws of this commonwealth over the persons and property of individuals," is supposed to include the whole idea of "full and absolute right and exclusive jurisdiction," which is ceded by the second section, then the legislature would in effect say, that we cede to the congress and government of the United States a certain district, the full and absolute jurisdiction over which shall vest in congress as soon as the said district shall become the seat of the government of the United States; provided, nevertheless, that the said jurisdiction shall not vest on the happening of that event, but on a subsequent act which is to be done by congress, under, and by virtue of, the jurisdiction which we transfer. The absurdity of this construction is evident, and we must from thence infer that the expression, "jurisdiction of the laws over the persons and property of individuals," was not intended to convey the same idea as the former expression, "full and absolute right and exclusive jurisdiction as well of soil as of persons." It must be evident that the expression in the fourth section is far less comprehensive than that in the second. The terms "full and absolute right and exclusive jurisdiction as well of soil as of persons," comprehend the whole complex idea of sovereignty; but the expression, "jurisdiction of the laws over the persons and property of individuals," conveys only a part of that idea. There is certainly a difference between the whole sovereign authority of an independent state, which comprehends the political as well as legislative or municipal jurisdiction, and the simple effect of the laws enacted under and by virtue of its municipal or legislative power. When a state, possessed of sovereign authority, transfers to another state a part of its territory, in full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon, it parts with its whole rights of sovereignty over such portion of its territory. It may, if it chooses, stipulate that the laws which were the rules of conduct in such portion of territory at the time of its cession, shall continue in force, as rules of conduct, until altered by the state to which the territory is transferred; but in such case, those laws

would not derive their obligatory force from the continuance of the jurisdiction of the former sovereign of the territory, but from the compact between the two sovereign states, by which they became the laws of its new sovereign.

The proviso in the fourth section appears to me to be nothing more than a stipulation that the laws of Virginia, as they should exist at the time of the actual transfer of the jurisdiction, should remain in force as law, until congress should otherwise provide, under their jurisdiction. Virginia has stipulated, and the United States by their act of acceptance have assented; it is a mere matter of compact between two sovereigns having full power to contract upon that subject. The jurisdiction of the laws, can mean nothing more than the operation of the laws; and so it was understood by congress, who, in their act of acceptance, have said: "Provided that the operation of the laws of the state within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until congress shall otherwise by law provide."

What then is the operation of a law? A law is always in operation as long as it is the rule of conduct of the subject upon which it is intended to operate; that is, as long as the subject is bound to obey it, or conform his conduct to its provisions. The operation of a law can be nothing more than the obligation of a law. A law ceases to operate when it is no longer obligatory, and as long as it is obligatory it is in full operation. The laws would not cease to operate upon the citizens of a state, although it should happen that there was neither a court, a judge, or an officer of justice to punish a breach of those laws. In England it was formerly the case that upon every demise of the crown, every commission of every officer of justice expired; but it was never suggested that the operation of the laws was in any degree affected thereby. There is a great difference between the operation of the laws, and the execution of the laws. A law may be in operation, and yet from a defect of courts or officers of justice, it may not be possible to carry it into execution. The operation of a law is a part of its very essence. It ceases to be a law when it is no longer operative. Congress may pass an act whose operation may commence on a future day, but until that day arrives it does not become a law, it is only an act which at a future day is to become a law. If, in the mean time, before its operation commences, a person does an act which would be contrary to that act of congress if committed after the time limited for its commencement, still that person commits no crime, no offence, and has done nothing against law.

If congress should pass an act, and declare that the operation of that act should commence on the first day of January next and continue until the first day of July following, it would not become a law until the first of January, and it would cease to be a law on the first of July. Operation, therefore, is an essential quality of every law, and means no more than the moral power, or obligation of a law, or that quality by which the law becomes binding upon a man as a rule of his conduct. If, then, the jurisdiction of the laws means the operation of the laws, if the operation of the laws is simply their moral power or obligatory quality, and if those laws derive their binding force or obligation, not from any remnant of the jurisdiction of Virginia, but from the act of congress by which that stipulation was agreed to, then it will follow that the jurisdiction of the laws of Virginia may not cease or determine, and yet Virginia may have parted with every shred of jurisdiction over the territory.

But it has been said, that if we take the laws of Virginia, we must take their courts and their officers of justice also. I consider it unnecessary to give an opinion on that subject, as in the case now before the court it will be sufficient if we show that the jurisdiction over this district was vested in congress on the 27th of February, 1801. But it may well be doubted whether the courts or officers of justice constitute any part of the laws of Virginia, or of their jurisdiction or operation, within the meaning of the term laws, as used in the act of cession and acceptance. It is even doubtful whether an act of assembly constituting a court, is properly speaking a legislative act, or can be called a law. It seems more like a charter or grant. The appointment of judges and other officers is certainly not a legislative act, nor would it become so by being made by a legislative body. It has been said also that as the jurisdiction of the laws of Virginia was not to cease or determine, so the powers of the courts, judges, and other officers of justice must continue and be co-operative, or the laws could not operate. But I trust I have already shown that the operation of the laws does not depend upon the existence of courts or officers of justice, whose only business is to enforce the execution of the laws. The reason of inserting the fourth section in the act of cession, seems to have been that the inhabitants of this district should not be without laws, from the time of the transfer of the jurisdiction, until congress should have leisure to frame a body of laws for their government.

It was foreseen that as soon as the District of Columbia should become the seat of the government, the operation of the laws of Virginia must cease. It might be supposed that it would take congress a long time to form a complete system, but it would not take many days to erect a court and establish the necessary offices for car-

rying those laws into effect. There was therefore little or no reason for withholding the jurisdiction, if the operation of the laws could be continued consistently with its transfer. That the legislature of Virginia thought this might be done appears from the expressions in the fourth section, "until congress, having accepted the said cession, shall, by law, provide for the government thereof under their jurisdiction, in manner provided by the article of the constitution," &c. By the constitution, congress could not exercise exclusive legislation over the district until it had become the seat of government. Congress must have the jurisdiction before they could constitutionally pass a law "under" that jurisdiction. Or if congress had, before its removal to the district, passed an act for its government to become operative when it should become the seat of government, still the jurisdiction must vest before the act could be of effect; so that the vesting of the jurisdiction could not be the consequence of such an act. I must confess that when this question was first suggested, I was inclined to think that the jurisdiction of Virginia did not cease until the passing of the act of congress on the 27th of February, 1801. But upon an accurate comparison of the act of cession with the constitution and the act of acceptance, I am clearly of opinion that the jurisdiction was completely vested in congress on the first Monday of December, 1800.

As to the second reason alleged in arrest of the judgment, viz., that the indictment does not conclude against any statute, it seems to be without foundation. I have no doubt that an indictment at common law is good. It was urged that the common law was, by the convention in 1776, declared to be in force in Virginia until it should be altered by act of assembly; and it was contended that it had been altered in this case by that act of assembly which authorizes a punishment for larceny different from that which the common law inflicted. But that act contains no negative words by which the common law punishment is excluded, and I think the common law cannot be altered without such negative words.

As to the third exception, namely, that there was no previous court of examiners, I imagine it is a fact out of the record, and which cannot be alleged in arrest of judgment. The record, in this case, does not notice any proceeding prior to the indictment, and you might as well allege an informality in the warrant which issued to apprehend the criminal, or in the mittimus by which he was committed.

I am therefore of opinion that the judgment must be entered.

MARSHALL, Circuit Judge, concurred in this opinion. KILTY, Chief Judge, dissented.

Case No. 15,294.

UNITED STATES v. HAMMOND et al.

[2 Woods, 197.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1875.

STATUTES — REVISION — MISTAKE — ENACTMENT — GRAND JURY—DISQUALIFICATION—CRIMINAL PRACTICE—PLEA IN ABATEMENT.

1. Although the provisions of section 820, Rev. St. U. S., were not in force on the first day of December, 1873, and that section seems to have been included in the Revision by mistake, it has nevertheless been re-enacted by congress, and is a part of the law of the land.

2. The presence of one disqualified person upon the panel of a grand jury vitiates the indictments found by it.

[Cited in Richards v. State, 22 Neb. 149, 34 N. W. 346 Cited in brief in State v. Cox, 52 Vt. 472. Cited in Watson v. Com. (Va.) 13 S. E. 24.]

3. Section 820, Rev. St. U. S., prescribes an absolute disqualification for the causes therein mentioned of grand and petit jurors, and it does not rest in the discretion of the court or with the United States attorney to decide whether the rule of disqualification shall be applied or not.

[Cited in U. S. v. Reeves, Case No. 16,139.]

4. The federal courts on questions of criminal practice, not regulated by act of congress, are governed by the common law.

[Cited in U. S. v. Coppersmith, 4 Fed. 205.]

5. Where a party indicted was neither in custody nor under bond when the grand jury which indicted him was impaneled, and had no chance to challenge the grand jurors, he may take advantage of the disqualification of any one or more of them by plea in abatement.

[Cited in U. S. v. Reeves, Case No. 16,139.]

[Cited in Com. v. Brown, 147 Mass. 589, 18 N. E. 589, 591, 592. Cited in brief in State v. Ward, 60 Vt. 148, 14 Atl. 187; Watson v. Com., 87 Va. 613, 13 S. E. 22.]

6. A plea in abatement alleging such disqualification will not be favored, but should contain all essential averments pleaded with exactness.

7. A plea in abatement which alleged as a disqualification of a grand juror that he "did take up arms and join the insurrection or rebellion against the United States, and adhered to said insurrection or rebellion, giving it aid and comfort," but without any specific averment of time or place, is uncertain and bad.

8. The proper conclusion of a plea in abatement is a prayer that the indictment be quashed.

9. When a plea in abatement prays for a judgment which the court can not give upon a plea in abatement the plea is defective and bad.

10. A plea in abatement alleging a disqualification of one of the grand jurors who found the indictment need not be verified.

This was an indictment for conspiracy to defraud the United States, based on section 5440, Rev. St. The defendants [Samuel W. Hammond and others] pleaded specially to the indictment returned against them, that two of the grand jurors (naming them) by whom the indictment was found were disqualified to act as such, because without duress or coercion they had taken up arms and joined the insurrection and rebellion against the United States, and adhered to the said

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

insurrection and rebellion, giving it aid and comfort prior to the present term of this court. To this plea the United States attorney demurred, and insisted that the plea was bad in substance and form.

J. R. Beckwith, U. S. Atty., and J. H. New, Assoc. U. S. Atty.

Thomas J. Semmes and J. D. Rouse, for defendants.

WOODS, Circuit Judge. The plea is based on section 820 of the Revised Statutes. This declares: "The following shall be cause of disqualification and challenge of grand and petit jurors in the courts of the United States, in addition to the causes existing by virtue of section 812, namely: without duress and coercion to have taken up arms, or to have joined any insurrection against the United States; to have adhered to any insurrection, giving it aid and comfort," etc. This is an absolute disqualification imposed by statute. That such a disqualification of a single grand juror vitiates the indictment was the doctrine of the common law. "If any one of the grand jury who find an indictment be within any one of the exceptions of the statute, he vitiates the whole, though never so many unexceptionable persons joined with him in finding it." Hawk. P. C. bk. 2, c. 25, §§ 16, 26, 28; Whart. Cr. Law (6th Ed.) p. 170, § 468; 1 Chit. Cr. Law, 309; U. S. v. Blodgett, 35 Ga. 336 (per Erskine, U. S. Judge); U. S. v. Wilson [Case No. 16,737]; U. S. v. Williams [Id. 16,716]; U. S. v. Collins [Id. 14,837]. Such has also been the doctrine of most of the state courts of America. See Doyle v. State, 17 Ohio, 222; State v. Middleton, 5 Port. [Ala.] 484; Com. v. Parker, 2 Pick. 559; Barney v. State, 12 Smedes & M. 68; Van Hook v. State, 12 Tex. 252; Com. v. St. Clair, 1 Grat. 556; Hardin v. State, 22 Ind. 347; State v. Duncan, 7 Yerg. 271; State v. Rockafellow, 1 Halst. [6 N. J. Law] 332; State v. Ligon, 7 Port. [Ala.] 167; Wilburn v. State, 21 Ark. 198; State v. Cole, 17 Wis. 674; Kitrol v. State, 9 Fla. 9; Vattier v. State, 4 Blackf. 73; State v. Symonds, 36 Me. 128; State v. Martin, 2 Ired. 101.

As the federal courts, in questions of criminal jurisprudence, not regulated by statute, must be governed by the common law, and as the rule of common law, as stated by Hawkins, supra, seems to be well settled, I must hold that the plea of the defendants under consideration is good in substance.

It is next objected to this plea that it comes too late; that the grand jurors subject to the disqualification should have been challenged at the time the grand jury was impaneled. This objection is clearly untenable. It does not appear that the accused ever had an opportunity to present a challenge. On the contrary, the court knows, from its own records, that the accused were not under arrest or recognizance when the grand jury was impaneled. The first charge of offense against the criminal laws of the United States committed by them was made in the indictment to which they have pleaded. They were not supposed to have knowledge of what was going on in the grand jury room. On the contrary, the grand jury was sworn to secrecy, in order that they might not be advised. Their first chance to object to the qualifications of any members of the grand jury was when they were called upon to plead to the indictment. If they have the right to object at all, it seems clear they have not lost it by failure to exercise it at an earlier time, for they have objected at the very first opportunity. That a disqualification enacted by statute may be pleaded in abatement, if done reasonably, has been held in the following cases: U. S. v. Blodgett, 35 Ga. 336; Doyle v. State, 17 Ohio, 222; U. S. v. Wilson [supra]; Com. v. Parker, 2 Pick. 559; Barney v. State, 12 Smedes & M. 68; Hardin v. State, 22 Ind. 347; Wilburn v. State, 21 Ark. 198; State v. Cole, 17 Wis. 674; Kitrol v. State, 9 Fla. 9; Stanley v. State, 16 Tex. 557; State v. Ostrander, 18 Iowa, 435; State v. Rickey, 3 Halst. [8 N. J. Law] 50; People v. Jewett, 3 Wend. 314. And it was the same at common law. Hawk. P. C. bk. 2, c. 25, §§ 16, 28; 1 Chit. Cr. Law, 309. When the courts have held that the objection to a grand juror must be taken before indictment, the ground of exception has usually been to the juror, and has not been a statutory disqualification. U. S. v. White [Case No. 16,679]; People v. Jewett, 3 Wend. 314.

It is next objected that the disqualification mentioned in section 820, Rev. St., is one which it rests within the discretion of the court and of the prosecuting officer of the government to insist on, and that the accused have no right to challenge for such cause. The theory on which this objection is founded is based on section 821, Rev. St., which declares that at every term of any court of the United States, the district attorney, or other person acting in behalf of the United States in said court, may move, and the court in its discretion may require the clerk to tender to every person summoned to serve as a grand or petit juror, venireman or talesman in said court, the following oath or affirmation, namely; then follows the form of an oath to the effect that the affiant has not, without duress and constraint, taken up arms or joined any insurrection or rebellion against the United States, etc., and the section concludes as follows: "And every person declining to take said oath shall be discharged by the court from serving on the grand or petit jury, or venire to which he may have been summoned." This section does not affect the positive enactment of the preceding section, which declares that engaging voluntarily in insurrection or rebellion against the United States shall be a cause of disqualification and challenge. Without the oath prescribed by section 821, a juror might be sworn on his voir dire, and if found

subject to the disqualification prescribed by section 820, he could be challenged. Section 821 seems designed to provide a method by which, in advance, the court in its discretion could purge the venire of both grand and petit jurors of any persons who could not take the oath therein prescribed. To hold, however, that the right of any person interested to challenge a grand or petit juror disqualified under section 820 is left discretionary with the United States attorney and the court, is to blot out that section altogether. There stands its positive enactment that engaging in any insurrection or rebellion against the United States shall be cause of disqualification and challenge of grand and petit jurors. This provision enures to the benefit of all parties in all cases, whether civil or criminal, and is entirely unaffected by the following section which provides additional means of enforcing, but surely does not restrict the provisions of section 820. I am of opinion, therefore, that the plea is not only good in substance, but that it has been seasonably pleaded.

It is further objected to the plea that it is insufficient in matter of form. The defects alleged are: (1) That the plea does not tender a clear and distinct issue of fact, but is vague, uncertain and insufficient; (2) that it does not conclude as required by the rules of pleading; and (3) that it is not verified.

1. Pleas like the present are not favored, and the law requires that they shall contain all essential averments pleaded with strict exactness. U. S. v. Williams [Case No. 16,716]; O'Connell v. Reg., 11 Clark & F. 155; Com. v. Thompson, 4 Leigh, 667; Hardin v. State, 22 Ind. 347; Lewis v. State, 1 Head, 329. This plea alleges, as cause of disqualification, that one of the grand jurors (naming him) "did take up arms and join the insurrection or rebellion against the United States, and adhered to said insurrection or rebellion, giving it aid and comfort prior to the present term of this honorable court, having been captain of company O, in the Crescent regiment from New Orleans, in the service of the so-called Confederate States of America during the late Civil War between the United States and the said Confederate States." The averment as to the other grand jurors is in similar terms. These averments tender the only issues of fact to be found in the plea. It is obvious that the plea fails of the required certainty. There is no averment of time or place. The "insurrection or rebellion against the United States" extended over a period of five years and over a vast territory. The prosecution is entitled to be informed by the plea when and where the juror took up arms and joined the rebellion and insurrection against the United States. The plea gives no information upon these points. It lacks the precision and certainty required in all criminal pleading, and is in this respect fatally defective.

2. The plea concludes as follows: "and this they are ready to verify; wherefore they pray judgment and that by the court they may be dismissed and discharged from the said premises in the said indictment above specified." The prosecution claims that this is not the proper conclusion. There seems to be some confusion in the adjudicated cases upon the conclusion proper to a plea in abatement. See Rex v. Shakespeare, 10 East, 83, where Lord Ellenborough held that a plea of misnomer, by which the defendant prayed judgment of the said indictment, and that he might not be compelled to answer, the same was well pleaded, "although," he said, "if it had not been for the precedent cited of Rex v. Westby [Id. 85, note], I should have been much inclined to think this plea bad in respect to its conclusion." The conclusion adopted by the pleader in this case is the one appropriate for and used in pleas in bar, as the plea of autre fois acquit or autre fois convict. See form 1154, 2 Whart. Prec. Ind. By the same authority the proper conclusion for a plea in abatement, or plea that the defendant has no addition, or plea of misnomer, or plea of wrong addition, is a prayer that the indictment may be quashed. See 2 Whart. Prec. Ind. forms 1141, 1142, 1144; Starkie, Cr. Pl. 473; Whart. Cr. Law, § 536; State v. Middleton, 5 Port. [Ala.] 484. The judgment prayed for by this plea is one only proper to be pronounced upon a plea in bar. "In a plea in abatement the court will give no other than the proper judgment prayed for by the party." Rex v. Shakespeare, 10 East, 83. As the judgment prayed for in this plea is one the court can not give upon a plea in abatement, the plea is defective and bad.

3. As to the objection that the plea is not verified, I simply remark that so far as I have been able to look into the authorities, only pleas of misnomer or wrong addition are required to be verified, and the plea should expose the defendant's proper name and addition. Whart. Cr. Law, § 537. The reason of the rule as applied to such pleas is obvious, and the reason does not apply to the plea under consideration.

The result of my investigation is that the plea is uncertain and insufficient and does not pray the proper judgment of the court, but that the facts referred to, if properly pleaded, would have justified a judgment that the indictment be quashed. The demurrer to the plea is sustained.

Since the argument of the demurrer it has been suggested that section 820 of the Revised Statutes was improperly included by the compilers in their Revision of the statutes, that section not having been in force on the first day of December, 1873. This appears to be true. The section referred to was section 1 of the act approved June 17, 1862, entitled "An act defining additional causes of challenge, and prescribing an additional oath for grand and petit jurors in the United States courts" (12 Stat. 430). This section was repealed by the fifth section of

the act approved April 20, 1871, "to enforce the provisions of the fourteenth amendment to the constitution of the United States, and for other purposes" (17 Stat. 15). But the conclusion which the prosecutor seeks to draw from these facts, namely, that section 820 of the Revised Statutes is not now a part of the statute law, does not, in my opinion, follow. The work of the compilers, including section 820, was submitted to congress, and the whole re-enacted by the adoption of the Revised Statutes. The compilers may have exceeded their authority, congress may not have designed to re-enact section 820, but it has done so, and we cannot go behind the law and cure the mistakes and inaccuracies of congress. "We are bound," says Mr. Justice Buller in Jones v. Smart, 1 Term R. 44, "to take the act of parliament as they have made it;" and Mr. Justice Story in Smith v. Rines [Case No. 13,100], observes: "It is not for courts of justice proprio marte to provide for all the defects or mischiefs of imperfect legislation." That must be done by congress itself, and until it is so done we must take the law as we find it.

Case No. 15,295.

UNITED STATES v. HANCOCK.

[3 Cranch, C. C. 81.] [1]

Circuit Court, District of Columbia. April Term, 1827.

BASTARDY—RECOGNIZANCE—BY WHOM PROCEEDINGS TO BE INSTITUTED.

In the county of Alexandria, a justice of the peace has no authority to take the recognizance required by the Virginia act of December 26, 1792, p. 183, § 23, in a case of bastardy, unless upon application by an overseer of the poor of the county. Quære, whether that section is in force in the county of Alexandria?

The defendant [Andrew Hancock] had been brought before a justice of the peace in the county of Alexandria, as the reputed father of a bastard child, upon the application of the mayor of the town of Alexandria, who is ex officio a trustee of the poor-house and work-house. The justice required him to enter into a recognizance, with security in the sum of thirty dollars, to appear before this court, and to abide by and perform the order of the court, agreeably to the 23d section of the Virginia act of December 26, 1792.

Mr. Taylor, for defendant, contended that the Virginia law gives the jurisdiction only to the county court; but this court derives no jurisdiction from the laws of Virginia, which give jurisdiction to their respective courts. The act of congress of March 3, 1801 (2 Stat. 115), enumerates certain powers of the county courts of Virginia, and confers them on this court, but not this power in cases of bastardy. It is not a criminal case; it is merely a precautionary remedy, to be granted only on the application of the overseers of the poor; it is merely a police regulation, not adopted by the act of congress of February 27, 1801 (2 Stat. 103), because it is not applicable to the circumstances of the county of Alexandria since its separation from Virginia, and cannot be carried into effect here. The recognizance, by the Virginia law, is to the "governor of Virginia." If the party charged will not give the security required, he is to lay in jail until discharged under the insolvent law of Virginia. If the recognizance is given to the United States, instead of the governor of Virginia, the party cannot be discharged under the insolvent law of the District of Columbia.

Mr. Swann, for the United States, contended that the public good required that the jurisdiction should be supported; that it is a criminal case, and this court has a general criminal jurisdiction; that this court has all the powers of the district courts and the county courts of Virginia; that the Virginia law, if in force here, gives the party the right to a discharge under the insolvent law of the district, although, nominally, the recognizance is to the United States, yet it is for the use of the county. The United States has no interest in it.

THE COURT (nem. con.) was of opinion that the magistrate could not require the recognizance, unless upon the application of an overseer of the poor of the county.

Recognizance discharged.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,296.

UNITED STATES v. HAND et al.

[6 McLean, 274.] [1]

Circuit Court, D. Ohio. Oct. Term, 1854.

CONSPIRACY TO BURN VESSEL — RECOGNIZANCE — OFFENCE—COMMISSIONER—SURETY.

1. A recognizance taken by a commissioner of the circuit court, conditioned for the appearance of the principal "to answer the charge of a wilful and corrupt conspiracy to burn the steamboat Martha Washington on the Mississippi river," is void, as not describing an offense made punishable by any act of congress, and cognizable by the circuit court.

[Cited in U. S. v. George, Case No. 15,199; U. S. v. Hudson, 65 Fed. 73.]

2. By the 23d section of the act of congress of March 3, 1825 [4 Stat. 122], defining and punishing the crime of conspiring to cast away, burn, or destroy a vessel, the intention thereby to injure underwriters is an essential ingredient of the crime; and without the averment of such intention, no offense is described in violation of any act of congress.

3. The authority of a commissioner in arresting, holding to bail, or committing to jail, is expressly limited to complaints or charges importing an offense against the laws of the United States.

[Cited in U. S. v. Eldredge (Utah) 13 Pac. 679.]

[1] [Reported by Hon. John McLean, Circuit Justice.]

4. The recognizance in this case, was void ab initio, and created no obligation on the principal to appear.

5. The bail was not therefore bound by this recognizance for the appearance of the principal, as it is of the essence of every undertaking by the bail or surety of another, that there should have been a valid obligation of the principal.

At law.

Mr. Morton, Dist. Atty., for the United States.

Ward & Swayne, for defendants.

LEAVITT, District Judge. This is a suit by scire facias on a recognizance taken by a commissioner of this court, by which Nicholson as principal, and [Linns] Hand and [Francis G.] Stratton as bail, acknowledge themselves, jointly and severally, to owe the United States the sum of five thousand dollars, upon the condition that said Nicholson shall appear before this court, at the term then next following, "to answer a charge of wilful and corrupt conspiracy for burning the steamboat Martha Washington, on the Mississippi river." The scire facias avers that the recognizance was duly returned to said court, and that, Nicholson failing to appear, a default against all the parties was entered. The scire facias has been returned served on the defendants Hand and Stratton, and not found, as to Nicholson. The defendants on whom service has been made, have appeared, and filed a general demurrer to the scire facias.

The main point urged in support of the demurrer, is, that the act charged in the recognizance, to answer which the defendants undertook for the appearance of Nicholson, is not an offense by act of congress, and therefore not cognizable by this court; and that the recognizance is a nullity, creating no obligation on the principal or his bail. This objection is fatal to this action. There is no statute of the United States, which punishes a conspiracy to burn a steamboat on the Mississippi river. This recognizance was probably intended to provide for the appearance of the principal, Nicholson, to answer to charge of conspiracy to burn the steamboat named, with intent to injure certain underwriters. This is a crime defined and punished by the 23d section of the act of congress of March 3, 1825 (4 Laws U. S. 122 [4 Stat. 122]); but by its terms, the intent with which the alleged conspiracy is entered into, is an essential ingredient of the crime. By an inadvertence, this intent, as descriptive of the crime, is omitted in the recognizance; and the act set forth is not in violation of any act of congress, and therefore not within the cognizance of this court. Under the clause contained in the constitution of the United States, vesting in congress the power to regulate commerce among the states, it was no doubt competent for that body to punish the offense defined in the section above referred to; and this court, by its decision, has sustained an indictment framed under it. But, in that case, the intent of the alleged conspiracy was set forth in the language of the statute; and it is clear, without such averment, the indictment could not have been sustained.

It results from this view, that the commissioner had no authority to take the recognizance of these parties, for the offense which it describes. The power conferred by the 33d section of the judiciary act of September 24, 1789 [1 Stat. 91], upon a judge or justice of the United States, or of a state, to issue warrants in criminal cases, and commit or hold to bail, is expressly limited to violations of the laws of the United States. And the same limitation is contained in the act of August 23, 1842 [5 Stat. 516] by which commissioners of the circuit court are authorized to exercise the same powers as are vested in a judge or justice, under the said 33d section of the act of 1789. This recognizance, being void ab initio, imposed no legal obligation on the principal to appear and answer to the charge which it set forth. And it is clear, if there was no legal obligation on the part of the principal, there was none on his bail. It is of the essence of all contracts or undertakings by a surety or bail, that there should have been a valid obligation of the principal. It is well said by a writer on this subject, that "the nullity of the principal obligation, necessarily induces the nullity of the accessory."

The demurrer to the scire facias is therefore sustained.

Case No. 15,297.

UNITED STATES v. HAND.

[2 Wash. C. C. 435.] [1]

Circuit Court, D. Pennsylvania. April Term, 1810.

ASSAULT UPON FOREIGN CHARGE D'AFFAIRES—INTENT—INTERNATIONAL LAW.

1. Indictment for an assault upon the chargé d'affaires of Russia, and for infracting the law of nations, by offering violence to the person of the said minister.

2. When the minister had a large party at his house, and a transparent painting at his window, at which a mob who had collected took offence, the defendant fired two pistols at the window, his intention being to destroy the painting, without doing injury to the person of the minister, or of any one.

3. An assault is an offer or an attempt to do a corporal injury to another, as by striking at him with the hand or with a stick, or shaking the fist at him, or presenting a gun, or other weapon, within such distance as that a hurt might be given; or drawing a sword, and brandishing it in a menacing manner—each of those acts to be done with intent to do some corporal hurt to another.

4. The law of nations identifies the property of the foreign minister, attached to his person, or

[1] [Originally published from the MS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

in his use, with his person. To insult them, is an attack on the minister and his sovereign; and it appears to have been the intention of the act of congress, to punish offences of this kind.

5. To constitute an offence against a foreign minister, the defendant must have known that the house on which the attack was made was the domicile of a minister; or otherwise, it is only an offence against the municipal laws of the state.

The first count contains a charge of an assault upon the person of Mr. Daschkoff, the Russian chargé d'affaires; and the second, for infracting the law of nations, by offering violence to the person of the said minister. The defendant pleaded not guilty. The evidence was, that on the night of the 26th of March, the minister, with a view to celebrate the coronation of his sovereign, invited a large party to his house; and from a desire to compliment the persons without, and to evidence the friendship between his government and this, placed at one of the windows of his drawing-room on the second floor, a transparent painting, which represented a vessel under the American flag entering a port of Russia, above which was placed a crown. The people without, misunderstanding the design of the painting, and the intention of the minister in exhibiting it, took offence at the crown, and particularly at its position over the American flag. A large crowd collected, many threats to pull it down were clamorously made, and some bricks and stones were thrown at the house. Some of the gentlemen from the house went out to explain the matter to the mob, and endeavoured to pacify them, but in vain. They promised, however, that they would be satisfied if the minister would take down the crown, and agreed to give a certain number of minutes for this to be done. In the mean time, the defendant, with a Mr. Henderson, having left the theatre between 11 and 12 o'clock, attracted by the illumination, went to see what it was. Hand and Henderson soon separated in the crowd, the latter exerting himself to pacify the people. Some short time afterwards the defendant, who lived in Fifth street between Market and Arch, was seen coming from Seventh street, in Chestnut, to the crowd opposite the minister's house, between Seventh and Eighth streets. He carried in each hand a large pistol, and, coming opposite to the house, in less than two minutes fired one pistol at the illuminated window, and immediately after, the second. At this time, the minister and one of his domestics were in the window, extinguishing the lights, in compliance with the wishes of the mob; and the bullet from the pistol first fired, passed into the room, through the window over their heads. The company fortunately was below stairs, at supper, when the pistols were fired. The defendent was proved to have been considerably intoxicated, and was taken, by his friends, to a friend's house, where, being informed of the insult done to the Russian embassador, he declared he did not know it was his house; which he afterwards repeated. No proof was given that he had this knowledge.

WASHINGTON, Circuit Justice (charging jury). The indictment contains two counts, or charges, upon which the jury must pass; and I shall therefore consider them distinctly. The first is for an assault upon the Russian minister, against the provisions of the act of congress. The definition of an assault (1 Bac. Abr. tit. "Assault," 242) is an offer or attempt by force to do a corporal injury to another; as if one person strike at another with his hands, or with a stick, and misses him; for, if the other be stricken, it is a battery, which is an offence of a higher grade. Or if he shake his fist at another, or present a gun, or other weapon, within such distance as that a hurt might be given; or drawing a sword, and brandishing it in a menacing manner. But it is essential to constitute an assault, that an intent to do some injury should be coupled with the act; and that intent should be to do a corporal hurt to another. Apply these principles to the evidence in the cause. The intention of the defendant most clearly was, to destroy, or, as he termed it, to take down, the crown, which his heated mind had construed into an insult to the service of which he was a member. His whole conduct showed that his intention was not to do a personal injury to any one, and certainly no act was done in the smallest degree indicative of such intention. The outrage of which he was guilty, must be reprobated by all good men, and deserves to be punished; but it did not amount to an assault upon the Russian minister, which is the offence charged in the first count of the indictment. Upon this count, therefore, the jury ought to find him not guilty.

The second count charges him with infracting the law of nations, by offering violence to the person of the minister. Here again, the difficulty recurs, which has been noticed under the first count. How can an attack upon the house of the minister, without an intention to injure the person of the minister, be an offer of violence to his person? Upon common law principles, such evidence would seem inapplicable to such a charge. But the act of congress refers us to the law of nations for our test; and if the act amount to the offer of personal violence, by that law, the charge is supported. That law, with respect to offences committed against ambassadors, &c., identifies the property of the minister, attached to his person, or in his use, with the person of the minister. The expressions of Vattel are very strong: "His house, carriage, equipage, family, &c., are so connected with his person, as to partake of the same fate with it. To insult them, is an attack on the minister himself, and upon his sovereign. It is an insult to both." Vatt.

Law Nat. 618, 715, 719, et seq. All this is a legal fiction, for the purpose of rendering the protection to which the minister is entitled full and complete, and to guard him, as well against insults, as real personal injury. It is not more extravagant than the fiction which considers the minister, his house and property, out of the country, for the purpose of ousting the jurisdiction of the tribunals of the country over him. Nor is it more strange than that which once prevailed in our law, though long since overruled, that provoking words alone would amount to an assault. Moreover, it seems pretty clear, that offences of this sort were intended to be covered by the general expressions of the 27th section of the law to punish crimes. The preceding part of the section had specified four distinct offences, the lowest of which is an assault; and it is difficult to imagine any directly against the person of the minister, which can be lower. But congress knew that there were many other injuries which might be offered to a public minister, and which the law of nations considered as being indirectly attacks upon his person, and, without attempting a further specification, covered under general expressions all such as were deemed by the law of nations to be offences against the person of the minister. Without such a construction, it would be difficult, if not impossible to imagine cases of violence against the person, to satisfy the general words, which are not included in those that are specified in this and the two preceding sections. But, to constitute this an offence against the law of nations, the defendant must have known that the house upon which the violence was committed was the domicile of the minister; or otherwise, it is merely an offence against the municipal laws of Pennsylvania; and this is the only point of consequence for you to decide. Without giving any opinion upon the evidence, I shall content myself with presenting it fairly to your view.

It is always difficult, and frequently impossible, to bring home to any man the knowledge of a fact, by positive proof; and therefore, it may fairly be collected from circumstances. But these circumstances should be legally proved, and should be sufficiently strong to satisfy the mind that the fact was known. In favour of the defendant, his declaration, immediately after the outrage was perpetrated, that he did not know that it was the house of the minister, made in a state of mind when caution and reflection were not to be expected, and that, at different times afterwards, confirmed by similar declarations, have been much relied upon by his counsel. The denial of the accused is certainly the lowest species of proof; but it may be sufficient to repel slight evidence to fix him with a knowledge of the fact. On the other side, the defendant lived in Philadelphia; and if he had not obtained by this means a previous knowledge of the residence of the minister, the occasion which drew him to the spot, the novelty of the sight, the appearance of a crown, the general irritation of the crowd, and of the defendant in particular, at its position, were all calculated to excite inquiries, which it is proved by the witnesses could at once have been answered. It appears that some of those who went there ignorant that this was the house of the minister, soon gained information of the fact. One of the gentlemen from the house had addressed the crowd, and explained to them the occasion of the illumination, and the impropriety of their conduct upon the occasion. If it had been proved that the defendant was one of the crowd at this time, the evidence against him would be complete. But it seems very probable, that soon after his first coming to the place, and possibly before this explanation was given, he had gone away in pursuit of his pistols; and it is in proof, that almost immediately upon his return, he fired them. It is possible also, from the state of intoxication in which he was, that he did not wait to make inquiries. As to this fact, upon which the cause turns, the jury must judge. If they are satisfied, upon the evidence, that he knew this to be the residence of the minister, they ought to acquit him under the first count, and find him guilty under the second. If otherwise, find him not guilty, generally.

Verdict not guilty.

Case No. 15,298.

UNITED STATES v. The HANNIBAL.

[Cited in U. S. v. 129 Packages, Case No. 15,941. Nowhere reported; opinion not on file in clerk's office.]

Case No. 15,299.

UNITED STATES v. HANWAY.

[2 Wall. Jr. 139; 9 Leg. Int. 22; 4 Am. Law J. (N. S.) 458; 9 West. Law J. 103.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1851.

JURORS—CHALLENGE—TREASON—INDICTMENT—RESISTANCE TO LAW—FUGITIVE SLAVE LAW.

1. One who being summoned as a juror in a case, where treason was charged to have been committed—stated, on being challenged, that he had read the newspaper accounts of the facts at the time, and come to his own conclusions—had made up his mind, that the offence was treason, though he had not expressed that opinion,—nor apparently formed nor expressed an opinion that the defendant was or was not engaged in the offence—is incompetent to sit as a juror. (Walsh's case.)

2. One who has formed a conditional, but not an absolute opinion on the law of treason: e. g., who says he can't understand how treason can be committed against the United States if such and such facts do not constitute it, is competent to sit as a juror, if he says that, on being in-

[1] [Reported by John William Wallace, Jr., Esq. 9 West. Law J. 103, contains only a partial report.]

structed by the court, that the opinion is erroneous, such opinion will cease to influence him as a juror. (Reynolds' case.)

3. The prosecution have no right to ask a juror, whether he has so made up his mind [on facts?] as that it could not be altered in the course of a trial; there being no obligation on the prisoner to take upon him the burden of changing the juror's mind to the extent, that even if this question were answered negatively, he might have to do it, to procure an acquittal. (Whitman's case.)

4. One who, without forming or expressing any opinion as to the matter to be tried, had "formed an opinion that the laws had been outraged," is competent. (Brinton's case.)

5. One who had "certainly expressed an unfavourable opinion towards the course of these gentlemen,"—that is a party of persons with whom the prisoner agreed in opinion; the person summoned being sensible of no such bias as would affect his action as a juror; having neither formed or expressed any opinion as to the guilt or innocence of the prisoner, or of the other persons charged to have participated with him in the offence; not presuming to be a judge whether the offence was treason; knowing none of "these gentlemen" individually, and meaning to express nothing more than an opinion against the transaction, and that the persons engaged in it ought to be punished, is competent. (Lyons's case.)

6. One who had formed, though not expressed, "some opinion" relative to the matter to be tried —who had made up his mind as to the subject of treason, provided the facts were proved, but not as to the guilt of the prisoner, was recommended by the court to be withdrawn; the trial being one for "treason"; the definition of which word in application, though not abstractly, had not yet been perfectly settled by judicial decision; and the court considering that his answer indicated that he might have "made up his mind" on the law of treason; and made it up differently from what the court would decide.

[Cited in Higgins v. Minaghan, 78 Wis. 604, 47 N. W. 941.]

7. The court, in the early empanelling of jurors, where the numbers unchallenged are yet great—or in particular trials, or in particular circumstances,—as where public opinion has been abused by the party-press—or where there is reason to suppose that the opinion of the neighbourhood from which the jurors came, may be biased—will allow more searching and particular questions to be put to the persons summoned as jurors, than it would afterwards, where it appears that a jury, such as would be entirely desirable, cannot be had; or where the case has not excited public interest. It will seek in the first instance, and as far as practicable, to have a jury not only free from legal bias, but even from any even light impressions about the case at all.

8. On an indictment for treason, everything tending to show that there was an intention to make public resistance to a law of the United States, is entirely evidence in chief, and cannot be received in rebuttal.

[Cited in Lawson v. Miller, 44 Ala. 616.]

9. On an indictment for treason, the intent of the act, being essential, it is competent to show, that a long time (say within nine months) before the alleged treasonable occurrence, facts had occurred, and rumours were prevalent in the neighbourhood, which would explain certain particulars relied on, to show treasonable intent, and make them show a different intent.

10. A person who stands indicted of treason along with the defendant in another indictment not now trying, is a competent witness for him in an indictment now trying, and in which such person is not included.

11. To constitute the offence of treason against the United States, there must be a conspiracy to resist generally and publicly, by force,—and an actual resistance by force or by intimidation, of numbers—of a law of the United States.

12. A conspiracy to resist by force the execution of such law in particular instances only;—a conspiracy for a personal or private as distinguished from a public and national purpose, is not treason; however great the violence, or force or numbers of the conspirators may be.

13. In a prosecution in the circuit for treason, in the alleged commission of which a citizen of a state, without the circuit, had been assaulted and killed, the court approves of the presence of special counsel from that state; as well counsel coming here by order of the governor of the state, as counsel employed by the friends of the deceased.

Hanway was indicted for treason against the United States, the punishment for which is death. A number of other persons also stood indicted at this term for the same offence in which he was said to be engaged. The bill charged Hanway with intending to resist, in a treasonable way, the execution of an act of congress passed September 16, 1850 [9 Stat. 462], and commonly called the "Fugitive Slave Law." As already stated, this law, its expediency, its constitutionality, and every thing connected with it, had been the theme of violent party debate. And a resistance to it, with which Hanway and the other persons were charged to have been connected, had also been the subject of general knowledge, of all kinds of representations, and of violent comment and debate: and this particular trial, the counsel, the court, the pleadings, the evidence, the law, had all engaged the columns of the party press, especially in New England. The prisoner being arraigned and the jurors ready to be called, a discussion arose here as to the proper questions to be put. The court said that they considered it due to the panel, and due also to the purposes of justice, that as far as possible every juror that was sworn to pass between the United States and the prisoner, should be entirely without bias of any sort whatever. That the offence of which the prisoner was charged, consisted of the two elements of the act, and the intent of that act. And that a juror who had formed an opinion as to the prisoner's participation in a certain act, or as to the intent which would be deducible from that act, had already passed in his mind upon a part of the general proposition involved in a question of guilt or innocence. In that view of the subject, the court allowed the following questions; precedents, with certain variations in some, being adduced for all of them. They said, however, in subsequent parts of the case, that they did not mean to promulgate and settle all and each of these questions, as the exactly proper and the only ones, to be put in all instances and under all circumstances. They would enlarge or limit their extent in application by construction. There being many treason trials to come on, they thought it possible,

that in the progress of the cases, it might become necessary, in order to have a trial at all, to modify the questions. They took notice of the fact, that there had been an attempt, by portions of the press, to prejudice the public mind and to anticipate the decisions of the court and jury on the subject of these trials, and stated that to be the reason why questions more searching than usual, were allowed. If it should turn out in the result, that the jurors summoned from the community were preoccupied by newspaper reports, but were yet capable according to their best judgment, of rendering a true verdict according to the law and the evidence, it might become indispensable to reconsider and modify questions settled in an earlier and different state of the case.

The questions allowed were these: (1) Have you any conscientious scruples upon the subject of capital punishment, so that you would not, because you conscientiously could not, render a verdict of guilty, death being the punishment, though the evidence required such a verdict? (2) Have you formed or expressed any opinion relative to the matter now to be tried? (3) Are you sensible of any such prejudice or bias therein, as may affect your action as a juror? (4) Have you formed or expressed any opinion as to the guilt or innocence of the accused, or of the other persons alleged to have participated with him in the offence charged against him in the indictment? (5) Have you heard anything of this case which has induced you to make up your mind as to whether the offence charged in the indictment constitutes treason or not? (6) Have you formed an opinion that the law of the United States, known as the "Fugitive Slave Law" of 1850, is unconstitutional, so that you cannot for that reason, convict a person indicted for a forcible resistance thereto, if the facts alleged in the indictment are proved, and the court hold the statute to be constitutional?

Walsh, in reply to the 2d and 3d questions —whether he was sensible of any such prejudice or bias, as would affect his action as a juror; and whether he had formed any opinion as to the guilt or innocence of the accused, or of the other persons alleged to have participated with him in the offence charged? answered, that he had read the newspaper accounts at the time, and "came to his own conclusions." He was challenged by the prisoner for cause.

Counsel of the United States. The cause is insufficient. If every juror who has come to a conclusion in his own mind, upon statements made in the newspapers, is to be excluded, we shall be scarcely able to obtain an impartial panel. Almost every intelligent man has read an account of this proceeding, given by the newspapers, and has undoubtedly formed some conclusion in his own mind. The human mind is so constituted, that facts can scarcely be brought to bear upon it that it does not conclude either pro or con, in regard to it. It is not enough that he should have read an account, and come to a conclusion upon it in his own mind. He must have expressed that conclusion. There is a difference between the formation and expression of an opinion. If the juror has formed an opinion, without having expressed it, he is not committed as far as language is concerned. He is not so far committed in one case as in the other. That pride and prejudice, which we all possess, is enlisted in requiring that an opinion expressed should be maintained and proved true. In the Case of Callender, before Judge Chase, a similar question was proposed to Mr. Basset. [Case No. 14,709, note 2.] See Mr. Basset's own account (Chase, Tr. p. 200). The indictment charged the publication of a certain book, being a malicious libel. Mr. Basset "had never seen the book, though he had extracts in the newspapers, and he had formed and expressed an unequivocal opinion, that if the extracts were correctly taken, and Callender was the author or publisher of that book, the book was a seditious act; but he had never formed and expressed an opinion in respect to the indictment; for he had neither seen nor heard it." Id. 6; 2 Chase, Tr. p. 487. He was admitted; and though this was found fault with, and made one of the charges against Judge Chase, on his trial, he was acquitted of impropriety—there being no dispute about facts—by a majority of 24 to 10. The ruling was referred to, apparently with approbation, by Chief Justice Marshall (Burr, Tr. p. 370), who explains Mr. Basset's account by saying, that Mr. Basset had declared the book to be a libel, but had not expressed an opinion who was the author.

GRIER, Circuit Justice. Before the court can exclude Mr. Walsh for cause, we wish to know if he has formed a conclusive opinion, that the transaction for which this defendant is upon trial, or his participation in it, was treasonable against the United States government. If he has, then he has formed an opinion which affects a most important matter in this case, which is, the intention of the defendant; or if he has formed an opinion that this defendant is or is not one of the persons who was guilty upon that occasion, and expressed it, that is important. But, standing merely by itself, his reply might be made by every juror, and we might not get a panel for two years.

GRIER, Circuit Justice. Have you formed a conclusive opinion as to whether the persons engaged in this transaction are indictable for treason?

Juror. I think the offence treason.

GRIER, Circuit Justice. You have made up your mind, I understand you. Have you ever expressed the opinion?

Juror. I do not remember that I have expressed it.

GRIER, Circuit Justice. Did you, at that time, form the conclusion in your mind, that the offence was treason?

Juror. I did, sir.

GRIER, Circuit Justice. That is sufficient. Walsh set aside.

Reynolds, in reply to the 4th question, whether he had formed or expressed any opinion as to the guilt or innocence of the accused, or of the other persons alleged to have participated with him in the offence charged, answered: I cannot say that I have formed an absolute opinion about it; I may have conditionally. It is in my mind a matter of doubt. I say that if it is not a treason, I don't see how treason against the United States can be committed; for as to 'levying war'—in the ordinary sense of the word war—against the United States, things could not go to that extent. A large army would not be allowed to assemble. The opposition would be put down before it presented such an aspect. I have also expressed an opinion that the white persons, if there were any engaged in it, were more culpable than the absconding slaves, who were led on by them. Challenged by the prisoner for cause.

Counsel for the United States. There is no difficulty here. The juror is asked if he has formed an opinion as to whether this is treason or not; and his answer is, "I do not know whether it was or not." He has not made up his mind upon the subject. "But if this was not treason, I do not know what constitutes treason." The point is, has he so armed his mind, that he is not disposed to take the law from the court, as presented by it? Will he act upon his own judgment, in opposition to it? And the question should be put, "Have you so formed an opinion, that if the court instructs you to the contrary, you will still hold it?" The opinion may be so light as to be easily removed.

Counsel for the prisoner. The intention of the court is, to get men that stand untainted by rumours. Mr. Reynolds asserts in effect, that he has made up his mind that it is treason; for he says he has formed an opinion, that if there can practically be treason against the United States, this is it. He has formed an opinion, that it is treason, if treason can be committed without levying war in the ordinary sense of the word. If, therefore, the court instructs him that it can, a conviction follows as of course. All the facts are prejudged. He has also gone a step further, and shows a bias and prejudice against the prisoner. He says he has expressed an opinion, that the white men, if any were engaged in the affair, as this prisoner, a white man, is charged to have been, were more guilty than the blacks whom they instigated. Therefore, the question naturally arises, whether that very expression is not a bias or prejudice against the prisoner on trial. Upon the two opinions given, we are entitled to a challenge.

GRIER, Circuit Justice. The juror is not disqualified by having formed opinions upon the law, if they are not of such a character as to influence his action, in case the court shall instruct him that they are erroneous: But if his action as a juror would be affected by those opinions in any degree, notwithstanding such instructions; it is good cause of challenge.

Reynolds challenged peremptorily.

Whitman in reply to the first four questions, had no conscientious scruples upon the subject of capital punishment, nor had he formed or expressed any opinion relative to the matter to be tried, nor was he sensible of any bias, which would affect his action as a juror, nor had he formed or expressed any opinion as to the guilt of the accused, or of the other persons alleged to have participated with him in the offence charged; but on the fifth question being put, whether he had heard anything which induced him to make up his mind whether the offence charged in the indictment constitutes treason"—said: "I have formed some opinion about that. I take this case to be pretty nearly similar to Fries's, which happened in the town from which I come." He was challenged for cause.

Counsel of the United States. The cause is insufficient; it having been decided in this circuit, that a juror who sat in a case where the defendant was charged with an offence, could sit and decide in another case where the defendant was charged with the same offence. The party having already answered that he is not sensible of any prejudice, which would affect his action as a juror, showed that his present answer was to be taken with a qualification, which made his conclusion harmless.

Counsel for the prisoner. The juror thinks the case like that of a particular individual, who was accused, tried and convicted of treason. In deciding that, he has passed upon the question of intention, which is a question to be submitted to the jury. The next question might be, "What do you mean by treason?" which we might find hard to answer; but here the juror has given the case of a man accused, tried, and convicted, and pardoned for treason; there can be no difficulty about the intention.

GRIER, Circuit Justice. The witness has not given a direct answer, and you may ask an explanation of it.

Counsel of the United States. Have you so made up your mind as to the character of the crime, that it could not be altered in the course of the trial?

GRIER, Circuit Justice. That is not a proper question. The prisoner must not have the burden of changing the juror's mind. This 5th question would not be a good one, except on the ground that in a public transaction of this character—the intention of each and all of the parties concerned, is one of the matters which go to make up treason. If the juror had fully made up his mind that this was not treason, it would be an opinion upon a portion

of the case, to wit, the intention of the parties concerned, which would make him unfit to be a juror in the case. It being eminently desirable that if it be possible, jurors in all these cases should be without any bias on one side or the other, we think—not meaning by this to lay down an absolute rule for the future, that perhaps the counsel of the United States had better allow Mr. Whitman to go.

Whitman set aside for the present.

Brinton had no conscientious scruples; but in reply to the question, whether he had formed or expressed any opinion relative to the matter now to be tried—answered that he had formed an opinion, "that the laws were outraged in this Christiana case." Challenged for cause.

GRIER, Circuit Justice. That is no reason for excluding the juror; I suppose every man in the community has formed the same opinion.

Brinton challenged peremptorily.

Lyons, in reply to the question, whether he had formed or expressed any opinion relative to the matter to be tried, had "certainly expressed an unfavourable opinion towards the course of these gentlemen:" but in reply to the other questions was sensible of no such prejudice or bias in the matter as would affect his action as a juror; had neither formed nor expressed any opinion as to the guilt or innocence of the accused, or of the other persons alleged to have participated with him in the offence charged against him in the indictment: and did not "presume to be a judge," whether or not the offence charged in the indictment was treason. He knew none of "these gentlemen" individually; had seen the names of some of them published, and likely had seen the prisoner's name among them, but did not know him.

GRIER, Circuit Justice. Did you mean to express anything more than an opinion against the transaction, and that the persons engaged in it ought to be punished?

Juror. No, sir.

GRIER, Circuit Justice. We do not consider that, taken with his answer to the other questions, is sufficient to exclude him. If a man has been informed that a burglary or arson has been committed, and has said the fellow who did that ought to be sent to the penitentiary—would that make him incapable of being a juror? If the juror had expressed an unfavourable opinion as to this defendant, it would be different; but his opinion having been only a general opinion as to this transaction, does not incapacitate him.

Challenged peremptorily.

Smith had formed "some opinion" relative to the matter to be tried; but had not expressed it. He had "made up his mind as to the subject of treason, provided the facts were proved, but not as to the guilt of the prisoner."

Challenged by the prisoner for cause.

Counsel for the prisoner. The witness has made up his mind about the law of treason. He assumes the office of the court: and whether his law is right or wrong, if certain facts which come up to his notion of what makes treason, he will find the prisoner guilty. In the case of Walsh, who was set aside, the juror's expression was, that he had "made up his mind." The court will not ask a juror, whether, his mind being "made up," it will be altered by a charge from the court. That is a matter of mere speculation, and which no man can safely undertake to answer. All presumption is, that it will not be.

In Burr's Case [Case No. 14,693 (Proceedings of Monday, August 10, 1807)] Roberts was set aside, because "he had thought and declared from the reports in the public newspapers, that the prisoner was guilty of treason, though he had no doubt that his opinion might be changed by the production of other testimony." If this man goes into the jury box, we have to labour to get an impression out of his mind. He is not ab omni exceptione major. "A juryman," says Marshall, Chief Justice, "should come to a trial of a man for life, with a perfect freedom from previous impressions."

Counsel of the United States. The court has already said, in the case of Reynolds that a person is not disqualified from sitting, though he has formed an opinion of the law, if, when instructed that the opinion is wrong, it will not influence his action as a juror. This man has formed an opinion, if the facts stated in the papers are true, that those facts constitute treason, but he has not connected the prisoner in any way with the facts. That distinguishes the case from Roberts's, cited from Burr's trial. The juror here has formed no opinion conditional or otherwise as to the guilt or innocence of the prisoner, nor any opinion as to the truth of the facts stated in the newspapers. His opinion is abstract merely. Certain facts he believes constitute treason. So does every man of sense. But a man's intelligence is not to be cause for challenge.

GRIER, Circuit Justice. I think that if this were an ordinary case, as an indictment for burglary, the conclusions of the juror would hardly be sufficient to exclude him. It is very natural if your neighbour's house has been broken open and robbed at night, that you should come to the conclusion that a burglary had been committed; and such belief ought not to prevent a person being sworn in a panel, to try a man accused of the offence. There is no dispute there as to what is a burglary in the meaning of the law. I do, however, see some difference in this case. The whole country has been agitated by questions as to what in application legal is "treason." The defence will perhaps contend, that admitting every fact asserted, there is no treason. Its applied definition of

treason may be wholly different from that of the prosecution, while both of course adopt in the abstract the definition in the constitution. It is to the honour of our country, that the crime has never been so defined by judicial application of it to cases, as to settle its meaning in the same way as the meaning of other offences; burglary, for example, is settled. Now this witness would rather seem to have made up his mind upon the subject. He has settled for himself the meaning, in application, of the constitutional definition. This being a point, which will probably form a great subject of argument, and the matter not being absolutely res judicata, we think it best that this person should withdraw.

Challenge sustained.

The principal case.

A jury being impanelled, the facts of the prosecutor's case as they appeared from its own evidence, were essentially these. On the 9th of September, 1851, Mr. Gorsuch, of Maryland, having procured from a commissioner of the United States, authorized to issue them, certain warrants to arrest some fugitive slaves of his, went with Kline, an officer, appointed by the commissioner, to Christiana, in Lancaster county, Pennsylvania, to take them. The place was inhabited by people who, in general, were strongly opposed to the fugitive slave law; many of them being violent and fanatical on this subject. Mr. Gorsuch's son, nephew and some relatives, went with the officer. The fact that the writs had issued, became known to Williams, a negro in Philadelphia, who preceded Kline and his party to the neighbourhood of Parker's house, where the slaves were lurking, and gave notice that the arrests were to be made, leaving with another person the names of some of Mr. Gorsuch's slaves, on a piece of paper. On the 11th, the officer and the others went over to Parker's, which they reached about daylight. While proceeding along the road, their attention was arrested by the sound of horns and the blowing of a bugle. After watching about Parker's house for a short time, one or two negroes were seen coming out of it. On discovering Kline and his party, they fled back into the house, and on pursuit being made by him, ran up stairs. These negroes were recognized by Mr. Gorsuch as his slaves. Kline entered the house, and almost immediately ascertained that a large number of negroes were concealed in the upper part of it; he nevertheless went to the stairway and called the keeper of the house to come down, stating that he was desirous of speaking to him. The negroes at this time were heard loading their guns. Kline, hearing the noise, said to them that there was no occasion for arming themselves,—that he designed to hurt no one, but meant to arrest two men who were in the house, and for whom he had warrants. Some one replied they would not come down. Mr. Gorsuch then went to the stairway, called his slaves by name, and stated that if they would come down and return home, he would treat them kindly, and forgive the past. Kline then read the warrants three times, and afterwards attempted to go up stairs, when a sharp-pointed instrument was thrust at him, and an axe afterwards thrown down, which struck two of the party below. Mr. Gorsuch then went to the front door of the house, and looking up to the window, again called to his slaves by name, when a shot was fired at him from the window. To show that his party was armed, Kline fired his pistol. At this period a horn was blown in the house, which was answered by other horns from the outside, as if by preconcerted action. The negroes then asked fifteen minutes time for consideration, which was granted to them. At this moment a white man was seen approaching the house on horseback. It turned out to be Hanway. Kline walked towards him, and inquired if he resided in the neighbourhood. According to the testimony of this Kline, who was not a person of the best character for veracity, his answer was short and rude—"It is none of your business." Kline replied, by letting him know he was a deputy marshal of the United States, gave him the warrants to read, and called upon him, in the name of the United States, to assist in making the arrests. Hanway replied "he would not assist—that he did not care for that act of congress or any other act,—that the negroes had rights and could defend themselves, and that he need not come there to make arrests, for he could not do it." By this time another white man had arrived on the ground (Lewis), who walked up to Kline, and asked him for his authority to be there. Kline showed his papers to him also. Lewis then read the warrants, passed them to Hanway, who returned them to the marshal. Lewis, after reading the warrants, said, "the negroes had a right to defend themselves." Kline then called upon him to assist him in making the arrests, when he refused, and would not even tell his name. Kline then asked Hanway where his residence was? He replied, "You must find that out the best way you can." Kline then explained to them what his views of the act of congress of September 18, 1850, were, and informed them that through their agency these slaves would escape. By this time the blacks had gathered in very large numbers around the house, armed with guns, which they commenced pointing towards the marshal. At this juncture, Kline implored Hanway and Lewis to keep the negroes from firing, and he would withdraw his men, leave the ground, and let the negroes go. Hanway instantly replied, "they had a right to defend themselves, and he would not interfere." Kline's answer was, "they were not good citizens, or they never would permit the laws to be set at defiance in this way." One of Mr. Gorsuch's

family then remarked, "that all they wanted was their property, and that they did not wish to hurt a hair of any one's head." Lewis replied, "that negroes were not property;" and then walked away. By this time another gang of negroes had arrived, armed with guns and clubs, and Hanway rode up to them and said something which was not heard. He moved his horse out of the way of the guns; the negroes shouted, and immediately fired from every direction. Hanway rode a short distance down the lane leading from Parker's house, and sat on his horse watching the blacks. Kline then called to Lewis, telling him a man was shot, and begging him to come and assist, which Lewis refused to do. The number of negroes assembled at this time was between fifty and a hundred. Before the firing commenced, Mr. Gorsuch was struck with a club on the back part of the head, and fell forward on his hands and knees. As he was struggling to rise, and in the act of getting upon his feet, he was shot down amid frantic yells and howlings; and when prostrate on the ground, was cut on the head with a corn cutter, and beaten with clubs. His son on perceiving the attack made upon his father, immediately rushed to his assistance, when his revolver was knocked out of his hand, and he himself shot in various parts of the body, rendering him utterly helpless. A nephew was attacked at the same time, and defended himself with his revolver, which he twice snapped at his assailants, but the powder being wet it would not go off. He was also struck down, beaten and maltreated. When the firing commenced, Kline, in order to avoid its effects, escaped into a corn-field, but on seeing Mr. Gorsuch's son struggling, apparently wounded and bleeding, went to his assistance, and placed him under the shelter of a tree until aid could be procured. Two of the others of Kline's party were at the time making their escape. The negroes overtook one of them, knocked him down with a gun, beat and bruised him. The other escaped into a farm house, where he was concealed. A number of shots were fired at others, as they moved off. One was shot in the wrist, side and shoulder, and a ball also passed through his hat just above his forehead. In the effort to escape, these last rushed towards Hanway, who was on his horse which was yet standing still. They besought him to prevent the negroes from pursuing farther. He said he could not. They then asked for permission to get upon his horse, which would afford the means of making their escape. He refused their request, and putting whip to his horse rode off at full speed. Several of the United States party were subsequently carried to houses in the vicinity, and were a long time recovering from their wounds. Mr. Gorsuch was killed. In connexion with these facts it appeared from Kline's testimony (1) that so soon as Hanway appeared at the bars, the negroes in Parker's house appeared to be encouraged, and gave a shout of satisfaction, when before that they had appeared discouraged, and had asked for time; (2) that before the firing commenced, Kline had given orders to his party to retreat, and they were actually engaged in the retreat when the attack was made; (3) that Mr. Gorsuch, who was killed, had no weapon of any kind in his hands.

Such was the case of the United States giving credit to all its testimony. No essential fact in it was disproved or indeed denied. The defence showed, however, that Hanway was a native of one slave state, had resided long in another, had been a resident of a part of the country far distant from Pennsylvania, and had been living in the neighbourhood of Christiana for only three years past, and while there was evidence that anti-slavery conventions had been held at West Chester, a place near Hanway's residence, where the fugitive slave law was denounced as unconstitutional, wicked and of no force against "the higher law of every man's own conscience," and denunciations made against every judge, who would enforce it, as governed by the spirit of Jeffries and Scroggs; there was no evidence that Hanway attended these meetings. As to the events of the morning of the 11th of September, the defence showed that about sunrise of that day, Lewis, already mentioned, was informed by a person, who was called at his house, that there were "kidnappers at Parker's house." And starting at once for this place, as he passed, gave the information to Hanway, who was just getting up. Hanway, in his shirt sleeves, mounted his horse, rode over, and at the place met Lewis, who had taken a nearer route across the fields. As they arrived Kline met them, and stating that he was marshal, required their aid. Lewis asked to see his authority, and Kline produced the writs. Meanwhile the blacks were rapidly gathering, and Hanway, pointing out the fact, warned the marshal of the danger of attempting, under such circumstances, an arrest, and advised him to retire. At the same time, and before any firing, they retired. And passing out of the road, Lewis followed by Kline, turned in one way, while Hanway rode off in another. In regard to this matter of "kidnappers," it was not easy to gather the exact facts of the case. It was certain that in September, 1850, and in March, 1851, men of bad character not having, or at least not professing to have any warrant of law, had in a rough way come to Christiana, and carried away at night, out of the houses where they were, two negroes, then residing there, who never again returned. But whether these negroes were runaway slaves, now taken home by men, who expected to be paid by the owners, or to get a reward publicly offered; or whether they were free persons of colour, stolen by "kidnappers" in the legal sense of the word, was not prov-

ed. The term was perhaps a slang one; it being one which had been frequently applied with others, as bad, to persons who came from the South, to recover their runaway slaves. It appeared, however, that the events excited some alarm in the place, which had many persons in it opposed to the fugitive slave law, and that there was some feeling of insecurity professed among the people of that neighbourhood.

Points of evidence.

Such was the case as presented by the evidence given before the jury. A good deal of it was received after objection only, and hence upon this, as also upon evidence excluded there arose in the case several incidental points. For example, that relating to "kidnappers." In introducing this evidence, the counsel of the defence did it by asking a witness to state any fact he knew with regard to the kidnapping and carrying away coloured people in the neighbourhood of Parker's house, within a period of about nine months prior to the events of the 11th of September: but the object of the testimony being stated to be to show that there was great alarm in the region, about kidnappers and that Hanway came to see if these men were kidnappers or not.

Counsel of the United States. This testimony is irrelevant to the issue, and if it were introduced, would have a pernicious effect upon the execution of all law. We have charged that the defendant sought to resist the laws of the United States, and so far as the testimony is before this court, have shown that warrants were issued on the 9th; that notice in opposition to them was given immediately by Williams; that resistance took place on the 11th; that Hanway was on the spot, as by preconcert, saw the United States process in the hands of its officer and countenanced and encouraged the acts which took place. They purpose to show that nine months anterior to this 11th of September, there were parties who actually kidnapped. Can it be given in evidence that certain parties did nine months before commit an unlawful act? There is no crime in the world that could not be justified in the same way, and by showing that somebody had done a wrong anterior to it. If they can go back nine months, they can go back eighteen months. If they can show something within even two weeks, it will be admitted by us; but, to permit them to show that some other parties, not purporting to have any connection with this affair at all, committed a certain outrage nine months anterior to the time this transaction took place, is opening too wide a door on their side.

Counsel for the prisoner. The crime of treason consists in acts done, and the intention with which they were done. Many acts may be done which, if done with an intention to levy war against the United States, would be treason; but these same acts done without any such previous intention, would amount to an ordinary breach of the peace, or to misdemeanor and murder. The question for the jury is, what brought together these people, some armed and some unarmed. For if they have come together with a lawful intent, and afterwards, even they who came with such intent, committed murder, it is not treason. How then are you to show what brought these people together? The prosecution have given some slight testimony, such as the sounding of a horn about breakfast time, from which they will ask the jury to infer that there was a previous combination to resist the United States government. Now, what we propose to show is this: That there were residing in that immediate neighbourhood a gang of professional kidnappers: that they had not only upon one, but on two or three occasions, in the dead of the night, invaded the houses of the neighbours, (of white people, where black men lived, and black people,) and by force and violence and great injury and malice, without authority whatsoever, seized and carried these men away; and that they have never afterwards been seen or known of in those parts. And that in consequence of this, there was a general feeling of indignation, not against lawful authority, but against outlaws who thus prowled over and disturbed this neighbourhood. And that when the prisoner in the morning (for the first time) came out of his own house, not having heard any thing of this, he was informed that there were kidnappers trying to kidnap Parker, whom it was supposed was the object of the attack. And that in pursuance of such information, and with a full knowledge of the repeated acts of outrage and kidnapping in that neighbourhood, he went to the place where he did go. We do this to show what might have brought him there, which is one essential part of the case. And we do it, that if any body should suspect that "kidnapper" was a covert term or slang phrase, and that kidnappers did not mean kidnappers, to show that it did mean those who followed that business for a living.

GRIER, Circuit Justice. The objection of the prosecution would be irresistible if Hanway was indicted simply for resisting an officer of government. But in treason there must be some previous agreement. The prosecution will probably infer from certain premises a certain intent. They have given evidence that a negro went down on the 9th or 10th and said that kidnappers were abroad, or left certain hierogliphics, or what you please; and applying this as a slang term to a master seeking his slaves, may argue conspiracy in a whole neighbourhood. But Hanway might not have understood it so; and though masters were there with proper process to arrest a runaway, I think

it will be proper for the defendant to show, that kidnappers, in a proper sense of the word, had been about, and that there was a degree of insecurity among the free negroes who resided in that neighbourhood. Suppose the sheriff came to my door, and I fired at him out of my window and killed him; under such circumstances you might infer I did it with the intention to murder an officer of the law. But suppose I could show, that a few nights, or even months, ago, a person had broken into my house, and committed a robbery, would you not infer from the fact, that my mind was bent upon something else, and far from any intention to murder the sheriff? Or take the analogous case of a person accused of murder, and upon the question of an intent, it is in proof, that he went to the place where the alleged murder was committed, bearing deadly weapons, it would certainly be permitted him to show that there was a general sentiment of personal insecurity in the community, which justified him in carrying arms, and that that was the reason why he had arms. The question is not perhaps in the strictest form. You might ask more correctly, perhaps, if such rumours or fears were not prevalent. But this, in essence, is not important, and the inquiry may just as well be made as to the facts on which the belief was founded.

Question allowed.

Second point of evidence.

In support of the defence, the prisoner's counsel called Lewis, the person who had informed Hanway of there being kidnappers at Parker's house. Lewis was not included in the present indictment with Hanway, but was included in another indictment which had been found, and in which Hanway, Lewis and one Scarlet were indicted together for treason; and in another also in which these same, with several negroes were indicted in the same way. The objection now made to Lewis's testimony was that he was interested in this indictment as an instrument of evidence; that if Hanway were acquitted on this indictment he could not be tried again, and that this acquittal would enure to Lewis's benefit on the other indictments in which he stood charged jointly with Hanway. There had been no verdicts. A party was brought into court to testify for a defendant who is indicted with him. If he can do this for Lewis, he can for others. Suppose indictments in which Lewis is not included against all of the other parties. Is Lewis a competent witness to give testimony ad seriatim and thus to acquit all the others and so finally himself; for if every one else is acquitted he cannot be guilty. Treason cannot be committed, we assume, by a single person.

GRIER, Circuit Justice. No good precedent could be found, I think, where by sending up a bill of indictment against him, a witness, otherwise competent, had been cut out entirely from giving evidence. If thirty or forty are indicted I see no reason why one may not be found guilty and the others acquitted. Or why if one has been tried and acquitted, the verdict in his favour would affect the others.

KANE, District Judge. Supposing there were many indicted for treason, and on their trial together, and no evidence given against one of the defendants, could not the court direct a verdict of acquittal, in order to make him an evidence for the defence? which presupposes there is no disqualification of evidence. Even in the common law there is a distinction between conspiracy and treason. The difference was this: that conspiracy was an offence essentially joint, and there must be a joinder in the indictment, and a conviction of more than one to make it. Treason may be committed severally as well as jointly, and one may be indicted.

Witness allowed.

Third point of evidence.

The defendant having closed his case as already reported, the United States offered testimony to prove that in September, 1850, to wit, a year before this outrage, the county of Lancaster, and particularly the neighbourhood of Christiana, was patrolled by armed bodies of negroes, who went from house to house in that neighbourhood, searching for certain owners of slaves who, it was reported, were thereabouts, attempting to recover their runaway slaves; the said bodies of negroes swearing vengeance and death against such slave owners. The purpose of such testimony was stated to be, to prove that for a long time there had been a regular organization, for the purpose of resisting in that neighbourhood upon every and all occasions, laws of the United States. No notice of the names or residence of the witnesses, by whom this was to be proved, had been given to the prisoner. The act of congress (Act April 30, 1790, § 29 [1 Stat. 118]) on the subject of treason, says, "that any person who shall be accused and indicted of treason, shall have a copy of the indictments, and a list of the jury and witnesses to be produced on the trial, for proving the said indictment, mentioning the names and places of abode of such witnesses and jurors delivered unto him at least three entire days before he shall be tried for the same."

This testimony offered as above stated, was objected to by the counsel for the prisoner, who contended that in the nature of an indictment for treason, it was testimony in chief and not rebutting testimony. Previous combination is of the essence of treason. The prosecution has given evidence of such combination; (of what value, indeed, we will consider hereafter.) Now our case shows that we have not sought to prove

anything to the contrary of what they thus showed or attempted to show. We have confined our case to that which showed the intentions of Hanway alone; though showing incidentally, perhaps, at the same time what induced other individuals to assemble on the morning of the 11th. We have kept our evidence within certain limits, and shown our case in a particular way. We may contend, it is true, and as a defence on the outworks, that the prosecution has not shown treason at all; but our real and our individual position is on more confined ground; and we shall contend that whether other persons did or did not commit treason, is unimportant, since Hanway was neither of their number nor counsel. Now the evidence offered is not in rebuttal of anything confined to the exculpation of the particular individual. Our objection is substantial. It is unfair to bring the principal part of the case upon the rear of a defence full and complete to all that has been presented as requiring an answer. The case that ought to be heard by the jury first, would be thus made to be heard last, and operates with the effect of the most recent impression. If there were no legal and substantial objections, the act of congress obliges the prosecutor to furnish to the prisoner the names of his accusing witnesses in chief, three days before his trial. Its provisions cannot be defeated by this mere shift of position.

Counsel for the United States. The evidence on the part of the prosecution closed, relying upon the prima facie case which was made out; st. the evidence of concert throughout the neighbourhood; that notice has been sent to Christiana from Philadelphia, by Williams, who accompanied some of the officers employed by Mr. Gorsuch; that the names of Mr. Gorsuch's slaves were left on a piece of paper in the neighbourhood of Christiana; that armed men, some on foot, some on horseback, were instantaneously assembled by a concerted signal; and that Hanway was there, and came there, to all appearances like the others. This was prima facie evidence of treason, and enough to connect the prisoner with it. The counsel of the defence had an opportunity of saying it was not treason, and that there was a total failure of evidence necessary to establish that crime. But they go on to make a defence: and what is that defence? Why, confessing the fact that there was organization; that horns did sound to summon armed bands to the rescue; they have referred the origin of that organization to lawful motives—the exercise of a fair and natural right—their own protection. They have gone on, therefore, to explain the motive of this organization, and to say it was not for the purpose of resisting the law, in the reclamation of slaves, but to prevent illegal violence to those who are free. Are we not to rebut that allegation? And if in rebutting it, we introduce evidence which might have been admissible in chief, if notice had been given, is it to be excluded? The only inquiry in regard to this rebutting proof is, whether it is strictly rebutting? Does it not, then, destroy the allegation of motive on which the defence rely? We offer it only to rebut that; and, so limiting it, we are entitled to it as rebutting evidence.

GRIER, Circuit Justice. There is a great difference between rebutting evidence and evidence by way of set-off. The statute gives a man accused of treason, (an offence involving terrible consequences,) a particular protection about testimony; but if testimony such as this could be brought in by way of rebuttal, the provision of the statute, (not more humane than just), would in effect be evaded. You cannot evade it by changing the order of proof. On general grounds, also, everything tending to show that there was an intention to make public resistance to a particular law, was evidence entirely in chief, and not at all rebutting anything. It should have been given in evidence in chief: and to draw an illustration from the game of whist, if you gave it now, you would be reneging and keeping your trump back to the last trick. I do not know, indeed, but that the testimony offered might prove directly the contrary of that which it is designed to prove, and only show that there was a band of runaway negroes consociated to help each other to resist their master, who came to reclaim them. And this would not be such public resistance to the law as to be called treason.

KANE, District Judge. I concur with Judge GRIER entirely. The two elements of the crime are the act and the preconcert. It is for the prosecution to make out both, and by omitting evidence of preconcert, they fail in their original case. The evidence which is now offered is merely to prove that preconcert. It was an indispensable element of the original case. It seems to me, therefore, that it cannot be introduced as rebutting evidence. It is one of the matters going to prove the charge laid in the indictment, in regard to which the act of congress is express, that it shall only be proved by those witnesses of whom three days' notice has been given to the other side.

The principal case resumed.

The bill of indictment charged that the prisoner, Hanway, wickedly intending and devising the peace and tranquillity of the United States to disturb, and prevent the execution of the laws thereof, to wit, "An act, &c.," and another act, supplementary to the same, passed on the 18th September, 1850, did on the 11th of September, 1851, wickedly and traitorously intend to levy war against the United States. It then sets forth five several overt acts:

(1) That with a large number of persons

armed and arrayed with warlike weapons, with purpose to oppose and prevent, by means of intimidation and violence, the execution of the said laws, he did wickedly and traitorously levy war against the United States. (2) That in pursuance of said purpose, the prisoner and others so armed and traitorously assembled to prevent the execution of said laws, did with force and arms traitorously resist Kline, an officer of the United States, duly appointed, from executing lawful process, and wickedly and traitorously did prevent by force and intimidation, the execution of the said laws. (3) The third was the same as the second, with this addition, that they assaulted Kline, and liberated from his custody persons arrested by him, who owed service and labour to Edward Gorsuch under the laws of Maryland, thereby traitorously preventing the execution of said laws. (4) That the prisoner, with the others, did traitorously meet, conspire, and consult to oppose, resist and prevent by force the execution of said laws. (5) That in pursuance of said traitorous intention, he prepared divers books, letters, resolutions, addresses, &c., which he caused to be dispersed, containing incitements and encouragements to fugitives and others to resist, oppose and prevent by violence and intimidation the execution of said laws.

J. W. Ashmead, U. S. Dist. Atty., G. L. Ashmead, and J. R. Ludlow represented the United States. R. J. Brent, Atty Gen. of Maryland, James Cooper, a senator of the United States for Pennsylvania, and R. M. Lee, of Philadelphia, appeared as special counsel,—Mr. Brent, by order of the governor of Maryland (of which state Mr. Gorsuch was a citizen); Mr. Cooper and Mr. Lee, as private counsel of Mr. Gorsuch's relatives. J. J. Lewis, of West Chester, T. Stevens, of Lancaster, J. M. Read, T. Cuyler, and W. A. Jackson, of Philadelphia, for the prisoner.

For the United States. Levying war against the United States, is a phrase, the meaning of which is settled, both in England and the United States. The statute of 25 Edw. III., c. 2, contains seven descriptions of treason, and two of them are thus stated by Blackstone (Comm. bk. 4, c. 6, §§ 3, 4), (1) If a man do levy war at our lord the king in his realm. (2) If a man adhere unto the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere. These are the two kinds of treason, which are defined in the constitution of the United States, and the words used to describe them are borrowed from the English statute, and had a well known legal signification at the time they were used by the framers of our constitution. This is stated by Chief Justice Marshall (2 Burr, Tr. 402), his language being that "it is reasonable to suppose the term 'levying war' is used in that instrument in the same sense in which it is understood in the English law to have been used in the statute of 25 Edw. III." He then adds "that principles laid down by such writers as Coke, Foster and Blackstone, are not lightly to be rejected." He then defines (Id. p. 408) in what levying war consists; viz. "That where a body of men are assembled for the purpose of making war against the government, and are in a condition to make war, the assemblage is an act of levying war." There is no dispute that English writers maintain the doctrine that any resistance to an act of parliament by combination and force, to render it inoperative and ineffective, is treason by levying war. We need not however go into a consideration of the English law of treason, or of what in England, is "a levying of war." The matter is settled by our own decisions. In the Cases of the Western Insurgents, in 1795,[2] Judge Patterson says: "If the object of the insurrection was to suppress the excise office, and to prevent the execution of an act of congress by force and intimidation, the offence in legal estimation is high treason; it is an usurpation of the authority of the government. It is high treason by levying war." In Fries' Case [Case No. 5,126], Judge Iredell, in his charge to the grand jury (A. D. 1799), says: "I am warranted in saying, that if in the case of the insurgents who may come under your consideration, the intention was to prevent by force the execution of any act of the congress of the United States altogether, any forcible opposition calculated to carry that intention into effect, was a levying of war against the United States, and of course an act of treason. But if its intention was merely to defeat its operation in a particular instance, or through the agency of a particular officer, from some private or personal motive, though a high offence may have been committed, it did not amount to the crime of treason. The particular motive, must however, be the sole ingredient in the case, for if committed with a general view to obstruct the execution of the act, the offence must be deemed treason." This was the charge of Judge Iredell to the grand jury. Fries having been indicted by them, was tried before Judges Iredell and Peters, who iterate the doctrines just above declared. Judge Peters says: "It is treason in levying war against the United States for persons who have none but a common interest with their fellow-citizens, to oppose or prevent by force, numbers or intimidation, a public and general law of the United States, with intent to prevent its operation, or compel its repeal." Fries' Case [supra]. Again, "although but one law be immediately assailed, yet the treasonable design is completed, and the generality of interest designated by a part assuming the government of the whole. * * * Though pun-

[2] U. S. v. Vigol [Case No. 16,621]; U. S. v. Mitchell [Id. 15,788]; s. c. Whart. St. Tr. 175, 176, 182.

ishments are designated by particular laws for certain inferior crimes, which if prosecuted as substantive offences, and the sole object of the prosecution, are exclusively liable to the penalties directed by those laws, yet when committed with treasonable ingredients, these crimes become only circumstances or overt acts. The intent is the gist of the inquiry in a charge of treason." Judge Iredell referring to the law laid down by Judges Paterson and Peters in the Cases of the Western Insurgents [Id. 17,437], says: "As I do not differ from that decision, my opinion is that the same declarations should be made upon the points of law at this time." On the second trial of Fries, in 1800 [Id. 5,127], Judge Chase was on the bench, and in an elaborate opinion he maintains the doctrine which had been ruled in the previous cases. Judge Story, in 1842, says (1 Story, 614): "It is not necessary that it should be a direct and positive intention entirely to overthrow the government. It will be equally treason if the intention is by force to prevent the execution of any one or more of the general and public laws of the government, or to resist the exercise of any legitimate authority of the government in its sovereign capacity. Thus, if there is an assembly of persons, with force with intent to prevent the collection of taxes lawful, or duties levied by the government, or to destroy all custom-houses, or to resist the administration of justice in the courts of the United States, and they proceed to execute their purpose by force, there can be no doubt it would be treason against the United States." President King of the common pleas of Philadelphia holds the same doctrine (charge on the occasion of the Kensington riots, MS.). His language is, "that where the object of a riotous assembly is to prevent, by force and violence, the execution of any statute, or by force and violence to compel its repeal by the legislative authority, or to deprive any class of the community of the protection afforded by law, as burning down all churches or meeting-houses of a particular sect, under colour of reforming a public grievance, or to release all prisoners in the public jails and the like, and the rioters proceed to execute by force their predetermined objects and intents, they are guilty of high treason in levying war." The case of U. S. v. Hoxie [Case No. 15,407] is no exception to these principles. It was clearly no case of treason, but simply of a private outbreak.

The authorities and opinions quoted, thus prove that the forcible resistance to the execution of the fugitive slave law, in which the defendant participated, if designed to render its provisions inoperative and void, was treason against the United States. It was a levying of war within the meaning of the constitution. The intent with which the act was committed, is the essential ingredient in the offence. We have then an uninterrupted line of decisions from the foundation of our government, until the present hour. It is unprofessional, and will be vain to attempt to discredit these earlier decisions on the law of treason. They have the force of that contemporanea expositio quæ fortissima est. The seats of judgment were never filled by abler, more learned, or purer men. The bar was never graced by more splendid talent, more intellectual force, greater devotion or more practised advocacy. Upon the bench were Marshall, Paterson, Iredell, Chase and Peters! At the bar was William Bradford, Sitgreaves, Lewis, the elder Dallas, and the elder Rawle, Edward and William Tilghman. Never were cases more eloquently, more cogently, more learnedly argued, or with greater interest of every kind. Never were cases more temperately, more clearly and more properly adjudged! Treasonable designs must, in the nature of the case, be often inferred from the facts and circumstances which attended the transaction. The combination or conspiracy of the defendant with others, forcibly to resist the law at Christiana, can be established without direct proof. "The concert of purpose," says Judge Kane [charge to the grand jury on the law of treason, Fed. Cas. Append.], "may be adduced from the concerted action itself, or it may be inferred from facts occurring at the time or afterwards, as well as before." It is not to be expected, that direct proof shall be brought, where a whole region is infected. We cannot enter a horde of traitors, and take thence voluntary witnesses to implicate directly those who think and feel as they do themselves. Because a whole county, a whole township, or a whole neighbourhood, are involved in plotting treason: and no eyewitness can be produced to prove their treasonable meetings, cannot treason be proved? cannot combination and wicked conspiracy be established, as any other fact in the law, by circumstantial evidence? If you see the stream which comes from the distant mountains, swollen and leaping along as if a deluge were pouring its waters through its channel, do you not know that the snows have melted at its source, and the rains have descended from the heavens? Cannot you judge the cause from the effect? You see that the prisoner was ready to leap upon his horse as rapidly as possible, and go to the ground, to incite those who are assembling by concert to resist the laws; can you not infer that he went there by pre-arrangement, and that he was known by the coloured people as a man who would stand by them, in their resistance of the laws? You see them hail his presence with a shout, and see him stand by and read the process of the United States, saying not one word to these ignorant, misguided individuals, warning them of their danger, "though he had come to see justice done" to the blacks. He will not tell these ignorant people, who were about to imbrue their hands in innocent blood, "You are doing wrong, here is authority from the United

States." Can you not infer concert and design from these things? Indeed there is no necessity for inferential proof, so far as this defendant is concerned. His resistance to the law was declared. He avowed his determination on the spot, not to regard the provisions of the fugitive slave law, or any other act of congress upon that subject, and in the presence of an armed band of negroes who had come together to resist the law, he declared that its supremacy should not be maintained by him, and that the rights of these insurgents were superior to any statute of the United States. This man did not confine himself to mere sympathy, nor occupy a position merely passive; he was already connected with an organized band, which had been formed for treason. But suppose he was there as a spectator, and that he there first connected himself with an organization formed for the purpose of resisting the law. Is he not as guilty as the rest? But he had no arms in his hands! What of that? The coloured people then and there armed, were his instruments of war; they were his arms. If, while sympathizing with these blacks, and determined to resist this law, Hanway and Lewis had put on their armour and led their soldiers to the fight, they would have been at least heroes in their way. But to go there with no arms, to incite an ignorant and infuriated horde, who are there for the purpose of treason, murder and robbery; this is less manly, but no less treasonable. If Hanway incited them by word, speech, gesture, or presence, then he has done more than merely refuse to assist—he has become a conspirator. He has connected himself with them, their acts are his acts, and their intentions are his intentions.

For the prisoner. If the issue were on the fugitive slave law, and the question was, whether Hanway disapproved it? he could not be convicted even of that. There is no certain evidence which shows that he has an opinion about that law. Admitting that he disapproved the law, as he had a right to, there is no evidence which shows what motive brought him to this spot on the morning of the 11th. The sounding of a horn about breakfast time (an usual signal in the country for breakfast) shows nothing; and if it were clearly shown to be a signal for concourse, it follows not that it was a concourse for a treasonable purpose. There is evidence that there was in the neighbourhood a gang of professional kidnappers, who, on recent occasions, without any authority, had seized black men and carried them away, so that they were never heard of again. And that in consequence of this, there was a general alarm and feeling of indignation in the neighbourhood—not against lawful authority, but against man-stealers. Lewis was informed exactly, that there were "kidnappers at Parker's house," and he gave that information and none other to Hanway. And it does not matter, that by the word "kidnappers" slave owners were sometimes called, since there had recently been people in the neighbourhood to whom the word strictly and legally applied. Now who can say on the evidence what took Hanway to this spot? It is the intent which here is every thing. For if Hanway came there with a lawful intent, it is no treason, even though he did afterwards see with composure the laws violated, or even commit a murder.

Treason in China, means disrespect to the emperor. On the continent of Europe it has been reduced by the intrigues of faction, or the command of power, to about the same thing. In England there have been bad times, and the law has given way to party rage and power. At all times, indeed, their law of treason has confessedly been more extended than ours, and largely influenced by the ruling authorities. But the fathers of our government, deeming the life and liberty of the citizen of too much moment to be subjected to the sport of factious excitement, or to the spirit of power, have made the definition of treason a part of the paramount law, which every federal officer is sworn to support. This definition is short, plain, and precise; involved in no phrases of dubious import, or of technical subtlety. To the layman and way-faring man it simply declares what is treason. To the lawyer and the scholar, bewildered in the mazes of the metaphysical jargon with which judicial butchery, in violent times, racked their brains for reasons for doing wrong; to the judge and the juryman in admonition of the duty of discarding bad precedents and of abstaining from the extension of crime by construction, it does more; it declares what is not treason. Const. art. 3, §§ 1, 3. "Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." This definition was framed by men who, in the exercise of the right of revolution, had risked the penalties of treason, and studied the subject on the steps of the scaffold. Indignant at the wrongs that had been perpetrated, and the blood that had been shed for fictitious offences made treason by ingenious construction, they determined to deprive both faction and power of so potent an engine of mischief, long used and abused by demagogues and despots. They cut off at one blow, that once flourishing and fatal branch of interpretative treason. They defined the crime by terms severely strict and rigorously exact. Every word is significant. There is not a syllable to spare, nor one on the meaning of which sophistry can hang a doubt. "Treason shall consist only in levying war, &c." No court, no legislature, no power in the state shall make any thing else treason. The same words which gave to the acts enumerated the highest denomination in the catalogue of crimes, contain an emphatic prohibition against the

slightest extension. The offence requires the existence of war. Its sole element is war. It cannot be committed in time of peace. To be guilty of the crime, a person must be actually engaged in the war, or giving aid to those that are. To contemplate, or to advise war, or even to conspire to wage it, is not enough. The war must be actually levied. It must not be a mere tumult—a fight—a struggle in arms between individuals or companies, or violence offered to an executive or military officer of the government, in a matter relating only to individual interest or private right, but it must be national in its scope and object. It must possess that dignity in mischievous design that aims at the life of the government, or at least at the prostration of some branch of its power, by an armed opposition. It must have the impress of universality. A contest between the lords of neighbouring manors, involving the destruction of many lives by small armies, raised and maintained for the purposes of mutual revenge and plunder, was decided even by an English court, in violent times, to be no treason. An attack on the negro population of a town or city, by an armed mob of a thousand, such as have occurred in different parts of our country at different times, has never been supposed to be treason. A combination to destroy a newspaper press by violence, and to overcome all opposition by arms, and the purpose executed, as happened formerly in Baltimore, when the Federal Republican press was destroyed, General Lingan killed, and a number of other persons grievously injured; though the mob held possession of the city for days, overawed the police, and set the municipal authorities at defiance, was deemed no more than misdemeanor. The driving of the peaceable Mormons from the city of Nauvoo, at the point of the bayonet, and with no inconsiderable slaughter too, though battles were fought and a siege maintained, passed unnoticed by the United States government, as an offence cognizable only by the local tribunals. The same remark applies to the Philadelphia riots of 1844, when churches were burnt and houses destroyed, streets barricaded, and windows shaken by the thunder of artillery launched in civil strife, and a population of near half a million of persons stricken with terror, and forced to call on the country for protection. Such cases, though wearing much the appearance of war on a limited scale, and possessing many of its characteristic features, do not amount to war, in the constitutional sense, as generally received and understood

Upon the question, what constitutes a levying of war, there have been several determinations in the federal courts. The first occasion that occurred for its consideration, was that of the Western insurrection in 1794, five years after the constitution was adopted. The second was Fries's Case, or the Northampton insurrection, only five years later. The government in these times was new, the treasury exhausted, and the nation comparatively weak. The trial of the great experiment of a constitutional republic was considered of doubtful success, and was watched with earnest solicitude by the statesmen of the day. The value of the Union was still a debateable subject. Reverence for the constitution had not become a common sentiment. We were in the midst of the old French revolution, "when," as the jurors say, in asking a copy of Judge Iredell's charge to them (Fries' Case [Case No. 5,126]), "false philosophy and the most dangerous and wicked principles were spreading with rapidity, under the imposing garb of liberty, over the fairest countries of the old world." In every speck of disaffection there was danger. Every open opposition to the regular action of the government, furnished just cause for alarm. The federal authority was in the hands of men who held high-toned opinions, and who were disposed to carry out these opinions, in the exercise of their official functions. The judges had been educated in the English law, and naturally looked for their guides to the precedents which that law furnished, and which were established in dark and remote periods, and could not anticipate the more liberal and enlightened sentiments which have since animated English jurisprudence. Under such circumstances we should reasonably expect to see strong ground taken and strong doctrine promulgated. And such we find actually to have been the case. Under different circumstances the law might have been, and probably would have been, differently ruled; or general principles laid down less broadly. As it was, they gave great dissatisfaction, and have been subjected to severe criticism by learned commentators. Still, as far as they bore upon the particular circumstances under investigation, in application to the facts proved by the evidence in the several cases, they may perhaps be safely admitted to have the force of precedents. But they are not to be received as bearing upon a case varying in any material point from those in hand.

The Western insurrection was an extensive combination, embracing great numbers of the inhabitants beyond the Alleghany mountains, not only of the state of Pennsylvania, but of Virginia also, to resist by force the execution of an excise law of the general government. It commenced in 1791, and continued till 1794. It was originated and fomented and supported by what was called sometimes the "Anti-Federal or Republican," and sometimes the "Jacobin or Democratic," party. It was composed of men who like Gallatin and others represented by the "Aurora," had opposed with the utmost violence the adoption of the federal constitution, and who, after its adoption, sought to paralyse and destroy its operation; men who hated the person and opposed the administration of Washington, whose history yet remains

to be written, "The Enemies of Washington," and who in pursuance of their objects, sought in theory and in fact to overthrow the government. The party had not then,—adopting the federal constitution,—sought to qualify its operation by a jealous construction. They had opposed violently its adoption. Failing in this, they sought, when it was adopted, to nullify its operation; which was to overthrow it in fact. Application was made to congress for a repeal of the obnoxious act. That having failed, resort was had to force, and within the disaffected territory the excise law was as effectively annulled as though it had been repealed by congress.. Even those who were disposed to obey it, were prevented through the terror of the insurgents. Proclamations were issued by the president; requisitions were made on the militia of New Jersey, Pennsylvania, Maryland, and Virginia; and our army, composed of several divisions, and commanded by an officer of high military reputation, was marched into the disaffected region, and a considerable force under General Morgan was left to occupy it as a conquered country. It was in view of such circumstances that the language quoted by the prosecution, was employed. Judge Paterson declared that the object of the insurgents "was of a general nature, and of a national concern." The magnitude of the effort was in proportion to that of the object, and required no inconsiderable exertion of the force of the nation to defeat it; it was therefore deemed a war, and those that waged it in opposition to the national authority, traitors.

The Northampton insurrection out of which Fries's Case arose, had much the same origin, though the rebellion was not of equal extent; and owing to the prompt and efficient action of the government, did not become so formidable. Three large counties, however, were engaged in the opposition, which assumed an aspect sufficiently threatening to require the interposition of the military force. The legislature of Pennsylvania resolved to co-operate with the general government, in case it should become necessary, and the authority of the executive of the state, as well as of the Union, was actively exerted to suppress the spirit of resistance. The object of the insurgents was to obtain a repeal of the house and direct tax law; they proceeded to acts of violence, and they succeeded in impressing the public with the opinion, or at least the apprehension, that they had sufficient power to effect their purposes. It was in reference to such circumstances that the judges delivered the charges quoted by the prosecution. They did not decide that these circumstances constituted a levying of war, but they presented the case in such a way as gave a pretty clear intimation of their opinion, and on a precisely similar state of facts, those opinions would operate with great weight. Still the general expressions are to be applied to the cause then in hand, and not to a cause altogether differently constituted.

The report of the Fries Case makes Judge Peters say: "It is treason in levying war against the United States, for persons who have none but a common interest with their fellow-citizens, to oppose or prevent by force, numbers, or intimidation, a public and general law of the United States, with intent to prevent its operation, or compel its repeal;" and this passage is torn from its context, and presented here by the counsel of the United States, as an authoritative exposition of the law of treason. The force of the language is more readily perceived by rejecting all superfluous words, throwing out such members of the sentence connected by the disjunctive conjunction, as obscuring the point, and making a somewhat different collocation of those retained, by placing the verb and the object nearer together. Thus: "It is treason, in levying war against the United States, to oppose by intimidation a general law, with intent to prevent its execution." This is the concentrated sense of the passage, and if it is to be considered as announcing a general principle, applicable to all cases, as the prosecution would have us suppose, it is to be taken as declaring that levying war, in the meaning of the constitution, does not require force, but only intimidation, and that the intent with which the intimidation is used, need not go beyond the prevention of the execution of a law of congress, in any particular instance. The words are without qualification. To smuggle goods is to prevent the execution of the revenue laws, and to threaten an officer of the United States, attempting to execute those laws, so as to intimidate him, would be treason, if this is all that would be required to constitute it. Even to prevent a United States marshal by intimidation from summoning a juror to attend this court, would, according to this construction, amount to the same offence. But this was not the meaning of Judge Peters. He spoke in reference to the facts before him, the means used and the object avowed. He intended merely to recognize the decision in the Case of the Western Insurgents [Case No. 17,437], and to do no more, for he says in immediate connection with the passage excerpted from his opinion: "Force is necessary to complete the crime, but the quantum of force is immaterial. The point was determined by this court on a former occasion, which was, though not in all circumstances, yet, in principle and object, very analogous to the subject of our present inquiries. I hold myself bound by that decision, which, with due consideration, I think legal and sound." What that decision was, we know; for the facts have become a subject of history; and the decision was, that there was a levying of war within the meaning of the constitution. But what the charge of the court was, we do not know. We have no report of it, but only of what

is said to be its substance. We have not the language of Judge Paterson, and who can say that there has been no transmutation in the process of condensing; or, that the meaning has been faithfully preserved, while many of the words that conveyed that meaning have been omitted, and the phraseology changed? As the book has it, he says: "The first question to be considered, is what was the general object of the insurrection? If the object was to suppress the excise offices, and to prevent the execution of an act of congress by force and intimidation, the offence in legal estimation is high treason. It is an usurpation of the authority of the government. It is high treason by levying war; taking the testimony in a national and connected point of view. This was the object. It was of a general nature and of national concern." Western Insurgents' Case [supra]. In this description of the offence, we recognize nothing of the accuracy or finish, which characterize the productions of that jurist, and it is most certain, that it does not embody his whole meaning. For it cannot be doubted that an insurrection to suppress the excise offices of a limited district of country, and to prevent the execution of an act of congress therein, through a spirit of private revenge, with a view to individual interest, or for purposes of plunder, though by force and intimidation, would not amount to a levying war, and would not be treason; and it is an imputation upon the impartiality of the judge, to suppose that he was not careful in describing the crime of which the defendants were accused, and to attribute to him an omission in that description of the main ingredient of the offence—the intent with which the overt acts were done. All that we have therefore in relation to the subject of levying war, in the reports of the trials of the Western Insurgents, and of Fries, in the Northampton Case, is very little, and that little of no authority, beyond the cases decided. When such cases occur again, but not before, they will be precedents.

I leave out of view the charges to grand juries, from which the prosecution has made quotations, because they do not possess the character of authority; and though entitled to respect as the opinions of eminent men, are entitled to no more respect than the opinions of other men equally or much more able, who have never held judicial positions. Such charges are delivered without the benefit of argument by counsel, and only as guides to an inquiry preliminary to the trial. The charge of Judge Chase to the jury, in the second trial of Fries, may be put in much the same category as charges to grand juries; as by his arbitrary conduct on the trial, he drove the counsel for the prisoner out of court, and deprived himself of the assistance which he might have received from their arguments, in interpreting the law. It is pertinent however to remark, that in his statement of the law, he has been more precise, exact and definite, than either of the judges whom the prosecution has quoted. "It is," says he, "the opinion of the court, that an insurrection or rising of any body of the people, to prevent by force or violence, any object of a great public nature, of public, general, or national concern, is a levying of war against the United States, within the contemplation and construction of the constitution." And he takes the precaution further to observe: "The court are of the opinion, that the assembling of bodies of men armed and arrayed in a warlike manner, for purposes only of a private nature, is not treason, although the judges, or other peace-officers, should be insulted or resisted, or even great outrages committed to the persons or property of our citizens." The prosecution has referred to this opinion without reading it. It happens not to fall into their line of argument so well as the looser phraseology, attributed to Judges Paterson and Peters. Its terms are still very general, and they need the illustration which is furnished by the facts to which they were applied. Those facts have been already adverted to. A wide spread disaffection existed. Formidable preparations were made to resist the law by force in three counties, and actual resistance had been made, yet the court in the Case of Fries, has been universally considered as having carried the law of treason to the utmost allowable limits, if it has not surpassed them.

Mr. Luther Martin, in his argument on Burr's trial, after proving by authority, "that an assemblage of men, even armed in military array, is not to be considered as treasonable, unless their intention be proved to be treasonable, that is (applying the doctrine to this country), unless the intention be to subvert the government of the United States," uses this strong language. "Sir, I execrate a contrary doctrine as highly tyrannical and oppressive. And here I beg leave to enter my censure against the decisions of the court of Pennsylvania on this subject, in the cases of what were called the whiskey and hot water insurrections. Some of them were decided, in my opinion, improperly, to be guilty of treason, according to the constitution of the United States. * * * I think it my duty to enter my solemn protest against the decision of the court in those cases, although made by gentlemen of learning and integrity; and if ever the question should come before the supreme court, I will endeavour to show that those decisions were illegal and improper. In those cases there was no design to subvert the government. Such a thought was not entertained. It was the expression of their disapprobation of a particular law, and an opposition to the execution of that unpopular law, and the intention of those people went no further than to induce its re-

peal. But according to the authority already referred to, though war was levied with all the solemnities of actual war, though violent acts were committed and a number of people killed, yet the parties engaged in it would be only guilty of a great riot, or at most, of murder, but not of treason, on this principle, that their intention was not treasonable, that the subversion of the government was never in their contemplation."

In U. S. v. Hoxie [Case No. 15,407], in 1808, Judge Livingston cites the Western Insurgent Cases and Fries's Case, without approbation, and draws broadly the line of distinction between such public systematised insurrections as threaten the existence of the government, and those minor offences, which partake more or less of opposition to the laws of the United States, but which from their suddenness, imbecility, and want of organization, are incapable of making a serious impression upon the peace of the nation.

In Fries's Case [Id. 5,126], Judge Chase has drawn his description of treason from the English authorities, but has omitted those specifications which assist to explain the sense of the commentator and limit the application of the terms employed, and it is useful, therefore, to refer to those authorities for a more definite idea of what is meant by levying war. Lord Hale says (1 P. C. 149, 150): "An actual levying of war against the king, consists of two principal parts or ingredients, namely: First, it must be a levying of war; second, it must be a levying of war against the king. What shall be said to be a levying of war is partly a question of fact. For it is not every unlawful or riotous assembly of many persons to do an unlawful act, though de facto they commit the act they intend, that makes a levying of war, (for then every riot would be treason, and all the acts against riotous and unlawful assemblies had been vain and needless,) but it must be such an assembly as carries with it speciem belli; as if they ride or march vexillis explicatis, or if they formed into companies, or were furnished with military officers; or if they are armed with military weapons, as swords, guns, balls, halberts, pikes, and are so circumstanced, that it may be reasonably concluded they are in a posture of war."

The language of Justice Foster (Crown Law, p. 209), though not so particular in the enumeration of the circumstances necessary to constitute a levying of war in the sense of the statute, is to the same general effect. And he adds, that an insurrection to throw down all inclosures in a particular place or county, to pull down all brothels in a particular town, or to remove a local nuisance, is not such an insurrection as amounts to a levying of war.

The last decision in the American courts is that in U. S. v. Hoxie, already mentioned. In that case Vandusen had sent a raft of timber to be transported to Canada, in violation of the embargo laws. It was seized on its way by the collector of Vermont, and placed in the custody of a company of militia. While the company were at some distance from the raft, a company of about fifty men, hired for the purpose, and armed, some of them with a dozen muskets, and the rest with clubs and spike poles, assembled with the intention of rescuing the raft, and if necessary, of making prisoners of the troops that guarded it. They got possession of the raft without resistance, no one being near it, and proceeded towards Canada. In about an hour, as the raft passed a point of the shore twenty rods distant, the troops fired upon it, and those on the raft returned the fire. This firing continued until the raft was beyond the reach of musket shot. About one hundred shots were fired from the raft, and the balls struck trees on the shore, and the shot from shore also struck the raft, but no persons were wounded. The firing was in earnest, and intended for execution. Here was a combination of men to prevent the execution of an act of congress by force, the authority of the United States successfully resisted, and the occurrence of an actual skirmish between an armed body and troops in the service of the nation sent to defeat the unlawful enterprise. Not a single ingredient of treason is wanting as the prosecution expounded the word: yet the court decided that the offence was not treason. "A levying of war," says Judge Livingston, "without having recourse to rules of construction or artificial reasoning, would seem to be nothing short of the employment, or at least, of the embodying of a military force, armed and arrayed in a warlike manner, for the purpose of forcibly subverting the government, dismembering the Union, or destroying the legislative functions of congress. These troops should be so armed and so directed as to leave no doubt that the United States or their government were the immediate object of their attack."

Before GRIER, Circuit Justice, and KANE, District Judge.

GRIER, Circuit Justice (charging jury).[3] [We must commend the patient attention which you have thus far given to this most important and interesting case. It has taken up much of your time, and caused you some personal inconvenience, but not more, perhaps, than the importance of the issue, both as respects the interests of the public and your duty to the prisoner whom you have in charge, has necessarily required. It has been the anxious desire of the court, notwithstanding the pressure of other duties, to give ample time and opportunity for

[3] [From 4 Am. Law J. (N. S.) 458.]

the careful and full investigation of the facts and law bearing on the case, not only because it is the first of a numerous list of cases of the same description, which involve the issue of life and death to the parties immediately concerned, but because we know that the public eye is fixed upon us, and demands at our hands the unprejudiced and impartial performance of the solemn duties which we have been called to execute. The prisoner at the bar has a right to require of you that you should not permit the atrocity of the transaction, or your horror of the offence with which he is charged, or your proper desire to vindicate the insulted laws of the country, to cause you to forget your duties to him, and convict him without full and satisfactory proof of his guilt. The government, also, while it cannot desire the sacrifice of an innocent individual for the purpose of public example, has a right to demand of you a firm, a fearless, an unflinching performance of your duty, and that the verdict you shall render shall be a true verdict, according to the evidence which you have heard, and the law as explained to you by the court.

[Before proceeding to notice more particularly the questions of law or fact arising in this case, or the defendant's complicity in the transaction, suffer me to advert to some matters, which, though only historically known to us, yet having passed before our eyes as citizens of the commonwealth, may have a tendency to create in our minds some bias on this subject, but which should not be permitted to affect your verdict, whatever your private sentiments and feelings may happen to be. Without intimating any opinion as to the guilt or innocence of the prisoner at the bar, it must be admitted that the testimony in this case has clearly established that a most horrible outrage upon the laws of the country has been committed. A citizen of a neighboring state, while in the exercise of his undoubted rights guaranteed to him by the constitution and laws of the United States, has been foully murdered by an armed mob of negroes. Others have been shot down, beaten, wounded, and have, with difficulty, escaped with their lives. An officer of the law, in the execution of his duty, has been openly repelled by force and arms. All this has been done in open day, in the face of a portion of the citizens of this commonwealth, whose bounden duty it was, as good citizens, to support the execution of the laws without any opposition on their part, without any attempt at interference to preserve the peace; and who, if they did not directly encourage or participate in the outrage, looked carelessly and coldly on. These, I say, are facts established in this case beyond contradiction. That it is the duty, either of the state of Pennsylvania, or of the United States, or of both, to bring to condign punishment those who have committed this flagrant outrage on the peace and dignity of both, cannot be doubted. It is now more than sixty years since the adoption of the constitution of the United States. Under its benign influence we have become a great and powerful nation; happy and prosperous at home, feared and respected abroad. And why has this Confederacy obtained such an immeasurable superiority over the other republics on this continent? It is because here we have a moral, virtuous, and a religious people, and a firm, fearless, and impartial administration of the laws; because, here, the minority upholds the constitutions and laws imposed by the majority; because we have not here pronunciamentos, rebellions, and civil wars, caused by the lust of power, by the ignorance of faction or fanaticism, which in other countries have marred every attempt at free government. That the people of the great state of Pennsylvania have a loyalty, fidelity, and love to this Union, and the constitution and laws which have so exalted us as a nation, cannot be doubted; and yet I grieve to admit that the only trials and convictions on record for armed and treasonable resistance to the laws of the United States since the adoption of the constitution have their venue laid in Pennsylvania. But these were more than fifty years ago, and before we had become accustomed to the working of a new and untried experiment in self-government, or anticipated its glorious results. It is not our purpose to excuse or vindicate those early outbreaks of popular insubordination, which were soon suppressed by military force, and the impartial execution of the laws by courts and juries. But without, at present, expressing any opinion whether the present outrage is to be classed under the legal category of riot, murder, or treason, we think it due to the reputation of the people of this commonwealth to say that (with the exception of a few individuals of perverted intelligence, some small districts or neighborhoods whose moral atmosphere has been tainted and poisoned by male and female vagrant lecturers and conventions,) no party in politics, no sect of religion of any respectable numbers or character, can be found within our borders who have viewed with approbation, or looked with any other than feelings of abhorrence, upon this disgraceful tragedy. It is not in this hall of independence that meetings of infuriated fanatics and unprincipled demagogues have been held to counsel a bloody resistance to the laws of the land. It is not in this city that conventions are held denouncing the constitution, the laws, and the Bible. It is not here that the pulpit has been desecrated by seditious exhortations, teaching that theft is meritorious, murder excusable, and treason a virtue. The guilt of this foul murder rests not alone on the deluded individuals who were its immediate perpetrators, but the blood taints with even

deeper dye the skirts of those who promulgate doctrines subversive of all morality and all government. This murderous tragedy is but the necessary development of principles and the natural fruit from seed sown by others, whom the arm of the law cannot reach.

[In making these remarks, we prefer to speak the truth in plain language, without seeking for bland euphuisms or flattering terms of respect for the promulgators of principles which we verily believe are not only dangerous to the peace, prosperity, and happiness of the citizens of these United States, and tending to the dissolution of the Union, but subversive of all human government. I have adverted to these matters, which must have forced themselves on our minds and attention before the commencement of this trial, in order to warn you also against suffering them to bias your minds in this case. This defendant must stand or fall by the evidence in the cause, and not be made the scape-goat or sacrifice for the offences of others, unless he be proved to have participated in them. But if that shall have been made to appear by the evidence, it will be no excuse or defence for him that others are equally guilty with himself. It is due to him, however, to say that there is no evidence before us that the prisoner attended any of these conventions got up to fulminate curses against the constitution and laws of the country, to libel its best citizens, and to exhort to a seditious and bloody resistance to the execution of its laws. You will have observed that this bill of indictment charges the defendant with treason in resisting the execution of a certain law of congress concerning fugitives from labor, which has been the subject of much controversy and agitation, and on which it may be proper to make a few remarks before we proceed to the more immediate merits of the case.

[The learned counsel for the prisoner, having a due regard for the high character which they sustain in their profession, have not made the objection to this law which has been so clamorously urged by many presses and agitators, that it is unconstitutional. It is true some ecclesiastical assemblies in the North, treating it, we presume, as a question of theology or orthodoxy, have ventured to anticipate the decision of the legal tribunals on this subject. But, highly as we respect their opinions on all questions properly within their cognizance, we cannot receive their decisions as binding precedents on questions arising under the constitution.

[The constitution enacts that "no person held to service or labor in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." This is the supreme law of the land, binding not only the respective states as such, but on the conscience and conduct of every individual citizen of the United States. It is well known that, without this clause, the assent of the Southern states could never have been obtained to this compact of union. And if, contrary to good faith, it should be practically nullified, —if individuals or state legislatures in the North can succeed in thwarting and obstructing the execution of this article of our confederation, and the rights guaranteed to the South thereby, they have no right to complain if the people of the South should treat the constitution as virtually annulled by the consent of the North, and seek secession from any alliance with open and avowed covenant breakers. Every compact must have mutuality; it must bind in all its parts and all its parties, or it binds none. Those states in the North whose legislation has made it a penal offence for their judicial and executive officers to lend their assistance in the execution of this clause of the constitution, and compels them to disregard their solemn oath to support it, have proceeded as far, and perhaps farther, in the path of nullification and secession than any Southern state has yet done. I know it is attempted to justify such legislation by casting the blame on the supreme court of the United States, and quoting certain dicta of some of the judges in the case of Prigg v. Pennsylvania [16 Pet. (41 U. S.) 539]. The question before the court in that case, and the only question which could be decided, was this, and this only: "That the master of a fugitive, having a right, under the constitution, to arrest his slave without writ, and take him away, any state legislation which interfered with or obstructed that right, and (as in the case before the court) punished the master or his agent as a kidnapper, was void." How such a decision can justify such legislation it is not easy to perceive.

[The act of congress of 1792 [1 Stat. 275], which was first made to enforce this clause of the constitution, was found to be defective and inoperative, and chiefly because it provided no legal process or public officer to make the arrest of the fugitive, and bring him before the magistrate. The forcible arrest and seizure of a man without any writ or semblance of legal authority justly became odious, because it was liable to very great abuse. There was nothing to distinguish the arrest of a master from the seizure of the vile kidnapper and man-stealer. The act of 1850 remedies this evil. It gives the master legal process and an officer of the law to make the arrest, and, moreover, gives the party arrested the benefit of a hearing and the decision of a judicial officer before he can be deported. The free colored man, who was before liable to capture by kidnappers, is better protected by this law than he was before. In this feature alone is there any characteristic difference be-

tween this act and the act of 1793 [1 Stat. 302], to which it is a supplement. No objection had ever been urged to that act, that it was unconstitutional, because it did not give the alleged fugitive a jury trial. In no cases of extradition either of fugitives from justice or from labor, where the only question to be decided is the identity of the person whose reclamation is sought, had it ever been heard that the country or state to which he fled was to try the question of his guilt or innocence, or pass upon his rights and duties in the state from which he fled. And yet this newly-discovered argument is the only one which has ever been urged, with any pretence even to plausibility, by those who make so great clamor against this act. The truth is, the shout of disapprobation with which this act has been received by some has been caused, not because it is injurious or dangerous to the rights of freemen of color in the United States, or is unconstitutional; but because it is an act which can be executed, and the constitutional rights of the master in some measure preserved. The real objection with these persons is to the constitution itself, which is supposed to be void in this particular from the effect of some "higher law," whose potential influence can equally annul all human and all divine law.

[It is true that the number of persons whose consciences affect to be governed by such a law is very small. But there is a much larger number who take up opinions on trust or by contagion, and have concluded this must be a very pernicious and unjust enactment, for no other reason than because the others shout their disapprobation with such violence and vituperation. And possibly some might be found who affect to join the chorus with some slight hopes that they may be able to ride into place and power on the waves created by continual agitation. It may not be said of this law, or perhaps of any other, that it is perfect, or the best that could possibly be enacted, or that it is incapable of amendment. But this may truly be said, that while there are so many discordant opinions on the subject, it is not probable that a better compromise will be made, and most probably none of us will live to see any act on this subject made to please every one.

[Let it suffice for the present to say to you, gentlemen of the jury, that this law is constitutional; that the question of its constitutionality is to be settled by the courts, and not by conventions either of laymen or ecclesiastics; that we are as much bound to support this law as any other, and that public armed opposition to the execution of this law is as much treason as it would be against any other act of congress to be found in our statute book.

[Let us now proceed to examine more particularly the specific charge laid in this bill of indictment, the evidence given to support them, and the questions of law involved in the case. The bill of indictment charges that the prisoner, Castner Hanway, wickedly intending and devising the peace and tranquility of the United States to disturb, and prevent the execution of the laws thereof, to wit "An act respecting fugitives from justice and persons escaping from the service of their masters," approved February 12, 1793, and another act, supplementary to the same, passed on the 16th of September, 1850, did, on the 11th of September, 1851, wickedly and traitorously intend to levy war against the United States. It then sets forth five several overt acts. (1) That with a large number of persons armed and arrayed with warlike weapons, with purpose to oppose and prevent, by means of intimidation and violence, the execution of the said laws, he did wickedly and traitorously levy war against the United States. (2) That in pursuance of said purpose, the prisoner and others, so armed and traitorously assembled to prevent the execution of said laws, did with force and arms traitorously resist one Henry H. Kline, an officer of the United States, duly appointed, from executing lawful process, and wickedly and traitorously did prevent, by force and intimidation, the execution of the said laws. (3) The third is the same with the second, with this addition, that they assaulted Kline, and liberated from his custody persons arrested by him, who owed service and labor to Edward Gorsuch, under the laws of Maryland, thereby traitorously preventing the execution of said laws. (4) That the prisoner, with the others, did traitorously meet, conspire, and consult to oppose, resist, and prevent by force the execution of said law. (5) That in pursuance of said traitorous intention, he prepared divers books, letters, resolutions, addresses, &c., which he caused to be dispersed, containing incitements and encouragements to fugitives and others to resist, oppose, and prevent by violence and intimidation the execution of said laws.] [4]

Whether the allegations of this bill of indictment are supported by evidence, is the matter which you are sworn to try. In assisting you to arrive at a correct conclusion on these points, it is not the intention of the court to intimate an opinion on any disputed fact. But there are certain facts in the case which have not been disputed by the learned counsel, and which, in speaking of this case, we may assume to have been satisfactorily proved, as they have not been denied. They are these: That Mr. Edward Gorsuch, a citizen of Maryland, was the owner of certain slaves, or persons held to labour by the laws of that state. That these slaves had escaped and fled into Pennsylvania, and were known to be lurking in the neighbourhood of the village of Christiana, Lancaster county. That Mr. Gorsuch came to Philadelphia in

[4] [From 4 Am. Law J. (N. S.) 458.]

September last, and obtained warrants, for the arrest of these fugitives, from a commissioner of this court, having authority by law to issue such warrants. That these warrants were put into the hands of Kline, an officer duly authorized to execute them. That on the morning of the 11th of September, about daylight, Kline, accompanied by Gorsuch, his son, nephew, and cousin, and two other persons, citizens of Maryland, proceeded to the house of one Parker. That a person who was recognized as one of the fugitives for whom the warrants had been issued, was seen to come out of the house. That the fugitive on seeing the officer and his company, immediately fled into the house and up stairs, leaving the door open behind him. That Mr. Gorsuch pursued him, followed by the officer. That a number of negroes were collected up stairs, armed in various ways and determined to resist the capture of the fugitives. That a gun was fired by one of them at Mr. Gorsuch, and others of his assistants were struck with missiles thrown from the upper windows. That a pistol was then fired by the officer, not aimed at the negroes, but rather to frighten them and let them know their assailants were armed. That a parley was then held between the parties, and the negroes informed that the officer had legal process in his hands for their arrest. That the negroes demanded time for the purpose, as was supposed, of offering terms of surrender, but in reality, perhaps, to gain time for the arrival of assistance from the neighbourhood. That after some lapse of time, the defendant arrived on the ground, and at the same time, or soon after, large numbers of negroes began to collect around with various weapons of offence, such as guns, clubs, scythes, and corn-cutters. That on the arrival of these reinforcements, the persons in the house set up a yell of defiance. That the officer made known his character, and exhibited his writs to the defendant, and another white man who had arrived on the ground, and demanded their assistance in executing the warrants, which was refused. That the officer deeming the attempt to execute his writs in the face of a numerous armed and angry mob of negroes hopeless, made no further attempt to do so, being content to escape with his life. That the mob of armed negroes, now amounting to near or over one hundred persons, immediately made an attack upon the party who attended the officer. Mr. Gorsuch was then shot down, beaten with clubs, and murdered on the spot. His son, who came to his assistance, was shot and wounded, and with difficulty escaped with his life. That the nephew was surrounded and beaten, but escaped with his life; and that on the preceding evening, notice had been given in the neighbourhood, by a negro who had followed the officer from Philadelphia, that an arrest of the fugitives was intended, and that the concourse and riot of the morning, was evidently by preconcert and in consequence of such information.

Without at present further noticing the history of the transaction, or expressing any opinion of the conduct of the white people in the neighbourhood, on the occasion, we may say that the evidence has clearly shown that the participants in this transaction are guilty of riot and murder at least. Whether the crime amounts to treason or not will be presently considered.

Two questions present themselves for your inquiry: (1) Was the defendant, Hanway, a participant in the offences proved to have been committed? Did he aid, abet or assist the negroes in this transaction, without regard to the grade or description of the offence committed? (2) And secondly, if he did, was the offence treason against the United States, as alleged in this bill of indictment? The first of these questions is one wholly of fact, and for your decision alone. The last is a mixed question of law and fact. On the law, you have a right to look to the court, for a correct definition of what constitutes treason, but whether the defendant has committed an offence which comes within that category, is, of course, a matter of fact for your decision. When a murder is committed, all who are present, aiding, abetting and assailing, are equally guilty with him who gave the fatal stroke. An abettor of a murder in order to be held liable as a principal in the felony, must be present at the transaction; if he is absent, he may be an accessory. But in treason all are principals, and a man may be guilty of aiding and abetting, though not present. "If one man watch while another breaks into a house at night and robs it, both are guilty of burglary." "If A. comes and kills a man and B. runs with an intent to assist him, if there should be occasion, though in fact he doth nothing, yet he is a principal, being present as well as A." "If divers persons come with one assent to do mischief, as to kill, rob or beat, and one doth it, they are all principals in the felony." "If many be present, and one only gives the stroke, whereby the party dies, they are all principals." "Thus if two fight a duel, and one of them is killed, the seconds who are present, are both guilty of murder." "If A. and B. be fighting, and C. a man of full age comes by chance, and is a looker-on only, and assists neither, he is not guilty of murder or manslaughter, but it is a misprision for which he shall be fined, unless he uses means to apprehend the felon." Lastly, "if divers persons come in one company, to do any unlawful thing, as to kill, rob, or beat a man, or to commit a riot, or to do any other trespass, and one of them in doing thereof kill a man, this shall be adjudged murder in them all that are present of that party, abetting him, and consenting to the act, or ready to aid him, although they did but look on."

I have given you these examples from the

books, in order that you may form some idea as to the nature of what the law treats as criminal; and what it regards as aiding, abetting and countenancing the perpetration of an offence. In the present case, Hanway was confessedly present. But did he come to aid, abet, countenance or encourage the rioters? If so, he was guilty of every act committed by any individual engaged in the riot—whether it amount to felony or treason. There is no evidence of any previous connection of the prisoner with this party, before the time the offence was committed—that he had counselled, advised or exhorted the negroes to come together with arms and resist the officer of the law or murder his assistants. There is no evidence, even, that the prisoner was a member of any of these associations or conventions, which occasionally or annually infest the neighbouring village of West Chester, for the purpose of railing at and reviling the constitution and laws of the land, and denouncing those who execute them as no better than a Scroggs and a Jeffries—who stimulate and exhort poor negroes to the perpetration of offences, which they know must bring them to the penitentiary or the gallows. The fact of his interference, whether active or passive, of his aiding, counselling or abetting the perpetrators of this offence, has been argued from his language and conduct during its perpetration in his presence. His acts, his declarations and his conduct, are fair subjects for your careful examination, in order to judge of his intentions or his guilty complicity with those whose hands perpetrated the offence. If, as the counsel for the United States have argued, he countenanced or encouraged, aided or abetted the offenders in the commission of the offence, he is equally guilty with them. If, on the contrary, as is argued by his counsel, he came there without any knowledge of what was about to take place, and took no part by encouraging, countenancing, or aiding the perpetrators of the offence—if he merely stood neutral through fear of bodily harm, or because he was conscientiously scrupulous about assisting to arrest a fugitive from labour, and therefore merely refuse to interfere, while he did not aid or encourage the offenders, he may not have acted the part of a good citizen; he may be liable to punishment for such neutrality by fine and imprisonment, but he cannot be said to be liable as a principal in the riot, murder and treason, committed by the others—and much more so if, as has been argued, his only interference was to preserve the lives of the officer and his attendants. A man may have such conscientious principles on the subject of non-resistance, as to stand by with indifference and neutrality, when his father or friend is attacked by a madman, and in case of his death may not be liable as an aider or abettor in the murder or manslaughter. We may wonder at his philosophic indifference, though we cannot admire the man. So a man who is a mere spectator in a contest where a mob of rioters are resisting an officer of the law in the execution of his duty, may refuse assistance, countenance or aid to either side. In so doing he is not acting the part of an honest, loyal citizen; he may be liable to be punished for a misdemeanor for his refusal to interfere, but such conduct will not necessarily make him liable as a principal in the riot or murder committed. But such conduct is a fair subject for the consideration of a jury, in connection with other circumstances, to show preconcert and guilty complicity with the rioters, murderers or traitors.

What inference the jury may draw from the evidence in this case of the conduct of this prisoner, is for them to say, after carefully weighing the arguments which have been so ably urged by the learned counsel.

With these remarks we submit this point of the case to the jury, after reading to them, if they desire it, the testimony of the witnesses bearing more directly on this question. If you should find that the defendant Castner Hanway did not aid, assist or abet in the perpetration of the offence, you will return a verdict of not guilty, without regard to the grade of the offence; whether riot, murder, or treason. But if you should find that he has so aided and abetted, so as thereby to become a principal in the transaction according to the rules of law which we have just stated, you will next have to inquire whether the offence as proved, amounts to the crime of "treason against the United States."

The bill charges the defendant with "wickedly and traitorously intending to levy war against the United States:" and the jury must find the act or acts to have been committed with such intention. For although the prisoner may have been guilty of riot, robbery, murder, or any other felony, he cannot be found guilty under this bill of indictment, unless you find that he intended to levy war against the United States, or that the acts were committed by himself and others in pursuance of some conspiracy or preconcert for that purpose; and this is a question of fact for the decision of the jury. But in the decision of it, the jury should regard the construction of the constitution as given them by the court as to what is the true meaning of the words "levying war." Treason against the United States, is defined by the constitution itself. Congress has no power to enlarge, restrain, construe or define the offence. Its construction is entrusted to the court alone. By this instrument it is declared that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court." What constitutes "levying war against the

government," is a question which has been the subject of much discussion, whenever an indictment has been tried under this article of the constitution. The offence is described in very few words, and in their application to particular cases, much difference of opinion may be expected. We derive our laws as well as our language from England. As we would apply to English dictionaries and classical writers, to ascertain the proper meaning of a particular word, so when we would inquire after the true definition of certain legal phraseology we would naturally look to the text writers and judicial decisions which we know that the framers of our constitutions would regard as the standard authorities in questions of legal definition. Otherwise the language of the constitution on this subject might be subject to any construction which the passion or caprice of a court and jury might choose to give it in times of public excitement. At one time the constitution might be nullified by a narrow construction, and at another time the life and liberty of the citizen be sacrificed by a latitudinous one.

The term "levying war," says Chief Justice Marshall (Burr's Trial, vol. 2, p. 402), "is not for the first time applied to treason by the constitution of the United States. It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our constitution, in the sense which has been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed, must be considered as employing them in their ascertained meaning, unless the contrary is proved by the context." Since the adoption of the constitution but few cases of indictment for treason have occurred, and most of them not many years afterwards. Many of the English cases, then considered good law and quoted by the best text writers as authorities, have since been discredited, if not overruled, in that country. The better opinion there at present seems to be, that the term "levying war" should be confined to insurrections and rebellions for the purpose of overturning the government by force and arms. Many of the cases of constructive treason quoted by Foster, Hale, and other writers, would perhaps now be treated merely as aggravated riots or felonies. But for the purposes of the present case, it is not necessary to pursue this subject further, or to look beyond the cases decided in our own country. The subject is one of too serious importance to allow this court to indulge in speculations, or wander from the safe path of precedent.

In England, all insurrections to imprison the king, or to force him to change his measures, or to remove evil counsellors; to attack his troops in opposition to his authority; to carry off or destroy his stores, provided for defence of the realm; if done conjointly with and in aid of rebels or enemies, and not only for lucre or some private and malicious motive; to hold a fort or castle against the king or his troops, if actual force be used in order to keep possession; to join with rebels freely and voluntarily; to rise for the purpose of throwing down by force, all enclosures; alter the law or religion, &c.; to effect innovations of a public and general concern, by an armed force, or for any other purpose which usurps the government in matters of a public and general nature. All these acts have been deemed "a levying of war." So also have insurrections to redress by force national grievances; or to reform real or imaginary evils of a public nature, and in which the insurgents had no private or special interest, or by intimidation to force the repeal of a law. But when the object of an insurrection is of a local or private nature, not having a direct tendency to destroy all property and all government, by numbers and armed force, it will not amount to treason. In the case of Ex parte Bollman and Swartwout, in the supreme court of the United States (4 Cranch [8 U. S.] 75, 126–128), it is declared "that it is more safe, as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases;" "that to constitute the specific offence, war must be actually levied against the United States;" that "to conspire to levy war, and actually to levy war, are distinct offences;" and that "to complete the crime of levying war, there must be an actual assemblage of men for the purpose." This case also recognized the doctrine which had been previously laid down by Judge Chase in Fries's Case [Case No. 5,127], that "if a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States, by force, they are guilty only of a high misdemeanor; but if they proceed to carry such intention into execution by force, they are guilty of the treason of levying war, and the quantum of the force employed neither lessens nor increases the crime, whether by one hundred or one thousand persons, is wholly immaterial:" and that "a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used in pursuance of such design to levy war; but it is altogether immaterial whether the force used is sufficient to effectuate the object; any force, connected with the intention, will constitute the crime of 'levying war.'" In Mitchell's Case [Id. 15,788] it was decided that to resist or prevent by armed force, the execution of a par-

ticular statute of the United States, is a levying war against the United States, and consequently treason, within the true meaning of the constitution. And in Fries's Case, already mentioned, "that an insurrection or rising of any body of people within the United States, to attain by force or violence any object of a great public nature, or of public, (or national) and general concern, is a levying of war against the United States." "That any such insurrection or rising to resist or prevent by force or violence the execution of any statute of the United States," "under any pretence, as that the statute was unjust, burthensome, oppressive or unconstitutional, is a levying of war against the United States within the constitution." And in a case in the circuit court of New York (U. S. v. Hoxie [Case No. 15,407]) it was declared that if the intention be, to prevent by force of arms, the execution of any act of congress altogether, any forcible opposition calculated to carry that intention into effect, is levying war against the United States. But the resistance of the execution of a law of the United States accompanied with any degree of force, if for a private purpose, is not treason. To constitute that offence, the object of the resistance must be of a public and general nature. I do not think it necessary to quote further from the decisions of my predecessors. It will suffice to say that the late charge of my Brother Kane to the grand jury, in the circuit court [Fed. Cas. Append.], contains what I believe to be a correct statement of the decisions on this subject, and that I fully concur in the doctrines stated, and the sentiments expressed in it.

In the application of these principles of construction to the case before us, the jury will observe, that the "levying of war," against the United States, is not necessarily to be judged of alone by the number or array of troops. But there must be a conspiracy to resist by force, and an actual resistance by force of arms or intimidation by numbers. The conspiracy and the insurrection connected with it must be to effect something of a public nature, to overthrow the government, or to nullify some law of the United States, and totally to hinder its execution, or compel its repeal. A band of smugglers may be said to set the laws at defiance, and to have conspired together for that purpose, and to resist by armed force, the execution of the revenue laws; they may have battles with the officers of the revenue, in which numbers may be slain on both sides, and yet they will not be guilty of treason, because it is not an insurrection of a public nature, but merely for private lucre or advantage. A whole neighbourhood of debtors may conspire together to resist the sheriff and his officers, in executing process on their property—they may perpetrate their resistance by force of arms—may kill the officer and his assistants—and yet they will be liable only as felons, and not as traitors. Their insurrection is of a private, not of a public nature; their object is to hinder or remedy a private, not a public grievance. A number of fugitive slaves may infest a neighbourhood, and may be encouraged by the neighbours in combining to resist the capture of any of their number; they may resist with force and arms, their master or the public officer, who may come to arrest them; they may murder and rob them; they are guilty of felony and liable to punishment, but not as traitors. Their insurrection is for a private object, and connected with no public purpose. It is true that constructively they may be said to resist the execution of the fugitive slave law, but in no other sense than the smugglers resist the revenue laws, and the anti-renters the execution laws. Their insurrection, their violence, however great their numbers may be, so long as it is merely to attain some personal or private end of their own, cannot be called levying war. Alexander the Great may be classed with robbers by moralists, but still the political distinction will remain between war and robbery. One is public and national, the other private and personal.

Without desiring to invade the prerogatives of the jury in judging the facts of this case, the court feel bound to say, that they do not think the transaction with which the prisoner is charged with being connected, rises to the dignity of treason or a levying of war. Not because the numbers of force was insufficient. But (1) for want of any proof of previous conspiracy to make a general and public resistance to any law of the United States; (2) because there is no evidence that any person concerned in the transaction knew there were such acts of congress, as those with which they are charged with conspiring to resist by force and arms, or had any other intention than to protect one another from what they termed "kidnappers" (by which slang term they probably included not only actual kidnappers, but all masters and owners seeking to recapture their slaves, and the officers and agents assisting therein).

The testimony of the prosecution shows that notice had been given that certain fugitives were pursued; the riot, insurrection, tumult, or whatever you may call it, was but a sudden "conclamatio" or running together, to prevent the capture of certain of their friends or companions, or to rescue them if arrested. Previous to this transaction, so far as we are informed, no attempt had been made to arrest fugitives in the neighbourhood under the new act of congress by a public officer. Heretofore arrests had been made not by the owner in person, or his agent properly authorized, or by an officer of the law. Individuals without any authority, but incited by cupidity, and the hope of obtaining the reward offered for the return of a fugitive, had

heretofore undertaken to seize them by force and violence, to invade the sanctity of private dwellings at night, and insult the feelings and prejudices of the people. It is not to be wondered at that a people subject to such inroads, should consider odious the perpetrators of such deeds and denominate them kidnappers—and that the subject of this treatment should have been encouraged in resisting such aggressions, where the rightful claimant could not be distinguished from the odious kidnapper, or the fact be ascertained whether the person seized, deported or stolen in this manner, was a free man or a slave. But the existence of such feelings is no evidence of a determination or conspiracy by the people to publicly resist any legislation of congress, or levy war against the United States. That in consequence of such excitement, such an outrage should have been committed, is deeply to be deplored. That the persons engaged in it are guilty of aggravated riot and murder cannot be denied. But riot and murder are offences against the state government. It would be dangerous precedent for the court and jury in this case to extend the crime of treason by construction to doubtful cases, and our decision would probably operate in the end to defeat the purposes of the law, which the government seeks to enforce.

I cannot conclude this charge to the jury, without availing myself of the occasion which it offers, to express the satisfaction which the court has in seeing here the attorney general of the state of Maryland and the private counsel associated with him; for although the ordinary officers of the United States are deserving of all praise for the vigilance, ability and learning they have shown in bringing offenders to justice, the indignation felt by the people of Maryland at the calamitous and disgraceful murder of Mr. Gorsuch, are most natural indeed; and we receive their representatives here, in defence of the law, with cordial respect and readiness, in the hope that it may efface all angry feeling between the people of these two states, and foster those of respect and friendship.

[5] [The time may come when, with an elective judiciary, dependent on the will of the majority (which is here the sovereign power), may use such a precedent to justify the foulest oppression and injustice, and the tragedies enacted by a Scroggs and a Jeffries be repeated, and again sully the page of history. But I would not be doing justice to all parties concerned in this prosecution, if I did not express my cordial approbation of the course pursued by the authorities of the United States and state of Maryland on this occasion. This is the second instance in which a citizen of Maryland, in the legitimate pursuit of rights, guaranteed to him by the constitution, has been foully murdered on the soil of Pennsylvania. As might be expected, it created a great excitement, and a just feeling of indignation in the breasts of the people of Maryland.

[The act of 1850, passed to secure them in the enjoyment of their acknowledged rights, had been received with a shout of disapprobation, in certain parts of the country. Meetings had been held in many places in the North, denouncing the law, and advising a traitorous resistance to its execution; conventions of infuriated fanatics had incited to acts of rebellion, and even the pulpit had been defiled with furious denunciations of the law, and exhortations to a rebellious resistance to it. The government was perfectly justified in supposing that this transaction was but the first overt act of a treasonable conspiracy extending over many of the Northern states to resist by force of arms the execution of this article of the constitution and the laws framed in pursuance of it. In making these arrests, and having this investigation, the officers of government have done no more than their strict duty. The activity, zeal, and ability which have been exhibited by the learned attorney of the United States in endeavoring to bring to condign punishment the perpetrators of this gross offence, are deserving of all praise. It has given great satisfaction to the court also that the learned attorney general of Maryland, and the very able counsel associated with him, have taken part in this prosecution. And I am persuaded that, notwithstanding the unfortunate and disgraceful occurrence which has taken place, and the just feelings of indignation felt by the people of Maryland, caused by it, that this meeting of that state by its representative here with the people of Pennsylvania will tend to efface all angry feelings, and foster those of respect and friendship between the people of these adjoining states. And though the duty of punishing the perpetrators of this outrage may have to be transferred, in whole or in part, to the courts of Lancaster county, we have an assurance, from the activity and zeal already exhibited by the law officers of that county, that it will be performed with all fidelity. With these remarks the case is committed to you.

[The jury found for the defendant.] [6]

[7] [Mr. J. W. Ashmead said that the prisoner was also charged on four other bills for misdemeanor; but as he had passed through such an ordeal, he purposed entering a nolle prosequi on those bills. If the state does not hold him for anything else, I move for his discharge.

[GRIER, Circuit Justice, said, that, on motion, the prisoner was discharged.] [7]

[5] [From 4 Am. Law J. (N. S.) 458.]

[6] [From 4 Am. Law J. (N. S.) 458.]

[7] [From Clerk's Book (Philadelphia) p. 169.]

Case No. 15,300.

UNITED STATES v. HARBISON.

[13 Int. Rev. Rec. 118.]

Circuit Court, E. D. Tennessee. Jan. Term, 1871.

INTERNAL REVENUE — ILLEGAL DISTILLING AND RETAILING OF LIQUORS — AIDING AND ABETTING.

[1. The owner of a distillery, who rents the same to another, knowing that the latter intends to use it for distilling whisky in violation of law, is guilty of aiding and abetting such unlawful manufacture, within the meaning of the statute.]

[2. To be a retailer of liquor, within the meaning of the statute, one need not keep a shop or store or carry on the business for a livelihood. It is enough to warrant a conviction for selling by retail without a license that defendant did sell whisky, in small quantities on several occasions.]

[This was an indictment against J. C. Harbison, for violation of the internal revenue laws.]

On the trial of this case the only witness introduced by the government was James Williamson, who testified that about the month of December, 1866, he leased from the defendant a still and fixtures, on which witness made one run of eleven gallons of whisky, of which he was to and did pay the defendant one-seventh part for the use of said still and fixtures. Witness also stated that another person had rented from defendant, upon the same terms, the same still and fixtures some time in October and November, 1866, and had made two or three small runs thereon. Witness also stated that he had at three different times during the spring and summer of 1867 purchased whisky from the defendant, getting one quart each time, and paying seventy-five cents for each quart, all of which, witness stated, occurred within the district. No evidence was offered by the defence.

T. R. Camick, attorney for defendant, insisted that defendant could not be convicted for distilling, as charged in the first count, because, under the language of the statute, only the principal in the transaction could be said to "be carrying on the business of distiller," and that the doctrine of "aiders and abettors being guilty as principals" does not apply in such cases. As to the charge of retailing, defendant's attorney contended that occasional acts of retailing did not constitute a liability under this statute; but that, before a conviction could be had, the government must prove the defendant to have engaged in retailing spirituous liquors as a business or means of livelihood. Defendant's attorney cited and relied on the former holdings of Judge Trigg in the case of U. S. v. Cooper [Case No. 14,863], and U. S. v. Logan [Id. 15,624], as sustaining both of the positions above insisted on.

E. C. Camp, U. S. Dist. Atty., while admitting that the holding of Judge Trigg in the two cases cited sustained the positions taken by the attorney for defendant, yet insisted that those cases were not sustained either by sound reason or the authorities; while the results that would arise from such a construction of the law would be such as to defeat the very end intended to be accomplished by the law itself, and but serve to enable guilty parties to find a way of escape from punishment.

EMMONS, Circuit Judge (charging jury): I shall call your attention to that portion of the proof only which is uncontradicted. It is unnecessary to look beyond that of Williamson, if you give full credit to him. Your verdict will be the same under this indictment, whether one or many offences are proven under each count. There is but one for distilling and one for retailing. (His honor here read full minutes of the testimony of the witness Williamson, and said): Substantially he swears that the defendant was the owner of a still and apparatus for the manufacture of whisky; that on several occasions he leased them for the purpose of being unlawfully used, and received as rent one-seventh of the gross product of whisky made. Details are given. No counter testimony has been offered by the defendant. The witness is unimpeached and uncontradicted, and, if you think his statement consistent and rational, he is entitled to credit. You have no right to reject what he says as untrue by assuming the existence of some unproved hypothesis, or upon any imaginary surmise that by possibility he may be mistaken or untruthful. You may criticise and weigh the testimony as carefully as possible; but, when this duty is performed, if it would obtain your credence in the ordinary affairs of life, you have no right arbitrarily, and without reason, to say you will disregard it. If upon this evidence you believe that Harbison did the acts sworn to, they constitute the offence of distilling without a license. It is not necessary that a defendant should carry on the business personally, that he should be responsible for the labor, or interested as owner, or act as chief agent. It is enough that he aids and abets the manufacture, knowing that it is carried on in violation of law. A citizen has no right to aid in breaking the laws of his country, and is bound alike in law and morals to abandon all service for another the moment he has good reason to believe his business is carried on in disregard of them. Should the owner of an illicit distillery be absent from the state, or, being within it, be unknown, if such were not the rule, this statute might, through the instrumentality of agents and laborers, be broken with impunity. It is a necessary doctrine that all who knowingly aid are alike guilty. A thousand may be as much so as one, if they have common knowledge of illegality. The imaginary hardship of this doctrine is wholly answered

when it is conceded that a laborer or other employé, without any knowledge that the law was violated, would be innocent. While the principle goes no further than to hold all guilty who, directly or indirectly, knowingly participate in the commission of the offence, neither justice nor policy would restrain its full application. If you believe, therefore, that Harbison was a party to an agreement in pursuance of which a distillery and apparatus, or any part of it, was used in the unlawful manufacture of whisky, you will find him guilty under the first count. The witness also swears that in the spring of 1867, on three occasions, the defendant sold a quart of whisky at each time, and that he received in payment seventy-five cents per quart. If you believe this evidence, you will find defendant guilty under the second count. In order to constitute one a retailer, he need not keep a shop or store, like a merchant, or carry on the business for a livelihood. It is enough that he sells liquor by retail. It seldom happens that all or any considerable part of the sales actually made can be proved. In order to enforce this law, it must be held that the citizens shall not at all sell by retail without a license. The extreme cases imagined at the bar, where one neighbor, in cases of sickness or other sudden emergency, sells a single quart, to relieve distress, have no application here. If they had, I am unable to perceive how the motive of the sale can relieve illegality. Very little whisky would be sold if the trade were limited to calls of mercy. The safer way to prevent prosecutions in such circumstances, occurring in the midst of so many attempts to evade the law, is for gentlemanly and ordinarily well-conditioned citizens to present or lend to the suddenly suffering neighbor the little whisky which such exigencies really demand. This interpretation of the law, so necessary for its enforcement, will have no tendency to repress neighborly sympathy or prevent the procuration of all necessary medicinal supplies. If you give credit to the testimony, you will find the defendant guilty under the second count.

The jury, without retiring, convicted the defendant both of distilling and retailing.

Case No. 15,301.

UNITED STATES v. HARDING et al.

[1 Wall. Jr. 127:[1] 6 Pa. Law J. 14; 3 Pa. Law J. Rep. 473; 3 Leg. Int. 41.]

Circuit Court, E. D. Pennsylvania. Oct. 12, 1846.

CRIMINAL LAW — POWER OF FEDERAL COURTS TO GRANT NEW TRIAL—DEATH OF JUDGES—MURDER AND MANSLAUGHTER.

1. Where two or more defendants are jointly charged in the same indictment with murder, it is competent for the jury to find one guilty of murder, and another of manslaughter, and, on such a verdict being rendered, it will not be disturbed by the court as irregular.

2. After a conviction in the United States of a capital offence, it is in the discretion of the court to grant a new trial on the application of the prisoner; it being competent for the prisoner himself, by such application, to waive the benefit of that clause in the constitution which provides that no man shall be put twice in jeopardy of life or limb for the same offence.

[Cited in U. S. v. Macomb, Case No. 15,702; Sparf v. U. S., 156 U. S. 175, 15 Sup. Ct. 321.]

[Cited in Bohanan v. State, 18 Neb. 74, 24 N. W. 398; Ex parte Bradley, 48 Ind. 553; Ohms v. State, 49 Wis. 425, 5 N. W. 835; Shular v. State, 105 Ind. 300, 4 N. E. 876; State v. Behimer, 20 Ohio St. 580; State v. McCord, 8 Kan. 241; State v. Ross, 29 Mo. 59.]

3. Where the judges who compose a court have all been commissioned subsequently to a verdict, taken by a former court, of murder as to one defendant and manslaughter as to others, which former court became vacant by the death of all its judges pending a motion for a new trial in the case on the ground that the verdict was against evidence and against law, the new court will not award sentence on the verdict as to defendants who ask for a new trial, nor will that court hear evidence as to what opinion, on the motion for a new trial, the former court had formed; the same having been confidentially expressed to an officer of the court, and not yet made known from the bench.

At a circuit court held in May last, before the late Judge RANDALL, District Judge of this district, then sitting for the circuit court, Harding was found guilty of murder, and Grimes and Williams of manslaughter. The indictment was for murder, and against them jointly; Harding being charged as principal, and the other two as present, aiding, abetting, and assisting. Application was made soon after the verdict for a new trial, and the application very fully argued before Judge Randall. His honour had formed, after the hearing, and expressed to an officer of this court (as it was offered to be proved), his opinion on this application, but, just as he was about to deliver it, sudden illness arrested his design, and soon after terminated his life. Judge Baldwin, the circuit judge, had died some time before; so that, before any decision had been given upon the motion for a new trial, the bench became vacant. In this state of things the present judges received their commissions, and the application for a new trial came again to be argued before them, on the same reasons which had been filed originally in the cause. Among these were: Because the verdict was against the evidence. Because the court charged the jury (and so is the law) that if the defendants, or either of them, were present, aiding, abetting, and assisting Harding in the assault made upon the deceased, the person or persons so aiding, abetting, and assisting were guilty of the same offence as that committed by Harding; and, if said defendants were not so present, aiding, abetting, and assisting, they are not guilty of any offence of which they can be convicted

[1] [Reported by John William Wallace, Esq.]

under this indictment. Nevertheless, the jury convicted Grimes and Williams of manslaughter, and Harding of murder; whereas they all should have been convicted of murder or of manslaughter, or acquitted.

["(4) Because the defendants having applied for separate trials, before jury sworn or plea pleaded, in order that they, or either of them, might not be deprived of the benefit of such witnesses as they were or might be entitled to, the learned judge overruled the said application. (5) Because the defendants, Harding, Grimes, and Williams, applied to the court at various times, and at different and proper stages of the trial (as appears by the record or minutes), for permission to take a verdict in the case of Brown, Swan, and Adams, in order that they might be examined as witnesses. The court refused to allow such verdict to be taken, although the said Brown, Swan and Adams, having been finally acquitted, the other defendants were legally entitled to their testimony. (6) Because the court having directed the jury, upon the close of the case of the prosecution, to find a verdict of not guilty in the cases of Lope and Adams, the jury declined to find such verdict in regard to Adams, but complied with the instructions of the court so far as regarded Lope, and acquitted him accordingly; whereby the defendants were illegally deprived of the testimony of Adams. (7) Because the evidence of Adams, Swan and Brown, thus excluded, would have established the innocence of Harding, Grimes, and Williams, and led to their acquittal."] [2]

The only proof of what the evidence on the trial or the charge of the court was, were the notes of counsel who tried the case, and a report of the trial in one of the newspapers of the day, professing to give, in most parts, the words of the witness or court, though, in others, their substance only, and sometimes their effect.

On the argument before the new court, the attention of counsel was directed to the following points: (1) Whether it was in the power of the court to grant a new trial after a capital conviction. (2) Whether the present court, being composed of judges whose commissions bear date since the verdict in the case, and who therefore have no judicial knowledge of its merits, can pass sentence on the prisoners.[3]

These points, with those already mentioned as having been made before the former court, were accordingly now argued:

Mr. Pettit, U. S. Dist. Atty., and Mr. J. M. Rush, for the prosecution. The finding is good. Hawkins lays it down that, "if there were malice in the abettor, and none in the person who struck the party, it will be murder as to the abettor, and manslaughter only as to the other." P. C. bk. 2, c. 29, § 7. This embraces our case in principle, and it has been decided in instance, as long ago as 1795, and in our own country. State v. Arden, 1 Bay, 487. The power of the court to grant a new trial in capital cases has been denied by Story, J.,[4] with earnestness; and there is an obiter dictum to the same effect by Sutherland, J. (People v. Comstock, 8 Wend. 549), of New York. It is proper to state, however, that we rest our case upon the merits; more particularly since, in another case [5] decided by Story, J., in 1835, he uses language apparently irreconcilable with the opinion set forth by him in 1834. As to the right to pass sentence, in civil cases, the power of a judge to give judgment on a verdict taken by his predecessor is clear (Life & Fire Ins. Co. v. Wilson's Heirs, 8 Pet. [33

[2] [From 6 Pa. Law J. 14.]

[3] By act of congress April 30, 1790 [1 Stat. 112], manslaughter, of which two of the prisoners were convicted, is punishable, in the discretion of the court, with imprisonment not exceeding three years, and fine not exceeding $1,000.

[4] U. S. v. Gibert [Case No. 15,204], decided in 1834. In the case here referred to, Mr. Justice Story examines the matter very laboriously at common law and under the constitution. He cites many cases to shew that it is a fundamental maxim of the common law that there can be no second prosecution in a capital case, where there has been a verdict of acquittal or conviction regularly had upon a sufficient indictment; and makes it evident that in England the practice where a prisoner has been wrongfully found guilty is to apply to the crown for relief. The American decisions (of which he cites three where new trials have been held in capital cases) he disposes of by the remark that in most of them the constitutional prohibition was not made a point in the case, or that the trial was in a local court, where the constitution of the state contained no clause similar to that in the constitution of the United States, or that the case was ill considered, imperfectly reported, or, on some other account, not strong authority. He thinks that the mode usual in England of application to the executive is perfectly adequate to secure the ends of justice here; that the court itself, if conscious of serious errour, would aid in such application; and remarks that this ultimate appeal to the pardoning power has been deemed satisfactory and safe in the land of our ancestors. His honour, however, takes up each of very many reasons presented for a new trial, and, after examining them separately, and at length, concludes that, if the power to grant a new trial exists, the case is deficient in merits. Judge Davis, the district judge, dissented from Judge Story as to the power to grant a new trial, which he thought clear, if the prisoner desired one; but, agreeing as to the absence of merits, the motion for a new trial was of course overruled, and on that ground alone.

[5] U. S. v. Battiste [Case No. 14,545], where, in arguing on a capital case, against the right of the jury to pass upon the law, his honour says: "If the jury were at liberty to settle the law for themselves, the effect would be not only that the law itself would be most uncertain from the different views which juries might take of it, but, in case of errour, there would be no remedy or redress by the injured party; for the court would not have any right to review the law, as it had been settled by the jury. On the contrary, if the court should err in laying down the law to the jury, there is an adequate remedy for the injured party by a motion for a new trial," etc.

U. S.] 291), and it has been decided to exist equally in criminal cases: (1) In Pennsylvania (Anon.),[6] where it is said to have been decided (and, apparently, on principles independent of the state law) that where the indictment is good, and there is no error in the trial (sentence only being defective), the court will not send the prisoner back for a new trial, but will sentence him de novo. (2) In Alabama (Charles v. State, 4 Port. 107; [Flora v. State] Id. 111), where it was decided, in a capital case, that a judge who is appointed since the one who took a verdict of guilty, and who died before he pronounced sentence, has power, equally with the former judge, to proceed and give sentence in the case. As to the prisoners convicted of manslaughter, they cannot object if they receive the lowest measure of punishment. It is intimated, in the case just cited (page 110), that if there be any doubt as to whether the verdict was against evidence, the new judge may ascertain whether or not his predecessor was satisfied with it. We do not, however, suggest such an inquiry, unless the information be desired by the court, when we should be able to make known the conclusion to which the late Judge Randall had, in point of fact, arrived.

The merits of the case were, of course, fully discussed on both sides.

Mr. D. P. Brown, for the prisoners. Hawkins, though his work is in general weighed down with references, does not, on the point for which he is cited, refer to a single case. A single case counsel here have found, but that vouches no authority as good as Hawkins himself. (The counsel was about to pass over the second point, as waived by the candour of the district attorney; but, the court desiring to hear it spoken to by the defence, he proceeded to argue it.)

The construction given in U. S. v. Gibert [Case No. 15,204], or, rather, by Mr. Justice Story in that case, to the provision of "not twice in jeopardy," is shocking on principle, and on precedent is false. If, upon a good record, one which affords no evidence of a mistrial, a person whom the court believes to be innocent is found guilty through the prejudice of the jury,[7] what is to be done? or if the court has admitted testimony which reflection satisfies it was not evidence? or asserted doctrine which it discovers was not law? These are common cases. Extreme ones may be supposed. Mr. Justice Story argues that the prisoner may apply to the executive, and "it cannot be doubted," he proceeds, "that the court, if conscious of any serious errour, would cheerfully aid in the application." But the executive is not bound to pardon, and may decline. What then becomes of the prisoner? He has been found guilty. He is believed to be innocent. A new trial cannot be granted him. The executive does not pardon, and the court, "conscious," by Mr. Justice Story's hypothesis, "of serious errour," is to do what? To sentence him to death? To discharge him after a verdict of guilty? Or to leave him to die a natural death in gaol?—when, if innocent, he ought to be at large, or, if guilty, to be hanged. Besides, if the executive have power to pardon, it has none to acquit. If the prisoner is admitted to be innocent, he has a right to be found so; for every man charged with an offence has a right to a fair and legal trial.[8] Is it not moreover a mistake, as to the true nature of executive power, to treat the president as a court of errour and appeals? There are many cases—among them the case of great state criminals—in which policy may require a remission of a punishment strictly due, and for a crime certainly ascertained. The peculiarly appropriate sphere of executive action is in such cases, and the very notion of mercy implies the accuracy of theoretic justice.

The doctrine in question is at war with all American authority. The clause of the constitution relied on by Judge Story was adopted in 1789, and until 1834, when that late eminent judge gave to it a new construction, no one ever doubted that it was made in favour of life, and not for its destruction. The former construction had been given to it in many cases, as: (1) In 1794, by one of the superiour courts of South Carolina (State v. Hopkins, 1 Bay, 372), Rutledge, afterwards chief justice of the United States, presiding. Judge Story would intimate, indeed, that the case was not one of a capital offence; but to any one who reads the report, nothing can be clearer than that it was so;[9] and the fact noted by Judge Story "that the power to grant a new trial was silently taken for granted on all sides," argues quite as much in favour of the power as it can detract from the value of the decision. "The constitution of South Carolina," the learned judge thinks it "material" to state, "contains no prohibition on the subject."

[6] Mentioned from the bench, in Drew v. Com., 1 Whart. 281.

[7] This case, the counsel said, had occurred in Ball v. Com., 8 Leigh, 726, where the court believed that the evidence was "utterly insufficient," and where the jury, disregarding all recommendation from the court, persisted in adhering to a verdict of guilty.

[8] In both the cases of State v. Hopkins, 1 Bay, 372, and U. S. v. Fries, 3 Dall. [3 U. S.] 515, the prisoner, found guilty on the first trial, was acquitted on the second. The same result took place, it is probable, in Jerry v. State, 1 Blackf. 395, and in Ball v. Com., 8 Leigh, 726; in the former of which cases, the evidence on which the verdict was given is said to have been doubtful, and in the latter "utterly insufficient."

[9] One of the counsel, in arguing for a new trial, on the ground of an unfair verdict, says: "The juryman had declared that he was 'determined to hang the prisoner at all events.' No words could possibly express a greater degree of malice and ill will against the unfortunate man whose life was about to be committed to a jury of his country." Page 373.

But how is this material, if, as his honour has taken so much pains to shew,—and as no lawyer ever doubted,—the constitution of the United States only incorporated into itself a maxim "embedded in the very elements of the common law" (U. S. v. Gibert [supra]); or if, as other judges have thought,[10] and as seems but rational, the provision of the federal constitution, being general in its nature, and unrestricted in its terms, operates, by the very provisions of the instrument, as well on state courts as on federal. (2) In 1795, in this circuit (U. S. v. Fries, 3 Dall. [3 U. S.] 515), and in a case admitted by Mr. Justice Story to be an authority in point; Mr. Rawle, Dist. Atty., and Mr. Sitgreaves both conceding that "the power to grant a new trial could not be denied." "But," objects Mr. Justice Story, "the clause in the constitution was not even alluded to, much less reasoned out. The court did not, in giving their judgment, in any manner speak to the point," and he thinks that it is not too much to say, "that the court might have been surprised into the decision." This truly is to make trim reckoning of a judicial adjudication, and I have only to say that if, in 1795, judges and counsel like those in that case,—men, all of them, of education and understanding, bred in the apostolic age of our country, and breathing the air of the constitution when it imparted everywhere its energy and spirit,—could not, any of them; see in that constitution aught which touched the case before them, then that no such thing existed there; or, at any rate, that it will not be given to either judge or counsel in these later days to discover it. (3) In 1825, in Indiana (Jerry v. State, 1 Blackf. 395), a state in whose constitution it is admitted that there is a clause like that in the constitution of the United States.

Here, then, are three adjudications, all of which U. S. v. Gibert treats as of no authority at all. And if the language of Mr. Justice Story in that case was in the face of all prior decisions, all subsequent decisions are in the face of it; as (1) In 1837, in Virginia (Ball v. Com., 8 Leigh, 726), where the doctrine asserted by Judge Story was brought directly before the court, and overruled; the judge who had ventured it below concurring with all his brethren in overruling himself above. (2) In 1844, in Alabama (State v. Slack, 6 Ala. 676), where, after commenting on U. S. v. Gibert [supra], the court declares: "It cannot be questioned that the clause was intended for the protection of the citizen; and it would be a mockery to put such a construction upon it as will make it operate to his prejudice."

Each of these five cases is a decision on the point, and I may well leave for others the collection of the many cases where, though a new trial has been refused, the power to grant them has been recognized, and those many more others in which, without any discussion of the point, a new trial could not have been properly granted, unless the power exists.[11]

As to U. S. v. Gibert [supra], itself, the new trial was refused upon the merits; Judge Davis, the district judge, dissenting from Judge Story on the question of power, and both judges concurring as to the absence of merits. The whole disturbance, therefore, of the criminal system which has been caused in this matter, arises from an extra-judicial dissertation of a single judge; a dissertation, it may be added, not close in point of argument, and far from either respectful or accurate in the consideration of authorities.

The court will not give sentence unless satisfied with the verdict, and how can it be satisfied with the verdict, unless it knows upon what evidence the verdict was given? There is no proof before this court of that evidence. Even had there been no motion for a new trial, the former court would not have given sentence if not satisfied with the verdict. The case is stronger here, because a question was yet pending and undecided as to the propriety of the verdict. In the strongest case (Charles v. State, 4 Port. 107–110) cited on the other side, there was no motion for a new trial, and the question was therefore merely one of the naked power upon a state of admitted guilt. The exercise of the power is suggested by the court itself as a very different thing; and the court, leaving the straightest line of its duty, stretches forth its hand to give the prisoner that aid which the court below and his counsel had unaccountably omitted to give him.[12]

But, even if judgment were given as to the prisoner found guilty of murder, how is it to be given as to those found guilty of manslaughter, and whose punishment rests in the discretion of the court? You may sentence, it is said, to the lowest measure of punishment, but, unless such sentence be the result of the court's discretion, it is improper. It is said that the prisoner cannot complain, if, deserving a higher degree of punishment, he receives a less. But the United States may,

[10] See the language of Spencer, C. J., in People v. Goodwin, 18 Johns. 201.

[11] See cases of both sorts collected in Mr. Wharton's Treatise on American Criminal Law (pages 623–635).

[12] "The facts relied upon in support of the motions," says the court above, "did not affect the power of the court to give judgment in this case, and therefore gave the prisoner no right to be discharged, or to arrest the judgment. Whether the circuit court, in the exercise of a sound discretion, ought not voluntarily, and without a motion from the prisoner, to have granted him a new trial, is a point which that court did not reserve for the consideration of this. It is true, as the counsel of the prisoner affirmed, that Sir Matthew Hale never would give judgment, or award execution, upon a person who had been reprieved by another judge, because he could not know for what reason he had been reprieved; and his rule in this respect has been, in general, observed by his successors." Pages 109, 110.

and so may the prisoner, if he receives, through ignorance or from irrational doubts, that smaller measure to which he is entitled from an enlightened understanding acting upon ascertained facts.

Of the anonymous case cited in Drew v. Com., 1 Whart. [281], in Pennsylvania, we have an imperfect report, while all that it is said to decide may be admitted. It may be that a sentence "defective" merely can be set right in a court of errour; for the question before such a court is independent of the merits.

Before GRIER, Circuit Justice, and KANE, District Judge.

GRIER, Circuit Justice. The opinion of the court will be delivered by my Brother KANE; my engagement on the circuit having occupied most of my time since the argument of this motion. I may take this opportunity to say, however, that, had I been left to my own unassisted investigations, I would not, most probably, have arrived at the conclusion that a new trial ought to be granted; not because I believed this court has not the power, but because the reasons alleged were clearly insufficient.

I am abundantly satisfied that the prisoners have had a full and fair trial, and that the learned judge who presided on the occasion, in the leniency and kindness of his heart, accorded to them every indulgence and protection to which they were entitled by the laws of the land.

[13] [It would be highly injurious to the administration of justice, if persons engaged in a conspiracy or mutiny, or any other joint criminal enterprise, could become witnesses for each other. Perjury would be lightly esteemed by those whose lives were in jeopardy for a higher offence. In such cases the law esteems every one who aids and abets in the perpetration of the crime as a principal offender, and awards the same punishment to all, without measuring the degree of their participation; yet juries are always unwilling to sacrifice a hecatomb to appease offended justice. They usually select one or two of the most active ringleaders as victims to suffer the extreme penalty of the law, and, usurping the prerogative of the executive, they pardon, rather than acquit, the remainder. It is true the technical and legal conclusion is that they are innocent whom a verdict has pronounced "not guilty"; but the fact, and, indeed, the meaning of the verdict, is often nothing more than that, in comparison with those convicted, they are somewhat less guilty. It would require but a small share of perspicacity to see that, if the court were to grant a new trial to those convicted, in order that those not convicted might become witnesses, it would open a way of escape to all, and every great crime committed by great numbers would then go unpunished. Cases may possibly occur in which the officers of government, prosecuting vindictively, would include innocent persons in the indictment, for the purpose of excluding them as witnesses, and thus sacrifice the accused by depriving him of his testimony. But it seldom happens, in modern days, since trials for treason have almost ceased to exist, that the officer who represents the government can be influenced by any such motive; and, if he were, so manifold is the protection thrown around the accused by the lenity of the law, that he would find it difficult to perpetrate such oppression; for, before the party accused can be arrested, there must be evidence on oath of his guilty participation, on which the magistrate shall found his warrant; next, twelve, at least, of the grand jury must find, on their oaths, that there is sufficient evidence to put the accused on his trial; and, lastly, if the traverse jury shall be of opinion that the prosecutors have wholly failed to implicate any one of the defendants by the evidence, they may pronounce him not guilty, and thus permit him to appear as a witness for the others. With these barriers against wrong and oppression to the accused, he can seldom have just cause for complaint. In the present case it is complained that the jury differed in opinion with the court as to the evidence implicating Adams, one of the defendants in the offence, and refused to acquit him on the trial, in order that he might be made a witness. If the jury differed with the court as to the weight of testimony, they certainly had a right to do so; and the very fact that they did so is conclusive evidence that the case did not require or justify such action. In fact, if we may judge from the report of the evidence before us, the judge acted with prudence and good judgment. The circumstance that Adams took no active part in the mutiny or the murder is not conclusive evidence of his innocence. The testimony showed that he partook in the mutinous temper of the crew; and, from his own account, he stood as an idle and impartial spectator on an occasion where neutrality was a crime, and inaction almost conclusive evidence of guilty participation.

[As this was in the main point relied upon by the learned counsel for the defendants in demanding a new trial, I have thought proper to make these few remarks, and to take this opportunity to state explicitly that, though the court have concluded to grant a new trial, it is not for any of the reasons filed of record; and, moreover, I do it in order that this case may never be quoted as a precedent for a doctrine which I think would be dangerous and highly injurious to the administration of justice.] [13]

I would not, however, while my learned brother entertained doubts on any part of

[13] [From 6 Pa. Law J. 14.]

[13] [From 6 Pa. Law J. 14.]

the subject, have assumed the responsibility of pronouncing sentence of the law upon the prisoners. A careful examination has tended to confirm the original suggestions of his mind; and it is due to him to state that the thorough investigation he has given to the subject, and the able arguments which he has urged in support of his opinion, have gained my hearty concurrence.

KANE, District Judge. The considerations which determine the opinion of the court are altogether independent of any discussion of the reasons filed. It is enough that there is a question of merits, referring itself to evidence that is not before us. We cannot, unless under the coercion of a necessity which admits of no escape, undertake the exercise of a judicial discretion, without legal assurance of the facts by which it should be guided.

It is asserted upon this record by the prisoners that the verdict of conviction was against evidence, and we do not know what the evidence was; that it was against law, and, not being informed of the facts, we cannot know what were the legal principles they invoked; that it was against the charge of the court, which charge we have not seen. We are called on to pronounce the sentence of death against a man whom the judge that tried him may have thought clearly innocent; and to measure out sentences of imprisonment and fine against two others, in terms and amounts resting in our discretion, without judicial information of their grades of guilt. The record which is before us is, of course, barren of facts. The notes of the counsel for the prosecution, made to assist them in argument, but not professing to detail the evidence in the words of the witnesses, still less affecting to portray their spirit and manner,—these, and the columns of an irresponsible newspaper, that gives sometimes the language of the witness, sometimes its import, and sometimes the reporter's opinion of its value,—these, and nothing more, are to form the basis of our judicial action. The notes of the judge who tried the case upon the merits, the certificate of his opinion, if, indeed, he had formed one,—the very material for our review,—these are not before us. The questions presented to us for our solemn judgment depend upon facts which are neither admitted nor proved.

To my mind, the principle of the law is clear. The defendant, before sentence can be pronounced on him, has a right to the judicial determination of his guilt by the court, as well as by the jury. If the verdict does not satisfy the conscience of the judge, the prisoner is entitled to a new trial. After the verdict is rendered, the judicial discretion is still in exercise; and, at any time before the sentence is recorded, it may modify the punishment if the statute has not made it specific, or set aside the conviction altogether. It does not need a motion on the part of the defence. The judge, himself, at the very latest moment, may, sua sponte, award a new trial. This is done not unfrequently in England, if the offence is below the grade of felony; and, in other cases, the English court respites the prisoner till the royal prerogative can either commute the punishment, so as to conform it to the merits, or relieve against the improper conviction by a pardon. In our country, where the powers of the constitution are distributed differently, and the chief magistrate has no part in the judicial administration, the experience of all of us is full of precedents for the grant of new trials upon the suggestion of the court.

The prisoners here were entitled to the advantage of this judicial revision, from the judge who sat upon their trial; and whether we will intend in favorem vitæ, that he was disinclined to pronounce the capital sentence, or whether we content ourselves with an admission of the fact that the time in which this judicial discretion might be exerted had not yet expired, we cannot affirm, in either case, that Judge Randall was content to enter judgment on this verdict. Even were we now satisfied what were his opinions at the time of his decease, we should be without just and legal assurance that they might not have been modified by after reflection, and before the appropriate moment for recording them. I had no wish, therefore, to hear the evidence, which it was intimated at the argument was perhaps within our reach, of the views confidentially expressed by Judge Randall. A judge's opinions become operative only when they are solemnized by their assertion from the bench.

I have alluded incidentally to the diversity between our practice and that of the English courts, on the subject of new trials after convictions for felony. I cannot doubt that this diversity exists, and that it has its foundation in sound reason, and the differing character of our institutions. I do not review the American cases that establish it, only because this has been perfectly well done in a recent treatise by a member of our own bar. Whart. Am. Cr. Law, pp. 623–635.

But there is a reason for our departure from the English rule, which is to my mind conclusive. The British constitution, like the common law, is made up in a great degree of principles inferred from long continued usage. Among these is the combined attribution to the sovereign, as the fountain at once of justice and mercy, of the power and the duty to apportion punishment to the guilty, and to shield the innocent from wrong. Whatever assurance the English people have that the other powers of sovereignty shall be rightfully exercised, they have in regard to this. It is surrounded by the same safeguards against non-user as

well as against abuse. I do not remember to have read of a single instance in which the judicial recommendation has been disregarded by the ministers of the crown, and I do not suppose that it could be without a breach of the constitution of the realm. In England, therefore, the denial to the courts of a revisory power over verdicts in any cases is apparent, rather than real. The judge, if dissatisfied with a conviction on the merits, respites the sentence or reprieves the prisoner, and the king's prerogative interposes to do justice as a thing of course. If there be a doubt upon any point or proceeding connected with the case, such as with us would be reviewed on a motion for new trial, the judge reserves the question, it is argued by counsel upon his report before the twelve judges, and the action of the king is determined by their advice. Indeed, the pardoning power in England is so entirely regarded as forming part of the justical administration, that from the time of the statute of Gloucester (chapter 9), down to the present day, the right of a prisoner to demand a pardon, under certain circumstances, has been expressly and repeatedly affirmed by acts of parliament. Hawk. P. C. bk. 2, c. 37.

It is unnecessary to refer to our American constitutions to show that the power of pardoning as conferred by them, in consequence of the absolute and entire separation of the judicial from the executive departments, and the exclusion of the former from the right to grant reprieves, cannot relieve a judge from the responsibilities of an erroneous or improper conviction. With us, therefore, the new trial becomes an indispensable resort.

I am aware that one of the most eminent of our jurists (Story, J., in U. S. v. Gibert [supra]) has found an inhibition in the constitution against the grant of new trials in cases involving jeopardy of life. But I cannot realize the correctness of the interpretation, which, anxious to secure a citizen against the injustice of a second conviction, requires him to suffer under the injustice of a first. Certainly I would not subject the prisoner to the hazards of a new trial without his consent. If, being capitally convict, he elects to undergo the sentence, it may be his right, as it was, to have pleaded guilty to the indictment. When, however, he asks a second trial, it is to relieve himself from the jeopardy in which he is already; and it is no new jeopardy that he encounters when his prayer is granted, but the same, divested of the imminent certainty of its fatal issue.

Reference is also had to the rule of the common law, as it stood when the constitution was adopted; and the language of the judiciary act is supposed to present a further difficulty, inasmuch as it limits the power of granting new trials to cases in which there are "reasons for which new trials have usually been granted in courts of law." Act Sept. 28, 1789 [1 Stat. 73]. But within the limits of this circuit, at least, from the earliest judicial date to the present time, there has been no recorded case in which a new trial has been refused for the want of authority in the court to grant it. The circumstances of the present case are novel, and in one sense, therefore, the reasons for a new trial may be said to be unusual. But our power cannot be qualified by the absence of precedent, if the principles of accustomed and essential justice invite our action.

It is the characteristic excellence of the common law that it adapts itself to the circumstances of men, and makes progress with the age. Its principles, legitimate deductions of right reason, are, of course, invariable; but its rules of conduct and its modes of procedure change with the social and intellectual condition, which it is their office to supervise and protect. Time and advancing freedom of mind have modified the barbarous usages and penal inflictions that characterized at one period the administration of criminal justice. The law of contracts has expanded with the necessities of expanding commerce. The rights of conscience and of political and civil liberty have been developed, and have found safeguards. But through all these changes the great principles of the common law have remained the same. Our ancestors brought this law with them, in all its capacities of adaptation and expansion. They abrogated none of its principles, when they emancipated their lands from the feudal tenures, and their liberties from hereditary rule. They adapted its rules to their circumstances, but they left its principles unchanged. They claimed it as an inheritance for themselves, not only,—a scanty band of emigrants on a savage continent,—but for their posterity, enriched, powerful, and free; and they transmitted it to us with all that flexibility to the varying exigencies of men which had so signally commended it in their own experience. It is of little moment, and always has been, what are the forms of the common law, whether declared by regulation or inferred from usage. They are the means, not the end; and, so soon as they fail to secure the great objects of the law itself,—enlightened and substantial justice,—the form must give way to the principle.

I have looked with some care through the English books, but have not been surprised to find that they supply few materials for reference on this question. In fact the organization, as well as the practice, of the English courts is such that a case like this, in all its circumstances, can scarcely, by possibility, occur there. Yet I have found enough to satisfy me that, where those courts are vested with a discretion as to their action on a verdict, that discretion

is never exercised without unequivocal, direct, judicial knowledge of the facts disclosed on the trial. Either the action upon the verdict is by the same court before which it was rendered, or all the facts that are not patent on the record come up by formal certificate from the judge who heard the evidence. The only case that we read of in which this caution was disregarded is that which is commemorated in the note of Sir Matthew Hale, and on which he seems to have grounded his rule "never to give judgment or award execution upon a person reprieved by any other judge but myself, because I could not know upon what ground or reason he reprieved him." 2 Hale, P. C. p. 406, c. 56.

At the common law, before the statutes of 11 Hen. VI. (chapter 6), and 1 Edw. VI. (chapter 7), if a prisoner had been convicted before commissioners of oyer and terminer, and a new commission issued before the award of execution, no judgment could be entered or execution ordered by their successors. "And there was," says Mr. Chitty (1 Cr. Law, 697), "some reason for this restriction; for the subsequent judges were unacquainted with the circumstances of the case as developed on the trial, and might, therefore, unconsciously be the occasion of injustice."

In the case of Rex v. Baker, Carth. 6, where there had been a conviction by verdict of speaking seditious words, which was removed by certiorari into the king's bench, it was said that that court "never gives judgment on a conviction in another court; but the practise is, after issue joined in another court, and the indictment removed, always to admit the party to waive the issue below, and to go to trial upon an issue joined in this court;" and in that case "the court directed a new trial, and Baker was found guilty by a second verdict." On the authority of this same case, the court, in the case of Rex v. Nichols, 13 East, 412, note, refused to sentence on conviction for conspiracy in an inferiour court, which had been brought up by certiorari between verdict and judgment, on the ground that, "the fine being discretionary in the court, upon the circumstances of the case as it appeared in evidence upon the trial, the justices who tried the merits are the only proper judges to assess the fine."

The same principle is recognized in the case of Warrain v. Smith (king's bench) 2 Bulst. 147, where it is said by Coke, C. J., referring to the Case of Sutton's Hospital [10 Coke, 1a], that in the exchequer chamber, if one of the judges die pending the argument, and another be appointed after the argument had, he shall not give his opinion in the case.

The only case I have found in which execution was awarded by the court of king's bench, when it had only the record for its guide, is that referred to by Sir John Strange in his argument in Rex v. Nichols, already referred to. It was the case of a capital conviction, brought up by certiorari from one of the counties. But the learned counsel who cited it admitted that it was distinguishable from the other cases, in this: that "the judgment was certain, and no discretionary power in the court,"—circumstances that distinguish it also from the present case, since as to two of these defendants the judgment is not certain, and, if I have reasoned rightly, the court has a discretionary power as to all.

The order of the court is that a new trial be granted to Harding, and that, as to Grimes and Williams, the case be continued for one week, at the expiration of which they are to elect whether they will take a new trial, or abide by their former conviction.

GRIER, Circuit Justice, then addressed Grimes and Williams as follows: William Grimes and John Williams—You ought clearly to understand and weigh well the position in which you now stand. You have been once tried and acquitted of the higher grade of offence charged against you in this indictment, the penalty affixed to which is death; but you have been convicted of the minor offence of manslaughter. Your lives have been in jeopardy, and you have escaped. The constitution of your country declares that "no person shall be twice put in jeopardy of life or limb for the same offence." This is to shield you against oppression and injustice, and puts it out of the power of the court to subject you to the danger of another trial, except at your election and request. We believe that you have a right to waive the protection thrown around you by the constitution, for the sake of obtaining what may seem to you a greater good. But let me now solemnly warn you to consider well the choice you shall make. Another jury, instead of acquitting you altogether, may find you guilty of the whole indictment, and thus your lives may become forfeit to the law. If you choose to run this risk, and to again put your lives in jeopardy, it must be by your own act and choice, being neither compelled nor advised thereto by the court; and when your solemn election shall have been put on record, the court will hold you forever after estopped to allege that your constitutional rights have not been awarded to you.

Before we enter of record an order for a new trial as to you, we will give you one week to ponder carefully on this subject, and consult with your counsel as to what will be your safest and best course.

On a subsequent day, these two prisoners appeared in court, and, being called upon to make their election whether to take a new trial or abide by the former conviction, declared their determination to take a new trial. The whole of them were afterwards tried anew, and a verdict of guilty of manslaughter was found

against Harding and Grimes, and Williams was acquitted.

Harding was sentenced to three years imprisonment and fine of $1. Grimes to one year imprisonment and a like fine.

Case No. 15,302.

UNITED STATES v. HARE.

[1 Cranch, C. C. 82.] [1]

Circuit Court, District of Columbia. April Term, 1802.

COMPETENCY OF WITNESS—INTEREST.

Upon a trial for larceny, the owner of the stolen goods is a competent witness in chief, upon filing with the clerk of the court, for the use of the prisoner, a release of the witness's right to one half of the fine which the court might impose.

[Cited in U. S. v. M'Cann, Case No. 15,655; U. S. v. Tolson, Id. 16,530. Followed in U. S. v. Brown, Id. 14,657.]

Indictment [against John Hare] for stealing a pocketbook and money from Anthony Conrad. This indictment was under the act of congress of April 30, 1790, § 16 (1 Stat. 112), which imposes a fine of fourfold the value of the goods stolen, and gives one half of that fine to the owner of the goods.

Mr. Mason, for the United States, offered Conrad, the owner of the goods as a witness, and produced a release from Conrad to the prisoner of the half of the fine which might be imposed.

Mr. Jones, for the prisoner, objected that the release cannot operate to convey a mere right to an uncertain future, contingent possibility. Besides, as it is not delivered to the prisoner, he will not accept it.

THE COURT ordered the witness to be sworn, on his delivering the release to the clerk and filing it in the cause.

CRANCH, Circuit Judge, doubted.

Case No. 15,303.

UNITED STATES v. HARE et al.

[4 Sawy. 653.] [2]

Circuit Court, D. California. Oct. 28, 1867.

LAND TITLES IN CALIFORNIA—NATURE OF PUEBLO TITLES — EXECUTION AND SALE — CONTROL BY GOVERNMENT — GRANTS AND RESERVATIONS BY MILITARY AUTHORITIES—SAN FRANCISCO PUEBLO LANDS.

1. The existence of a Mexican pueblo at the site of the present city of San Francisco, on July 7, 1846, its possession of an interest in lands to the extent of four square leagues, and the succession of the present city to such interest, having been judicially settled in a controversy between the city and the United States, are matters no longer open to discussion.

2. Lands within the limits of the pueblo of San Francisco were not subject to levy and sale under judgment and execution against the city.

3. The lands of the pueblo of San Francisco were not held in absolute property, with full right of alienation and disposition, but were subject to the control and disposition of the government until the title passed to private parties; and this right of control and disposition, which existed in the former government, passed upon the cession of the country to the United States, and could afterward be exercised by them at any time before the property had passed to third parties by the action of the pueblo authorities in accordance with existing laws.

4. The officers of the United States army who occupied California prior to the organization of the state government, had no power to grant or dispose of, or to reserve from grant or disposition, any portion of the pueblo lands or any portion of the public property of the United States; they could in no respect impair any rights which the United States may have acquired over either by the conquest or might subsequently acquire by treaty.

5. The attempted grant to San Francisco by Gen. Kearny, on March 10, 1847, of the beach and water lots was an act beyond his authority to execute, and passed no interest whatever.

6. The attempted selection by Major Hardie, on July 18, 1847, of a government reserve at Rincon Point in San Francisco, was invalid; such appropriation could only have been made by act of congress or order of the president.

7. While the president of the United States was authorized in particular cases to reserve from sale for public uses portions of the public lands, no such power was vested in the head of any subordinate departments of the government. The secretary of the treasury could not execute nor approve of a lease of any property belonging to the United States without special authority of law.

8. Parties who obtained conveyances from the city of San Francisco, whilst its claim for pueblo lands was pending before the United States tribunals, took whatever interest they acquired subject to the determination of the claim.

9. The final decree in the San Francisco pueblo case took effect, by relation, on the day when the petition was presented to the land commission in July, 1852, and is to be considered as if entered on that day.

10. The term "grants" in the final decree of the San Francisco pueblo case, declaring that the confirmation is in trust for the benefit of lot holders under grants from the pueblo, town or city, comprehends all previous conveyances from the city.

This was an action for the possession of certain real property situated on Rincon Point, in the city of San Francisco, being a portion of lots five and six of the block lying between Folsom and Harrison streets, and between Main and Spear streets. It was tried at the October term, 1867, by the court, without the intervention of a jury by stipulation of the parties. On the trial the plaintiffs produced and gave in evidence the proceedings and decree in the San Francisco pueblo case, and proved that the premises in controversy were within the limits defined by said decree. They also produced, proved and read in evidence the following documents, numbered from 1 to 14 inclusive:

(No. 1.)

I, Brigadier-General S. W. Kearny, governor of California, by virtue of authority in

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

me vested by the president of the United States of America, do hereby grant, convey, and release unto the town of San Francisco, the people or corporate authorities thereof, all the right, title, and interest of the government of the United States, and of the territory of California in and to the beach, and water lots on the east front of said town of San Francisco, including between the points known as the Rincon and Fort Montgomery, excepting such lots as may be selected for the use of the general government by the senior officers of the army and navy now there; provided the said ground hereby ceded shall be divided into lots and sold to the highest bidders, after three months notice previously given. The proceeds of said sale to be for the benefit of the town of San Francisco. Given at Monterey, capital of California, this tenth day of March, 1847, and in the seventy-first year of the independence of the United States. S. W. Kearny, Brigadier-General and Governor of California.

(No. 2.)

Headquarters 10th Military Department,
Monterey, California, June 23, 1847.

Sir: Colonel Mason has not yet officially learned that any selections have been made of lots in the town of San Francisco, known as the beach and water lots granted to said town for sale, excepting such as should be selected for the use of the general government by the senior officer of the army or navy. The time of sale under the decree of General Kearny of March 10, 1847, rendered it necessary that the selection be made soon, and Colonel Mason wishes you to consult with Commander Biddle, or other senior naval officers that may be on the station, and to select in accordance with the terms of the grant, if it has not already been done, the lots best suited for wharves both for army and navy purposes, with space enough for all the buildings that it may be necessary to erect hereafter. A suitable lot should also be selected for a custom-house with the storehouses that it may require. Colonel Mason wishes these selections to be made so far as the army is concerned, and officially communicated to the alcalde of the town before the day of sale.

I have the honor to be your most obedient servant, W. T. Sherman,
1st Lt. 3 Art'y, A. A. A. Gen'l.

Major James A. Hardie, Com'd in San Francisco.

(No. 3.)

Headquarters Nor. Mil. Department,
San Francisco, California, July 18, 1847.

Sir: In obedience to orders from his excellency the governor, Colonel R. B. Mason, I have the honor to inform you that I have selected for the use of the government the following lands in the town of San Francisco: All that portion of Rincon Point not divided off into lots and marked "Government Reserve" upon the map entitled "Map of the beach and water lots of San Francisco, A. D. 1847," now in the alcalde's office of San Francisco. Also, all the beach and water lots bounded by streets entitled Montgomery, Washington, and Jackson streets, on a map entitled "Map of San Francisco," now in the alcalde's office, and the bay running out into deep water and marked on the aforesaid map of beach and water lots "Government Reserve." And also all the beach and water lots bounded by streets entitled Sansome, Broadway, and Pacific streets on the aforesaid map of San Francisco, and the bay running out into deep water and marked "Government Reserve" on the aforesaid map of beach and water lots of the town of San Francisco.

I am sir, very respectfully, your obedient servant,
(Signed) Jas. A. Hardie,
Major 1st N. Y. Reg't Volls.

To Alcalde of the Town of San Francisco, California.

(No. 4.)

Headquarters 10th Mit'y Dep't,
San Francisco, Cal'a, Sept. 30, 1847.

Sir: You will be pleased neither to grant nor to give any deed for any town lots or other land to the southward of the Rincon Point and eastward of a line commencing at the north-west corner of the government reserve, at the said Rincon Point, and running south eleven degrees west (S. 11 W.) with the true meridian. The land eastward of the above-named line is intended for the use of the United States government, the southern boundary of which will be more particularly described when the town surveys are more fully completed.

I have the honor to be your obd't serv't,
(Signed) R. B. Mason,
Col. 1st Dragoons, Gov. California.

To George Hyde, Esq., Alcalde of San Francisco.

(No. 5.)

Headquarters 10 Mil. Dep't,
Monterey, Cal., Aug. 9, 1849.

Captain: I am instructed by the commanding general to say that you will cause the government reserves at San Francisco to be properly marked and notice to be given in one or more of the papers published in that town forbidding trespassers, by the erection of buildings, or in any other manner whatsoever. Mr. Thompson and Mr. Steinberger are the only persons authorized to occupy any portion of these lands, and without authority communicated to you through or from department headquarters, you will permit no one else to occupy them.

Very respectfully, your obedient servant,
Ed. R. S. Canby, Ass't Adj't Gen'l.

Capt. E. D. Keyes, 3d Artillery, San Francisco.

(No. 6.)

Headquarters 10th Mil. Dep't,
Monterey, Aug. 23, 1845.

Captain: Your communication of the seventeenth inst., and its inclosures, were received last night, and I am directed by the commanding general to say that his instructions to you of the ninth inst., were not more definite because the papers in relation to the claim of Mr. Thompson, and the permission given Mr. Steinberger to occupy a portion of the reserve, are, or should be on file at your post, or in the assistant-quartermaster's office of San Francisco. By the decisions of Generals Mason and Riley, the former and present governors of California, "occupancy of the house," commonly known as the "Kanacka House," and "a right of way to the beach," has, under certain restrictions, been guaranteed Mr. Thompson, "until his claim be submitted to the United States government, or decided by the proper tribunals." Beyond this his title has not been and will not be recognized, and you are desired to apply to Mr. Billings, attorney-general for California, for any assistance that may be deemed necessary to protect the right of the United States to this property. The reservation at Rincon Point, and any other public lands that there may be at San Francisco, are included in your instructions of the ninth inst.

Very respectfully, your ob'd't serv't,
Ed. R. S. Canby, Ass't Adj't Gen'l.

Capt. E. D. Keyes, 3d Art'y, Commd'g Residio, San Francisco.

(No. 7.)

Government Reserve, by Capt. E. D. Keyes, U. S. A., to Theodore Shillaber: This indenture, made this twenty-seventh day of November, in the year of our Lord one thousand eight hundred and forty-nine, between Captain E. D. Keyes, U. S. army, commanding at San Francisco, Upper California, and Theodore Shillaber, of the same place, witnesseth, that the said E. D. Keyes, as agent of the United States, by and with the authority of Brevet Brigadier General Bennett Riley, U. S. army, commanding the 10th military department, doth hereby lease, demise, and let to the said Theodore Shillaber, his heirs and assigns, all those lots, parcels, and blocks of ground in the town of San Francisco, Upper California, which have hitherto been setapart, indicated or known as "government reserve," and which are embraced: (1) By Montgomery street on the west; Jackson street on the north; Washington street on the south; and the limits of the town or deep water on the east; and (2) by what is commonly known and indicated on the map of said town as "Rincon Point;" the second piece or parcel of ground embracing all that has been heretofore set apart as government reserve on "Rincon Point" and its immediate neighborhood. To hold for the term of ten years from the twenty-seventh day of November, A. D. one thousand eight hundred and forty-nine, subject to the following conditions and exceptions, to wit: First. The said lessee yielding and paying to the officer of the quartermaster department on duty at San Francisco, or to such other persons as may be duly appointed to receive it for the benefit of the United States the sum of two thousand dollars for each and every year. Second. To acquire for and surrender to the United States at the expiration of this lease, all titles or claims belonging to or held by other persons, and all persons in and to the whole or any part of said premises. Third. To pay all taxes and assessments which may be laid on the premises, or any portion or portions of them, after they shall come into the possession of the said lessee by the proper authorities. Fourth. After the expiration of five years from the said twenty-seventh day of November, to surrender to the United States such a portion or portions of the premises as may be required for the actual uses of the government, and which may be called for by the proper authorities; it being understood that in case such claim should extend to portions of the premises upon which large amounts of money shall have been expended in permanent improvements, that the said lessee shall be allowed a fair compensation for such improvements, to be determined by three disinterested men, impartially selected according to usual forms, and for such claims as are made for the purposes specified in the article, the said lessee to have quiet and peaceable possession for the whole ten years aforesaid. Fifth. In case the United States shall claim and appropriate any portion or portions of the premises before the expiration of the term of this lease, then, in such case, the said lessee shall be allowed not less than ninety days to remove the buildings thereupon, or the United States government may, at its option, purchase the same upon the valuation of three men selected as aforesaid, and the same conditions respecting the removal or purchase of the buildings shall hold at the termination of this lease. Sixth. The said Shillaber agrees honestly and faithfully to defend and protect the interests and rights of the United States in and to all and every part of the lands embraced in this indenture, but if it shall be decided by the proper tribunals that any other person or persons possess a valid and bona fide title to any portion or portions of them, and if such person or persons shall have or shall obtain legal possession thereof, then, in such case, the portion or portions so claimed and obtained shall be considered as not embraced in this indenture, or lease, this indenture holding good with all the conditions and exceptions to all other parts and portions of the premises herein described. Seventh. In default of the payment by the said lessee within the year for which it is due of the $2,000 aforesaid, this

lease to become null and void, and the said lessee to surrender the premises to the United States. Eighth. At the expiration of the ten years aforesaid, the said Shillaber agrees to surrender the whole premises peaceably to the United States. It being understood that should the lessee be required to surrender any portion or portions to them before the expiration of ten years, that a fair correspondent diminution of the rental of $2,000 is to be allowed to him. Ninth. The said Shillaber agrees not to allow any person whatsoever to participate in the uses or profits of the premises herein described, who does not fully and without reservation or predisposition of his claim subscribe to all the conditions of this lease. In witness whereof, the said parties to this indenture have hereunto set their hands and seals the day and year first above written.

Theo. Shillaber (Seal.)
E. D. Keyes (Seal.)

Captain Third Artillery, Commanding at San Francisco.

Executed in presence of Robert R. Pierpont, Thos. I. Peachy.

It is understood that at the termination of this lease, the said Shillaber is not to claim, nor are those holding under him to claim any compensation for any excavations or embankment made upon such portions of the premises, as he may hold during the whole ten years. Theo. Shillaber. (Seal.)
E. D. Keyes. (Seal.)

Captain Third Artilley, Commanding at San Francisco.

Witnesses: Robert R. Pierpont, Thomas I. Peachy.

Territory of California, District of San Francisco, ss.: Before me, first alcalde of said district, personally appeared the within named E. D. Keyes and Theodore Shillaber, who acknowledged the within instrument to be their voluntary act and deed for the purposes therein mentioned.

Given under my hand this twenty-ninth November, A. D. 1849.

Jno. W. Geary, First Alcalde.

Approved: B. Riley, Brevet Brigadier-General U. S. A., Commanding the Department.

Having examined the above lease, and being satisfied that it is to the interest of the United States to place the property herein demised in the possession and under the legal control of those whose interest and duty it will be to protect the property from squatters and adverse claimants, I hereby ratify and confirm the same on the part of the United States. Alex. H. H. Stuart,
Secretary of Interior.

(No. 8.)

San Francisco, Feb. 26, 1850.

Captain E. D. Keyes, U. S. A., Captain Commanding at San Francisco—Sir: As the lessee of the government reserve on Rincon Point, from you in your official capacity, which lease has been approved by your superior officer, General Riley, I have to request that you will maintain me in possession of the rights which I have to said reserve, in virtue of the title derived from you, and that you will assist me in maintaining inviolate the claim of the United States thereto.

I therefore desire that you will take such measures as may appear to you most proper to eject from said "reserve" all such persons now residing thereon as are there without my consent. My own endeavors to establish possession thereon have been rendered futile by the refusal and threats of the squatters now occupying it. I am, sir, your most obedient servant, Theo. Shillaber.

(No. 9.)

Presidio of San Francisco, Feb. 28, 1850.

Major E. R. S. Canby, Ass't Adj't Gen'l: Sir: Having been notified by Mr. Shillaber yesterday that he could not get possession of the reserve at Rincon Point, which was leased to him in November last, I immediately repaired to that place, and notified the squatters that they must leave in twenty-four hours. Some promised to go, and others refused. To-day at one o'clock p. m., I marched to Rincon Point with all my disposable force, and was obliged to order the pulling down of two tents and two sheds claimed by a man named White. The structures were removed without unnecessary violence, and no injury was done to his goods. Most of the other squatters promised to remove peaceably, and no other use of force was made. Immediately on my return to San Francisco, I was summoned by the judge of first instance, Judge Almon, to appear in his court. I appeared accordingly, and, after hearing the case, was discharged. White is an Englishman by birth, and I feel convinced he has backers whose design it is to get the reservations annulled, and to set at naught all the proceedings of officers of the army in reference to them. Unless those reservations are maintained, I do not see how officers can maintain themselves at their posts, whenever it shall appear to be the interest of citizens to dispossess them. The case appears to me to be a difficult one under present circumstances, and I trust it may be urged to a settlement at Washington by General Riley. Judge Almon refused to grant an injunction to stay my proceedings, but stil I am not determined whether to go on and force others off or not. I therefore take the liberty to ask for further instructions. Under the circumstances of my position, I deem it proper to request the withdrawal of the tender of my resignation. A letter to that effect will accompany this.

I have the honor to be, sir, your most obedient servant, E. D. Keyes,
Capt. Third Art'y Com'g Post.

(No. 10.)

Headquarters 10th Military Department,
Monterey, Cal., March 12, 1850.

Capt. Keyes: Sir—Your letter of date February twenty-eighth last has been received, and laid before the commanding general, who directs me to say that your course in ejecting the intruders on the government lands, was correct; that this matter has been several times reported at Washington for the action of the war department, and that until that action be known you will continue to preserve the public reserve from private occupation; that your letter recalling the tender of your resignation, has been forwarded with his approval.

I am, sir, very respectfully,
J. Hamilton,
Second Lieut. Third Art'y A. A. A. Gen'l.

To Capt. E. D. Keyes, Third Art'y, Presidio of San Francisco.

(No. 11.)

Caution to Purchasers.

The public are notified that neither Crane & Rice, nor any other persons are authorized to sell any houses, buildings or lots on "Rincon Point," or to occupy any point of said land, without permission from Theodore Shillaber, to whom the exclusive possession of the same legally belongs.

Horace Hawes,
Attorney for Theodore Shillaber.

San Francisco, September 28, 1850.

The land above mentioned is included between Folsom street, Beale street, and the Bay of San Francisco. Horace Hawes.

(No. 12.)

San Francisco, June 6, 1851.

Sir: The undersigned having been appointed by the secretary of the treasury, commissioner to superintend the construction of a custom-house and marine hospital, in San Francisco, have, under instructions from that department, selected Rincon Point as a suitable site for a marine hospital, we have examined the indenture by which that point, together with another portion of what is known in this city as the "Government Reserves," was leased to you, on the twenty-ninth of November, 1849, by Captain E. D. Keyes, for the period of ten years, and without expressing any opinion, or meaning to be understood as indicating an opinion with regard to the validity of said lease, we are clearly of opinion that the United States have, by the express terms thereof, the unquestionable right to take possession and use, and occupy, at any time, any portion or portions thereof, for government purposes, the lessee to be allowed the term of ninety days for removing any buildings which may have been placed thereon. We, therefore, beg respectfully to inquire whether this be your understanding of the true intent and meaning of said indenture, and whether, if this be not your understanding, it is your intention to control the right of the government to take possession and use, and occupy said point for the purpose above indicated, the said term of ninety days being allowed for the removing of any buildings which may have been erected on the premises.

Very respectfully, your obedient servant,
Allen A. Hall,
J. Butler King,
Commissioners for Construction of Public Buildings.

Captain Theodore Shillaber.

(No. 13.)

San Francisco, Cal., June 10, 1852.

To Major O. Cross, Quartermaster U. S. Army—Sir: Your letter of the second June, is before me In reply to your questions, I have to state that: First. The reserve made particularly for military purposes, such as warehouses, etc., is that at Clark's Point, between Pacific street and Broadway, and comprises all that portion east of Sansome street, out to Ship's Channel, with the exception of fifty vara lot No. 318, on the south-east corner of Sansome street and Broadway, which was sold by the city authorities, before the reservation was made. Second. The lots east of Montgomery street, and between Washington and Jackson streets, out to Ship's Channel. These were reserved for the custom-house or revenue purposes. Third. The lots on Rincon Point, east of Beale street. These were reserved for military purposes, or for hospital or other government works. Fourth. The authority under which these reservations were made, was that of General Kearny, while in command in this country, in the spring of 1847. General Kearny authorized the sale of the property commonly known as "beach and water lots" or the flats in front of this city, by the authorities of the town, and directed the principal military and naval authorities here to reserve from that sale all such lots and locations as they thought might be required for government purposes. In accordance therewith, the late Commodore Biddle, U. S. Navy, Major J. K. Hardie, 1st regiment N. Y. volunteers and myself, made the reservations heretofore described. Fifth. The property known as "Government Reserves" is now held, I believe, by Messrs. Palmer, Cook & Co., on lease for eight years. The leases were given by Capt. E. D. Keyes, U. S. army, to Theodore Shillaber, and Messrs. Palmer, Cook & Co., hold as Shillaber's assignees. Much of the property is held by title in conflict with those of Messrs. Palmer, Cook & Co., some of them are squatters' claims, and some pretended grants. I think there are no genuine grants to any portion of the original reserves as made by the officers above named, in 1847. It was an object to get reserves far from

claims of every kind. Sixth. I believe the property described above to be worth $750,000. Seventh. I do not know the term of leases to Messrs. Palmer, Cook & Co., but I am informed that they have never paid anything for the use of the property they hold.

I am, sir, respectfully, your obedient servant. J. L. Folsom, A. Qr. Master.

(No. 14.)

Whereas by ordinance, No. 280 of the common council of the city of San Francisco, it was ordained as follows: "The people of the city of San Francisco do ordain as follows: That his honor, the mayor, be directed to convey on their behalf to the United States, all their right, title, and interest, in and to certain six fifty-vara lots, bounded and described as follows: On the east by Spear street; on the south by Harrison street; on the west by Front street; and on the north by the beach, the whole comprehended within an area of one hundred varas by one hundred and fifty varas." Now, therefore, this deed made and entered into this eleventh day of December, eighteen hundred and fifty-two, by and between the city of San Francisco by Charles J. Brenham, the mayor thereof, party of the first part, and the United States of America, party of the second part, witnesseth, that for and in consideration of the premises, and of the sum of one dollar to the party of the first part in hand paid by the party of the second part, the receipt of which is hereby acknowledged, the said party of the first part doth by these presents grant, convey, and quitclaim unto the said party of the second part, all the right, title, interest, claim and demand, legal or equitable in possession, remainder, or reversion, of the said party of the first part in and to the premises aforesaid, and every part thereof, which premises are situated and being within the corporate limits of said city, and are bounded and described as set forth in said ordinance. To have and to hold the said premises with all the privileges and appurtenances thereunto belonging, unto the said party of the second part forever. In witness whereof, the said Charles J. Brenham, mayor of said city, hath hereunto set his hand and caused the official seal of said city to be hereunto affixed, the day and year aforesaid.

(Seal.) C. J. Brenham, Mayor.

I hereby certify that the copy of ordinance, No. 280, included within the foregoing deed, is a true copy of an original ordinance returned by the mayor to the common council with his approval, December 10, 1852. Edward Toby,

Clerk of the Common Council.

San Francisco, Dec. 13, 1852.

State of California, County of San Francisco, ss.: On this fourteenth day of December, 1852, personally appeared before me, Frederick A. Sawyer, a notary public for said county, Charles J. Brenham, mayor of the city of San Francisco, and Edward Toby, clerk of the common council of said city, to me known to be the individuals described in and who executed the several instruments above, to which their names are subscribed, and acknowledged to me that they executed the same freely and voluntarily, and for the purposes therein mentioned. In testimony whereof I have hereunto set my hand and seal of office this day and year last above written.

(Seal.) F. A. Sawyer, Notary Public.

Recorded in recorder's office of county of San Francisco, Liber 19 of Deeds, page 101, December 14, 1852, twelve o'clock m.

Thos. B. Russum, County Recorder,

By Jo. Clement, Dep'y.

Delos Lake, U. S. Atty.

S. W. Holliday, for defendant.

FIELD, Circuit Justice. This is an action for the possession of a portion of the fifty-vara lots, numbers five and six, in block lying between Folsom and Harrison streets, and between Main and Spear streets, in the city of San Francisco. The demand in the complaint is for the entire lots, but it was admitted on the trial that the title of the plaintiff does not extend to that portion of the lots which lies below the ordinary high-water mark of the Bay of San Francisco, as that mark existed on the acquisition of the country.

The claim of the plaintiffs to the upland portion rests upon the hypothesis that previous to the admission of California into the Union, the premises were reserved for public purposes by the action of officers of the army of the United States, and that such reservation was recognized by the subsequent legislation of congress, and by the decree of this court in the Pueblo Case [Case No. 12,316].

The defendants not only controvert the positions of the plaintiffs, but assert title in themselves, or parties they represent, from three sources: (1) By virtue of a grant from a justice of the peace of the city of San Francisco, in January, 1850; (2) by virtue of a deed from the sheriff of the county of San Francisco, bearing date in October, 1851, executed upon a sale of the premises under a judgment and execution against the city; (3) by virtue of a conveyance by the city through the commissioners of the sinking fund created in 1850, and the commissioners of the funded debt created in 1851. That a Mexican pueblo existed at the site of the present city of San Francisco upon the acquisition of the country by the United States, on the seventh of July, 1846; that it possessed an interest in lands to the extent of four square leagues measured off from the northern portion of the peninsula upon which the city is situated; and that

the city has succeeded to such interest, are matters no longer open to discussion. They have been settled by judicial decision in a controversy between the city and the United States after the most mature consideration.

It was admitted on the trial that the premises in controversy were within the four square leagues mentioned. They were not, therefore, the subject of levy and sale under judgment and execution against the city. That source of title to the defendants may therefore be laid aside. So the grant of the justice of the peace may also be passed over without consideration, as no authority for the exercise of any power to grant portions of the municipal lands by officers of that description in the pueblo has been furnished us in the laws or customs of the country. The alleged title of the defendants by conveyance from the city arises in this wise: In August, 1850, the common council of San Francisco passed an ordinance to create a fund for the erection and promotion of city improvements, and provided, in the execution of this purpose, for the issue of city stock to be called a "sinking fund stock." The ordinance appointed a board of five persons, entitled "the commissioners of the sinking fund," and invested them with the charge of all the real estate in the possession of the city, and pledged the property as security for the redemption of the stock and interest at maturity. By a subsequent ordinance the common council directed a conveyance of this property to be made to the commissioners, in trust, for the purposes mentioned; and such conveyance was executed on the twenty-fifth of December, 1850. This conveyance includes the premises in controversy, and all the tract known as the "Government Reserve" at Rincon Point.

On the fourth of May, 1851, the legislature of the state passed an act "to authorize the funding of the floating debt of the city of San Francisco, and to provide for the payment of the same." The act created a board called "Commissioners of the Funded Debt of the City of San Francisco," and directed the commissioners of the sinking fund, created as mentioned by the ordinance of the city, to convey to them all the property and rights of property belonging to the city; and empowered them to sell or lease the property at such time and place as in their discretion the interest of the city might require, and to apply the proceeds to the liquidation of its floating debt.

Under this act the commissioners of the sinking fund, on the seventeenth of May, 1851, executed the conveyance directed, of all the property embraced in the deed which they had received. Soon after the issue of the grant by the justice of the peace, which we have mentioned, the defendants, or the parties whom they represent, went into possession of the premises, and were in possession when they obtained the conveyance of the sheriff. Under the title thus derived they asserted ownership until the passage of the ordinance of the common council for the settlement of land titles, in June, 1855, known as the "Van Ness Ordinance," and its confirmation by the legislature in March, 1858, after which they also claimed under the ordinance. Some conflict thus arose between them and the commissioners of the funded debt. Similar conflicts had also arisen with other parties, claiming under like circumstances against the commissioners. To remove the embarrassment arising from this cause, the legislature, in April, 1862, passed an act authorizing a compromise between parties thus situated and the commissioners; and a conveyance of the title by the latter to such parties. Under this act, and in pursuance of its provisions, a compromise was effected, and conveyances were executed in 1862, and 1863 to the defendants, or the parties represented by them.

No question is raised as to the validity of these conveyances, except that the premises had previously been appropriated for the public purposes of the government. Though it has been held that there was no authority in the common council of the city, under the charter of 1850, to create the board of commissioners of the sinking fund, or to execute a conveyance of the city property to them, yet it has not been doubted that it was competent for the legislature to direct a conveyance of the property by them to the commissioners of the funded debt, or that such conveyance passed the interest of the city. The power of the city to dispose of the property was, after the admission of California into the Union, subject to the control of the legislature of the state. The legislature could restrain or enlarge, at its pleasure, the authority of the agents of the city over the property, and could authorize a transfer of the title through the commissioners of the sinking fund as well as in any other way, or through any other body. Payne v. Treadwell, 16 Cal. 233, and authorities there cited.

The real question, therefore, at issue, relates to the efficacy of the acts of the officers of the army of the United States, in creating a reservation of the premises before the title had thus passed from the city, and the effect upon such acts of the legislation of congress and the decree in the Pueblo Case. In considering the claim of the plaintiffs, we shall assume, that until the action of the city authorities in disposing of the property, the United States retained the same right to reserve for public purposes portions of the pueblo lands to which the city had succeeded as they possessed to reserve portions of the public domain; at least, that they retained such right previous to the admission of California into the Union. As we have had frequent occasion to observe, it is difficult to state with precision the exact nature of the title or interest which the pueblo possessed in its lands. They were not held in

absolute property, with full right of alienation and disposition. They were subject to the control and disposition of the government, until by proceedings of the officers of the pueblo, acting under the regulations established for the disposition of the property, the title passed to private parties. Several grants to individuals within the limits of the four square leagues were made by the governors of the department, some with, and some without, the sanction of, or consultation with, the authorities of the pueblo. The validity of these grants has been repeatedly recognized by judicial decision. If the governors could thus pass the title to private persons, it would seem to be a reasonable inference, as we said in the case of Grisar v. McDowell [Case No. 5,832], "that they could reserve from the disposition of these authorities such portions of the lands as might be required by the government for public purposes." This right of control and disposition, which existed with the former government, passed upon the cession of the country, with all other public rights, to the United States, and could afterward be exercised by them at any time before the property had passed to third parties by the action of the authorities of the pueblo in accordance with existing law.

The various acts of the officers of the army of the United States, upon which the asserted reservation is based, can be briefly stated. On the tenth of March, 1847, whilst California was in possession of the military forces of the United States, Brigadier-General S. W. Kearny, then acting as military governor of the country, issued a document purporting to grant and convey to the town of San Francisco all the right, title and interest of the United States, and of the territory of California, in the beach and water lots on the east front of the town, included between points known as "Rincon" and "Fort Montgomery," excepting such lots as might be afterwards selected for the use of the government by the senior officers of the United States, then present at the town. The attempted grant was subject to the condition that the property should be sold at public auction after three months previous notice. On the twenty-third of June, 1847, Major General Sherman, then first lieutenant of the third artillery, and assistant adjutant-general, acting under the authority of Colonel Mason, who had succeeded General Kearny, as military governor of California, directed Major Jas. A. Hardie, who was then in command at San Francisco, to consult with Commodore Biddle, or other senior naval officers on the station, and to select, in accordance with the terms of the grant of General Kearny, lots best suited for wharves, both for army and navy purposes, with space for all the buildings that it might become necessary to erect, and a suitable lot for a custom-house, and the storehouses that it might require; and to inform the alcalde of the town of the selections made before the day of sale under the grant. On the eighteenth of July, 1847, Major Hardie informed the alcalde of the town that, in obedience to the orders of the governors he had selected for the use of the government all that portion of Rincon Point which was not then divided off into lots, and was marked "Government Reserve" upon a map of the beach and water lots then in the alcalde's office; and that the portion thus designated included all of Rincon Point lying east of Beale street and south of Folsom street, and bounded by the tide waters of the bay; and that he had also selected certain described beach and water lots. On the thirtieth of September, 1847, Colonel Mason, acting as such military governor, notified the alcalde of the town not to grant or give any deed for lots within the tract thus designated at Rincon Point, stating that the land was intended for the use of the United States government. Several communications between the commanding generals of the country and subordinate officers, subsequent to 1847, up to the time of the admission of California into the Union, relate to the land designated at Rincon Point, and speak of it as reserved to the government for public purposes. Notices were directed by the officers to be published forbidding the erection of buildings upon the premises, or any intrusion thereon, and in some instances parties intruding were forcibly removed. On the twenty-seventh of November, 1849, General E. D. Keyes, then captain of the third artillery at San Francisco, executed, with the approval of Brigadier-General Riley, the successor of Colonel Mason, as military governor of California, to Theodore Shillaber a lease for ten years of a part of the beach and water lots known as the "Government Reserves," and also that portion of the upland thus designated as Rincon Point. This lease was approved by the secretary of the interior in April, 1851. In June, 1851, the commissioners for the construction of public buildings at San Francisco, appointed by the secretary of the treasury, notified the lessee, Shillaber, that acting under the instructions of the secretary, they had selected Rincon Point as a suitable site for a marine hospital, without, however, indicating what portion of the general tract thus designated was intended. By a provision of the lease to Shillaber, the government reserved the right to take possession at any time of any portion of the property which might be required for its purposes, the lessee being allowed ninety days for the removal of any buildings, which might be placed thereon.

Previous to the selection, and on the thirtieth of September, 1850, congress had appropriated the sum of $50,000 for the construction of a marine hospital, to be located by the secretary of the treasury, at or near San Francisco. In August, 1852, and in August, 1854, further appropriations were made for the completion of the building, and

the arrangement and inclosure of the grounds upon which it is situated. But before the erection of the building was commenced, application was made on behalf of the government to the city of San Francisco for a conveyance of its interest in the land at Rincon Point, which had been selected as the site of the hospital. In accordance with that request an ordinance was passed on the tenth of December, 1852, by the common council of the city, directing the mayor to execute to the United States a conveyance of its right, title and interest to six fifty-vara lots, which include the premises in controversy. The hospital was subsequently erected on two of these six lots, being lots numbers one and two of the block, and out-buildings connected with the hospital were erected on two others of them, being numbers three and four of the block.

It is very clear from this statement of the action of the military officers of the United States, that there was no valid reservation for public purposes made by them of the tract at Rincon Point. The treaty of Guadalupe Hidalgo was not made until the second of February, 1848, and ratifications were not exchanged until the thirtieth of May following. Until the treaty, and long subsequently, California was simply occupied by the military forces of the United States, and whatever powers the officers of the army may have exercised, from the necessity of the case, for the preservation of the country and maintenance of public order, the power to grant or dispose, or to reserve from grant or disposition, any portion of the pueblo lands, or any portion of the public property of the United States, was not one of them. They could in no respect impair any rights which the United States may have acquired over either by the conquest, or might subsequently acquire by treaty. If the absolute title to the land had passed to the United States, neither its alienation, nor its reservation could have been made, except by congress, or subject to its regulation. The constitution vests in that body the sole power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States. The attempted grant to San Francisco of the beach and water lots by General Kearny was, therefore, without any validity. It was an act beyond his authority to execute, and it, of course, passed no interest whatever.

The selection made by Major Hardie of the upland at Rincon Point, for the use of the government, was not a selection in accordance with the terms of the Kearny grant, as that grant embraced only beach and water lots; nor was the selection in conformity with the instructions of Colonel Mason, under which Major Hardie purported to act. This fact, however, did not change the character of the proceeding, for such selection appears to have been subsequently approved by the commanding general. This approval, however, did not add to or give validity to the transaction. If the title had been in the United States absolutely, the selection and the subsequent acts of the military officers in excluding intruders, and in holding the premises, would not have effected an appropriation of the land to public purposes. Such appropriation of public lands could only have been made by act of congress or order of the president, and it is not pretended that any such act was passed or any such order was made in the present case.

Nor can the legislation of congress, in September, 1850, appropriating $50,000 for the construction of a marine hospital, to be located by the secretary of the treasury, at or near San Francisco, be justly considered as giving any sanction to the previous proceedings of the officers of the army, or as having any reference whatever to the property at Rincon Point. It only indicated the intention of congress that the institution should be erected at or in the vicinity of the city; and was as applicable to any other point as the one finally selected by the commissioners of public buildings. The appropriations made in 1852 and 1854 for the completion of the building and the inclosure of the site, cannot be deemed to have any efficacy whatever, as the title had previously passed to the commissioners of the funded debt under the legislation of 1851.

There are several circumstances which go to show that the title derived from the city is the only title upon which the United States ever relied. In the first place, the tract designated as "Rincon Point" by the officers of the army in the proceedings to make a reservation, included all the land lying east of Beale street and south of Folsom street, and bounded by the tide waters of the bay, which embraces several entire blocks; but the United States since 1850 have made no claim, except in one instance, to any portion of it, besides the six lots embraced in the deed of the city. The exceptional instance was in 1865, when suit was brought for the entire tract. The suit was abandoned, it is understood, upon a representation of the facts at Washington. In the second place, in November, 1850, a formal reservation was made by order of President Fillmore, for the purposes of the government, of several parcels of land at San Francisco, and its vicinity, and no reference was made therein to the land at Rincon Point; nor was any such reference made in any subsequent order of the president respecting reservations at San Francisco. The approval of the lease to Shillaber, by the secretary of the interior, in April, 1851, added nothing to the validity of the attempted reservation. Whilst the president was authorized, in particular cases, to reserve from sale for public uses portions of the public lands, no such power was vested in the head of any department of the government. Nor could the secretary of the treasury execute or approve of

a lease of any property belonging to the United States without special authority of law. In the third place no attempt was made to erect the building until after the deed of the city was obtained.

It only remains to consider the effect of the final decree in the Pueblo Case. Parties obtaining conveyances from the city, whilst its claim for the lands was pending before the tribunals of the United States, necessarily took whatever they acquired, subject to the determination of the claim. Their title stood or fell with the claim, for the decree took effect by relation on the day when the petition of the city was presented to the land commission, in July, 1852. It is to be considered as if entered on that day. The claim confirmed embraces an area of four square leagues, subject to certain deductions, among which are "such parcels of land as have been heretofore reserved or dedicated to public uses by the United States." It is contended that this exception covers the premises in controversy. We do not think so. The terms are fully answered by limiting the application to the four lots actually occupied by the hospital, and the reservations at the Presidio and Black Point. They cannot be extended so as to embrace the two lots claimed by the defendants without being also extended so as to include the whole of the tract known as "Rincon Point," embracing several blocks held under conveyances from the city, and which have been improved by the erection of large and valuable buildings. The construction contended for would also conflict with the concluding clause of the decree, which declares that the confirmation is in trust for the benefit of lotholders under grants from the pueblo, town or city of San Francisco. The term "grants" comprehends all previous conveyances from the city.

It follows that judgment must pass for the defendants. Counsel will prepare the proper findings, and present them to the court for settlement.

Findings were accordingly filed and judgment entered thereon for the defendants. The case was afterward taken to the supreme court of the United States, on writ of error, and the judgment was there affirmed by a divided court.

Case No. 15,304.

UNITED STATES v. HARE.

[Brunner, Col. Cas. 449;[1] 2 Wheeler, Cr. Cas. 283.]

Circuit Court, D. Maryland. May, 1818.

CRIMINAL LAW — COMMON-LAW JURISDICTION OF FEDERAL COURTS—STANDING MUTE IN CAPITAL CASES—ROBBERY OF THE MAIL.

1. The courts of the United States have not common-law jurisdiction in criminal cases; they will not punish an offense at common law unless punishable by statute.

2. On arraignment for a capital offense, if the person charged stand mute, the trial will proceed as though he had pleaded not guilty.

[Approved in U. S. v. Borger, 7 Fed. 195.]

3. The first offense of robbing the mail is a capital crime, if the robbery be effected by the use of dangerous weapons, thus putting in jeopardy the life of the person having the custody of such mails.

[4. Cited in Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. 761, to the point that in cases not capital the prisoner is not entitled to a copy of the indictment at government expense.]

Joseph Thompson Hare, Lewis Hare and James Alexander were indicted under the second clause of the nineteenth section of the act of April 30, 1810, which is in the following words: "Or, if in effecting such robbery of the mail the first time the offender shall wound the person having custody thereof, or put his life in jeopardy, by the use of dangerous weapons." It appeared that between 10 and 11 o'clock p. m., on the 11th of March, 1818, the great southern mail was stopped and robbed by the prisoners. They built a fence across the road, within two miles of Havre de Grace, and when the mail came up they sprang from behind the fence and presented pistols, which were cocked, and said: "Here we are, three of us, highway robbers, armed with double-barrel pistols and dirks," and threatened to blow the driver's brains out if he made any resistance. They tied the driver and Mr. Ludlow, a passenger, and proceeded to plunder the mail. The driver and Mr. Ludlow both testified they considered his (the driver's) life in danger if he had made any resistance. The robbers were subsequently arrested and tried before the circuit court of the United States, Baltimore, May, 1818. One count in the indictment charged them under the above clause of robbing the mail by putting the life of the driver in jeopardy. The other counts were for a simple robbery of the mail.

William Wirt, U. S. Atty. Gen., Elias Glenn, U. S. Dist. Atty., Thomas Kell, and Reverdy Johnson, for prosecution.

Gen. William Winder, David Hoffman, Charles Mitchell, Upton S. Heath, and Eben. L. Finley, for prisoners.

[2] [The grand jury having returned bills of indictment against the prisoners, John Alexander, and Lewis Hare, they were brought before the court for arraignment. Upon the arraignment of Joseph Thompson Hare, he pleaded not guilty. The indictment against Lewis Hare was then read to him, when Mr. Mitchell, on the part of the prisoner, observed, that the counsel were not prepared to plead, nor to advise what plea was proper to be entered. The court decided that as the prisoner had been arraigned, he must plead instanter; and observed that his plea should not be considered with any prejudice to his rights, and might be withdrawn the next day if the counsel thought proper. A

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

[2] [From 2 Wheeler, Cr. Cas. 283.]

plea to the jurisdiction, and a plea of not guilty were then tendered. John Alexander was then arraigned, and the same plea tendered.

[Tuesday, May 5th.—The prisoners were brought before the court. Their counsel asked leave to withdraw their pleas, stating they had not considered what course would be most beneficial for the accused. Mr. Kell, on the part of government, objected, unless the counsel for the prisoners would state what was their object in withdrawing the pleas. The counsel replied that they had entered them upon an unconditional promise of the court that the pleas might be withdrawn if the counsel for the prisoner thought proper. To this Judge Houston assented; and by order of the court the pleas were in each case withdrawn. The prisoners were then severally placed in the bar, and were informed by the court that they had allowed their pleas to be withdrawn, and that they were now to plead anew. The indictments were then read in each case, and the prisoners were severally arraigned, and upon being asked whether they were guilty or not guilty, they stood mute and refused to answer. The counsel for the prisoners informed the court that they had instructed them to stand mute. The district attorney then stated that the court might proceed in the same manner as if they had pleaded not guilty, either under the 30th section of the act of congress of 1790 [1 Stat. 112], entitled "An act for the punishment of certain crimes against the United States," or that the court might proceed against them as at common law. The court, however, took time till the next day, to make up their opinion on the proper course of proceeding.

[Wednesday, May 6th.—The court met, and, the counsel for the prosecution and the counsel for the prisoner appearing, the court heard an argument on the proper course of proceeding in the trials of the prisoners.

[Reverdy Johnson, Esq., on the part of the prosecution, addressed the court to the following effect: The court are now called on to decide a question, which, I believe, has never before presented itself to any of the courts of the United States. That is, whether this court has the power to proceed to the trial of the persons indicted of robbing the mail of the United States, notwithstanding their refusing to plead, or, in technical language, their standing mute? As one of the counsel for the prosecution, it becomes my duty to show the court they have such power. If this offence was especially contained in the act of congress of 1790 (chapter 9), then there could be no doubt as to the course which the court on this occasion ought to adopt, because it would be expressly provided for by the 30th section of that law. It will, however, no doubt, be contended by the counsel for the accused, that inasmuch as the offence for which their clients are indicted was not created by the act of congress of 1790, but by that of 1810, for the regulation of the post office, that, therefore, the provisions of the 30th section of the former law, for incidents like the present, in the trial of offences, only embraces offences created by that law, and does not extend to those of a subsequent origin; or, in other words, that that provision cannot be construed to apply to offences which did not exist at the time such provision was made. I will, however, endeavour to convince the court that by a fair and liberal construction of the act of congress of 1790, the case before the court is included in the provision in question. By the 29th section of that law, after directing that every person accused of treason shall have a copy of his indictment, and a list of the jury, &c., three days before he shall be tried for the same; and it is further directed, "that in other capital offences, he shall have such copy of the indictment, &c. two days before his trial." That section further provides for persons so accused many other rights and privileges. Then comes the 30th section, and so far as is necessary for the consideration of the question before the court, it is in those words: "If any person be indicted of treason against the United States, and shall stand mute, &c. or if any person be indicted of any other of the offences herein before set forth, for which the punishment is declared to be death, if he shall stand mute, &c. the court in any of the cases aforesaid, shall, notwithstanding, proceed to the trial of such person so standing mute, &c. as if he or they had pleaded not guilty, and render judgment thereon accordingly." The court will perceive that the offences in both these sections of the law are enumerated in the same order, and that the only variance in their language is that the words "other capital offences" are used in the second sentence of the 29th section, and the words "offences herein before set forth" in that of the 30th section. From this similarity, therefore, it would seem to follow that the provisions of both sections should receive the same construction; and, since no one can doubt but that the persons now indicted are entitled to copies of the indictments, and to all the other privileges given by the 29th section, so also, it seems to me impossible that any one can conceive that the power of the court to proceed to trial, when the party stands mute, as provided by the 30th section, does not also extend to the case now before the court. Again, the words "herein before set forth," contained in the 30th section, which the counsel on the other side will contend prevents the provisions of that section from applying to the case before the court, can, as I apprehend, receive no other sensible construction than that which will extend it, not only to offences specially described in the preceding part of the law, but to every offence previously mentioned; and since the general words, "other capital offences," in

the immediate preceding section of the law, it is admitted on all hands embraces every offence against the laws of the United States, and, therefore, the offence now to be tried, it follows, that the provisions of the 30th section extend also to this case. As another reason for giving liberal construction to the words "herein before set forth," I would remark to the court, that the provisions of the 30th section did not infringe any right which persons in such situations previously enjoyed, but, on the contrary, gave them an additional privilege. To show the court that I am correct in this opinion, I refer them to the 11th section of the act of congress of 1789 (chapter 20), by which exclusive jurisdiction of all crimes and offences cognizable under the authority of the United States is given to the circuit courts of the United States, except where it is otherwise directed; and to the 34th section of the same law, where it is provided that the laws of the several states, except when otherwise directed, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. If then the provisions of the 30th section of the act of congress of 1790 should be construed by reason of the words "herein before set forth," to extend only to the offences created by that act, it follows, that in the trial of all other offences, where the persons accused stood mute, the court would be obliged to proceed as the laws of the state, in which the trial happened, in like cases directed. What then, previous to the act of assembly of Maryland of 1809 (chapter 138), by which, in all cases of treason or felony, where the party stands mute, a similar provision is made to that of the 30th section of the act of congress of 1790, was the law in such cases in this state? I state it to have been, and I do so without fear of contradiction, that a standing mute amounted to a confession of the charge, and that judgment would have been rendered thereon as on the finding of the verdict. In order to satisfy the court that such was the law, I refer them to Kilty's Report of English Statutes, p. 17, where in a note on the statute of Westminster (3 Edw. I. c. 12) two cases are cited in which such a judgment was awarded, and to the statute of 12 Geo. III. c. 20, which directed such judgment in all cases of felony to be entered, which statute extended to this state by express provision, as the court will find by the same report of statutes (page 199). I think that I have now satisfactorily shown the court that I was right in saying that the 30th section of the act of congress of 1790 did not restrain, but enlarged, the privileges of persons accused of offences against the laws of the United States. If, however, the court should be of opinion that I am wrong in giving this liberal construction to the act of 1790, and that the provision of the 30th section of that law cannot be made to apply to the case before the court, I think there is another ground, on which the court may safely proceed to the trial of these persons, and it is shortly this: By the 34th section of the act of congress of 1789 (chapter 20), which I have before had occasion to refer to, it is directed "that the laws of the several states, except where the constitution creates or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." I imagine it will hardly be contended that this provision was intended to be confined to such laws of the states as were in existence at the time that act of congress was passed. There is nothing in the language of the provision which justifies such a restricted construction. The words are general, that the laws of the several states, &c. shall be rules of decision in the courts of the United States, except where it is otherwise directed. What then is the law in this state, on a case like the present? By the act of assembly of 1809, c. 138, § 12, which I have also before incidentally noticed, it is provided "that if any person be indicted of treason or felony, and he or she shall stand mute, or will not answer to the indictment, the court in such case shall notwithstanding proceed to the trial of such person so standing mute, as if he or she had pleaded not guilty, and render judgment thereon accordingly." If therefore, the court should be of opinion—which I am far from anticipating—that they have no authority to go on with the trial of those persons, under the 30th section of the act of congress of 1790, I imagine they then cannot doubt but that they have such power under the act of assembly of this state, when taken in connection with the 34th section of the act of congress of 1789 [1 Stat. 92]. Because, if "there be nothing in the constitution, treaties, or statutes of the United States, which otherwise provides," that act of assembly must be regarded as a rule of decision by the courts of the United States, and this court is bound by it under the 84th section of the act of congress of 1789; and as no such provision can be found, this court has full and complete authority, nay, they are compelled, to proceed according to that act of assembly, and that is, to go on to try those persons as if they had pleaded not guilty. Here I think I might safely rest this question. There are, however, some other remarks which, with the permission of the court, I will now suggest. If the acts of congress of 1789 and 1790 had never passed, I feel but little hesitation in saying that you would notwithstanding have no difficulty in proceeding with this trial; because, as the trial by jury for offences of this kind is directed in general words, by the constitution of the United States, it would follow that all the incidents to that mode of trial, in the absence of particular provisions on the subject, would be considered as also directed. In the whole

history, then, of jury trial, previous to the time of Edward I., I defy the counsel for the accused to point out a single instance where a person escaped a trial by standing mute. If this mode of trial was ever at any stage of its existence, so defective as to suffer such an escape, it is obvious that they would always have been effected, and that the trial itself would have been only a mockery of justice. The gentlemen may possibly say that the party might have escaped a trial by standing mute; he could not have escaped with impunity, as he would have been subject to the dreadful punishment of "peine forte et dure." I deny, however, that such a punishment ever existed at common law. We are to look for its origin to the statute of Westminster (3 Edw. I. c. 12). By the common law, standing mute was, in all cases, as it is now by the statute of 12 Geo. III., a confession of guilt. To prove this, I refer the court to 4 Bl. Comm. 327. In the United States, however, it is very certain that the punishment of "peine forte et dure" never existed. In the absence then of all statutory provisions, the court would be justified in considering those persons as confessing their guilt, and in according judgment against them accordingly. There is, however, another reason, which to my mind, shows conclusively that you must have the power to proceed with this trial, and it is, that if you have not that authority, those persons must escape unpunished, since the state courts, in cases like the present, do not possess concurrent jurisdiction, because they have not the power of punishing to as great an extent as the act of congress prescribes for the punishment of those persons if they should be convicted. The courts of the states have only jurisdiction over the prosecution of such offences against the act of 1810, under which the persons now before the court are indicted, as by the laws of the state they can punish to as great an extent as that act directs. If then the counsel for the accused are right, robberies of the mail of the United States may be effected with almost perfect, safety, since, if detected, the robbers may escape being tried by adopting the plan of the persons now charged with that offence; or in other words, if they will only stand mute when arraigned, they may securely bid defiance to the laws of the land, and render the act of 1810, so far as it regards the offences of robbing the mail, a dead letter. I believe I have now put the court in possession of all the observations that have occurred to me on this question. I feel confident that much more might be said than I have been able to suggest. I shall be followed however by gentlemen who will add everything which the question admits of. I feel sorry that I should have suffered myself to have trespassed so long on the patience of the court. I return the court thanks for the kindness with which they have listened to me, and I conclude with a full assurance that this trial will go on as if the prisoners had pleaded not guilty.

[Elias Glenn, Dist. Atty., for prosecution. —The question now under consideration presents more of novelty than of difficulty. The learning respecting standing mute has been long considered rather as a subject for the curious student, than of essential importance to the practical lawyer. To-day, for the first time since the adoption of our present form of government, we have to inquire a little into its nature, and to ascertain whether the voluntary act of a criminal can obstruct the progress of justice, and put at defiance laws the most salutary and necessary for society. According to my understanding of the case, this is its situation: Upon their arraignment in the first instance, the prisoners pleaded not guilty. Their counsel, after some advisement, thought proper to request of the court that this plea might be withdrawn, in order, according to my impression, that the prisoners might plead de novo, for if such an understanding had not existed with the court, would they for one moment have permitted any alteration to have been made in a plea which gave to the prisoners every fair and proper advantage that a prisoner ought to possess? If such impression were correct, and the court knew, as is the fact, that the visitation of God has not silenced the prisoners, would it not be proper for the court to insist on some plea being filed in the cause? But waiving, for argument's sake, this consideration, let us enquire in what predicament the court is now placed,—whether the trial must stop at this place, and the infliction of the punishment provided by law for offences of the high character charged in this indictment is to be prevented by this course of proceeding. I shall contend on this point —1st. That this conduct of the prisoners is a constructive confession, and the court must proceed to pass sentence upon them. Or 2d. That the court may proceed to the trial, as if the general issue plea of not guilty had been interposed.

[1st. The counsel for the prisoners contend that this is a casus omissus in the law, and there being no common law by which the courts of the United States can be governed in criminal cases, we must stop here. If the prosecution is to derive no benefit from the common law, the prisoners must be upon the same footing in this respect. They are to have no benefit of it either, and our common sense is called in to govern in the decision of this case, and what would that say? That the prisoners were guilty; that their silence is a constructive confession. In pleading (which is justly said to be a system of sound reasoning), not denying an allegation is an admission of it. If a defendant in a civil suit say nothing, judgment is rendered against him. If a charge be made against a man in his presence, and in his hearing, and he does not deny it, this

might be given as evidence to prove the fact thus charged upon him. Now, if the very facts laid in this indictment had been charged upon the prisoners in any other place than a court of justice, and they had pursued the same line of conduct which they have now adopted, such conduct would have served as testimony to have produced a conviction for this very crime. For whose benefit was the provision of the act of April 30th, 1790,—for the benefit of the prosecution or of the prisoner? Unquestionably for the benefit of the prisoner. He is, by his obstinacy, amenable in a degree to the court; but our laws (wishing to give a criminal every possible advantage of a fair and impartial trial) have considered him as guilty of no offence in the particular cases therein mentioned. Then if the provisions of that act do not reach this case, the prisoners are not even entitled to the lenient and merciful provisions of that law.

[On the second point Mr. Glenn contended that, as an incident to the power and authority of the court, they had a right to try these men. The prisoners have divers privileges for their own benefit. They may plead not guilty, they may have counsel, they may have witnesses, they may challenge jurors, they are entitled to a copy of indictments, and a list of the witnesses. But if they decline the enjoyment of their rights, is the progress of justice to be arrested? If they will not receive a copy of their indictments, are they never to be tried? If they will not enjoy the benefit of counsel, is the court obliged to wait until their better judgment shall induce them so to do? If they will not challenge jurors, must the court pause until they think fit to challenge them? These are all privileges granted to the prisoners. They may accept or refuse them at their pleasure; but such refusal shall never operate to retard the march of justice in its course. In England, a speedy disposition of these causes would have been made by the common law. This conduct of the prisoners is a constructive confession. Staunf. P. C. 149; 2 Hawk. P. C. c. 30, § 13; 2 Hale, Com. Law, 317, 322; 4 Bl. Comm. 324, 329. Now if the court cannot proceed with these trials, the monstrous absurdity follows that a criminal by a shift, a trick, may forever evade the provisions of a penal law,—a proposition, the statement of which carries with it its own refutation. This court must frequently proceed according to the directions of the common law. They can fine jurymen and witnesses for non-attendance; nay, if a bystander had advised the prisoners at the bar to stand mute, would the court not have punished him for such conduct? In England they certainly would. 4 Bl. Comm. 126. It would be arresting the progress of justice, and I think the court would be fully authorized to impose a penalty similar to that inflicted in England.

[But we consider this case as coming reasonably within the provisions of the act of 30th April, 1798, or to be governed by the rules of the laws of the state of Maryland. See Act Cong. Sept. 24, 1789; 1 Laws [Folwell's Ed.] p. 47 [1 Stat. 73]; and Laws Md. 1809, c. 138. We are willing to allow to the prisoners every advantage which they could derive under a plea of not guilty, and not even by their own improper conduct to injure their cause.

[Charles Mitchell, Esq.—The court will find on examination, that this is not one of the cases of standing mute mentioned in the act of congress, where they are to proceed as if the prisoners had pleaded not guilty. Those cases are specifically enumerated in the act of 1790, and this power is limited to the cases there specified. Robbery of the mail is not one of them. You must proceed then according to the law and practice of this state at the date of the judiciary system. At that period the common law practice prevailed here; but the statute of Westminster I., and the subsequent English statutes to 12 Geo. III., providing for such cases, were never extended to this state. It was by statute alone that the English courts were enabled to punish him who stood mute as if he had pleaded guilty. At common law there was no such power. The utmost extent of common law punishment was severe imprisonment until he pleaded. Even the peine dure et forte was a statute punishment. If the prisoners stand obstinately mute, therefore, it is a casus omissus. You have no power to try them, or to inflict capital punishment. But if an inquest is awarded to inquire how they stand mute, it will be ascertained that they do not stand obstinately mute, but have merely exerted a legal right to refuse to plead because their arraignment was irregular and against the law of the land. I do not intend, however, to enter into the discussion here. It was no part of my object in rising to address the court. I have merely said this much to satisfy the court that, whether our conclusions are well or ill-founded, we have some plausible reasons at least for the course we have adopted, and have not been impelled by a wanton desire to embarrass the court without any prospect of advantage to our clients. We had indeed indulged the hope that the court knew us too well to render such an assurance or explanation necessary; but the unusual, unexpected, and extraordinary appeal from the district attorney has extorted these remarks where we should otherwise have been silent. The gentleman has charged us with obstructing the course of justice, and vehemently asks if such conduct is to be tolerated here, which in the courts of Great Britain would subject us to fine and imprisonment. Sir, I deny the law to be so in England as he stated it, and whenever he feels disposed to enter into that question, shall be ready to

meet him. But if it were so there, I desire to bless God and those who purchased our inestimable privileges with their blood, that our situation in this court is not so humble and degraded. Has the gentleman forgotten, sir, that while in England the accused is denied the aid of counsel altogether, except on questions of law, and then receives it as pure bounty from the court, here he has a legal—nay, a constitutional—right to be heard and advised by counsel in every stage of the proceedings against him; that while in the criminal courts of England the counsel for the prisoner is the mere creature, the automaton, the very serf of the court, holding his place by a base and servile tenure, here he is an independent officer of the constitution, standing erect and firm on his constitutional freehold, and accountable to God and his conscience alone for whatever advice he may give his client. Execrated let him be, and forever abhorred by his professional brethren, who shall meanly shrink from the sacred duties he has to perform, or tamely suffer the interposition of any judge or court between him and his client. Sir, we have deemed it a legal right of the prisoners to refuse to plead; we have thought it might be beneficial to them; and with these impressions, if we had not advised, or, having advised, were afraid to avow it, should we not merit the blasting mildew of public reproach which would inevitably fall upon us after the warring passions of the multitude against these prisoners shall have abated. We have advised our clients to insist on every legal advantage in defence of their lives, and here openly avow it, fearless of consequences. Our object is to save them from punishment, if not legally obnoxious to it, whatever may be their moral guilt; and this cannot be censured in counsel but by those whose unhallowed thirst for blood must be slaked in spite of the constitution and the laws of their country.

[David Hoffman, Esq.—I shall solicit your honour's indulgence while I briefly state our views as to the operation of the course adopted by the prisoners—viz. their standing mute. The indictment in these cases is predicated on the 19th section of the act of congress of 1810 [2 Stat. 598]. This provides that if any person shall rob any carrier of, or other person entrusted with, the mail of the United States, of such mail, or a part thereof, such offender shall be imprisoned, not exceeding ten years; and if in effecting such robbery he shall wound the person having custody of the mail, or put his life in jeopardy, by the use of dangerous weapons, such offender shall suffer death. The robbery of the mail, whether by mere putting in fear, wounding, or placing life in jeopardy, is an offence against the United States, originating in this act of congress. Its legal criminality, as a specific crime or public wrong against the Union, is derived solely from this source. In this act we find no provision whatever on the subject of standing mute, nor do we find that any other act of congress has legislated on the subject, except the act relative to crimes and punishments of 1790 (section 30), which surely can in no way apply or be extended to the present case, since that act provides for the case of standing mute only on indictments for crimes enumerated in that act. The present must therefore be a clear casus omissus; for the act of 1790 enumerates a variety of public wrongs, such as treason, piracy, perjury, bribery, forgery, falsifying of records, &c., &c., and constitutes these crimes against the United States. It then provides, that if "any person or persons be indicted of any of the offences herein set forth, for which the punishment is declared to be death, if he or they shall stand mute or will not answer to the indictment, or challenge peremptorily above the number of twenty persons of the jury; the court in any of the cases aforesaid shall, notwithstanding, proceed to the trial, as if he or they had pleaded not guilty, and render judgment thereon accordingly." Mail robbery, it is to be observed, is not one of the crimes enumerated in this act, but is an offence created by statute twenty years after. The power of the court to proceed to trial, on the prisoner's standing mute is given by no other statute than the act of 1790, and this, as we have seen, only where the prisoner is indicted for a crime enumerated in that act. As this is not there to be found, but originates in a law long subsequent, the legal sequitor to us appears to be that the present is a case at common law, wholly unaffected by the act of 1790.

[The provision relative to standing mute, contained in the 30th section of the law of 1790, surely will not be extended to the offence made a crime by the act of 1810; inasmuch as it is a principle of law, that a statute which takes away a common law remedy or privilege ought never to have an equitable construction. 10 Mod. 282. And it is laid down that if the words of a statute do not extend to a mischief which rarely happens, they shall not be extended by an equitable construction, to that mischief, but the case shall be considered as a casus omissus. Vaughan, 373. As, therefore, the act of 1810, on which the indictment is founded, contains no provision for the case of standing mute, and as the common law operation of standing mute appears to have been recognized by congress, and as the act of 1790 is the only statute speaking on the subject, and this extends expressly to the offences therein specified, and as its provision ought not to be extended by equitable construction, it appears to me a sound and legitimate conclusion that the present, as I have just stated, is a case of standing mute at common law, and

as such is to be dealt with differently from the case of an indictment for treason, piracy, &c. What then is to be the proceeding of this court, if the view I have just taken, and I hope with great deference, be correct? The books on this subject say that if a prisoner on his arraignment stand mute, the court ex officio must ascertain, by a jury, whether this proceed ex visitatione Dei, or ex malitia. On the verdict of this jury a judgment of mute is to be entered; and if it be decided that the muteness be from the visitation of God, the court shall proceed to the trial as if he had pleaded not guilty. This power, it will be perceived, is only in case the muteness be ex visitatione Dei. Vide 2 Hale, P. C. 317; 15 Vin. Abr. 532. And on this judgment, the better opinion appears to be that no sentence of death can be given. 2 Hale, P. C. 317; 4 Bl. Comm. 324. If the decision be that the prisoner is mute ex malitia, that is, obstinately, and he stands indicted for a felony, he can neither be tried nor convicted. He cannot be tried, because there is no issue, for there can be no issue without a plea, and, as we shall presently see, the judgment of peine forte et dure was introduced to extort a plea. Nor can such a prisoner be convicted, because standing mute amounts to conviction only in felonies of the highest and lowest degree, viz. in treason and petit larceny; so that quacunque via data, we cannot perceive how the prisoners in the present case can receive sentence of death; since the muteness, if supernatural, cannot be followed up by a judgment of death, and if from obstinacy, it is equally so, as there can be neither verdict nor conviction. 4 Bl. Comm. 325.

[It may be proper here to note an error of the learned district attorney, who in his observations just addressed to the court states it to be undoubted law, that standing mute in all cases, from the highest to the lowest crimes, amounts to conviction, and that the courts of England, for centuries past, have considered it so. The law I apprehend is not so. Standing mute amounts to conviction only in the highest and lowest crimes, viz. treason and petit larceny; and not as the gentleman has asserted, from the highest to the lowest. Prior to the statute 12 Geo. III. a, 20, (which can have no operation in this court, and therefore is to be wholly disregarded,) standing mute on indictments for any felony, other than treason and petit larceny, was uniformly followed, not by conviction, but by the judgment of penance. The books are so explicit on this point as to render misapprehension scarcely possible. Disingenuousness in stating the law is at all times censurable; but in a state officer, prosecuting in a case affecting the most dear and most valuable possession we have, —life,—it is surely doubly reprehensible.

[The crime, then, for which these prisoners stand indicted, being neither treason nor petit larceny, nor a crime affected by the 30th section of the act of 1790, which authorizes the court to proceed to trial in certain cases of standing mute, the present must be a case in which, in England, prior to the statute 12 Geo. III., the court would have proceeded to the sentence of penance, or peine forte et dure. Admitting, then, that had this case occurred in the court of king's bench, prior to the statute 12 Geo. III., the court would have awarded penance as the only means within their control, and conceding, gratia argumenti, this court to possess the power of awarding this terrible judgment, is the court now in a situation to pronounce such a judgment? Has there been that preliminary procedure, which forms the legal foundation for such a judgment? Has there been a jury impannelled to pronounce whether this muteness were obstinate, or by visitation of God? Has there been a judgment of mute? Farther, the books say that a mute prisoner is entitled to a respite for reflection. The sentence of penance is to be solemnly read to him, that he may be fully apprised of his danger. He is then to receive the trina admonitio. 15 Vin. Abr. 532; Staunf. P. C. 149. None of these formalities have taken place, so that if the court possess the power to award penance, as would unquestionably have been the only power of the court of king's bench, anterior to the 12 Geo. III., the exertions of this power should have preceded the forms just stated.

[Let us now briefly examine, whether this court san be considered as possessed of the power of awarding any such sentence. Such a power can be derived only from

[(1) The common law of England.

[(2) The statutes of England.

[(3) The acts of congress.

[(4) The acts of assembly of the state of Maryland.

[1. Admitting, for argument, this court in some cases to be guided by the English common law, the common law could give this court no such power, as the power itself in England is not derived from the common law, but from the statute of Westminster (3 Edw. I). Vide Bar. Obs. St. 32; 4 Bl. Comm. 327; Pref. to 1 State Tr. 12.

[2. There are no statutes of England, either prior to or since the Declaration of Independence, of any force or operation whatever, in any of the courts of the United States, so that we need not seek for this power in this source.

[3. It will not be pretended that any act of congress has legislated on the subject.

[4. Nor has any act of assembly of this state any provision whatever relative to this judgment of penance, and the statutes of Westminster (3 Edw. I.) has not been considered as extending to this state. Vide Kilty's Report of British Statutes.

[The case under consideration appears,

therefore, to be one in which the prisoner can be made responsible, if at all, only under the 3d count of this indictment, which is for an offence not capital. If these men be guilty of a crime which forfeits their lives, it may be a matter of regret that they cannot be amenable to the punishment so manifestly intended. But if the law be defective, let it be amended by the national legislature.

[The peine forte et dure was introduced in feudal times for the purpose of extorting a plea in capital cases, so that if death ensued, there might be a forfeiture or escheat of the prisoner's lands. But if there were no plea, corruption of blood, forfeiture, nor escheat could ensue.

[Finally, the prisoners in the present case stand mute. Can this court proceed to judgment as on a confession or conviction? We apprehend not, as standing mute is equivalent to conviction only in treason and petit larceny, and the statute 12 Geo. III., which renders standing mute in all cases a constructive confession, cannot alter the law of the case in this court. Can the court enter the plea of not guilty for the prisoners? We presume not, for even criminals have their rights, they cannot be forced to plead. Can this court proceed to trial as if the prisoners had pleaded not guilty? We humbly conceive not, as such a power is no where given but in the act of 1790, and there only in the cases of crimes therein specified.

[If the views I have thus briefly, hastily, and even to myself, unexpectedly taken, be not wholly unsound, I earnestly and respectfully entreat the court to accord to it some consideration, and, in favour of life, not to proceed but with great caution and consideration.] [3]

Before DUVAL, Circuit Justice, and HOUSTON, District Judge.

PER CURIAM. The two first named when arraigned severally pleaded not guilty, the third pleaded not guilty, and also put in a plea to the jurisdiction of the court.

The attorney for the United States objected to the double plea put in by Alexander; but it being after the hour of adjournment, the court adjourned till the next day, when the prisoners again being severally arraigned, Mr. Mitchell, one of their counsel, asked leave to withdraw their pleas, intimating that he did not then know what to advise his clients to plead. In order to give the accused full opportunity to make their defense, the court granted leave accordingly, under the impression that their counsel meant to plead other pleas. The accused being severally called on to answer were advised by their counsel to stand mute, and thus did stand mute, thus refusing to plead.

The attorney for the United States moved the court to proceed to the trial in the same manner as if the accused had pleaded not guilty, according to the twenty-ninth section of the act for the punishment of certain crimes against the United States. To this the counsel for the prisoners objected, contending that this mode of proceeding was applicable only to the trial of the crimes specified in the act for the punishment of certain crimes against the United States, and could not be extended by construction to the crime of robbing the mail, made capital by an act of congress subsequently passed.

On the part of the prosecution it was argued that by the act to establish the judicial courts of the United States, full power and authority are given to the circuit courts of the United States to try all crimes and offenses cognizable under the authority of the United States, and that the manner of conducting the trial prescribed by the twenty-ninth section of the act, for the punishment of certain crimes, is applicable to all cases arising under laws subsequently passed, inflicting the punishment of death for the commission of any crime or offense. That standing mute by a criminal accused of a capital offense amounts to a constructive confession of guilt. That the privileges of a person accused of a capital offense by the twentieth section of the same act are general, and extend to the trial of all crimes made capital, whether specified in that act or not, and that the mode of trial must be the same. That by the thirty-fourth section of the act to establish the judicial courts of the United States, which provides that the laws of the several states, except when the constitution, treaties, or statutes of the United States shall otherwise provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases when they apply; the laws of the state of Maryland, and the practice of the courts under them, would justify the court in pronouncing the prisoner guilty on his standing mute.

The question presented to the court is a novel one in the courts of the United States, but it is a question in the decision of which they cannot doubt the power and authority of the court to proceed to the trial of the accused. By the constitution of the United States it is declared that the trial of all crimes, except in cases of impeachment, shall be by jury. The act aforementioned, to establish the judicial courts of the United States, gives to the circuit court exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except when a different provision could be made. The act regulating the post-office establishment by the thirty-fifth section grants authority to the judicial courts of the several states, under certain restrictions, to try all causes of action arising under, and all offenses against that act; but this grant of power is permissive, and does

[3] [From 2 Wheeler, Cr. Cas. 283.]

not impair the authority of the courts of the United States to try certain causes under that act. Without this grant of power to the courts of the states the jurisdiction of the courts of the United States would have been exclusive; with it their jurisdiction is concurrent. By the constitution a fair and impartial trial by jury in all criminal prosetions is secured to every citizen of the United States. After all these solemn and salutary regulations, it would be strange indeed if the accused could by any management evade a trial by jury. The courts of the United States have not common-law jurisdiction in criminal cases. They will not punish an offense at common law unless made punishable by statute. But they will resort to the common law for a construction of common-law phrases. Standing mute according to the ancient common law of England, from whence we have derived most of our institutions, was, in many cases, tantamount to a confession of guilt. And now, by statutes passed at different times, standing mute in all cases amounts to a constructive confession, and is equivalent to conviction. Robbery is felony by the common law. It is made felony by the laws of the United States, and punishable with death whether committed on land or water. Robbery of the mail, if committed with the use of weapons which jeopard the life of the carrier, is felony, and punishable with death. How is the criminal to be tried? Let the constitution and laws of the United States furnish the answer—by jury. This mode of trial is secured by the constitution to the accused in all criminal prosecutions; and the laws of the United States give full power and authority to the courts of the United States to try all offenders, and the trial is imperatively directed to be by jury. Yet the counsel for the prisoners contend that by standing mute the criminal can evade a trial altogether. As well might they contend that if the plea to the jurisdiction had not been withdrawn, and the court had passed their judgment of respondeat ouster, and the accused had refused to answer, there would have been an end of the trial, standing mute and refusing to answer being substantially the same. The penance or peine forte et dure, to compel an answer, is unknown to the laws of the United States. The act for the punishment of certain crimes directs that if any person indicted of any of the offenses, other than treason, set forth in the act, for which the punishment is declared to be death, shall stand mute, or will not answer to the indictment, or challenge peremptorily above the number of twenty persons of the jury, the court shall, notwithstanding, proceed to the trial as if he had plead not guilty, and render judgment accordingly. The act for regulating the postoffice establishment inflicts the punishment of death on persons who may rob the mail, if attended with the aggravated circumstance before mentioned. The nineteenth section declares that on conviction the person committing such robbery shall suffer death. But how is he to be convicted? On trial by jury, conducted in the manner provided by law. The act for the punishment of certain crimes directs the manner, and if the person arraigned shall stand mute, or will not answer the indictment, or challenge peremptorily above the number of twenty persons of the jury, the court shall, notwithstanding, proceed to the trial as if he had pleaded not guilty. It is admitted that penal statutes should be construed strictly; that is, they shall be construed according to the strict letter in favor of the person accused, if there be any ambiguity in the language of the statute. But who ever heard of a construction that would prevent a trial altogether until the present time? Such a construction is calculated not only to defeat the purposes of justice, but to prostrate the constitution and laws of the Union.

Several acts of congress supplementary to the act to punish certain crimes have been passed at different times, inflicting heavy penalties for breaches of the law; and an act passed on the March 3d, 1817 [3 Stat. 383], prescribes the punishment of death for all offenses committed within the Indian boundaries, which before that time was punishable with death, if committed in any other part of the United States. In order to a just construction, it is proper to consider the whole system of criminal jurisprudence as established by the United States in our view. All the laws should be taken in pari materia. The objection will then be removed, and the court may proceed on the trial.

If the laws of Maryland are to be regarded as the rule of decision, the result will be the same. The declaration of rights adopts the common law of England, and the trial by jury according to the course of that law; and also all the English statutes existing at the time of their first emigration, and which by experience had been found applicable to their local and other circumstances, and such others as had been since made in England or Great Britain, and had been introduced, used and practiced by the courts of law or equity. As early as the year 1668 there are two cases on record in which criminals standing mute were sentenced by the court to be hanged. In the first case the crime was murder; in the second petit treason. By the act of 1737, c. 2, and 1744, c. 20, breaking open a tobacco house or other outhouse, and stealing goods and chattels to the value of five shillings sterling, and horse stealing are made felony and punishable with death; and if the accused shall stand mute, etc., the court may pronounce sentence against him. By the act of 1777, c. 20, if a person indicted for high treason shall stand mute, etc., the court may pronounce sentence of death against him, and all his estate is forfeited. The chancellor of the state in his report, in

pursuance of the direction of the legislature, of English statutes adopted and made applicable to Maryland, includes the statute of 12 Geo. III. c. 20, by which standing mute, in all cases of felony and piracy, is equivalent to conviction.

No new offense is created by the act of congress regulating the postoffice establishment. Robbing is the generic term, and robbing is felony at the common law, and punishable as such. The state of Maryland, by an act passed in the year 1809, has adopted in substance, and almost in words, the provisions of the twenty-ninth section of the act of congress to punish certain crimes. It is provided by that act that in all cases of treason or felony, if the person accused shall stand mute, or will not answer to the indictment, the court shall proceed to the trial as if he had pleaded not guilty, and give judgment accordingly. Hence it appears that if the laws of the United States have not provided for the case, and the laws of Maryland are to be regarded as the rule of decision, standing mute, prior to the year 1809, would be equivalent to conviction. Subsequent to that period, the trial would proceed as if the accused had pleaded not guilty.

The court orders that the trial proceed by jury, as if the prisoner had pleaded not guilty.

[4] [Mr. Kell [after the witnesses had been examined, and the evidence closed] then read the 19th section of the post-office law. (Act April 30, 1810, § 19): "That if any person shall rob any carrier of the mail of the United States, or other person entrusted therewith, of such mail, or of part thereof, such offender or offenders shall, on conviction, be imprisoned not exceeding ten years; and if convicted a second time of a like offence, he or they shall suffer death; or if in effecting such robbery of the mail the first time, the offender shall wound the person having custody thereof, or put his life in jeopardy, by the use of dangerous weapons, such offender or offenders shall suffer death." He then proceeded to inquire what is the putting life in jeopardy by the use of dangerous weapons?

[(1) The weapons used.

[(2) The manner of using them.

[(3) The alarm of the carrier.

[It appears, said Mr. Kell, all necessary to constitute the offence is proven. The party meet the driver in the night, on the highway, proclaim themselves highway robbers; that they are armed with double barrelled pistols and a dirk; that the pistols are cocked. It was then ascertained that they were armed with pistols which were presented towards the driver and passenger; and soon after, that they had a dirk. The exhibition of such weapons, the purpose for which such exhibition was made, does create danger and risk of life; in other words, it does jeopardize life. It certainly was a putting the life of the driver, (as well as of Mr. Ludlow,) in jeopardy. Did it not diminish their personal safety, and expose them to hazard? It perhaps is not necessary that the driver should have apprehended his life to be in danger. If it were so, the language and requisites of the law are fully proven; he stood in the predicament of a man whose life was in danger, and under the fear and apprehension of danger, he parted with the mail. The prayer presents the case in the fairest and most favourable manner for the accused. The weapons used are such as are eminently calculated to endanger life, or put it in jeopardy; the pistols were cocked and presented, with the declaration, "If you resist, we will blow your brains out." This, 'tis true, the driver says he did not hear, but he heard and saw enough to produce fear, and therefore gave up the mail: can it be thought by any deliberate mind that such acts, for such a purpose, do not endanger life, or put it in jeopardy? Can it be said that the life of a man situated as was that of the carrier of the mail, at the time of this transaction, was not in danger? It is not necessary that the pistol be discharged; intimidation and danger, by such means, are sufficient to constitute the offence; the jeopardy of life takes place at the moment when the weapons are presented.

[With this view and consideration of the subject, Mr. Kell felt himself authorized to ask the opinion and direction of the court, contained in the prayer submitted to them.

[Gen. H. M. Winder hoped the court would not deem it irregular or improper for him, after what had occurred, to suggest his views to the court as amicus curiæ on the question now propounded by the counsel for the United States. Indeed, having been called upon by the prisoner, although at too late a period to be prepared to advise him preparatory to or in the conduct of the trial, yet he had deemed it his duty to listen attentively, and he thought, if anything occurred to his mind of real importance to the prisoner, he was bound in duty, both to the court and the prisoner, to state it. He had never seen the clause of the act of congress until the trial commenced, and received from that perusal a very strong impression that the evidence did not support those counts in the indictment which charges the prisoner with a capital offence. This impression had been strengthened by the little reflection he had been able to bestow upon it, and more strongly confirmed by what he had heard on the part of the United States. The words of the act of congress are, "if in effecting such robbery," &c. See 2 Wheeler, Cr. Cas. 311.

[Now the life of the carrier must be put in actual jeopardy to bring the offence within that alternative of the clause; no apprehension of danger, or being put in fear of his life, satisfies the words of the act. The terms of

[4] [From 2 Wheeler, Cr. Cas. 283.]

the prayer to the court are a fair and just statement of the extent to which the testimony in this case can be urged, and by the very terms of the prayer no jeopardy of life is even supposed. It simply states, that if the prisoner exhibited dangerous weapons calculated to take life, thereby putting the carrier in fear of his life, and thus obtaining, &c. Can it be supposed, for a moment, that this is what was meant by congress when they say, "put the life of the carrier in jeopardy"? It would be to attribute to congress the most loose and unskilful use of terms, to make the apprehension of danger the existence of danger, the fear of jeopardy actual jeopardy. It is wholly impossible to contend that the words do not import an actual jeopardy; and if they do, surely the assumed state of proof in this prayer does not amount to actual jeopardy.

[If the position contended for be true, it will follow that a man may be guilty under this part of the act where no jeopardy of life has occurred; and if the prayer exhibits the just interpretation of the act of congress, a robber may put the life of the carrier in actual jeopardy without being guilty; for if he raises a fear of life, by having dangerous weapons, without doing any act which could possibly put life in jeopardy, he is guilty; but if a robber, in the dark, without the carrier's knowledge, snaps a loaded pistol or gun within killing distance, with intent to kill the carrier, no body will doubt but here was actual jeopardy; but the carrier could not possibly have any fear of life, since he had no knowledge of it; and if the mail should be immediately stopped by the robber and his associates, without farther acts of intimidation, the party would not be guilty under this clause. Can it be imagined that a construction leading to such absurdity can be just?

[To support the construction contended for, it is necessary to confound fear of life with jeopardy of life. Now, since a man may be in great fear of his life, where there is not the least jeopardy of life, so there may be great jeopardy of life without the least fear of life. To say that congress, therefore, meant fear of life by jeopardy of life, is inadmissible, especially in a criminal statute. But farther, this jeopardy of life must, by the express terms of the act, be created by the use of dangerous weapons. What is the use of dangerous weapons which can occasion jeopardy of life? Certainly they must be so used, as that life may be destroyed; as if a man strike at another with a sword, or fire or snap a loaded pistol or gun at him within reaching distance; this is clearly a use of the weapon that puts life in jeopardy. But if a man has a sword by his side, or a pistol in his belt, and he stops the mail, and says to the carrier, "You see I am armed; deliver the mail," the carrier might justly be said to deliver the mail in such case for fear of life. But can it be said that in effecting this robbery the carrier's life was put in jeopardy by the use of dangerous weapons? It is impossible that it can.

[Then if there be no ambiguity in the words of the statute,—which it is respectfully believed there is not,—how can any interpretation, especially in such case as this, be admitted different from these words? The use of dangerous weapons to produce fear of life, may be very different from the use of dangerous weapons to put life in jeopardy; but nothing in this act can render a man guilty but such a use of these as puts life in jeopardy. The facts in this case ought, therefore, to warrant the counsel for the United States to ask the court to direct the jury that if they believe the prisoner had dangerous weapons, which he used so as to put the carrier's life in jeopardy, then he is guilty, otherwise the court cannot instruct the jury to find a verdict of guilty on this point.

[General Winder concluded by remarking to the court that this view of the subject appeared to his mind very strong, and he thought could not but have strong weight with every unprejudiced mind; and since upon so hasty a view of the question, such strong motives of doubt, to say the least, had occurred, he trusted the court would, in the forlorn case of the prisoner, being without counsel prepared to assist him, incline to the side of mildness; but at all events, if the learned attorney general should be able to incline the balance against the prisoner, he respectfully submitted, whether the question was not so doubtful as to require the court to put it in a situation to receive the deliberate judgment of the supreme court, before the life of the prisoner should be taken.

[E. L. Finley, Esq.—He contended that congress, in using the words, "jeopardy of life," did not intend that the mere presentation of a pistol or dirk at the mail driver, without wounding him, should be such a "jeopardy of life" as would subject the party to the punishment of death; that the words, "wound the driver, or put his life in jeopardy," were used by them as convertible and synoynmous words; that the words "put his life in jeopardy," were intended as explanatory of the words "wounding the driver," and defining and limiting their extent. Congress (said Mr. Finley) intended that the wounding should be such as would put the life of the driver in jeopardy. They may have supposed that some doubts might arise upon the construction of the words wounding, and as to the nature and extent of the wounding. They, therefore, inserted the words "jeopardy of life," as explanatory, and to show that unless the wounding was of so serious a nature as to jeopardise life, the party should be subject only to imprisonment. The use of the disjunctive particle "or," does not necessarily make them two distinct offences. Mildness and humanity are the distinguishing characteristics of our Crimi-

nal Code. The number of offences to which the punishment of death is annexed is very limited: and it is only where the offence is of a very aggravated and criminal character, that this humane consideration for the lives of the citizens has been departed from. The act of 1810 [2 Stat. 592] was intended as an amelioration of the former post office act. The act of 1794 (section 17) annexed the penalty of death to a simple robbery of the mail, unaccompanied with injury to the driver, or the use of dangerous weapons. This severe punishment was considered as disproportioned to the offence. This act was repealed by that of 1810, which, in the first clause of the 19th section, provides, that for a simple robbery of the mail, the party guilty shall be subject to 10 years' imprisonment. Congress have determined, therefore, in this clause, by the punishment annexed, the degree of enormity they attached to a simple robbery of the mail. As then they did not consider it such an offence as to deserve death, they must be presumed to have intended, that unless the offence was attended with very aggravating circumstances, such as jeopardising the life of the driver by seriously wounding him, the punishment of death should not be superadded. This would be, in my opinion, an humane and reasonable construction of the act of congress. But if your honours should establish the construction contended for by counsel of the United States, viz. that wounding and jeopardising are two distinct offences, this act loses all its character of mildness, and would deserve to be enrolled in the bloody code of Draco. You could not undertake to graduate the degree of wounding. But if in effecting the robbery of the mail, the party should wound the driver slightly or seriously—no matter whether in consequence of such wound his life should be jeopardised or not—it would be perfectly immaterial, and you would be obliged to inflict upon the party robbing the punishment of death. To show, then, the absurdity of this construction, and its incompatibility with the object which congress must have had in view in making this provision of the act of 1810, viz. the amelioration of the act of 1794, punishing simple robbery with death. Suppose that in effecting the robbery of the mail, the robber should make a slight and trifling puncture with his dirk in the flesh of the driver; should scratch the face or cut the skin of the driver, or some other slight wound, which could not, by any possibility of construction or inference, jeopardise his life. Would this be a circumstance of such aggravation, of such enormity, as to entirely change the character or degree of the offence of simple robbery, to enhance its criminality, and to give to it such an increased and outrageous degree of wickedness, as to require the proportionably severe punishment of death? Is it equal in criminality, and does it call for the same degree of punishment? Would this be an amelioration of the act of 1794? Heaven protect us from such an amelioration! But if the construction contended for by the counsel of the United States be correct, the slightest scratch or puncture given to the driver, or the mere presentation of a pistol or dirk, without wounding him, changes the mild character of the law, and subjects the party to death. Where was, then, the necessity of repealing the 17th section of the act of 1794, and substituting the 19th section of 1810? The act of 1794 makes no mention of dangerous weapons; it simply speaks of the robbery of the mail, and whether the robbery was effected by the use of weapons or not, the punishment was death. But is it to be presumed that a highway robbery of the mail would ever be attempted without dangerous weapons, such as pistols and dirks? If the mere presentation, then, of dangerous weapons, without wounding, attaches death to the offence, the first clause of the 19th section of 1810, punishing a simple robbery; would be entirely nugatory and superfluous; as no robbery ever has, or ever would be committed without dangerous weapons. Can we suppose, then, that congress had no object in view in making this provision and drawing a distinction between a simple robbery, and one accompanied with wounding?

[Mr. Finley then observed that he had always understood it to be an established principle, in all our courts of criminal judicature, and one from which courts or juries could not deviate, that the most favourable, the most refined, the most extended construction, should always be given, in "favorem vitæ," to all penal acts. That too much value and consideration were attached to the life of a fellow creature, to permit it to be "jeopardised," or taken away on account of indistinctness or ambiguity in the phraseology of a law. That when the provisions of a law appeared to be unusually harsh and severe, and repugnant to the general character and habits of the people and a construction in "favorem vitæ," could be collected from the probable intention of the legislature that enacted it, that then such intention was to be the rule of construction. That the law of 1810, in the severity of its provisions, as contended for, was an anomaly in our Criminal Code; an isolated bloody statute, assimilating with nothing around it. That the most effectual mode of ascertaining the intention of congress, at the time of passing the law, and truly determining the construction they intended should be given to it, would be by examining the operation of the law, and comparing it with the policy which congress must have had in view in repealing the law of 1794, and substituting that of 1810.

[Mr. Finley then took a view of the laws of England and France on the subject of robberies, of the respective policy of those laws, and their effect upon those two nations.

[In France, said Mr. Finley, a robbery unattended with murder of the person robbed is punished by fine and imprisonment; if accompanied with murder, the punishment is an ignominious and painful death. In England, a simple robbery, whether accompanied by murder or not, is punished with death.

[What has been the effect and operation of these several laws? In France, all temptation to murder the person robbed is taken away; the fear and the interest, if not the humanity, of the robber, are enlisted and appealed to. The law says to him: "If the robbery you commit is unattended by murder, if it is not aggravated by taking away the life of a fellow creature, we will reward you for your forbearance by respecting your own life. But if it is attended with the horrid and unnecessary crime of murder of your victim, the severest punishment which the law can inflict, viz. the deprivation of life, shall be the consequence of your cruelty." In England, no distinction of punishment is made between robbery with and without murder; and the highwayman, who, probably impelled by the severest want, takes from you your purse, without endangering your life or even using any personal violence, and the hackneyed and hardened villain, who, to pamper and gratify his profligate passions, not only robs you of your purse, but deliberately and unnecessarily takes away your life, are alike involved in the same punishment, and punished in the same degree, notwithstanding the great disparity in the two crimes. All inducement to spare the life is therefore taken away for want of this discrimination. The highwayman, in the first instance, knows, that if he spares life, he leaves a witness to proclaim his crime, and to rise up in judgment against him when detected; that the law will not mitigate the severity of its punishment on account of his forbearance; but that if he murders his victim, he saves his own life, by silencing the only witness that could appear against him at a human tribunal. The consequence of this discriminating policy of the French law is that scarcely an instance occurs of the perpetration of a robbery, accompanied with murder; whilst the lamentable result of the mistaken and barbarous policy of the English law is that murder is almost inseparable from, and concomitant with, high robbery; and the criminal annals of England, furnish a bloody calendar from one year to another. May not congress then have had these several results of European policy in view at the time of passing this law? Would they not profit by experience? The object of their legislation was the public good, and the reformation of criminals But it would be charging them with a most culpable disregard of the lives and safety of their fellow citizens to suppose that they would be uninfluenced by the consideration of those several results. A reference, however, to the actual operation of the act of 1794, furnishes an additional and conclusive corroboration of the construction I contend for, and of the intention of congress to ameliorate the act of 1794 by that of 1810; for during the existence of the first act, several attempts at a robbery of the mail were made, and in almost every instance it was attended either with the murder of the driver, or the dangerously wounding of him.

[In the instance of the robbery of the Richmond mail, the driver was murdered.

[Mr. Finley then observed that the construction he had contended for, he conscientiously believed to be the true and correct one; but that, as he might be unsuccessful in his attempt to transfer this conviction from his own mind to the minds of the court, and as the counsel for the United States had contended for a different construction, he would make a brief reply to one of the arguments of the counsel, and then relieve the attention of the court. The counsel for the United States, said Mr. Finley, have contended, that the mere apprehension or opinion of the party that his life was in danger was to be the criterion by which the jury was to determine whether his life was put in jeopardy, within the meaning of the act of congress. This, I conceive, to be a most absurd and fallacious criterion. It would require a scale in every instance by which to graduate the fears of the party robbed. Some persons are operated upon by fear more easily than others. Such is the constitutional timidity of some persons, as to magnify mole hills into mountains, and to people every bush with midnight assassins and robbers. Should the driver be of this description, his life would be in continual jeopardy, according to this construction, while travelling on his route. The counsel have not properly discriminated between the mere fear or apprehension of danger, and the actual existence of danger. A man may anticipate danger, when no danger exists. I will give but one example in illustration of this distinction. Suppose a man presents a pistol, which is not loaded, at the breast of another (who is ignorant of its not being loaded), and in a threatening manner says that he will blow his brains out. In this case, the party to whose breast the pistol is presented would most assuredly apprehend that his life was in great jeopardy, though the jeopardy would exist only in imagination.

[Mr. Finley, then laid down a distinction between the jeopardy of the driver's life and the life of Mr. Ludlow. He contended that under this act it was perfectly immaterial whether Mr. Ludlow's life was jeopardised or not. That the act only extended to the driver's life, and expressly confined and annexed the punishment of death to cases of robbery, when the driver was wounded, or his life put in jeopardy. That

this was an important distinction to be kept in view by the jury, in the examination of and decision upon the testimony in this case. That there was a manifest difference in the testimony of Mr. Ludlow, and of the driver. That, although Mr. Ludlow swore that he considered his life in great danger, yet the driver swore that he felt no apprehension of danger to his life, until after the robbery was effected, and that this apprehension arose from an observation by one of the robbers, "What shall we do with these men?" and the reply, "I have a way to fix them;" but that his fears were removed, when he found, that "the way to fix them" was by tying them to the tail of the mail wagon. That he did not intend, by adverting to this difference in their testimony, to impeach the credit either of Mr. Ludlow or the driver; but to show that whatever may have been the apprehensions of Mr. Ludlow, or however his life may have been jeopardised, yet, that the driver's life was not jeopardised; neither did he feel any apprehensions of it.

[William Wirt, Esq.—He hoped the opposite counsel would both excuse him for observing that they did not appear to him to have found the key which unlocked the construction of this law in a manner the most simple and natural. They seemed to have taken it for granted that congress intended to describe, by this section, a new kind of robbery, unknown to the common law, and which called for a different kind of proof. From this opinion he begged leave to dissent. He contended that congress had not intended to create a new offence, unknown to the common law, so far as the circumstances attending the act and the degree of proof were concerned. That although the mail was a species of property unknown to the common law, and congress, in making the mail a subject of robbery, had extended the offence to a new subject; yet that the character of the offence, the robbery, was the same, both at common law and under this statute; that the only effect of the act was to extend the offence to a new subject, leaving the character of the offence, and the degree of proof, exactly where the common law had left them, in regard to other subjects. To make this clear, he begged the court to recollect that wherever the constitution or laws of the United States used a common law phrase, without any definition of that phrase, it was the uniform course to resort to the common law for its explanation. It was unnecessary to cite to this court, to whom they were familiar, the decisions which illustrated and proved this course; it was, indeed, impossible to conceive that any other could be adopted. But the court would observe that this principle was essential to the construction of this law, and that it demonstrated the truth that a new kind of robbery was not intended to be created. For in the first part of this section the term "robbery" is used without any definition. The words are (Act April 30, 1810, § 19): "That if any person shall rob any carrier of the mail of the United States, or other person entrusted therewith, of such mail, or of part thereof, such offender or offenders shall, on conviction, be imprisoned not exceeding ten years; and if convicted a second time of a like offence, he or they shall suffer death; or if in effecting such robbery of the mail the first time, the offender shall wound the person having custody thereof, or put his life in jeopardy by the use of dangerous weapons, such offender or offenders shall suffer death." Thus far the provision is general, by the use of the term "robbery," which is left unexplained. A resort must, therefore, be had to the common law, from which it is borrowed to explain it; and every species of robbery known to the common law is clearly embraced by the clause just quoted. If the court will attend to the structure of the sentences which follow this first sentence, and which are supposed to create a new offence, they are merely exceptions from the first sentence, and were consequently included in it, until so excepted. If the first sentence therefore covers, and merely covers, the common law offence of robbery, and the latter are only exceptions from it, these exceptions are merely parts of the common law offence of robbery, and consequently no new offence, and calling for no new and more aggravated degree of proof. Again, if you recall the different species of robbery as they have been decided to exist at the common law, you will perceive that the sentence on which the two first counts of the indictment are founded describes a kind of robbery perfectly familiar to the common law. At the common law, robbery might be committed: (1) By violence, without putting life in danger, and without previous fear. The lady whose ring was snatched from her in some place of public amusement, and dropped among the curls of her hair, was decided to have been robbed, although there was no danger of life, and no previous fear operating on her will to cause a surrender of the property. (2) By fear for reputation; as by a threat to charge the party with an infamous crime unless he should surrender his purse. In this case, there is no violence offered to the person and no danger to the life, yet the robbery is complete; it is the lawless constraint acting on his will, from regard to his character, which induces the surrender of his property, and which constitutes the offence. (3) By fear of personal violence; but this must not be the groundless fear of cowardice. The law requires that the danger should be apparent, and hence circumstances are always required to show that the fear was well founded. This was the kind of robbery in the contemplation of congress in the sentence under consideration. They have stated the evidence which shall show that the danger was real, the fear well grounded;

wounding the driver, or (without wounding him) putting his life in jeopardy, by the use of dangerous weapons. The robber, who, with a pistol, stops a traveller on the highway, and demands his purse (a case familiar to the common law courts of criminal jurisdiction in England,) presents the very case put by the act of congress. The weapon used is a pistol; a weapon fabricated for the very purpose of danger to life. It is used because it is dangerous; and the use produces the effect intended, by acting on the fears of the traveller, and inducing him to surrender his purse, by reason of the jeopardy to his life. There is nothing in the descriptive circumstances of the offence under the act of congress to distinguish that offence from the highway robberies once so common on Hounslow Heath and Bagshot in England.

[But it is insisted on the other side, said Mr. Wirt, that something more is meant by the expression "putting the life of the driver in jeopardy by the use of dangerous weapons." It is not enough that the robber be in possession of the dangerous weapons; it is not enough that he carry them to the ground; it is not enough that he perpetrates the robbery by the terror which they inspire; but they must be used in such a way as to produce jeopardy. For example, if the weapon be a dirk, a stroke must be made with it; if it be a pistol, it must at least be snapped. Let us examine some of the consequences of this construction. If a stroke be made with a dirk at right angles from the driver, it is not easy to conceive that greater jeopardy is produced thereby than by the mere possession and display of the weapon in the robber's hand. Such a stroke would be nothing more than a flourish, in terrorem. If the stroke be at an angle of forty-five or twenty-two and a half degrees, the same answer might be given to it; and so through all the gradations of angular distance. If the stroke miss the object, and be not repeated, the jeopardy is over, a miss, we are told, being as good as a mile. Or of gentlemen think this answer too light, is it not obvious that by insisting that the stroke shall, at all events, be made, in order to constitute jeopardy, they force the court and jury upon a mathematical disquisition as to the distance and the direction of the stroke, in order to jeopard the life? points extremely difficult of ascertainment, considering that their attempts are generally, if not always, made in the night time, when the distance and the direction, and even the fact of a stroke being made at all, can rarely be discerned. As to the snapping of the pistol, all the remarks made upon the direction of a stroke with a dirk apply; and indeed it is not very easy to discern, even if the pistol be levelled at the driver's head, how its having been snapped increased his jeopardy after the snap is over. Besides, the chances are sadly against the calculation that a pistol prepared for a robbery will snap; the probability is that it will go off; and then there is no jeopardy, for jeopardy implies uncertain danger, whereas, on this supposition, the hazard is reduced to a doleful certainty; the driver is killed. Can it be believed that this was the intention of congress? Can it be believed that anything more was meant than that the robbery should be effected by the use of dangerous weapons, of weapons calculated to take life?

[But still bolder ground is assumed on the other side. It is contended that in this case there was no jeopardy to life, because the robbers gave the assurance that if the driver and passenger would not resist they should not be hurt. It may be very true, gentlemen say, that if they had resisted they would have been killed; but they had only to give up the mail without resistance, and there was no jeopardy at all; and hence the case is not within the act of congress. This is the construction given to an act of congress intended to prevent robberies. Sir, it must be very clear that the jeopardy within the contemplation of congress was that kind of jeopardy which was in no other way to be avoided than by yielding to the lawless purposes of the robber; a jeopardy of life so imminent that the driver could not elude it, except by surrendering that which the robber had no right to demand. This ground so intrepidly taken in the construction of our statute would be just as tenable under the English common law. For example, by that law it is required that the party shall be put in fear; but the courts there require that this fear shall have a reasonable foundation. The robber there might say, "It is true, I was armed; it is true the traveller was put in fear; but the case is not within the law, because his fear had not a reasonable foundation, for he admits I told him I would not hurt him if he would surrender his purse." Such an argument, I must be permitted to say, would make but a sorry figure in Westminster Hall, or even at Old Bailey; for it goes to patronize and protect, not to prevent or punish, robberies; it founds the robber's exemption from punishment on the very circumstance which constitutes his guilt—the success of the robbery.

[The gentleman who urged his argument attempted to support it by a case from the law touching assaults and batteries, which he seemed to think analogous. That case is this: "If a man were to lay his hand upon his sword, and say if it were not assize time he would not take such language; this the gentleman says, and says truly, would not be an assault. But why? For a reason which destroys the analogy, because the words show an absolute purpose to do him no mischief at that time. The forbearance is not put on the condition of any act to be done by the party menaced. But suppose the assailant had drawn his sword, and required the other to fall upon his knees instantaneously and beg his pardon, or he would run him through the body, when the gentleman shall show

by authority that this would not be an assault, he will have furnished a case which does not present something like the appearance of analogy."

[The respectable young gentleman (Mr. Finley) who last addressed the court has insisted that the words "wounding the driver" or "putting his life in jeopardy by the use of dangerous weapons" mean the same thing; that the driver is, at all events to be wounded, and so wounded as to put his life in jeopardy. To this I think it sufficient to answer that the conjunction used is the disjunctive "or," and that according to all the rules of fair construction there were two cases in the contemplation of congress,—the one wounding the driver, the other putting his life in jeopardy by the use of dangerous weapons without wounding him. The aid which the gentleman attempts to derive to this construction from the act of 1799 is not, in my opinion, fairly furnished. The expression in that law is, "shall much wound the person having custody thereof, or put his life in jeopardy by the use of dangerous weapons." These were clearly distinct offences. In the present law, the word "much" is dropped, obviously because it was indefinite, and might lead to difficulties in the decision of cases arising under it, and because any wounding of the driver would be sufficient to show the wicked and determined purpose of the robber; but that purpose would be shown with equal clearness without wounding the driver, in effecting the robbery by the use of dangerous weapons calculated to take the driver's life.

[If any doubt could remain on this subject, it would be removed by pursuing this section of the law a little farther. It appears that robbing the mail, generally, is punished by the first clause of the section only with imprisonment for the first offence. Yet there were some modes of perpetrating such robbery so peculiarly obnoxious that congress had singled them out by express exception, and punished the first offence committed in either of these modes with death. Congress have gone still farther, and punished even the unsuccessful attempt to commit the robbery in either of these modes with imprisonment for three years; and the words in the section, in which the attempt is described, are intended to represent the same mode in which the act is described. So far as we have yet gone, the purpose is to punish the offence, if effected. Congress next take up the attempt to commit the offence where it fails. In defining the different modes of such attempts, they have kept up the analogy between the successful and unsuccessful attempts, and by a slight variation of language have thrown new light on the clause we are considering. The language of the law, where the offence is complete, is as follows: "If any person shall rob any carrier of the mail of the United States, or other person entrusted therewith, of such mail, or of part thereof, such offender or offenders shall, on conviction, be imprisoned not exceeding ten years; and if convicted a second time of a like offence, he or they shall suffer death; or if in effecting such robbery of the mail, the first time, the offender shall wound the person having custody thereof, or put his life in jeopardy by the use of dangerous weapons, such offender or offenders shall suffer death." I beg the court now to mark the correspondent description of the attempts. The words are these, "And if any person shall attempt to rob the mail of the United States by assaulting the person having custody thereof, shooting at him, or his horse or mule, or threatening him with dangerous weapons, and the robbery is not effected," &c. Here it is clearly observable that the assault, generally, meets the general description of the robbery, in the first sentence; secondly, that the shooting, in the attempt, corresponds with the wounding in the robbery; and thirdly, that the threatening the driver with dangerous weapons, in the unsuccessful attempt, corresponds with the putting his life in jeopardy by the use of dangerous weapons. Thus the description of the attempt reflects light on the description of the act, and demonstrates that congress, by using the terms "putting his life in jeopardy by use of dangerous weapons," meant nothing more than "threatening him with dangerous weapons," without having in view any other use of the weapons, or any further degree of jeopardy. According to the opposite construction, it would appear that congress had been solicitous to punish this peculiar mode of attempting the robbery with a peculiar punishment, distinguishing this kind of attempt from any other attempt; while the actual perpetrating the robbery by the use of dangerous weapons was left unpunished by any peculiar degree of rigor; thus convicting congress of an absurd solicitude about the attempt, without any correspondent solicitude in relation to the act; and to produce this absurd consequence, you are required to adopt principles of construction so subtile and metaphysical, as to what will not constitute jeopardy, that there are perhaps no twelve men in the community who will agree in their application to the same case. If you take the plain case which it seems to me was clearly before congress, that of robbing the mail upon the highway by the use of weapons dangerous to life, every case which can arise is carved, and the act is in perfect harmony with itself. By any other construction, the act is rendered imperfect, unjust, and absurd.] [5]

THE COURT charged the jury upon the laws as follows: "Robbing the carrier of the mail of the United States, or other person intrusted therewith, of such mail, by stopping him on the highway, demanding the surrender of the mail, and at the same time show-

[5] [From 2 Wheeler, Cr. Cas. 283.]

ing weapons calculated to take life, such as pistols or dirks, putting him in fear of his life, and obtaining possession of the mail by the means aforesaid, against the will of the carrier, is such a robbing of the mail, and such a putting the life of the carrier or person intrusted therewith in jeopardy by the use of dangerous weapons, as will bring the offense within the following terms of the nineteenth section of the act of congress of the 30th of April, 1810, entitled 'An act regulating the postoffice establishment,' to wit: 'Or if in effecting such robbery of the mail the first time the offender shall wound the person having the custody thereof, or put his life in jeopardy by the use of dangerous weapons, such offender or offenders shall suffer death.' "

The defendants were convicted and executed.

Standing mute is equivalent to a plea of not guilty. See U. S. v. Borger, 7 Fed. 195, affirming above case on this point.

[NOTE. On the trial of John Alexander and Lewis Hare, the two other mail robbers, who were charged with robbing the mail in company with John Thompson Hare, and were immediately tried and convicted on all the counts of a similar indictment, the same defence was made, and the court laid down the law as in the preceding case.] [6]

Case No. 15,305.

UNITED STATES v. HARE.

[See Case No. 15,304.]

Case No. 15,306.

UNITED STATES v. HARGRAVE.

[17 Int. Rev. Rec. 39; 5 Chi. Leg. News, 208.]

District Court, N. D. Ohio. Dec. Term, 1872.

COUNTERFEITING — DEGREE OF LIKENESS NECESSARY.

[In determining whether defendant is guilty of passing counterfeit coin, the question is, not whether the coin was such as would deceive a person of ordinary skill and caution, but whether it was capable of, and designed to be used for, deceiving the incautious and unskillful.]

The coin passed by the defendant [William S. Hargrave] was similar to the genuine coin of the United States in size, color, milling, and the devices on reverse and obverse sides, but differed in weight and in the inscriptions on either side. The indictment contained seven counts, four of which were framed under the act of March 3, 1825 (4 Stat. 121), and three under the act of June 8, 1864 (13 Stat. 120). The main question was whether the spurious coin in question came under either act.

It was claimed by the prosecution that it came under both,—that is: First, that it was in the similitude of the genuine coin; second, that if considered of "original design," it was within the later act above cited; and, third, that the question was, not whether it would deceive a person of ordinary skill and caution, but whether it was capable of, and designed to be used for deceiving the incautious and unskilful,—citing, particularly to this point, U. S. v. Burns [Case No. 14,691]. These points were much contested.

Geo. Willey, U. S. Atty., and H. S. Sherman, Asst. U. S. Atty.

Lockwood & Everett, for defendant.

THE COURT (SHERMAN, District Judge) in its charge to the jury, maintained the propositions of the prosecution, and the defendant was found guilty on all the counts of the indictment, and afterwards sentenced to imprisonment for five years in the Ohio penitentiary.

Case No. 15,307.

UNITED STATES v. HARKER.

[3 Sawy. 237.] [1]

District Court, D. Oregon. Dec. 16, 1874.

UNITED STATES MARSHALS — FEES IN CRIMINAL CASES.

By paragraph 18 of section 829 of the Revised Statutes, the marshal is entitled to charge as part of the expense of serving a writ in a criminal case, a per diem paid his deputy, not to exceed two dollars per day.

Appeal from the taxation of costs by the clerk. [This was an indictment against J. B. Harker.]

Rufus Mallory, U. S. Atty.

Addison C. Gibbs, for defendant.

DEADY, District Judge. On November 25, 1874, the defendant was convicted by the judgment of this court, upon the plea of guilty, of being engaged in the business of a dealer of manufactured tobacco, without having paid the special tax therefor, as required by law, and sentenced to pay a fine, and the costs of the action to be taxed.

The clerk taxed the costs of the United States at $55.70, from which taxation the defendant appeals to the court, and asks that the item of eight dollars allowed the marshal for per diem paid deputy W. F. Williams, for two days employed in arresting the defendant, in addition to his actual expenses for travel and fee for service of the warrant, be disallowed.

Paragraph 18 of section 829 of the Revised Statutes provides that the marshal shall be entitled, "for expense while employed in endeavoring to arrest, under process, any person charged with or convicted

[6] [From 2 Wheeler, Cr. Cas. 283.]

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

of a crime, the sum actually expended, not to exceed two dollars per day, in addition to his compensation for service and travel."

The compensation for serving the process or warrant in this case—that is, taking the defendant into custody upon it after he was found or reached, is fixed by the first paragraph of this section at two dollars. The expenses incurred in traveling from the place where the writ issues to the place where the defendant is arrested, is provided for in the last paragraph of this section; which directs that the marshal may, at his election, receive mileage for such travel or his "actual traveling expenses."

But compensation for the time employed in traveling to make an arrest, is a different matter and a very important one to the marshal. It may take a week's travel to make an arrest in this district. No person can be found to undergo this labor and loss of time, to make an arrest, for his mere actual traveling expenses and the fee for serving the writ in case an arrest is made. The time employed in making an arrest is also to be paid for at not exceeding two dollars per day, taking into consideration the value and responsibility of the duty to be performed. This expense is specially provided for in paragraph 18, supra, which enacts that the marshal shall receive on that account a sum not exceeding two dollars per day. The traveling expenses and the fee for making the service are prescribed in the last paragraph of the section; and it is stated in paragraph 18 that the expense therein provided for is "in addition" to these. The only or most manifest expense to which this paragraph can refer, is the expense incurred in employing a deputy at a reasonable per diem, in addition to his traveling expenses and fee for service, to make the arrest.

The marshal cannot make all or but few arrests in person, and therefore must employ a deputy to perform the service. This he cannot be expected to do unless he pays the deputy for the time actually employed. This per diem or compensation of the deputy is a necessary expense of serving the warrant. It is therefore incurred by the marshal in making or endeavoring to make an arrest, and is provided for in paragraph 18, supra.

Section 837, Rev. St., having provided that the marshal of this district shall receive double fees, the maximum sum allowed for this expense in this district is four dollars per day. I do not think, as a rule, that this is an unreasonable allowance per day for the services of a proper person while employed in traveling over the country by any and all modes and in all seasons, upon the responsible and, sometimes, hazardous duty of making arrests in criminal cases. The motion is denied, and the taxation of the clerk affirmed.

Case No. 15,308.

UNITED STATES v. HARMISON.

[3 Sawy. 556.] [1]

District Court, D. Oregon. Jan. 3, 1876.

AUTREFOIS CONVICT—JUDGMENT.

1. A plea of autrefois convict to an indictment charging the defendant with knowingly receiving gold dust stolen from the mails is sustained by evidence of a previous conviction of the crime of stealing the same dust from the mails upon the ground that the thief could not receive stolen goods from himself, and that his receipt and possession of the property, as such, was an integral part of the crime of larceny, of which he was already convicted.

2. A court has power to set aside or modify its judgments, in both civil and criminal cases, during the term at which they were given.

[Cited in Harris v. State, 24 Neb. 807, 40 N. W. 319; State v. Daugherty, 70 Iowa, 446, 30 N. W. 685.]

3. The legislature may carve out of a single transaction several crimes, but where a party is convicted of two crimes carved out of substantially one transaction, that fact ought to be considered in fixing the measure of his punishment.

[Cited in U. S v. Byrne, 44 Fed. 189.]

[This was an indictment against Andrew J. Harmison, upon the charge of knowingly receiving gold dust stolen from the mails.] Motion to have the defendant's sentence reconsidered, and the measure of punishment readjusted.

William H. Effinger and James D. Fay, for the motion.

Rufus Mallory, contra.

DEADY, District Judge. Late in the evening of Tuesday, December 21, the defendant was found guilty of embezzling a mail pouch from the United States mail on the stage between Roseburg and Levins' station, in Southern Oregon, and stealing three cans of gold dust therefrom. On the next morning the case of the United States against this defendant and Sarah J. Montgomery, for receiving the same dust, knowing it to have been so stolen, was called for trial. [Case No. 15,800.] The defendant then asked leave to withdraw his plea of not guilty to the second indictment and plead autrefois convict thereto. Leave was granted, and after argument the plea was held good, upon the ground that the thief could not receive stolen goods from himself, and that his receipt and possession of the property as such, was an integral part of the crime of larceny, of which he had been already convicted. But to enable the defendant to maintain this plea of autrefois convict, and thereby avoid a second trial for a part of the same offense, he was first compelled to ask the court to pass sentence and give judgment of conviction in his case without further inquiry into the circumstances of it. Accordingly the court sentenced him to eight years' imprisonment

[1] [Reported by L. S B. Sawyer, Esq., and here reprinted by permission.]

in the penitentiary, and ordered the execution of the sentence to be stayed until the further order of the court.

It is the settled practice of this court where a discretion is given it, as to the extent of the punishment to be imposed upon a party, to hear evidence of any circumstances which may properly be taken into view, either in mitigation or aggravation of such punishment. A similar mode of proceeding is prescribed for the state courts in like cases in sections 204–207 of the Oregon Criminal Code. The term at which this judgment was given, not having yet passed, the power of the court to set it aside or modify it, is undoubted. The supreme court in Ex parte Lange, 18 Wall. [85 U. S.] 167, announce the general rule upon the subject in these words: "The general power of the court over its own judgments, orders and decrees, in both civil and criminal cases, during the existence of the term at which they were first made, is undeniable."

On Thursday, and immediately after the trial of the indictment against Sarah J. Montgomery had resulted in a verdict of "Not guilty," the defendant made this application, and it appearing from the facts in the case that the defendant, by no fault of his own, had been deprived of the opportunity to offer evidence of circumstances in mitigation of his punishment, it was granted. On the reconsideration of the motion to fix the punishment, the defendant was examined as a witness on his own behalf, and cross-examined by counsel for the United States. (Here the court stated the testimony of the defendant, and considered its probability.)

On the whole, and for the purposes of the question before the court, I am constrained to regard the defendant, however guilty, as neither the sole nor principal party in the transaction. Still, upon his own admission and in contemplation of law, he is guilty of embezzling the pouch and stealing the dust therefrom. What he assisted another to do, he is technically guilty of doing himself.

When sentence was pronounced upon the defendant for four years' imprisonment for each offense, the court had no time or opportunity to examine into the matter, and supposing he would not be called for sentence until after the trial of the indictment for receiving the dust, and probably not until after the disposition of a motion for a new trial, I had not given the matter any particular consideration.

Section 5467 of the Revised Statutes, upon which this indictment is found, is far from being as clear and distinct as it should be. But I think it probable, and so charged the jury, that the legislature intended to make the act of taking a sack from the mail and abstracting its contents, two separate and distinct offenses, although, as in this case, done by the same person and at the same time. There is no doubt but that the legislature may carve out of a single transaction several crimes, and this seems to be the effect of the statute in this case. Yet, it is certain, that morally speaking, there was but one crime committed—one criminal transaction—in taking this pouch and appropriating its contents, and as the law has carved two offenses out of it, for both of which the defendant has been found guilty, the court, in fixing the measure of his punishment, ought to take that fact into consideration. Therefore, in consideration of the premises, the defendant is sentenced for the crime of embezzling the mail sack intrusted to his care, to five years' imprisonment at hard labor, this being the maximum punishment provided for the offense; and for the crime of taking the gold dust from the sack already so embezzled he is sentenced to one year's imprisonment at hard labor, that being the minimum punishment provided for the offense, and it is also ordered that this judgment be executed in the penitentiary of this state.

Case No. 15,309.

UNITED STATES v. HARRIES et al.

[2 Bond, 311.] [1]

Circuit Court, S. D. Ohio. Oct. Term, 1869.

INDICTMENT FOR VIOLATIONS OF INTERNAL REVENUE LAWS—FRAUDULENT REMOVAL OF SPIRITS—PRESUMPTIONS—ACCOMPLICES—WITNESSES.

1. In the trial of an indictment for the fraudulent removal of distilled spirits from the distillers' bonded warehouse, under section 45 of the internal revenue act of July 13, 1866 [14 Stat. 163], it is not necessary for the United States to prove that the warehouse, from which is is averred the spirits were removed, had been designated, or authorized as such, by an officer of the revenue department.

2. The court will take notice, judicially, that the statute requires every distiller to provide such a warehouse: and a jury may legally act on the presumption that the distiller had complied with the law, and has a warehouse as required by the statute.

3. In the case of a joint indictment against two or more for a statutory misdemeanor, those charged with the offense, though not personally present at the commission of the unlawful act specifically alleged, may be found guilty as principals in the second degree, if the evidence satisfies the jury they were cognizant of, and participants in, the fraud. In such a case, the law regards them as constructively present at the commission of the unlawful act.

4. The evidence proving the guilty complicity of the defendants, must relate to facts occurring before the commission of the criminal act; and, in the absence of such testimony, there can not be a verdict of guilty solely on proof of occurrences subsequent to the commission of the offense; but such evidence may be taken into consideration by the jury as explanatory of, or throwing light upon, the prior evidence.

5. An accomplice in a crime is not disqualified from being a witness; but his evidence is to be received with great caution; and, as a general rule, especially in crimes involving great moral turpitude, is to be wholly disregarded as

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

unworthy of credit, unless corroborated by credible testimony.

6. The willful false statement of a witness as to a fact material in the case, may be a ground for the rejection of his entire evidence, except such as is corroborated by credible evidence.

Warner M. Bateman, U. S. Dist. Atty.

H. L. Burnett and Robert Christy, for defendants.

LEAVITT, District Judge (charging jury). This case is an indictment against William Harries, J. R. Huston, H. P. Lane, J. R. Miner, and John Gallagher. Harries, Huston, and Lane are the only defendants now on trial, and your verdict will, therefore, decide the guilt or innocence of these three defendants. They are charged in three counts with a criminal violation of different provisions of the internal revenue laws. The first count charges the removal of ninety-four barrels of distilled spirits from the distillery of A. C. Campbell, and the rectifying distillery of H. P. Lane, with intent to defraud the United States, by evading the payment of the duty or tax imposed by law. The second count is substantially like the first, except that it alleges the fraudulent removal of the spirits to have been from the bonded warehouse of A. C. Campbell, instead of the distillery. The third count charges the unlawful removal of the spirits after sunset, and before sunrise, in violation of law. The first and second counts are based on section 45 of the act of July 13, 1866. Without detaining you to recite the entire section, which has been so often read in your hearing, it will be sufficient to call your attention to one clause, which is in these words: "And any person who shall remove, or who shall aid or abet in the removal of any distilled spirits from any warehouse, otherwise than is allowed by law, shall be liable to a fine of not more than $1,000, or to imprisonment for not less than three, or more than twelve months."

As to the first count, it is conceded by the district attorney that there is no evidence tending to show there was any removal of spirits from the distillery of Campbell. And, as to that count, it is not to be taken into consideration by the jury. Their inquiry, therefore, as to the removal of spirits, will be limited to the second count, charging the unlawful removal to have been from the bonded warehouse of Campbell. And the points of inquiry for the jury on this count will be: First. Is the proof satisfactory to establish the fact of a removal? Second. Were the defendants now on trial connected with the unlawful removal charged? Third. Was the removal with intent to defraud the United States of the legal duty or tax imposed? To justify a verdict of guilty on the second count, the jury must find these inquiries in the affirmative. And, as to the first, the fact of removal from the bonded warehouse, I understand, is not controverted; nor is it denied that the duty or tax on the spirits was not paid. And, just here, I may notice a proposition urged by the counsel for defendants, and on which the court is requested to instruct the jury, namely, that there can not be a verdict of guilty in this case without proof by the United States that the bonded warehouse named in the indictment, and from which it is alleged the spirits were unlawfully removed, was a bonded warehouse, sanctioned or authorized expressly by the proper officer of the government. But while it is undoubtedly necessary to a verdict of guilty that the allegation respecting the bonded warehouse should be proved, it is not necessary for the government to prove that it was selected or authorized as such by any direct official act. It appears clearly that the bonded warehouse of A. C. Campbell was known and recognized as such by these defendants. And the court and jury will take notice that the law in force at the time of this transaction, required every distiller of spirits to provide such a warehouse in connection with his distillery. And the jury may legally presume that Campbell had provided a warehouse, as he was required by law to do. I am not prepared, therefore, to withdraw this case from the consideration of the jury on the mere technical point made by counsel.

As indicated in the outset, it is not the purpose of the court to detain the jury by a recital of, or a reference to, the mass of testimony which has been introduced. It would be wearisome and unprofitable. It seems to be conceded by counsel, that the spirits in question were removed from the warehouse connected with Campbell's distillery, and were put on board a canal-boat; that it was taken down the canal from the distillery, through Dayton to Hamilton; that it was transferred to another canal-boat and brought back to Dayton, where it was unloaded and deposited at the rectifying establishment of the defendant Lane. The sole issue in the case is, therefore, whether there was fraud in the removal of the spirits in which these defendants participated; whether, in other words, there was an intent, of which they were apprised, by this management, to evade the payment of the duty. That the spirits found their way into the market, and were sold without the payment of any tax, is not disputed.

It is an important inquiry for the jury, whether, on the supposition, the fraud charged was perpetrated, these defendants, by the evidence, are so far connected with, and implicated in, the fraud as to require a verdict of guilty as against them. It is not proved or claimed that any of the defendants were personally present at the removal of the spirits from Campbell's warehouse. The jury will doubtless remember the circumstances connected with this removal, and the persons present and aiding in it. As I have remarked, there is no proof that the defendants, or any of them, were of the num-

ber. It is, however, urged most earnestly, by the counsel for the United States, that the defendants were cognizant of the fraud, and so connected with it, that they are legally guilty of the offense charged in the indictment, under section 45 of the statute to which I have before referred.

These defendants are jointly indicted. All or any one of them, if legally implicated in the fraud charged, may be found guilty. And if the jury find from the evidence that, although they were not personally present at the unlawful removal of the spirits, they were aware of the removal, and in any way aided or abetted such removal by any concert or arrangement for that purpose, with the intent to evade the tax, they may be held legally guilty as charged in this indictment. The main facts urged by counsel as justifying the conclusion that they are legally implicated in the fraud, are that they, or some of them, were the owners of, or interested in, the spirits in question, and had a direct interest in evading the payment of the tax; and that they, or some of them, had an agency in, or took part in, the means by which the spirits were to be fraudulently removed, as by hiring the canal-boat for the purpose, giving orders or directions as to the removal, and other acts, to which I will not specially advert. It will be for the jury to decide whether, from the evidence, the defendants, or any of them, are fairly chargeable with complicity in the alleged fraud.

The offense charged in this indictment is not in law a felony, but a misdemeanor. And it is well settled, as a legal principle, that in misdemeanors, all are principals in the first or second degree. Those guilty in the first degree are those personally present at the commission of the offense. Those guilty as principals in the second degree are such as are not personally present, but who are so connected with the offense charged, that, in the eye of the law, they are constructively present, and therefore legally guilty of the act. In this view of the law, it will be competent for the jury, if the proof warrants the conclusion of guilt, to find a verdict against these defendants, as principals in the second degree. But the court charge that the evidence of the guilty complicity of these defendants must be based on the facts proved, as occurring prior to the commission of the offense charged. In other words, unless there is some evidence proving the connection of the defendants with the criminal acts charged before the commission of the offense, there can not be a verdict of guilty upon proof of subsequent acts. If the evidence in this case was solely of facts occurring after the removal of the spirits, though it might establish the fact of prior knowledge that the removal was to be accomplished, or their approval of the removal when effected, the defendants could not be found guilty under this indictment. But in connection with proofs of the complicity of the defendants in the fraud, prior to its actual commission, the jury may properly consider subsequent facts in evidence, giving character to, or explanatory of, the prior facts proved.

And here it becomes my duty to state to the jury my views as to the weight and effect to be given to the testimony of Huffman, a witness introduced by the United States against these defendants. The jury will probably, have no hesitancy in concluding that the charge of fraud as against some, if not all of these defendants, is clearly made out, if they credit the testimony of Huffman. It is strenuously insisted, however, by the district attorney, that independent of the evidence of Huffman, there is sufficient to warrant a verdict of guilty against these defendants. It is claimed, also, by the government, if the jury should have doubts as to the sufficiency of the proof, excluding his testimony, they will be warranted in giving it credit, and can not do otherwise than find a verdict of guilty. In this aspect of the case, it may, therefore, be important to call the attention of the jury to the law bearing on the question of the credibility of Huffman's evidence. He is, by his own admission, a participant in the fraud for which these defendants are indicted. He was interested in the distilled spirits, and had knowledge of the fraud by which they were to be sold without payment of the legal tax. And he proves conclusively that Harries and Huston and Lane were apprised of, and aided in, the illicit removal of the spirits for a fraudulent purpose. But the counsel for the defendants urge that the jury must wholly ignore Huffman's testimony, for the reason that he was an accomplice in the crime charged, and, by law, is not entitled to credit as a witness.

I shall very briefly state my views of the law on this point. There can be no question, that Huffman, as a witness in this case, is before the court and jury under circumstances, which, in the estimation of the law, are suited to impair his credit. He is in the position of an accomplice, that is, one guilty of the crime charged, and his guilt is established by his own admission. It appears he had been indicted for his participation in frauds on the revenue. And while the indictment was pending, by direction of the commissioner of internal revenue, upon his making a full disclosure of his knowledge of frauds on the government in the vicinity of his residence, he was assured he would be protected from punishment for his part in those frauds. In felonies—crimes involving the deepest hue of depravity and moral turpitude—the testimony of an accomplice is more open to impeachment than in mere misdemeanors, or offenses of a less revolting character. In the former class of crimes, a jury ought, in no case, to convict on the uncorroborated evidence of an accomplice. There may be some rare exceptions to this rule, but as a general proposition it is well founded. The case before the jury, as already remarked, is an in-

dictment for a misdemeanor, to which the rule referred to, does not apply with the same force. In the case of a felony or a misdemeanor, before conviction, an accomplice is not disqualified from being a witness, but in either case, indeed in all cases, his testimony is to be received with great caution. And unless corroborated, or there are such circumstances in the case, as to relieve the witness from suspicion, and induce a jury to give him credit, it is the safer course to reject his testimony. The law is jealous of its own purity, and will not lend its sanction or countenance to anything implying moral turpitude. It will not be blind to the taint of crime in a witness, who is himself guilty, and who seeks by his testimony to implicate others in his admitted guilt.

But if an accomplice is used as a witness, and his testimony in its material parts is corroborated by other credible witnesses, there is, of course, no reason why it should not be received as truthful. And as applicable to the testimony of Huffman, if the jury believe he is supported in his statements by other witnesses, the jury will give them full credit. The credit of this witness is also impeached by the counsel for the defendants, on the ground that his evidence given before you is contradictory, and that the evidence of other witnesses directly impugns and falsifies his testimony. It will be for the jury to say whether these objections to Huffman's evidence have any just foundation. If a witness in testifying contradicts himself in any material statement, it will impair his credit with a jury. Or, if a witness as to a material fact is proved to have uttered a deliberate falsehood, it may justify a jury in rejecting all his testimony as false. The rule of law is, that a witness who willfully falsifies as to one fact stated by him, may have been false in every other statement. But I have detained the jury too long in the consideration of the question of credibility. It is a question, of which the jury are the sole judges, and to them it is referred. I have set forth merely some general principles of law for their guidance, in the exercise of their judgment on the question.

I have only now to remind the jury that the case submitted to them is one of great interest, both to the government and to the defendants. If they are guilty of the offense charged, it is important that the law should be enforced, and the rights of the public protected. If they are not guilty, they have a right to a verdict which shall relieve their persons, their property, and their reputations from all the effects of the pending charge. I commend the case to the deliberate consideration of the jury, reminding them that though whisky frauds, as they are termed, have been numerous in our country, almost beyond the power of computation, and although the government has been defrauded of many millions by their commission, yet judicial cases involving those frauds, are to be disposed of according to the inflexible principles of law, fairly and justly applied to the legal proofs in each individual case.

I have not deemed it important to direct your attention specially to the third count in the indictment. That count charges the removal of the spirits in the night-time, or between sunsetting and sunrising, in violation of law. If the jury find the defendant guilty of complicity in the fraud charged in the second count, it will not be necessary for them to inquire as to the charge in the third count. This being a criminal prosecution, there could not be a conviction on the third count, without proof of a fraudulent intent; and if such intent appears to the satisfaction of the jury, they may base a verdict of guilty on the second count, taking care to find the defendants not guilty on the first and third counts. It is hardly necessary to remind the jury, that if they find a part only of the defendants on trial are guilty, they may find a verdict of not guilty as to such as are not implicated in the fraud charged.

The jury after being out several hours reported their inability to agree on a verdict, and were discharged by the court.

Case No. 15,310.

UNITED STATES v. HARRILL et al.

[1 McAll. 243.] [1]

Circuit Court, N. D. California. Aug. Term, 1857.

ACTIONS AGAINST DEBTORS OF THE UNITED STATES —EVIDENCE—TRANSCRIPTS FROM DEPARTMENTS.

1. Congress, in derogation of the common law, have made transcripts from the departments at Washington, evidence against public debtors.

2. Their mode of authentication, as prescribed by law, must be strictly pursued.

3. They are, when so authenticated, prima facie evidence of indebtedness to the United States.

4. The omission to give in the account the disallowed credits, under the circumstances of this case, did not render the transcript incompetent as evidence under the post-office act of July 2, 1836 [5 Stat. 80].

At law.

P. Della Torre, U. S. Atty.
Glassell & Leigh, for defendants.

McALLISTER, Circuit Judge. This action was brought upon a postmaster's bond. A jury trial was waived by the respective parties, and the case submitted upon the law and facts to the court, with the stipulation that the determination of the court should be entered as its judgment, not only in this case, but similar judgments entered in the case of U. S. v. Harrill, and in the case of U. S. v. Jobson, pending in this court. Two bonds were given in evidence on the trial, and certain transcripts of statements of accounts from the post-office department were proffered. These latter were objected

[1] [Reported by Cutler McAllister, Esq.]

to, on the ground that they were incompetent and insufficient. No evidence was given by the defendants.

The question is as to the competency of these transcripts, and whether they are sufficient to sustain the present action. The acts of congress which make transcripts from the departments at Washington evidence against public debtors, introduced a new rule of evidence; but it has long since been decided by the supreme court that the legislature had the power to establish new rules of evidence, in derogation of the common law, by making such documents evidence. All that is required is that the mode of authenticating them, as prescribed by law, must be strictly pursued.

It is objected to the authentication of the account, that the certificate annexed does not declare the account to which it is annexed to be a "statement" of the account. The law which makes the statement of the account evidence, prescribes no form of certificate. In its eighth section it directs that the auditor of the treasury for the post-office department, shall credit and settle all accounts arising in his department, and certify the same to the postmaster general; and in the fifteenth section it declares that in every case of delinquency a statement of the account so certified shall be admitted. In this case, the auditor certifies "the above to be a true and correct copy of the account of Drury D. Harrill, late postmaster at Shasta, California, as audited and adjusted at this office." A certificate that it is a true and correct copy of the account as audited and adjusted, is more specific than one would have been had it certified generally it was a statement of the account. There is no defect in the mode of authentication.

The principal ground of objection is that the account does not exhibit on its face the items of credit which had been allowed to the party. In the case of U. S. v. Hodge, 13 How. [54 U. S.] 478, it is decided that the fact that the items of credit disallowed were not set forth on the face of the account, did not invalidate it as competent and legal testimony. It is difficult to ascertain why the omission of allowed credits should have that effect. The omission to set forth, item by item, each item of either class of credits, would not render less competent the accounts as evidence, though the omission might interfere with their sufficiency as testimony in the face of counter-evidence. They still are statements properly certified by the proper officer, and as such are competent testimony under the law. Not only such statements duly certified are made evidence but so are all other papers pertaining to the account, certified in like manner. Each in itself, and independently of all others pertaining to the account, is competent evidence. They are not less so because unaccompanied by other documents. In the case of Postmaster General v. Rice [Case No. 11,612], an account was given in evidence, the action being on a postmaster's bond. In relation to the former, the court say, "That shows the various balances due and owing at the end of each quarter." It was the only evidence offered on the part of the United States. It was objected to; and the court charged the jury that in giving their verdict they were to consider the document as legal evidence of the facts it contained, and as such, it established prima facie the debt as due to the United States. That case is more conclusive, as Judge Hopkins, who made the charge, had previously excluded as evidence a transcript from the treasury under the act of March 3, 1797 [1 Stat. 512]. This was done in the case of U. S. v. Patterson [Case No. 16,008]. The learned judge placed his decision on the language of that act, which requires "a transcript from the books and proceedings of the treasury," certified, &c., which language he considered intended a certificate of the whole accounts as they appear in the books of the treasury, together with all the proceedings which have been had concerning them. In the subsequent case of Postmaster General v. Rice [supra], the judge, in view of the difference between the phraseology of the act of March 3, 1797, and the thirty-first section of the post-office act of 1825, says of the latter: "It certainly was the intention of that act to substitute a statement of the settled account instead of copies of the accounts current," &c.

In Jones v. U. S. 7 How. [48 U. S.] 681, an account, the debit side of which was similar to the one before us, was given in evidence. With the exception of dates and amounts, the debit side of the account exhibited only the quarterly balances, and was in every particular like the account offered in evidence in this case. Although elaborately argued for the defendant, no objection was made to the mode of stating the account. It is true, as urged by counsel, that Mr. Justice Daniel, in the case of U. S. v. Hodge, 13 How. [54 U. S.] 485, uses the following language: "It is true that the cases above mentioned did not arise upon the statute regulating the post-office department; but they involved the construction of the act of March 3, 1797, the import of which, and indeed the language thereof, mutatis mutandis, are identical with those of the act of 1836 regulating the post-office department." Id. 485. The learned judge was endeavoring to show, by reference to decided cases under the act of March 3, 1797, the admissibility of the account before the court, in a post-office case; and to illustrate their applicability, made the above observation as to the similarity of the phraseology between the two statutes. The decision of the court was, that under the principles enunciated in the decisions under one act, a certified account was admissible in a post-office case. It is urged by counsel that the supreme court

has fixed the identity of the language of the two acts. It cannot be considered that the readings of one of the judges arguendo is the decision of the court.

A comparison of the language of these two statutes, will exhibit a difference. The act of March 3, 1797, requires "a transcript from the books and proceedings of the treasury," to be certified. The fifteenth section of the post-office act of July 2, 1836, declares that in every case of delinquency "a statement of the account, certified as aforesaid, shall be evidence; and the court trying the same shall be thereupon authorized to enter judgment and award execution." Judge Hopkinson recognized a clear distinction between the language of the act of March 3, 1797, the post-office act of 1810 [2 Stat. 592], and that of 1825 [4 Stat. 102], and acted upon such difference, as we have seen in the adverse decisions made by him. The difference between the two first-mentioned acts of congress is quite as great as that which occurred between the act of March 3, 1797, and the post-office acts under his consideration; and it controlled his judicial action. There can be no doubt of the competency of the testimony offered in this case, if we look to the post-office act of 1836. But, if viewed under the decisions made by the supreme court in construing the act of March 3, 1797, its admissibility is almost equally free from doubt.

As this question is one of great practical importance in the transactions between the government and individuals, I deem it proper to refer to certain cases relied on by counsel for defendant; as an inaccurate analysis of them will obscure a subject which ought to be clearly understood. Much stress is laid upon the language of Mr. Justice McLean in U. S. v. Jones, 8 Pet. [33 U. S.] 375, that "the act of congress in making a transcript from the books and proceedings of the treasury evidence, does not mean the statement of an account in gross, but a statement of the items, both debits and credits, as they were acted upon by the accounting officers of the department." The extent of what was determined by this language is to be known by referring to the state of things to which it was intended to apply it. The item objected to was in these words: "To accounts transferred from the books of the second auditor for this sum, standing to his debit under the said contract on the books of the second auditor, transferred to his debit on those of this office, $45,000." Here is a gross amount of accounts, of what number or their several amounts does not appear, no debit nor credit items,—all thrown together in one office and transferred in the aggregate to another. U. S. v. Patterson [Case No. 16,008], another case relied on, was where the account offered and rejected contained charges of gross amounts, referring to certain reports of file in the department. In U. S. v. Edwards [Id. 15,026]. the form of the account is not given. The court say it was objected to "because several items in the account, amounting to more than the balance claimed, were charged as balances found due by the officers of the treasury." It was doubtless rejected on that ground. The principle is enunciated in U. S. v. Buford, 3 Pet. [28 U. S.] 12, and U. S. v. Jones, 8 Pet. [33 U. S.] 375, that an account stated at the treasury department under the act of March 3, 1797, is evidence only of items disbursed through the ordinary channels known officially to the accounting officers, and appearing on their books. This is undoubtedly correct, and applies to either act,—that of March 3, 1797, or the post-office act of July 2, 1836. So, an account duly certified is no evidence against a collector or postmaster of the payments of moneys indirectly to him through the intervention of a third party, nor of a balance due on a former account, nor of items transferred from the account of any other person, nor of items re-charged which had been before credited.

We have adverted to all the restrictions upon the admissibility of a transcript as evidence, and now turn to the account offered in this case. It is precisely similar to the one which was before the court in the case of Jones v. U. S., 7 How. [48 U. S.] 681, and not even objected to; and also in the case of Postmaster General v. Rice [Case No. 11,312], where the court charged the jury they were to consider it "as legal evidence of the facts it contained, and as such, it established prima facie the debt as due to the United States." In the account offered in evidence, the balances both on credit and debit side are given at the end of each quarter, as due on the quarterly returns of the party as postmaster. The account is not obnoxious to the objection that there is a general balance stated. It is an account settled as it stood at the end of each quarter, and there are items corresponding as to time of settlement with those which must appear on the books of the postmaster, and consequently are susceptible of comparison and correction. These several items of debit are on the debit side of the official returns of the postmaster, founded on his own quarterly returns rendered by him in pursuance of law.

The main objection to the account is, that in the adjustment of balances as due on the quarterly returns, each item of credit allowed should have been set forth, in order to enable the party to ascertain those credits which had been disallowed. Now, such knowledge (if it were necessary to insert the credits), would have been more directly afforded by setting forth the disallowed credits themselves. This, the supreme court have decided, it is unnecessary to do, in U. S. v. Hodge, 13 How. [54 U. S.] 478. If that tribunal did not consider the

alleged necessity of inserting the disallowed items of credit so great as to invalidate the account as testimony if such credits were omitted, how can this court exclude it because the allowed items of credits are not inserted? In truth, no such necessity exists. The whole of the items are based upon the party's own quarterly returns. Under the law, the accounting officer adjusts them; and the party, if aggrieved, is allowed twelve months within which to appeal to the controller general from such adjustment. The quarterly returns themselves, where any items are disallowed, are, by the regulations of the department and the law, to be transmitted to the postmaster. It is to be presumed, in the absence of all testimony to the contrary, that the officer did his duty; that the benefit of the appeal was extended to the party in this as in every other case; and that the quarterly returns, if any credits had been disallowed, have been transmitted as adjusted to the party. Again, the debit side of this account is based upon quarterly returns made by the party himself, and furnished to the department. They are necessarily made at the end of each quarter, from the books of the post-office. If he does not know to what credits he is entitled, who does? Yet it is on this ground, viz., that this information should be conveyed to him, on the face of the account, that the court is asked to exclude the testimony as incompetent. If there has been any error in the adjustment of his quarterly returns, and the party has omitted to avail himself of his right of appeal, or the exercise of it has proved fruitless, he could have compelled for correction the production of them by notice, as was done in the case of Hoyt v. U. S., 10 How. [51 U. S.] 109. If not produced, he could have availed of his legal rights, and obtained any credit to which he was entitled, and which had been improperly disallowed; or prove error in any item with which he had improperly charged himself in his quarterly returns; or lastly, have established his claim to any credits not previously preferred for some reason, for which the act of congress dispensed with previous presentation. It has not been brought to the notice of the court that the officers of the department have been derelict in their duty; that the party has not been furnished with his adjusted quarterly returns; or to what items of credit the party is entitled which have been disallowed. Had such showing been made, this court, under the discretion confided to it by the act of congress, would have given such direction to this case as would have placed the defendant in the position the law presumes him now to occupy in the absence of any such showing.

If this testimony is competent, is it sufficient to sustain the present action? It would seem that where the law makes testimony competent, it is prima facie evidence of a fact, and becomes satisfactory in the absence of all other. Such evidence throws the burthen on the opposing party; and if no opposing evidence is offered, the jury are bound to decide in favor of the presumption. A contrary verdict would be set aside. 1 Greenl. Ev. § 33. But the act of congress under which this evidence is admitted, distinctly defines its sufficiency: "A statement of the account, certified as aforesaid, shall be admitted; and the court trying the same shall be thereupon authorized to give judgment and execution," &c. What statement is here meant? Certainly the statement previously mentioned. Whether the admissibility of this transcript of account be viewed under the construction of the treasury act of March 3, 1797; or under the more stringent provisions of the post-office act of July 2, 1836, there can be no doubt upon the point. The objection to its competency and its satisfactory character, in the absence of all counter-testimony, must be overruled.

Case No. 15,311.

UNITED STATES v. HARRIMAN.

[1 Hughes, 525.][1]

District Court, E. D. Virginia. Dec., 1876.

SEAMEN—AUTHORITY OF MASTER AND MATE—CORPORAL CHASTISEMENT.

1. The authority of the officers in a merchant ship to compel obedience and inflict punishment, is of a summary character, but not of a military character.

2. The right of a mate or other officer of a ship to inflict punishment on the seamen, when the master is on board and at hand, can be justified only by the immediate exigencies of the sea service, or as a necessary means to suppress mutinous misbehaviors on the part of the seamen, or to compel obedience by the seamen to orders which require immediate attention, and admit of no delay. Except where the obedience of the seaman admits of no delay, the officer must consult the master before inflicting blows upon the seaman. But the seaman must submit to blows at the time, and seek his redress by law on coming into port.

3. The master, when on board, in general has the sole authority during a voyage while at sea, to authorize the infliction of punishment on the seamen.

The information was in these words: "Be it remembered that L. L. Lewis, United States attorney for the said district, and who in this behalf prosecutes for the United States, in his proper person comes into the said court, on this the sixth day of December, A. D. 1876, and here gives the said court to understand and be informed, that Charles Harriman, on the first day of November, A. D. 1876, on the high seas, he, the said Harriman, then and there being an officer

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

of the American vessel Sontag, to wit, the first mate of the said vessel, unlawfully, from malice, hatred, and revenge, and without justifiable cause, did beat, wound, and otherwise ill-treat certain of the crew then and there on board the said vessel, to wit, John Kennedy, Edward Owen, William Dean, Richard Nicholas, Patrick Tracy, Andrew Olefsin, William Smith, and others, and then and there unlawfully did inflict upon the said John Kennedy, and the other members of the said crew just enumerated, cruel and unusual punishment, against the form of the statute in such case made and provided, and against the peace and dignity of the United States." Upon a statement of complaint, verified by the oath of John Kennedy, etc., competent witnesses. The ship Sontag, Harriman master, from Liverpool to Hampton Roads, shipped a crew at Liverpool, and set sail about the 4th of October, 1876. On her arrival in Hampton Roads, complaint was made before the United States commissioners at Norfolk, by the crew (about a dozen in number), of cruelty perpetrated upon them by the first and second mates, while on their voyage on the high seas. At the trial of the informations filed by the United States district attorney, it was shown in evidence that the two officers named made a practice of beating and kicking the men during the voyage, and in the case of two of them, inflicted very cruel treatment. The defendants denied the charge of cruelty and pleaded justification for their conduct. The offence charged was under section 5347 of the United States Revised Statutes, and the proceedings under secions 4300 and 4305. The case being novel, and the jury being unaware of the construction put upon section 5320 by the courts, asked for an explanation of that section from the court, which was given as follows:

HUGHES, District Judge. Disobedience to orders, and especially a deliberate refusal to perform duty, has always been considered as a very high offence by the maritime law, and, if the ship's condition is perilous, justifies quite harsh treatment, at the instant, on the part of the ship's officers. Except in very peculiar cases, the officer must at the time of giving an order be obeyed; and to secure obedience to his orders the law gives him authority to use force at the moment. In the exercise of this authority, however, regard must be had to the occasion and to the circumstances of the ship, and especially to the character and conduct of the seaman. If the officer exceeds his power, by exercising his authority harshly, or unjustly, or maliciously, he is answerable when he returns to port. It is, however, the duty of the seaman to obey orders and endure cruelty for the time; placing his reliance upon the courts and juries of his country for justice, on his return to American soil. But distinction must be made on this subject between the different officers of a ship. The master has generally the sole authority when on board of his ship to authorize punishment to be inflicted on any of the crew. Yet in many cases the safety of the ship may require instant obedience (as, for example, to take in sail) without waiting for any direct authority from the master to compel obedience. But the master cannot delegate to an inferior officer a general authority to inflict punishment; nor can the inferior officer inflict punishment at his own pleasure for any offence of the crew. The authority of any inferior officer to give blows exists only when it is, at the very moment, absolutely required by the necessities of the ship's service, to compel the performance of duty. But if he strikes, he becomes responsible to the country on coming into port. The master stands in this respect in the relation of parent to the seamen, and is bound to exercise his own judgment as to the time, the manner, and the circumstances, under which punishment is to be inflicted on the crew for any past misdemeanors, or for any present misdemeanors not immediately, at a critical moment, affecting the ship's safety. But under all circumstances where an inferior officer inflicts blows, the burden of proof is upon that officer to establish by clear evidence that the blows or punishment were inflicted in the moment of peril to the ship, or in self-defence. Seamen are not to be treated like brutes even though they misbehave themselves; neither has any officer of a ship a right to indulge his passions or resentment, by inflicting upon them cruel, or harsh, or vindictive punishment. If an officer does, he is amenable to the justice of his country for his misconduct. By the word "malice," used in law, is meant ill-natured wilfulness. It is a wilful intention to do a wrongful act. On one occasion, it was said by an English judge, that malice meant wilfulness. In legal signification it means "a wrongful act, done intentionally, without just cause or excuse." Such is the meaning of the word in the section 5347 of the Revised Statutes of the United States, making the infliction of blows on a seaman from malice an offence. See U. S. v. Taylor [Case No. 16,442] and U. S. v. Hunt [Id. 15,423]. See, also, Carleton v. Davis [Id. 2,408].

The court gives to the jury the following more summary instructions: 1. If the jury believe that Charles Harriman, the first mate of the said ship, on the voyage mentioned in evidence, beat or wounded any of the seamen without justifiable cause, or from malice, hatred, or revenge, they should find the accused guilty; if otherwise, that he is not guilty. 2. The penalty is to be fixed by the court, and may be from one dollar to a thousand as fine, and from one day to five years as imprisonment. 3. It is within the province of the jury to recommend a lenient penalty, as they may think proper, if they should find a verdict of guilty. 4. The language of the law forbids cruelty to "any of the crew"

of a vessel, which means any one or more of the crew.

Verdict of "Guilty," with a recommendation of leniency.

Case No. 15,312.

UNITED STATES v. HARRIS.

[Abb. U. S. 110; [1] 5 Int. Rev. Rec. 21.]

District Court, D. Kentucky. March Term, 1866.

POWERS OF THE PRESIDENT — REMISSION OF FORFEITURES.

1. After a judgment in proceedings for a fine, penalty, or forfeiture has been rendered, by which a moiety thereof has become vested in an informer or other individual, it is not within the power of the president by a pardon to remit or release the moiety thus accruing to the individual. His power is limited to a remission of the share of the government only. So *held*, where the conviction took place before the enactment of section 9 of the internal revenue act of July 13, 1866 (14 Stat. 146).

[Disapproved in U. S. v. Thomasson, Case No. 16,479. Cited in Pollock v. The Laura, 5 Fed. 136; The Laura, 8 Fed. 615; U. S. v. Griswold, 24 Fed. 365; Re Jayne, 28 Fed. 422.]

2. It seems, that before judgment, where the prosecution is wholly in the name of the United States, the president has complete power over the whole case.

Motion for payment out of funds in court.

Thomas B. Farleigh, for the motion.

B. H. Bristow, U. S. Dist. Atty.

BALLARD, District Judge. On March 15, 1866, J. G. Harris was convicted of having in his possession merchandise subject to duty for the purpose of selling the same with the design of avoiding the payment of duties imposed thereon, and also of the offense of selling cigars, not being the manufacturer thereof, upon which the duties imposed by law had not been paid, with the knowledge thereof.

On the same day, the court rendered judgment against the convict, that he pay a fine to the United States of five hundred dollars on account of the first offense, and one hundred dollars for the second offense, in all six hundred dollars.

On the motion of the district-attorney, the convict was not committed to prison until the fine should be paid, but a capias was awarded against him.

On the next day, March 16, John M. Hewitt was, by the judgment of the court, ascertained to be the first informer of the matters whereby the fine imposed on account of the first offense was incurred, and the judgment rendered on the day previous was so far modified that one moiety of said fine, to wit, two hundred and fifty dollars, was adjudged to be for the use of said Hewitt, and the remainder for the use of the United States.

On April 15, the president of the United States, by his deed of pardon, which recites that the said Harris had been "sentenced to pay a fine of six hundred dollars," remitted to him the payment of two-thirds of the same.

The marshal, who at this time had in his hands said capias, assuming that the pardon was fully effective to discharge, according to its tenor, the defendant from the payment of four hundred dollars of said fine, and that the defendant had a right, under the laws of the state of Kentucky, which have been adopted by the United States, to replevy the judgment, allowed the defendant to give his bond, with Walter C. Whittaker and others, sureties, dated May 14, whereby the parties undertook to pay, three months after date, two hundred and fifty-three dollars, with interest from date. This sum is just equal to one-third of the fine and the costs of prosecution. This bond was subsequently satisfied by the payment into court, on December 17, of two hundred and sixty-one dollars and forty cents.

And now R. M. Moseby, the assignee of the informer, has moved the court that the whole sum adjudged to the informer by the judgment of March 16, 1866, be paid to him out of the fund in court, with interest from May 14, the date of the replevin bond.

This motion assumes for its basis that the president had no right to remit any portion of the fine previously adjudged to the informer, and that the informer is therefore entitled to his whole share, just as if no remission had taken place.

The question presented by this motion is an exceedingly interesting and important one. It involves a consideration of the power of the president, under the constitution of the United States, to remit fines, and, so far as I am informed, it has never been determined by either the supreme court or by any circuit court of the United States. I would, therefore, gladly avoid its decision if I could; but every view which I take of the motion submitted only confirms me in the conviction that the question suggested is directly involved, and that its determination can in no way be shunned. But whilst I approach its consideration with unfeigned diffidence, fully impressed with the responsibility which every judge must feel when he is obliged to determine any matter concerning the limit which the constitution has imposed on any department of the government, I have no disposition to shrink from the performance of a duty which I conceive is clearly enjoined on me. Without, therefore, any further apology, I proceed to announce the conclusion to which I have arrived, and to assign some of the reasons on which it is founded.

By section 41 of the act of June 30, 1864 [13 Stat. 223], commonly called the internal revenue act, under which this conviction was had, it is provided that "all fines, penalties, and forfeitures which may be incurred or

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

imposed by virtue of this act, shall be sued for and recovered in the name of the United States, in any proper form of action, or by any appropriate form of proceeding: . . . . and when not otherwise or differently provided for, one moiety thereof shall be to the use of the United States, and the other moiety to the use of the person, to be ascertained by the judgment of the court, who shall first inform of the cause, matter, or thing whereby any such fine, penalty, or forfeiture was incurred." A similar provision is also to be found in section 179.

It has already been stated that by judgment of this court, rendered March 16, 1866, John M. Hewitt was ascertained to be the person who first informed of the matter, whereby the fine of five hundred dollars was incurred, and that one moiety thereof was then adjudged to him. Did this judgment so vest this moiety in him that it could not be, or rather was not, divested or impaired by the pardon of the president? This is the question which I now proceed to consider. By section 2 of article 2 of the constitution of the United States, it is declared that "the president . . . shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." This language is less explicit than that employed in the constitution of Kentucky, and in the constitutions of other states, to confer a like power on the governor. In this, and in other states, the governor is expressly empowered to remit fines and forfeitures, as well as to grant reprieves and pardons. But, although this difference of language might have led to a difference of construction in respect to the extent of the power intended to be conferred, and might have resulted in denying to the president the power of remitting either fines or forfeitures, such, in fact, has not been its effect, for it may be considered as settled that the power of pardon in the president embraces all offenses against the United States, except cases of impeachment, and includes the power of remitting fines, penalties, and forfeitures. 2 Story, Const. § 1504; U. S. v. Lancaster [Case No. 15,557]; U. S. v. Wilson, 7 Pet. [32 U. S.] 161; Ex parte Wells, 18 How. [59 U. S.] 307.

Conceding, however, that the power of pardon includes the right to remit fines and penalties, still, to understand the extent to which it may be exercised by the president, we must look to the extent of this prerogative rightfully belonging to the executive of that nation whose language we speak, and whose principles of jurisprudence the people of the United States brought with them as colonists, and established here. If the terms "pardon," "habeas corpus," "bill of attainder," "ex post facto," and other terms used in the constitution, had a well known meaning in that language, and in that system of jurisprudence, the conclusion is irresistible that the convention which framed the constitution had reference to that meaning when it employed them, and that the people accepted them in that sense when they ratified the work of the convention. But this proposition, impregnable as it seems to be in the light of mere abstract reasoning, is doubly fortified by judicial decisions. Calder v. Bell, 3 Dall. [3 U. S.] 390; Watson v. Mercer, 8 Pet. [33 U. S.] 110; Carpenter v. Pennsylvania, 17 How. [58 U. S.] 463; U. S. v. Wilson, 7 Pet. [32 U. S.] 160. Indeed, the supreme court, in the last case cited, speaking in reference to the very matter we have now before us,—that is, the extent of the power of the president to grant pardons,—says: "As this power has been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt these principles respecting the operation and effect of a pardon."

It follows from this reasoning, and from these authorities, that if the king of England cannot, under his prerogative of pardon, remit, after judgment, the share of a fine given by law to an informer, it is not within the power of the president to do it under the constitution of the United States. Indeed, it would seem absurd to suppose that either the framers of the constitution, or the people who ratified it, intended to confer on the president a power, in this respect, larger than that possessed by the sovereign of Great Britain.

Now I find that the English authorities are uniform to the effect that the king cannot make pardon to the injury or loss of others; that he cannot, by his act of grace, give away that which belongs to another; that he cannot divest a vested interest; in short, that, after an action popular, brought tam pro domino rege quam pro se ipso according to any statute, he may discharge his own share as well after as before judgment, but that, after judgment, he cannot remit the part of the informer, because, in the language of the law, this share of the informer is, by the judgment, vested in him. 3 Co. Inst. c. 105, 236–238; 2 Hawk. P. C. c. 37, p. 553; Foster's Case, 11 Coke, 65d, 66a; Vin. Abr. tit. "Prerogative" (N. a) pl. 7; 5 Com. Dig. tit. "Pardons," 245, citing Strange, 1272; Parker, 280; Cro. Car. 9, 199.

The authorities in the United States are to the same effect, though, as I have already said, the precise question here presented has never been decided. U. S. v. Lancaster [supra]; State v. Simpson, 1 Bailey, 378; State v. Williams, 1 Nott & McC. 26; In re Flournoy, 1 Kelley [Ga.] 606; State v. Farley, 8 Blackf. 229; State v. McO'Blenis, 21 Mo. 272; Ex parte McDonald, 2 Whart. 440; Duncan v. Com., 4 Serg. & R. 451; Playford v. Com., 4 Barr [4 Pa. St.] 144; The Hollen [Case No. 6,608]. In some of these cases it is expressly stated that by the common law of England, the king, in the exercise

of his prerogative of pardon, cannot remit either the share or fine awarded to an informer by the judgment of a court, or the costs of prosecution when they are adjudged to the officers of the court, and it is held that this limit also attaches to the power of pardon conferred on the governors of states by their several constitutions.

Following the mandate of these authorities, my conclusion is, that a proper interpretation of the constitution limits the power of pardon confided to the president, after a judgment ordering a portion of a fine to be paid to a private citizen, to a remission of the share of the government only, and that it is inoperative to divest an interest vested by such judgment in the citizen. What the president may do before judgment, it is, perhaps, not proper for me, in this case, to say; but when the prosecution is wholly in the name of the United States, I see nothing in the foregoing authorities which would deny him complete power over the whole case; for although the cases of Jones v. Shore, 1 Wheat. [14 U. S.] 670, and Van Ness v. Buell, 4 Wheat. [17 U. S.] 74, suggest that the informer has a right which attaches on seizure, or at least on the institution of a prosecution, they admit that this right is only inchoate, and is not consummated or vested until judgment.

I have not overlooked the decision of the supreme court in the case of U. S. v. Morris, 10 Wheat. [23 U. S.] 246, in which it is held that the secretary of the treasury, under the power conferred on him by the act of 1797 [1 Stat. 506], to remit fines, penalties and forfeitures, may remit, after judgment, the share of the informer, as well as the share of the United States. But it will be seen by reference to the opinion of the court, that they regard this power, conferred by act of congress on the secretary, as materially distinguishable from the power of pardon conferred on the president by the constitution. The secretary, by the terms of the act, can remit only where the penalty "shall have been incurred without willful negligence or any intention of fraud;" and is, therefore, authorized to administer a sort of equitable relief,—that is, to relieve where, in justice and equity, no penalty should be paid. But the power of the president proceeds on no such principle. He may pardon whom he will, and wholly without respect to the moral guilt or innocence of the legal offender. Moreover, the court rest their decision on the ground that the statute expressly confers on the secretary the power claimed; and recognizing the maxim "Cujus est donare ejus est disponere," they consider that there can be no question that congress, which gives the right to the informer, may, in its discretion, provide upon what conditions it may be enjoyed or taken away.

Nor have I overlooked the provisions of section 9 of the amended internal revenue act of 1866 (14 Stat. 146), which assert that "it is hereby declared to be the true intent and meaning of the present and all previous provisions of internal revenue acts granting shares to informers, that no right accrues to or is vested in any informer in any case until the fine, penalty, or forfeiture in such case is fixed by judgment or compromise, and the amount or proceeds shall have been paid, when the informer shall become entitled to his legal share of the sum adjudged or agreed upon and received."

Whatever may be the effect of these provisions in cases arising under this act, it is manifest they cannot affect rights vested previous to their adoption under the law as it then existed. If more was meant by these provisions than to change existing laws; if they were intended to furnish to the courts a rule for the interpretation of previous statutes, I cannot admit their binding force to this extent. It is the province of congress to make laws, not interpret them. Their interpretation, when made, is confided by the constitution to the judiciary.

Nor has the decision of the court of appeals of this state, in the case of Routt v. Feemster, 7 J. J. Marsh. 132, escaped my attention. That decision has been understood by some to hold that the governor may remit the share of the citizen in a fine. It will, however, be seen that the case goes only to this extent, that the governor may remit the whole fine, including the portion given by law to the commonwealth's attorney, because by the terms of the statute he is entitled to nothing until the fine is collected. But if the decisions of the courts in this state are to control my decision in this case, it may be well to refer to the case of Frazier v. Com., 12 B. Mon. 369, in which it is held that when the governor remits less than half of the fine, or more than half, the part not remitted, to the extent of not more than half, should be paid to the attorney of the commonwealth. This is an express authority for giving the whole of the fine collected in this case to the informer.

It is due to the president to say that it is very apparent, from the terms of the pardon granted by him, he was not aware that any portion of the fine adjudged against the convict had been ordered to be paid to an informer. If he was furnished with a copy of the judgment at all, it must have been a copy of that rendered March 15, which, as we have seen, adjudged the whole fine to the United States. If he had seen the judgment as it was modified by the order of the next day, which adjudged two hundred and fifty dollars to be for the use of John M. Hewitt, informer, it is not probable that he would have attempted to impair his right; for I find, by consulting the opinions of the attorney-general of the United States, that the power of the president to remit the share of an informer after judgment has never been expressly affirmed, but, on the contrary, frequently doubted, and often denied.

Let judgment be entered: That out of the money in the registry of the court, in this case, there be paid to the assignee of the informer two hundred and fifty-eight dollars and eighty-seven cents, which is the amount of the sum heretofore adjudged to the informer, with interest from the date of the replevin bond, May 14, until the day the money was paid into the registry of the court.

Case No. 15,313.

UNITED STATES ex rel. HENDRICKS v. HARRIS.

[Atlanta Whig, June 13, 1872.]

Circuit Court, D. South Carolina. June 10, 1872.

HABEAS CORPUS—JURISDICTION OF FEDERAL COURTS—SERVICE OF PROCESS—REMOVAL OF OFFENDERS—ISSUE OF WARRANT—APPEAL.

[1. Under Act March 2, 1833, giving a judge of any district court of the United States power to grant writs of habeas corpus in all cases of a prisoner confined, by any authority, for any act done in pursuance of a law of the United States, or any order, process, or decree of any court thereof, one committed by a state court on charges of altering a bench warrant, attempting to kidnap, and false imprisonment,—all arising out of his arresting a person on process of a federal court which had been altered by insertion of the name of the person arrested,—may, on a proper showing, be released by a United States district judge.]

[Cited in Case of Electoral College, Case No. 4,336.]

[2. An officer will be protected in serving process regular on its face, issued by a court having jurisdiction of the subject-matter, though it issued irregularly.]

[3. A United States district judge, within whose district is an offender who has fled from the district in which his offense is triable, may issue a warrant for the arrest and transportation of the offender directly to the other district without his being first committed in the district where arrested.]

[4. The mere production of a bench warrant from the United States circuit court for one state by an officer thereof, to a United States district court in another state, is of itself sufficient on which to issue process to arrest, in the latter state, a person whose arrest is ordered by the bench warrant.]

[5. Appeal to the supreme court will not lie from the judgment of a United States district judge releasing, under Act March 2, 1833, on habeas corpus, a prisoner confined by a state court for an act done in pursuance of process of a federal court.]

[This was an application by H. W. Hendricks for a writ of habeas corpus, addressed to J. O. Harris, sheriff and jailer of Fulton county, Ga., under the act of March 2, 1833.]

Authorities referred to or cited by United States Attorney Farrow and L. J. Gartrell, for relator: Act March 2, 1833; 2 Abb. N. C. 265, 266, 269, 272; 2 Am. Law Reg. 150; Ex parte Robinson [Case No. 11,935]; Code, §§ 391, 4624, 462, 5; 3 Kelly, 2; 17 Ga. 498; 1 Hale, P. C. 460; [U. S. v. Arredondo] 6 Pet. [31 U. S.] 691; [Delassus v. U. S.] 9 Pet. [34 U. S.] 117; [Strother v. Lucas] 12 Pet. [37 U. S.] 410; [Philadelphia & T. R. Co. v. Stimpson] 14 Pet. [39 U. S.] 448; [U. S. v. Price] 9 How. [50 U. S.] 89; [Minter v. Crommelin] 18 How. [59 U. S.] 87; 3 Grant, 406, 618, 13 Ill. 602; 30 Conn. 580; 15 La. 489; 34 Me. 210; 10 Post. 318.

Authorities referred to or cited by Attorney General Hammond and L. B. Spencer, for respondent: Act March 2, 1833; Ex parte Robinson [Case No. 11,935]; 1 Brightly, U. S. Dig. 52, 302, 596; Spafford v. Goodell [Case No. 13,197]; Judicial Act, § 33; Conk. Prac. 582, 583, 599; 2 U. S. Dig. 487; 9 Ga. 535; Code, §§ 3947, 4630.

ERSKINE, District Judge. This suit is nominally between H. W. Hendricks and J. O. Harris, but in reality it is a proceeding between the United States and the state of Georgia. I am uninformed if it is not the first cause, under the act of March 2, 1833, that has been brought into this court, nor do I remember such a proceeding being before the circuit or district courts, or at chambers in the Southern district. So I think I may may safely say that it is primæ impressionis in Georgia. It has always been the anxious desire and the endeavor of this court that the state and national judiciaries should be in positive harmony with each other. This feeling has been reciprocated by the state superior court for the Atlanta circuit, over which presides a learned and just judge. The sheriff of that court, J. O. Harris, promptly obeyed the exigency of the suit of habeas corpus. The relator, in his petition (I give it in brief), stated that he was confined, without lawful right, in the jail of Fulton county, in this district, by James O. Harris, sheriff and jailer of said county, charged with crimes against the laws of the state of Georgia, when, in fact, he alleges he was confined for an act done in pursuance of a law of the United States & by virtue of a process of a judge or a court thereof, as a special deputy of the United States marshal for the district of Georgia. He prayed for a writ of habeas corpus, under the act of March 2, 1833. To his petition he appended a copy of a bench warrant issued from the United States circuit court for the district of South Carolina, which process was under the seal of said court, and signed by the clerk thereof; also, a copy of a process issued from the United States district court for the Southern district of Georgia, during the February term, 1872, tested in the name of the judge, signed by the clerk, and sealed with the seal of said court, which warrant was indorsed upon the bench warrant. The judge granted the writ of habeas corpus on the 18th of May, and made it returnable on the 22d, before the United States district court for the Northern district of Georgia. The writ was executed on the defendant, Harris, who brought the relator, Hendricks, before the court. Defend-

ant then asked for further time to perfect his return, and he was given until the 27th to do so. On the day named, he came with the relator into court, and made his return to the writ, which is as follows:

"State of Georgia, Fulton County. In obedience to the within writ, and by virtue of the same, I have taken the body of the within named H. W. Hendricks from the jail of said county, and have him in the city of Atlanta, in said county, before the district court of the United States for the Northern district of Georgia. And for the cause of his detention and imprisonment in said jail, I assign and state that on the ——— day of May, inst. the said H. W. Hendricks was arrested by A. M. Perkerson, deputy sheriff for said county, by virtue of a bench warrant issued by the Hon. J. L. Hopkins, judge of the superior court in and for said county, founded on a true bill of indictment by the grand jurors of said county charging the said Hendricks with the offense of 'falsely and fraudulently altering a bench warrant,' and, the said Hendricks failing to give bail when arrested, was, by the virtue of the warrant so issued by the Hon. J. L. Hopkins, committed to jail by the said A. M. Perkerson, deputy sheriff, a copy of which warrant, properly authenticated, is here produced. And I further state, for reason of the detention and imprisonment of the said H. W. Hendricks, that on the 20th day of May, inst., a bench warrant was issued by the Hon. J. L. Hopkins, judge of the superior court as aforesaid, for the arrest of the said H. W. Hendricks, said last-named warrant being based upon a true bill of indictment found by the grand jury of said county, charging the said Hendricks with the offense of 'an attempt to kidnap,' and by virtue of the said bench warrant, on the 20th inst., the same was executed, and said Hendricks held in custody thereby. The said second warrant was duly executed as above by W. D. Brown, deputy sheriff of Fulton county, a true and authentic copy of said warrant is here also produced. I further state that, on the 22d day of May, inst., a bench warrant for the arrest of the said H. W. Hendricks was issued by the Hon. J. L. Hopkins, judge of the superior court as aforesaid, based on a true bill of indictment found by the grand jurors of said superior court, in and for said county, charging the said Hendricks with the offense of false imprisonment, and by virtue of said bench warrant, issued by the said J. L. Hopkins as aforesaid, the same was, on the said 22d day of May, inst., executed by placing under arrest the said Hendricks, and confining him in the jail of said county, he failing to give bail in terms of the law. Said last-mentioned warrant was executed by W. D. Brown, deputy sheriff of Fulton county. A true and authentic copy of said warrant is here produced. I therefore assign these reasons as the causes of the detention and imprisonment of the said Hendricks in said jail; that is to say, three bench warrants issued by the Hon. J. L. Hopkins, judge of the superior court in and for said county and state, which were by the state's officers aforesaid executed by the arrest of the said H. W. Hendricks, and he, failing to give bail in the terms of the law, is held in custody to answer the charges of alleged violation of the state laws as above set forth. All of which is respectfully submitted, with copies of the bills of indictment upon which said bench warrants issued, duly authenticated. J. O. Harris, Sheriff and Jailer.

"Sworn to and subscribed before me, 24th May, 1872, in open court. W. B. Smith, Clerk."

The defendant annexed to his return copies of these bench warrants and the indictment found by the grand jury of Fulton superior court against the relator.

Courtesy required that notice should be given to the attorney general of the state of the pendency of these proceedings. This was done, and, at the request of Governor Smith, he and L. B. Spencer, were appointed on behalf of the defendant. The United States attorney and Lucius J. Gartrell argued the cause for the relator.

The following is a copy of the bench warrant issued—or purporting to have been issued—by the circuit court of the United States for South Carolina, and also of the warrant issued by the United States district court for the Southern district of Georgia, indorsed upon the bench warrant:

UNITED STATES OF AMERICA, } ss.
District of South Carolina. }

Circuit Court.
April Term, 1872.

To Robt. M. Wallace, U. S. Marshal, or his Lawful Deputy:

Whereas a bill of indictment has been found against
William Wessley Scott & Thomas Hancock
Joshuway Spears for Conspiracy

under Acts of Congress.

These are therefore (by order of Court) to require you to seize, arrest, and bring before this Court, to be dealt with according to law, the said

Wm. Wessley Scott &
Thomas Hancock,
Joshuway Spears.

By order of the Court, this 29th day of April, A. D. 1872.

Dan. Horlbeck,
(SEAL U. S. Circuit Court, Dist. of So. Carolina.) Clerk C. & D. C. U. States for South Carolina.

United States of America,
Southern Dist. of Georgia.

H. W. Hendricks being the lawful deputy of the U. S. Marshal for the Districts of South Carolina and presenting the within warrant in this District alleging that said Defendant is within the limits of Georgia, it is hereby ordered that William H. Smyth the Marshal of the District of Georgia do execute the within warrant if said defendants can be found within the limits of Georgia, and that he deliver said defendant to the Marshal of the Districts of South

United States of America,
District of South Carolina.
Circuit Court,
April Term, 1872.

The U. S.	Warrant of Arrest to answer for Conspiracy.
vs.	
Wm. Wessley Scott Thomas Hancock Joshuway Spears	

Daniel Horlbeck,
C. C. C. & D. C. U. S.
for So. Ca.

Carolina, or his lawful Deputy.
Witness the Hon. John Erskine, Judge of the U. S. Dist. Court for the Districts of Georgia, this 30 day of April, A. D. 1872.
James McPherson, Clerk.
(Seal of District Court of Georgia.)

I Hereby depute H. W. Hendricks as my special deputy to execute the within warrant. Savannah, Ga., May, 1872.
Wm. H. Smyth, U. S. Marshal.

In justification of the acts done by the relator as a special deputy marshal, in pursuance of the process issued from the United States circuit court for South Carolina, and the process issued from the United States district court for the Southern district of Georgia, at Savannah, he put in evidence the papers just read. The process alleged to have been issued by the federal circuit court for South Carolina was inspected by the court, and, after argument by the respective counsel in the case, the court expressed the opinion that it could not, on the inspection of the paper, without more, determine whether the names of Thomas Hancock and Joshuway (sic) Spears, or either of them, was inserted in the warrant before or after it had received the seal of the court and left the hands of the clerk, or whether the names, or either of them, were inserted after the issuing of the process at Savannah. The court further said that, although the warrant contained on its face a cause of arrest, yet, as each of these names was, apparently, in a different handwriting, and the ink in each different, and also both inks obviously unlike that used in the body of the warrant and in the name of Wm. Wessley Scott, suspicion was cast upon the warrant, and its genuineness as an entirety rendered questionable,—apparently good as to Wm. Wessley Scott; suspicious as to Hancock and Spears. Therefore it was incumbent on the relator, who produced it in evidence, to explain by evidence the doubtful appearance. I may, however, here remark that I know of no rule or law which prohibits the inserting of one or more than one name, by interlineation or otherwise, in a warrant or other process, provided they are inserted at the proper time. Feeling the influence of the thought that a process for the apprehension of a man's person is an act of no unimportant character, and as no alteration can be rightfully made in it after it has finally left the hands of the judge or court, I acquainted the counsel on both sides that the court would, if they desired it, suspend the further hearing of the cause for a reasonable time, that testimony, by witnesses before the court, or by depositions, or by affidavits, could be produced. No request was made, and the cause proceeded.

W. H. Smyth, United States marshal, a witness sworn on the part of the relator, testified that he knew the relator, and appointed him a special deputy on the 1st of last May, in Savannah, Ga. There were 8 or 10 warrants to be executed in Georgia by him. Had now in his possession some of those warrants. Some have been executed and others are in the hands of deputies for execution. He had examined the warrants given him so far as to see that they had the authority of the district court of Georgia on them, only so far as the inside of the warrant was concerned. He had examined the printed form on one or two warrants, and saw that it was different from the form used in this state. While in Justice Butt's office, on the occasion of the arrest of the relator, he had examined other and similar warrants. His attention was directed to the indorsements made by Mr. McPherson, the clerk of the court in Savannah. There was a dissimilarity in the clerk's indorsements. He made this indorsement on each warrant, and handed them in a package to the relator. (Five warrants were tendered in evidence, and handed to witness. He found in the one on which Hancock was arrested three names,—Hancock, Scott, and Spears. In each of the two commissioners' warrants he found the name of one defendant and two witnesses.) He had seen the relator write. When he was bailed, he asked him to write to satisfy himself, without informing him of his object. Had afterwards compared this writing with the name interlined in the warrant. The only authority the relator had for acting as his deputy was the appointment on the warrants. Does not know whether he was sworn. He was not present when they were delivered to Mr. McPherson. He does not know the handwriting in the warrants; does not know Mr. Horlbeck's handwriting.

The attorney general for the state of Georgia offered the following writing, impressed with the seal of the federal circuit court for South Carolina and signed by the clerk, but not verified by oath, in evidence, in behalf of the defendant. It was read to the court without objection:

"Office United States Circuit Court for So. Ca.—ss: I, Daniel Horlbeck, clerk of said court, do hereby certify that no bill of indictment has been found against Thomas Hancock and no bench warrant has been issued against said Hancock. I further certify that a bench warrant was issued against Wm. Wessley Scott, and said warrant contained no other name. All the bench warrants issued from this office contained the name of but one individual against whom bill had been found.

"Witness my hand and seal of said court at Charleston, this 13th day of May, A. D. 1872.

"(Signed) Dan'l Horlbeck, C. C. C. U. S. for S. C.

"(Seal U. S. Circuit Court Dist. of South Carolina.)"

After the submission of this paper to the court, counsel for relator offered him as a witness in his own behalf, to rebut and overcome the testimony of Horlbeck, and to show that, if the warrant had been altered, he was innocent of the act, and of any knowledge by whom or when altered. Counsel relied on the act of July 6, 1862 (12 Stat. 588), which enacts that "the laws of the state in which the court is held shall be rules of decision as to the competency of witnesses in the courts of the United States, in trials at common law, in equity, and admiralty"; and also on the act of July 2, 1864 (13 Stat. 351), which declares that "in the courts of the United States there shall be no exclusion of any witness for account of color, nor in civil actions because he is a party, or interested in the issue tried."

Counsel for the defendant objected to the introduction of the relator himself, as contrary to all precedent and authority, in habeas corpus cases, and cited Com. v. Harrison, 11 Mass. 63. And, moreover, if allowed to testify, he might thus acquit himself of the crimes for which he stood indicted in the state court. The question was fully argued pro and con, and upon the court informing the learned counsel in the cause that it was ready to decide the question of competency, counsel for the relator said they would move to have the testimony of Horlbeck withdrawn; to which the court said, it would hear argument on that question. Here counsel on both sides conferred together, and it was agreed that the relator might testify.

One of the rights secured to the citizen by the fifth amendment of the constitution is that which declares that no person shall "be deprived of life, liberty, or property without due process of law." This essential safeguard of the people is deduced from its grand original, the twenty-ninth chapter of Magna Charta, which asserts and preserves, among other blessings, the personal liberty of individuals; and this guaranty contains the very essence of the writ of habeas corpus. Speaking of this writ, the supreme court of the nation, in Ex parte Watkins, 3 Pet. [28 U. S.] 193, said: "It is in the nature of a writ of error to examine the legality of the commitment. It brings the body of the prisoner up together with the cause of his commitment. The court can, undoubtedly, inquire into the sufficiency of that cause."

The fourteenth section of the judiciary act of 1789 gave authority to the federal courts and the judges thereof to "grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment." But this act did not empower a court or judge to issue the writ to bring up a prisoner in custody under a sentence or execution of a state court for any other purpose than to be used as a witness. And it was not until the manifestation of what were known as the nullification theories, in a sister state, that another act was passed, having for its object, among other things, the protection of persons who might be prosecuted under assumed state or other authority for acts done under the laws of the United States. This law is commonly called the "Force Bill." The seventh section provides that "either of the justices of the supreme court, or a judge of any district court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined on or by any authority of law, for any act done or omitted to be done in pursuance of a law of the United States or any order process or decree of any judge or court thereof, anything in any act of congress to the contrary notwithstanding. And if any person or persons to whom such writ of habeas corpus may be directed shall refuse to obey the same, or shall neglect or refuse to make return, or shall make a false return thereto, in addition to the remedies already given by law, he or they shall be deemed and taken to be guilty of a misdemeanor, and shall, on conviction before any court of competent jurisdiction, be punished by a fine not exceeding one thousand dollars, and by imprisonment, not exceeding six months, or either, according to the nature and aggravation of the case." 4 Stat. 624. This act was construed and applied, on several occasions, by some of the most eminent judicial minds of their day,—by Mr. Justice Grier, Judge Kane, and Mr. Justice McLean; and recently a clear and thorough exposition of it has been given by the district judge for the district of Kentucky in the case of U. S. v. Jailer [Case No. 15,463].

Ex parte Jenkins [Case No. 7,259],—first case: Jenkins, a deputy marshal, accompanied by three others, having a process in his hands, attempted to arrest one Thomas, a fugitive from labor. A violent and bloody encounter ensued, and Thomas, being encouraged and assisted by numerous people of the neighborhood, effected his escape. By state authority, a warrant was issued against the marshals, who were arrested on the charge of "an assault with intent to kill," and imprisoned. A writ of habeas corpus was sued out, under the act of 1833, and Mr. Justice Grier discharged them. While commenting on the act of 1833, Judge Grier said: "The authority conferred on the judges of the United States by this act of congress gives them all the power that any other court could exercise under the writ of habeas corpus, or gives them none at all. If, under such a writ, they may not discharge the officer when imprisoned 'by any authority' for an act done in pursuance of a law of the United States, it would be impossible to discern for what useful purpose the act was passed." I will now advert to Ex parte Jenkins [supra],—third case,—to show that

this court is not restricted to the evidence which may be found among the records of the state court. Ex parte Jenkins [supra], —second case: Some time after the prisoners were discharged by Judge Grier, Thomas brought a civil suit against Jenkins and the other deputy marshals in the supreme court of Pennsylvania. A judge of that court allowed a capias ad respondendum, in trespass vi et armis, and with bail in the sum of $5,000 to issue, and under this writ the deputy marshals were arrested by the sheriff of Philadelphia county, and, not giving bail, committed to prison. On petition, Judge Kane awarded to them a writ of habeas corpus. The prisoners were brought into court, and, after argument had, discharged from custody. See Ex parte Robinson [Case No. 11,935], before Judge McLean at chambers. The deputy marshals had not been discharged very long before they were arrested a third time, by the sheriff, under a bench warrant of outlawry from the sessions court of Luzerne county, Pa., based on an indictment found by the grand jury, charging them with riot and assault with intent to kill; but the indictment did not set forth that the parties indicted were officers of the United States, nor that the alleged crimes had been committed while they were acting or professing to act under a law of the United States, or some order, process, or decree, or some court or judge thereof. In delivering the judgment in this case, Kane, J., said: "I can well imagine that the record in these cases would say nothing of the official character of the prisoner, or of his justification under the authority of the general government. If, then, the act of congress is to be made operative for the protection of the officer, he must be permitted to go behind and beyond the record under which he is confined. And if he could claim to do this, even after conviction, how much more clearly before? If not concluded by the result of a trial of which he had notice, and in which, perhaps, he took part, how much more clearly not by preliminary action of a committing magistrate, or the ex parte finding of a grand jury." And the learned judge says: "I must therefore proceed to hear the case on its merits, under the act of congress, and to that end must receive the evidence which is offered by the relator."

In connection with the foregoing I may add that, in U. S. v. Jailer [Case No. 15,463], when the writ of habeas corpus was granted by Ballard, J., the relator was confined in jail, under a commitment made by a state court; but, intermediate the commitment and hearing of his case by the United States circuit court, the grand jury of the state court returned a true bill of indictment against Roberts for murder. In giving the opinion of the court, the judge said: "By a long course of judicial decisions it may now be considered as settled that the act gives relief to one in state custody, not only when he is held under a law of the state which seeks expressly to punish him for executing a law or process of the United States, but also when he is in such custody under a general law of the state which applies to all persons equally, where it appears he is justified for the act done, because it was done in pursuance of a law of the United States or of a process of a court or judge of the same."

The three indictments found by the grand jury against the relator are, as already mentioned, annexed to the return. The first of these was found on the 15th of May, 1872, and it charges the relator with falsely, fraudulently, and feloniously altering, in this county, on the 2d day of May, 1872, a bench warrant, which was in due form issued for the arrest of Wm. Wessley Scott, by inserting therein the names of Thomas Hancock and Joshuway Spears, with intent to defraud them of their liberty. A copy of the bench warrant from the United States circuit court, together with a copy of the process from the United States district court, at Savannah, and the appointment of the relator as a special deputy, is incorporated in the bill of indictment, and the indictment alleges that it is this "the said bench warrant" which the relator falsely and fraudulently altered and changed for the purpose of defrauding Hancock and Spears of their liberty. The second indictment, found true on the 20th of May, charges the relator with arresting and imprisoning Hancock without authority of law. Both the learned counsel for the state said that, if the court should be satisfied that the relator was a lawful deputy marshal, and had a valid warrant against Hancock, when he arrested him, on the 4th day of May, then, as to the indictments for false imprisonment and attempt to kidnap, he ought to be discharged. But with some plausibility they argued that the alteration of the bench warrant, by inserting the name of Hancock in it, could not be an act done in obedience to process issued by a federal court; also, that this act of altering was no part of the arrest of Hancock, for it was done on a different day, and for the alteration of the court must remand him, though it discharged him for the other alleged offenses against the state.

The learned counsel assumed the fact that the relator did make the alteration in the bench warrant. It was proved by the evidence before the court that the relator arrested Hancock on Saturday, the 4th of May, and the alteration is alleged, in the indictment, to have been made by the relator on the 2d day of May. Although, on a trial of this indictment, the proof may show that the alteration was made at a time prior or subsequent to the 2d day of May, still a court, in looking to the record alone, always assumes the time there stated to be the true time. Now, from the argument of the learned counsel, it must fairly follow, as a logical consequence, that, if the relator made the altera-

tion in the bench warrant, he did so before he arrested Hancock. Therefore he could not have had a legal process when he did arrest him. I here pause to remark that, during the hearing of this case, the attorney general for the state and his associate with becoming ingenuousness, were alike anxious, with the counsel for the United States, that the recondite causes of the imprisonment of the relator should be brought to view.

I have already spoken of the introduction of the evidence on the part of the relator and defendant respectively. William H. Smyth, United States marshal for Georgia, being sworn, stated that he had examined the warrants only so far as the inside was concerned, and saw that it was different from the form used in this state; only authority relator had for acting was that made by witness on each warrant; had compared relator's handwriting with the interlineations in the bench warrant; don't know handwriting in the bench warrant, nor Mr. Horlbeck's handwriting; don't know whether relator was sworn or not. The testimony of Mr. Horlbeck,—introduced by defendant: "There was no indictment against Thomas Hancock, nor had any bench warrant issued against him. There was a bench warrant against Wm. Wessley Scott, but it contained no other name, nor do bench warrants, issued from that office, contain more than one name." Such is the substance of the evidence of these two witnesses. Their evidence may be found in full supra. I find, on reading the evidence of the relator, given viva voce, in open court, that a synopsis of it cannot be made so as to preserve the substance of it. I therefore give it in full: H. W. Hendricks, being sworn, testified as follows:

"I have been acting as deputy marshal in the state of South Carolina about four months, under the appointment already read in evidence. (Warrant was here handed the witness, issued from the circuit court of South Carolina.) I had nothing whatever to do with the insertion of the names of Thomas Hancock and Joshuway Spears in the warrant handed me. I arrested Thomas Hancock in Kiser's store, in Atlanta. I was taken there by a man named Williams. I obtained the warrant from Williams. Williams first went into the store, came out again, handed me the warrant, and told me the man was in the store, and to go in and arrest him. I told him he must go in and point out the man. This was on Saturday two weeks ago. I got the warrant first in the city of Charleston from Maj. Stone, who was assistant district attorney. Williams was present at the time. Maj. Stone handed me eight or ten warrants. He took out one, said Williams did not want that. I was directed to act under Williams' instructions. I took the warrants to the marshal's office, and showed them to the marshal. I had between seven and eight. I was directed to take them to Savannah. I did so,—sent them in to the clerk's office from the marshal's office. I got them again the next day. Maj. Smyth, the marshal, delivered them to me. I took them to the hotel, put them in my valise, and took the night train for Macon. I found Mr. Williams at the train at Atlanta,—met him there. I had not arrested any one before I met Williams. After meeting Williams, I went with him over to the American Hotel, opened my valise, took out the warrants, and handed them to Williams. He said he knew every one of those men. He then said he must start immediately for Marietta. We took the 4 o'clock train and went to his uncle Whitlock's, near Marietta, arrested his counsin, went afterwards to his (Williams') brother. I returned to Atlanta next morning; got up at about 8 o'clock. After breakfast, Williams said, 'Now, let us go and get Hancock,' took me to Kiser's store, went into the store, returned after a few minutes, told me the man was in the store, and to go in and arrest him. I told him he must go in and point him out. He did so. I arrested Hancock, and told him to come with me to the marshal's office. He did so, and I turned him over to a deputy marshal in the office. I left him in his charge, and had nothing more to do with him. This was on Saturday. I was arrested on the Thursday following, four or five days after. After Maj. Smyth went my security for the false imprisonment case, and Col. Alston had dismissed the forgery case, I was arrested on the bench warrant, and have been in jail ever since. I knew nothing of the insertion of the names in the warrant; had nothing to do with it; knew nothing whatever of Hancock until about 8 o'clock that morning, when Williams called on me to make the arrest. I knew nothing at all about the insertion of the names in the warrant, nor had I anything to do with it, nor do I know who inserted them, when it was done, or anything about it." Cross-examined: "I reside in South Carolina. Know nothing of Williams except that I saw him about the courts. Williams resides in the upper part of South Carolina. I do not know the handwriting in the warrant, nor the handwriting of either of the names. I had not, to my knowledge, any other bench warrant with more than one name. When Williams took the warrants at the hotel in Atlanta, I do not know whether the two additional names were in the warrant in question or not. I do not know whether they were there before the indorsement by McPherson, the clerk, or not." Direct examination resumed: "I did not examine any of the warrants to see whether they had more than one name in them or not. I did not have time."

When I read the section of the law under which this writ of habeas corpus was issued, and consider the uniform interpretation given to it by the national courts, must I close my eyes to the light of judicial reason which surrounds me? If the court cannot

inquire into the real history of the cause of the imprisonment of the relator; if it cannot invoke the evidence given before the court itself, whenever essential to the ends of justice, through the law, go behind this series of indictments to ascertain whether they had their origin and birth in one cause and flow from a single and not from a triple course; if the court is restricted to the inspection of the bench warrants and the indictments, as they formally appear, for all the evidential knowledge upon which it is to act, and to give judgment whether the relator is justified or not,—then the sending forth of the writ, and the bringing of the prisoner before the court, merely to remand him, or virtually to deny to him, when here, the full benefit of the law of habeas corpus, which commands the court or judge to search into the cause of the commitment, would be a ridiculous pageant and mockery of justice. And, notwithstanding the statement of Mr. Horlbeck—for this paper (copied supra) was tendered in evidence by the defendant, and, unopposed by the relator, read to and received as evidence by the court—that the bench warrant, when issued, contained no other name than that of Wm. Wessley Scott, nevertheless, if the sworn testimony of the relator is to be believed, and no part of his evidence was or is objected to (his competency as a witness in this cause was admitted by, or at least met the distinct and positive acquiescence of, the defendant), then he did not insert the names of Thomas Hancock and Joshuway Spears, or either name, in the bench warrant, nor had any knowledge by whom, where, or when interpolated. Therefore the court, under the testimony produced before it, cannot do otherwise than to hold that the relator has dispelled the cloud of suspicion that rested upon him when he offered the bench warrant in evidence. It is true, however, that it is by his own testimony that he relieved himself from suspicion; but his truthfulness was not questioned by the defendant, nor was there any evidence offered to overthrow it. In coming to this conclusion, I have not been unmindful of what Mr. Horlbeck, the clerk, stated,—and stated truly, I have every reason to believe,—that neither the name of Thomas Hancock nor Joshuway Spears was in the bench warrant when it was issued from his office.

On the subject of the jurisdiction of the state court to try Hendricks for the alleged alteration of the bench warrant issued from the federal circuit court for South Carolina, I would remark that this court would be departing from its proper sphere of action if it assumed, in a habeas corpus case, to examine whether the state court could take cognizance of that or any other particular case. Indeed, the question is wholly irrelevant here. For whether the interpolation of names into that bench warrant is an offense against the state of Georgia, her courts alone can determine. I may add, the state courts cannot hold jurisdiction over offenses exclusively existing as offenses against the United States. Every criminal presentation must charge the offense as having been committed against the sovereign whose courts sit in judgment on the offender, and whose executive may pardon him. The jurisdiction of the national courts is limited, but within its limits supreme. And the constitution of the United States, and all acts of congress made pursuant thereof, are the supreme law of the land, binding on the conscience of state judges as well as those of the United States.

In respect to the "writing" on the back of the bench warrant, the learned attorney general contended (1) that it was not issued by the judge, but by the clerk, and without the judge's knowledge, and without authority of law; (2) had the process been good in South Carolina against Hancock, it could not, with that indorsement, be executed in Georgia (the fugitive must be committed, and then the judge must order his removal); and (3) that no commitment can be had except upon warrant issued upon oath, and upon evidence delivered under oath,—citing Conk. Prac. 582, 583, 599; Judicial Act, § 33 [1 Stat. 91]. A copy of the South Carolina warrant and the process issued at Savannah may be found supra. It will be seen that I have divided the proposition advanced by the attorney general into three clauses. To the first: It is doubtless true, as stated, that this writing was issued by the clerk, and not by the judge, or with his knowledge. But, nevertheless, it shows upon its face that it was issued during a session or stated term of the court, tested in the name of the judge, sealed with the seal of the court, and signed by the clerk.[9] These indicia being patent on the paper, the presumption of law is that it is a judicial process, and issued by the court whose test and seal it bears. Besides, if it was necessary to the validity of a process that the judge, sitting as a court, must make an order, or have knowledge of its being issued by the clerk, still there is no evidence whatever that the marshal was cognizant at any time of the manner in which it was issued. Neither is there any evidence that the relator, when appointed special deputy or afterwards, knew how it was issued. It is a recognized principle of law, applicable to this case, that when the court has jurisdiction of the subject-matter, or of similar subject-matter, the officer is not bound to examine into the validity of its proceedings or the regularity of its process, and is not liable,—certainly not without express malice. See Warner v. Shed, 10 Johns. 138; Dynes v. Hoover, 20 How. 65; Case of the Marshalsea, 10 Coke, 60, 68. And it has been held sufficient justification if a process is regular and legal on its face, though the officer has knowledge of facts rendering it void for want of jurisdiction. People v. Warren, 5 Hill, 440; Billings v. Russell, 23 Pa. St. 189. And see Code, § 294. In Keniston v. Little, 30 N. H. 318, which was an action for taking certain cattle of the de-

fendant, the court said: "If the process here did issue either erroneously or irregularly, the court having jurisdiction, it is not void, but is at most voidable. If erroneous, a party even may justify, under it, whatever was done by virtue of it while it was in force; and, if irregular, it is a justification for the party till set aside. Much more must it be so in the case of an officer." And Mr. Bishop, in his learned and accurate work on Criminal Procedure (volume 1, § 187, 2d Ed.), says: "If a warrant in due form is put into the hands of an officer to whom it is addressed, he is justified in executing it, if the magistrate who issued it had jurisdiction over the cause, even though it was improperly or unlawfully obtained." And see Boyd v. State, 17 Ga. 194. And he will be protected in executing a warrant, although he knew at the time it was obtained for an undue purpose. State v. Weed, 1 Fost. (N. H.) 262.

The gist of the second clause is this: Hancock, escaping from South Carolina to this state, must first be committed here, and afterwards the judge must order his removal. Provision is made by the thirty-third section of the judiciary act for the removal of offenders who have fled from one district to another; and if such commitment of the offender shall be in a district other than that in which the offense is to be tried, it shall be the duty of the judge of the district where the delinquent is imprisoned, reasonably to issue, and the marshal of the same district to execute, a warrant for the removal of the offender to the district in which the trial is to be had. In the case under consideration, the marshal is commanded "to execute the within warrant if said defendants can be found within the limits of Georgia, and that he deliver said defendant to the marshal of the district of South Carolina or his lawful deputy." It does not order him to commit them. True, the act speaks only of persons under "commitment." But does it make this imperative? Conkling (page 583) says that "it may doubtless be construed to warrant a removal without the formality of a previous commitment to prison, the form of the warrant being varied accordingly." In this case the views of that distinguished writer seem to have been substantially followed. Why commit him if the act does not make it obligatory to do so? When the person is arrested he may demand it as a right to be forthwith taken before the district judge, that the fact of his identity may be inquired into, and also bailed, if a bailable offense. He is entitled to an examination before he is removed to a distant state. See thirty-third section of judiciary act (1 Stat. 91), and remarks of Love, J., and of Mr. Justice Miller, in Re Bailey [Case No. 730]. "In some districts," says Murray (U. S. Proceedings, 30), "the judge issues his warrant for the arrest and transportation of the prisoner directly to the district wherein the offense was committed, without requiring the production of the body before him." A precedent is of file in this court, dated May 16, 1872, issued in the city of Jefferson, Western district of Missouri, tested in the name of the district judge, the Honorable Arnold Krekel, sealed with the seal of the court, and signed by the clerk, which I may perhaps refer to again.

The third and last clause is that no commitment can be had except upon warrant issued under oath, and upon evidence delivered under oath. Observing the process issued at Savannah, it will be seen that it does not appear to be issued on the oath of any person. The bench warrant issued by the United States circuit court for South Carolina, recited that, "whereas a bill of indictment has been found against Wm. Wessley Scott, Thomas Hancock (interlined) and Joshuway Spears (interlined) for conspiracy under acts of congress. These are," etc. The process issued at Savannah recites that "H. W. Hendricks being the lawful deputy of the U. S. marshal for the Districts of South Carolina and presenting the within warrant in this district alleging that said defendant is within the limits of Georgia, it is hereby ordered that William H. Smyth the marshal of the Districts of Georgia do execute the within warrant if the defendants can be found," etc. Here the point is presented whether the mere production of the bench warrant from the United States circuit court for South Carolina, by an officer of that court, to a United States district court in Georgia, was of itself sufficient upon which to issue a process to arrest Hancock in Georgia. This is a matter of prime vitality, and I have carefully considered it, but without the privilege of looking into the writings of some authors who, perhaps, cast light upon the subject. It has however, received the attention of Judge Conkling, in his treatise (page 581). He says: "It sometimes happens that a person indicted in one district makes his escape before arrest into another district. In such cases the exhibition of a copy of the indictment, authenticated by the certificate of the clerk under the seal of the court, would, it is supposed, be the proper evidence. Perhaps, also, an affidavit, or the certificate of the clerk alone, that an indictment had been found, would be sufficient, as in England. See 1 Chit. Cr. Law, p. 342. But where the application is founded on the fact of an indictment alone, there ought, on the arrest of the suspected party, to be evidence of his identity, to warrant a commitment." If the rule laid down by Conkling is correct,— and no authority has come to my notice questioning it, —this case is still stronger; for the bench warrant from South Carolina, issued "by order of the court," under its seal, and signed by its clerk, states that a bill of indictment had been found, etc. And it was solely on the presentation of a bench warrant, issued by this court, stating that an indictment had been found against one W. Scott Thomas, etc., that the district court for the Western

district of Missouri granted a warrant for his arrest and removal. I am of the opinion that the views presented by the attorney general on this branch of the case are untenable.

It was insisted by the learned attorney general that the relator had no authority, except that conferred on him by the marshal, who specially deputed him to execute eight or ten warrants, and having taken no oath of office in this state, he was, therefore, not an officer of the United States, and so could not execute the warrant. The appointment is this: "I hereby depute H. W. Hendricks as my special deputy to execute the within warrant. (Signed) W. H. Smyth, U. S. Marshal." The twenty-seventh section of the act of 1789 (1 Stat. 72), after speaking of the appointment and removal of marshals, says: He shall have power "to appoint as there shall be occasion one or more deputies, who shall be removable from office by the judge of the district court, or the circuit court sitting within the district, at the pleasure of either; * * * and the marshal shall take before said judge, as shall also his deputies, before they enter on the duties of their appointment, the following oath of office." And the seventh section of the act of July 29, 1861 (12 Stat. 282), declares that the marshals of the several districts "shall have the same powers in executing the laws of the United States, as sheriffs * * * in the several states, have by law, in executing the laws of the respective states." Ballard, J., in U. S. v. Jailer, supra, said: "The authority to appoint a special bailiff to execute a particular process, is recognized by all the authorities as appertaining to the sheriff." Conk. Prac. p. 319, says: "The service may be made by the marshal, by a general deputy, or by a special deputy or bailiff, constituted for that purpose." This is the practice in England, and I learn that it is the common practice throughout the Union. Indeed, it is authorized by the act of congress just quoted (and which is but a copy of the act of February 28, 1795); for it expressly gives to the marshals the same powers, in executing the laws of the United States, as sheriffs in the several states have. The relator was specially deputed in writing. In this state, a deputy sheriff may be appointed by parol. So even a deputy sheriff may appoint a bailiff to do a particular act. Matthis v. Pollard, 3 Kelly, 1; McGuffie v. State, 17 Ga. 497. But the point in the argument most strenuously insisted on was that the relator had taken no oath of office in this state, and therefore he was not an officer of the United States; so could not execute this warrant. There is no evidence before the court whether he was sworn or not. The marshal testified that he "did not know whether he was sworn." The relator was not asked whether he had taken the oath. When the marshal appointed him a special deputy, and he accepted the appointment, this instated him; and the law will presume that he complied with all its requirements before acting. In the case of U. S. v. Bachelder [Case No. 14,490], Mr. Justice Story said: "If an officer of the customs be duly commissioned, and be found acting in the duties of his office, the law presumes that he has taken the regular oaths until the contrary appears."

The court is of the opinion that the writ must be upheld, and, on payment of costs, the prisoner is discharged.

When the court announced its judgment discharging the prisoner, the attorney general of the state asked for an appeal to the supreme court of the United States, and that the relator give bail for his forthcoming should the judgment of this court be reversed. To-day the matter was heard, and the court decided that, under the act of 1833, no appeal lay in this case.

Case No. 15,314.

UNITED STATES v. HARRIS.

[12 Blatchf. 434.] [1]

Circuit Court, S. D. New York. Jan., 1875.

CRIMINAL LAW — EVIDENCE — PROOF OF OTHER CRIMES—SMUGGLING.

On the trial of an indictment for smuggling, an officer of the customs, having given evidence for the defendant, the court refused to allow the counsel for the United States to interrogate him as to violations of the revenue laws committed by him, but in no way connected with the charge under consideration, for the purpose of discrediting him as a witness.

This was an indictment [against David P. Harris] for smuggling.

Ambrose H. Purdy, Asst. Dist. Atty.
Samuel G. Courtney, for defendant.

Before BENEDICT, District Judge.

An officer of the customs, having given evidence for the defendant, the court refused to allow the counsel for the United States to interrogate him as to violations of the revenue laws committed by him, but in no way connected with the charge under consideration, for the purpose of discrediting him as a witness.

Case No. 15,315.

UNITED STATES v. HARRIS.

[1 Sumn. 21.] [2]

Circuit Court, D. Massachusetts. Oct. Term, 1830.

EMINENT DOMAIN—STREETS AND HIGHWAYS—EASEMENTS—OWNERSHIP OF FEE.

1. Where the legislature by a special act authorizes a street or highway to be laid out, and bars any action for possession or damages after

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

[2] [Reported by Charles Sumner, Esq.]

the laying out, and provides for the damages in a special manner, the owner is still entitled to the fee, subject to the easement.

[Cited in Prather v. Western U. Tel. Co., 89 Ind. 525; Winter v. Peterson, 24 N. J. Law, 527; Water Works Co. v. Burkhart, 41 Ind. 371.]

2. Such special acts are to be construed in conformity to the general highway acts, unless the legislature use words, which show, that the fee of the lands taken is intended to pass from the owner.

[Cited in Dingley v. Boston, 100 Mass. 559; Malone v. Toledo, 34 Ohio St. 546.]

3. The laying out of a highway at the common law and under the highway acts of Massachusetts does not deprive the owner of the fee, but only subjects it to the easement.

[Cited in Boston v. Richardson, 13 Allen, 159. Cited in brief in Old Colony & F. R. Co. v. Plymouth, 14 Gray, 158.]

This was an action of trespass brought by the United States [against Richard D. Harris] to determine the title to a piece of land situated within the limits of the navy yard at Charlestown in Massachusetts. The principal facts, as agreed upon by the parties, were as follows:

In October, 1781, the legislature of Massachusetts passed an act, entitled an act for widening and amending the streets, lanes, and squares, in that part of the town of Charlestown, which was lately laid waste by fire. The act, after reciting, that a committee was appointed by the town for regulating the streets, lanes, and squares in that part of the town, which was so laid waste, and that the committee had accordingly proceeded to lay out the same, a plan of which had been laid before the court and was then deposited in the secretary's office, proceeded to enact, "that the proceedings of the committee be and they are hereby confirmed; and all actions, that shall be brought for recovering possession of any land lying within any of the streets, lanes, squares, &c., laid out as aforesaid, or for damages sustained or occasioned thereby, shall be utterly and for ever barred." It further enacted, that no buildings whatsoever be so erected as to encroach upon any street, lane, or square, by them so laid out as aforesaid; and reciting, that some persons may suffer damage by laying out the streets, &c. according to the plan aforesaid, and others may receive benefit and advantage thereby, provided, that the value of all lands and buildings and other materials, taken from any person by virtue of the act, should be ascertained by appraisers chosen in the manner pointed out by the act, and that the town should be held and obliged to pay to the person interested in the land, buildings, and materials aforesaid, the sum at which it may be appraised. In like manner persons benefited by the proceedings were to be assessed a proportionate sum, which their estates were subjected to pay. It does not appear who, at this time, were the owners of the land now in controversy before this court, upon the special case agreed by the parties. But John Harris, the ancestor of the defendant, became owner thereof by deeds executed to him of various portions in 1791, 1792, and 1793, by various grantors. Although the plan of the committee was thus confirmed, no street was ever in fact laid out and opened over the premises until 1795 or 1796, when the town of Charlestown laid out a street over a part thereof, called Battery or Water street, for which a full compensation was paid to Harris by the town, by an award under the act of 1781. And again in 1798 or 1799, another street was laid out by the town, over another part thereof, called Henley or Meeting-House street, for which the town also paid a full compensation to Harris. Both streets were however marked out in the plan, and were finally laid out and opened, in conformity thereto. In this posture of affairs, the legislature of Massachusetts in June, 1800, passed an act (Act June 17, 1800; 2 Laws Mass. [1807] p. 940) consenting to the purchase by the United States of a tract of land in Charlestown for a navy yard, and ceding jurisdiction of the tract, not exceeding sixty-five acres. By that act, the value of the land so taken, when not agreed by the parties, was to be ascertained by a jury in the manner prescribed by the act. And accordingly the value of the land of Harris included in the navy yard was, upon the petition of Aaron Putnam, agent of the United States, so ascertained, and the amount paid to Harris by the United States in November, 1800, and February, 1804. In the proceedings under this inquest, five different parcels of land of Harris were set forth by abuttals as taken by the United States, and separately valued. One of these (No. 1) was on the north side of Henley or Meeting-House street, abutting thereon; another (No. 2) on the south side of the same street, and abutting thereon, and also on Battery or Water street; the other three (Nos. 3, 4, and 5) were on the south side of Battery or Water street and abutting thereon. Nothing material occurs in the description of either lot, except that in No. 2 the description begins as follows: "One other lot of land with the appurtenances, containing one half of an acre, &c." There were at that time three wooden buildings on No. 2, and no buildings on either of the other lots. In January, 1801, the town of Charlestown, for the accommodation of the navy yard, by vote declared, that such parts of the following streets and passages belonging to the town, as are included in the limits of the navy and dock yard be granted for the sole use of the United States; and that their termination from Main street be as follows, &c., describing certain lines across Henley or Meeting-House street, and across Battery or Water street. Harris being present at this town meeting, protested against the grant "on account of his rights to the advantages of the said streets." The premises in controversy constitute the land of the said street

so discontinued, and granted to the United States. The defendant claims the premises under Harris by devise and heirship. Upon these facts (which are the most material to be stated) the question arose, whether the United States had acquired any title to the premises in controversy, which are now included within the sixty-five acres and visible bounds of the Navy Yard.

Mr. Dunlap, U. S. Dist. Atty.

It is contended that Putnam's petition shows what land was wanted, and taken for the use of the United States, that is, John Harris' "lots," over which the roads had been laid out, which covered the places demanded on the part of the heirs of John Harris. This petition is broad enough to embrace the freehold of the roads, as was manifestly intended, being parts of those "lots." The jury were merely to value, not to bound the tract taken by the United States. Act Mass. June 17, 1800, § 2. Where it is not known to whom the fee of the road belongs, it is presumed to belong to the owners of the adjoining lots ex utraque parte, obviously upon the ground, that the road was taken out of what was once one lot, and belonging to the present or former owners of the adjoining tracts. In this case, the road, or the fee in the road, would have belonged to John Harris, as an abutter on both sides; for it would have been presumed to have been his property. The United States, taking his parcels bounded on the road, would have succeeded to his rights upon the presumption, that the fee of the road belonged to him. Can they lose their rights to the fee of the road, when, instead of being presumed, it is proved to have belonged to him, when the United States took the adjoining parcels ex utraque parte? Com. Dig. "Chimin"; 1 Rolle, Abr. 392, pl. 13; 1 Brownl. & G. 42; Lofft, 359; 13 Mass. 259; 3 Kent, Comm. 349; 1 Conn. 103; Just. Inst. lib. 2, tit. 1, § 25.

Under the term "appurtenances" in the valuation of one of the parcels bounded on both the roads, the fee of which is in controversy, the reversion of these roads passed. This was a summary proceeding, and not to be viewed with the strictness with which courts, from the force of precedents, established in the days of astute legal refinements, are accustomed to construe common law conveyances, oftentimes following precedents, which in these times would not be established. The appurtenances do not mean the buildings, for buildings pass with the land. "Cujus est solum, ejus est usque ad cœlum." When buildings are referred to by those, who doubt, whether they pass with the land, or ex majori cautelâ, they are always distinctly mentioned. By appurtenances is meant, not what is on, but that which is off the land, the adjunctum of the civil law; and we say appurtenant to, but never appurtenant on. The difficulty about land not being appurtenant to land is not insuperable, and in this case presses with less force, because it is a sort of reversion, after the discontinuance of the road, which passes, and which, according to the doctrine in Shep. Touch. 89, may well pass as appurtenant to a possession. No one can suppose, that it was the intention of the parties to leave these slips of land in the navy yard, to be, thirty years after, the subject of contention and annoyance; and if the proceedings have been such as to produce this state of things, it is manifestly from a blunder, and not from design. The claim therefore rests on technicalities; and, it is believed, there is more of technicality to rebut than support it. The following authorities were quoted and commented upon: Co. Litt. 121, 122 (Hargrave & B. Note, 174); Co. Litt. 5b, 56a, 56b; Cro. Jac. 121, 526; Cro. Car. 17; Cro. Eliz. 16, 113, 114, 704, 89; Plow. 170B; 1 Lev. 131; Shep. Touch. 90; 2 Term R. 498, 502; 1 Bos. & P. 53; 2 W. Bl. 727; 2 Saund. 400; Hazard v. Robinson [Case No. 6,281]; Whitney v. Olney [Id. 17,595]; 17 Mass. 447, 448; 8 Johns. 49; 6 Mass. 332.

John Harris' protest against the vote of the town of Charlestown passing the streets to the United States, was merely as an inhabitant of the town, to preserve the road, on account of his interest "in the road"; and it shows clearly that he considered his fee of the road taken; else he would not have protested against an act, the legal effect of which is, upon the ground now taken by his heirs, to revest in him the whole road and fee. The fact respecting the land purchased subsequently of Commodore Hull, it is contended, has no bearing upon the construction of Putnam's petition, and the verdict of the jury. The jury found one lot of John Harris in two parcels, each bounded on Henley or Meeting-House street, and they made a valuation of the whole lot by parcels from some imagined convenience. Still it is as much one lot, as a field through which a foot or cart way is granted, and as one lot completely covered by Putnam's petition. If, by the statute, the United States were authorized to take what might be wanted for the navy yard, not exceeding sixty-five acres, lying between Mystic and Charles rivers, against the will of the owners, which is believed to be the true construction of the statute, then all described in Putnam's petition, that is, John Harris' "lots," which include the roads, pass as levied upon by the United States. On the other hand, if the United States were not authorized to take the property against the will of the owners, then John Harris' receipt of the purchase money must be considered as an assent to the conveyance, and Putnam's petition is in the nature of a grant from Harris. In either case the result will be the same, and the roads be found included in John Harris' "lots," whether taken from him with or without his consent. These streets, the fee

of which, upon their being discontinued, is now claimed by the heirs of John Harris, were laid out by a committee of the town of Charlestown after the burning of that town by the British on the 17th of June, 1775, according to the plan in the office of the secretary of the state of Massachusetts. By the Massachusetts statute of October 30, 1781, the proceedings of the committee were confirmed; and by the first section it is provided, that "all actions that shall be brought for recovering possession of any land lying within any of the streets, lanes, squares, &c. laid out as aforesaid, or for damages sustained or occasioned thereby, shall be utterly and for ever barred." The language of this statute is as strong as possible: "all actions for the possession of any land lying within any of the streets, &c., are to be utterly and for ever barred." This statute, it is contended, destroys, in relation to the lands covered by these streets, the common law principle, that the ownership of the fee reverts to the original owners of the soil upon the discontinuance of the road; and the common law always gives way to the statute. 1 Bl. Comm. 89. In large cities and towns, the public necessity or convenience may require, that something more should be taken for streets, than the mere easements of a right of passing, which will answer for common highways. The freehold or fee may be required, and therefore may be taken. By this statute also all claims were "utterly and for ever barred," not only for the land lying within the streets, but also that lying within the "squares" laid out by the Charlestown committee. For the "squares" the freehold would be wanted, and the words of the statute as well bar all claims for the land lying within the "streets," as those within the "squares."

Mr. Minot, for defendants.

First. That the soil and freehold of the street called Henley or Meeting-House street, and of the street called Battery or Water street, did not pass to the United States, under and by virtue of the term appurtenances used by the jury in their verdict in the description of the lot No. 2, or by the description in said verdict of lots No. 1 and No. 3, or by the proceedings, by which the land was taken by the United States. By the second section of the Massachusetts statute of June 17, 1800, authorizing the purchase of the navy yard, it is provided, that if the agent of the United States and the owner of the land cannot agree in the sale and purchase, the land may be taken by the United States and valued by a jury. John Harris did not agree to the sale, and the land was taken under the statute by the agent of the United States. The transfer was therefore in invitum, and Harris cannot be considered as having made a voluntary conveyance of it. Before Meeting-House and Water streets were laid out, said Harris owned all the land from the lane leading to the brick yards to low-water mark. In 1800 these streets had been laid out, and the jury valued the land in distinct parcels. The verdict finds, that the jury were shown several lots of land, and that they had set out these lots by metes and bounds. If the United States meant to take the whole land of said Harris, including what was covered by streets, it is not easy to conjecture, why the jury should have valued it in separate lots; no advantage could result to either party from this valuation. The statute does not require, that the land should be set out by metes and bounds; and all that could have been necessary was to describe the land with reasonable certainty, so that it should appear, that it was within the limits allowed for the purchase. But, in fact, the jury did not take the whole of Mr. Harris's land; they left a small gore adjoining the lot No. 2, which his administrators sold to Commodore Hull, and which he sold to the United States; and that gore is now within the precincts of the navy yard.

It is inferred, that the jury did not intend to include, and did not in fact include, the soil and freehold of the streets as parts of the land taken and valued by them, from the following facts and reasons: (1) The jury describe the several lots, as they were enclosed by fences running completely round them, and, where they were bounded by streets, describing them as running on or by the streets, and thereby excluding the streets. In fact, a map of the lots could not afford a more perfect or definite description, than the jury give. The only doubt, which has been suggested, whether the streets are excluded, arises from the use of the word appurtenances in the description of the second lot. It was argued in the court below, that if the term "appurtenances" carried the two streets on which the second lot was bounded, it would give all the streets of which said Harris owned the soil; but this is an error in fact. Water or Battery street extends from the east end of lot No. 2, to a point marked B, on the southeast corner of lot No. 1, a distance of more than 300 feet; and, for that distance, it cannot be pretended, that the soil of the street can be affected by any construction of the term "appurtenances," as used in the description of lot No. 2. (2) It appears from the statement of facts, that there were buildings on lot No. 2, and no buildings on the other lots. This was probably the reason, why the jury distinguished this lot from the others. The term "appurtenances" is often used, in common parlance, to mean buildings. There was something on this lot, which gave it an additional value above the others. Persons unskilled in conveyancing are apt to consider some notice of buildings as proper in a deed of land. It is apparent, that there is no technical nicety in any part of the proceedings. The United States agent, Mr. Putnam, was

not a lawyer; and it would appear from his petition, as well as from other parts of the proceedings, that he did not employ counsel. (3) If the jury intended to include the streets, under the term "appurtenances," in the second lot, why did they not use the same term in describing the other lots? Lot No. 1 is wholly surrounded by streets; and it is reasonable to suppose, that if they intended to give the streets, they would have done it most especially in describing No. 1. These streets were as important to the navy yard as those adjoining the other lots. (4) There is no award of the value of the streets in the verdict. As said Harris did not make a voluntary sale, the jury were bound to value all they took from him. (5) On the north side of lot No. 1 is the road leading to the brick yards (which is one of the roads discontinued by the town.) This road, or a part of it, was sold by the town to Aaron Putnam, by deed, dated March 25, 1801, in consideration of said Putnam's agreeing to make a new road, north of the old road. The road thus conveyed by the town to said Putnam, he conveyed (with other land) to the United States, on the 2d of April, 1801. From these transactions, it is inferred, that Putnam, the agent of the United States, did not consider the soil of the streets as taken by the jury. (6) When the United States took the land from said Harris, the streets were public highways, and the soil was of little value to said Harris to sell, incumbered as it was with the easement; nor could he make any valuable use of it, until the easement was discontinued. (7) The protest of said Harris, made in public town meeting, is evidence, that he did not believe the soil of the streets had been set off by the jury, and that he considered himself as possessing an interest of some value in the streets. Jackson v. Hathaway, 15 Johns. 447. Where a person, over whose land a highway is laid, sells the land on each side of the highway, by such a description as does not include the road or any part of it, the soil of the highway does not pass to the grantee; as it is excluded by the description of the land granted, and cannot pass as an incident, though the deed contain the usual sweeping clause of all right, title, interest, &c. In Tyler v. Hammond, 11 Pick. 193, the defendant held a lot of land, granted with an exact description of all the boundary lines. The deed contained a sweeping clause, under which the defendant claimed the soil in the adjoining highway; but the court held, that the particular description controlled the sweeping clause in the deed, and that the highway did not pass as an incident or appurtenant.

Secondly. That the limitation contained in said statute of October 30, 1781, was not a bar to the defendant's right to the soil and freehold of said streets. From the whole of the statute, it is obvious, that the legislature intended to conform the acts of the committee, as nearly as their doings would permit, to regular proceedings under the existing statutes relating to highways, and also to provide an equitable contribution from estates not taken for highways, on account of the advantage derived to such estates by laying out streets in their vicinity. It appears from the preamble, that the town of Charlestown was desolated and destroyed by the events of the war. An effort was made in 1780 to recover it, to restore order and regularity to the streets, and to enable its inhabitants to rebuild their houses on a uniform plan. The preamble states, that a committee was appointed by the town "for regulating the streets, lanes, and squares, in that part of the town, which was so laid waste, and the committee has accordingly proceeded to lay out the same." The committee, being appointed by the town, had no power under the existing laws to lay out streets; that power being vested in the selectmen personally, or "such persons as they shall appoint," and subject to the ratification of the inhabitants in town-meeting. But the committee of the town had no power to regulate the streets. Their object was to ascertain the lines of the streets (in that part of the town, which had been laid waste), which were obliterated by the destruction of buildings, &c. In doing this, the committee were liable to error by including within the lines of streets, lands not before included. The business of the committee was to regulate (which in this connexion must mean to restore to order and the former condition) the streets, and the "committee accordingly proceeded to lay out the same." Here is no suggestion that any act had been done, affecting the right to the soil, but only that the streets had been regulated, and laid out; proceedings, which do not necessarily or usually touch the freehold. It is presumed that the town discovered that the committee had transcended their powers, and it became necessary to apply to the legislature to confirm their doings. What the proceedings of the committee were, appears from the preamble. They had regulated and laid out highways. If their proceedings had been regular, no confirmation was necessary. Wherein were they irregular? The committee was irregular in its creation. A committee so appointed having no power by law to lay out highways, all its acts were void. It is gratuitous to suppose that the irregularity was in taking the soil for highways, since we prove an actual irregularity, which could be cured by the power of the legislature only. It was no advantage to the town to have the fee of the highways, nor is it to be presumed that the legislature would give to Charlestown more than it gave to any other town in the commonwealth. The first section of the act confirms the proceedings of the committee, and bars actions for possession or damages. This section places the owner of the land in the same situation, as he stood by the existing highway statutes, except that he cannot question the regularity of the taking by the committee, as he might an irregular taking under the high-

way statutes. When land is regularly taken for a highway, no action for possession or for damages can be maintained by the owner. His only remedy is by petition, &c. St. Mass. 1786, c. 67. This statute was intended to make the proceedings of this committee equivalent to highway statute proceedings, and nothing more. The preamble to the fourth section, says, that, "whereas some persons may suffer damage by laying out the streets," &c. This is the language used in the highway statutes. "Damage by laying out," &c. is surely not descriptive of the loss of the freehold. It is used to express the value of the easement taken by the public.

The common law, which preserves the freehold of a road to the owner of the land, was early adopted in Massachusetts; and it is not easy to conjecture any reasons why the legislature should alter the law in this particular instance (and there is no similar instance since the settlement of the country), or why the town of Charlestown should desire to possess the freehold of the roads, when the easement was just as valuable to them. The town was at that time so poor as to command the charity of the general court; and can it be believed, that it would prefer to take the fee of the highways, and thereby incur a greater expense than if the easement only was taken? The public exigencies require that highways should be established, and they are provided to be laid out, and a reasonable compensation is provided by a series of statutes enacted very early after the settlement of the country, altered and continued to the present time. But it is only a public exigency which justifies the appropriation of the property of an individual to public uses. No such exigency existed in the case at bar. The appropriation of the freehold of a road to the public was wholly unnecessary and totally worthless. It is true that the statute provides a compensation in this case; but from the language used, "damages for taking," being the same as used in highway statutes, it may be inferred, that the legislature intended damages for the easement only. It cannot be presumed, that the legislature intended unnecessarily to violate private property, or to depart from the usual course of legislation on similar subjects; and in the absence of any manifest intention in the statute itself, to take the freehold of the streets, as well as from the uselessness to the town of such a proceeding, it is manifest that the legislature have adhered to the usual course of legislation on the subject of highways, and have given to the town all that it was needful for it to possess, without unnecessarily violating the property of an individual. It may be said, that John Harris has given validity to an illegal act by accepting a compensation. The reply is, that he had a right to compensation for the easement; that what he received was accepted by him for the value of the easement; and this is apparent from his protest at the surrender of the streets to the navy yard, "on account of his right to the advantages of the streets." But it is doubted whether the laying out of Water or Battery street and Meeting-House street is affected by the operation of this statute. The language of the statute is retrospective. It confirms the past proceedings of the committee. It speaks of lands taken away by the plan. The streets in question were laid out up to the present line of the navy yard in 1781, but were not carried into the land now occupied by the navy yard until 1796 and 1799, and the land now claimed by the heirs of John Harris was not taken from him till 1796 and 1799. The streets were not laid through the navy yard in 1781. There was no taking of Harris's land at that time, and there could be no damages before taking. The referees in 1796 speak of a street proposed to lead to the meeting-house, "but not yet opened." Can the statute of 1781, confirming past proceedings, bar an action for an act done in 1796? Harris had sustained no damage in 1781. Nothing was taken from him, he had the vesture and herbage and all other profits of the land till 1796. It will be seen, by reference to the statement of facts, that the town of Charlestown sold Back lane, one of the streets in the navy yard not laid out by the town's committee in 1781, and upon which that act could have no operation. From this fact it appears, that the town considered itself vested with the whole property in the streets by the mere act of laying them out, and did not consider that property as derived from the act of 1781.

Thirdly. That, upon the discontinuance of a highway by the public, in Massachusetts, the soil and freehold of such highway reverts to the owner of the land taken for such highway It is the settled law of Massachusetts, that, by the location of a way over the land of any person, the public acquire an easement; but the soil and freehold remain in the owner although incumbered with a way, and if the way be discontinued, he shall hold the land free from the incumbrance. This position is fully sustained by the decisions of the supreme court of Massachusetts, in Com. v. Peters, 2 Mass. 127; Fairfield v. Williams, 4 Mass. 427; Perley v. Chandler, 6 Mass. 454; Alden v. Murdock, 13 Mass. 259; Stackpole v. Healy, 16 Mass. 33; Robbins v. Boran, 18 Mass. [1 Pick.] 122.

STORY, Circuit Justice. The general principle of the common law is, that the soil, over which a street or highway is laid out, still remains the property of the original owner, subject to the easement, and he may pass the title thereto, notwithstanding the incumbrance. This principle is not now contested; and the only question is, how far it applies to the actual circumstances of the present case.

First, it is said, that the land on both streets (No. 2 abutting on opposite sides on them) will pass under the inquest as "ap-

purtenances" of No. 2. It may be admitted, that land may pass as "appurtenances" to other land, if such be the clear intent of the parties, as gathered from the terms of the deed or other instrument of conveyance; for, in such a case, the law does not insist upon strict propriety in the use of language, but is content to expound the words of the parties, and give effect to the instrument, according to the real and unquestionable meaning of the parties. But, strictly speaking, in a legal sense, land can never be appurtenant to land. But a thing, to be appurtenant to another, must be of a different and congruous nature, such as an easement or servitude, or some collateral incident belonging to and for the benefit of the land. In Co. Litt. 121b, it is said, that nothing can be appurtenant, unless the thing agree in quality and nature to the thing whereunto it is appurtenant; as a thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. And there are many other authorities to the same effect in Com. Dig. "Appendant and Appurtenant," and "Grant," E, 9. In a case, therefore, where the words of a grant pass land "with its appurtenances," the law will, in the absence of any controlling words, deem the word appurtenances to be used in its technical sense; and that construction will not be displaced, until it is made manifest from other parts of the grant, that some other thing was actually intended by the parties. I say, until it is made manifest; by which I mean, clearly and definitely ascertained, that the word is used in another sense. I add also, from other parts of the same grant; for it is not open to parol evidence to explain or vary the legal sense. If there is nothing in rerum naturâ, upon which the word can operate, that does not entitle the court to desert the legal sense. It has been said by the counsel for the defendant, that there were buildings on No. 2, to which the word "appurtenances" is commonly applied. But such buildings are in no just sense "appurtenances"; but if annexed to the freehold, they are a parcel of the land, and pass as such by the deed. It is not, however, necessary to show, that there are things granted, to which the word applies. It is often thrown in by conveyancers without any actual knowledge of the premises, to avail, as far as it may avail, by way of cautionary enlargement of the principal grant, if there be any thing, on which it may operate. If there be in fact no appurtenances, then the word, like other expletives in a deed, is merely nugatory. The authorities cited at the bar upon this point are full to the purpose, and especially Leonard v. White, 7 Mass. 6, Jackson v. Hathaway, 15 Johns. 447, and the very late case of Tyler v. Hammond, 11 Pick. 193, in the supreme court of Massachusetts. See also Com. Dig. "Chimin"; 2 Saund. 400, and note; 6 Mass. 332. To which I would add Whitney v. Olney [Case No. 17,595].

Now, in the present inquest (sufficiently loose in all its proceedings, and inartificially conducted, considering the magnitude of the interests at stake), there is nothing, upon which the court can put its finger, that in any manner justifies it in supposing the jury intended by "appurtenances" any thing but what are such in the legal sense. They appraise "one other lot, No. 2, with the appurtenances," then describing it by metes and bounds. These metes and bounds do not include the streets, or either of them. The lot is bounded by the streets, not over them. All the other lots are bounded on one of these streets; and there is no mention of "appurtenances" in the description of either of them. Yet if the intention were to include the land belonging to the streets, it must have been equally direct in regard to all these lots, as in regard to No. 2. The truth is, that no particular stress was laid on the word "appurtenances." If the streets had been private ways, the right to use them would have been "appurtenances" in the strict sense. But, as highways, they were public easements. This distinction may not have been attended to by the parties; and therefore the word "appurtenances" may have been inserted from greater caution. But the omission of it, in regard to the other lots, rather leads to the conclusion, that it was a chance hit, without intention or object. At all events, the fact, that all the lots are bounded by abuttals, which exclude the streets, irresistibly shows, that the jury did not intend to include them. If they had so intended, some positive expression would have been found. It has been said, that the duty of the jury was, to value the land only, and not to describe its boundaries. If it were so, it is too late to correct the error. But I am of opinion, that it was their duty to describe the land taken by definite bounds, in order to show the extent of this acquisition of property by the United States, in a proceeding in invitum. The description should be as definite and clear, as in a common grant. The title of the United States might otherwise have been brought into jeopardy. How, indeed, could the jury value the land without ascertaining its extent? So far, then, as the title of the United States is sought to be maintained upon this inquest, it appears to me unsustainable.

A question of more difficulty arises upon the construction of the act of 1781; whether it was simply intended to authorize the creation of servitudes or easements in the lands, over which the committee had laid out streets, lanes, and squares, according to the plan confirmed by the legislature; or whether it was intended to vest in the town the title and freehold of the soil itself, over which these streets, lanes, and squares were so laid. In other words, whether the

town was to acquire the whole property in the land taken for streets, lanes, and squares, paying damages to the full value; or was to acquire only a right of way, or public use, paying damages only for such right, and leaving the general ownership in the land, as it was before. It is unnecessary to consider, how far the legislature possessed a constitutional authority to take the lands for either purpose, depriving the owner of the right of a trial by jury to ascertain his damages; for Harris took no such exception, and received a compensation awarded according to the provisions of the act. But it is material to state, that by the terms of the act it is declared, that "all actions that shall be brought for recovering possession of any land lying within any of the streets, lanes, squares, &c. laid out as aforesaid, or for damages sustained or occasioned thereby, shall be utterly and for ever barred." In the ordinary mode provided by law for laying out town ways, streets, and highways under our general statutes, it is clear, that an easement only is created; and, subject to that, the general propriety remains in the owner of the soil at the time of laying it out. He may use it for any purposes, not inconsistent with the easement. He is entitled to any profits from the herbage on the way-side, and may maintain trespass for any wrong or dispossession by any intruder. The present act in terms bars for ever actions brought for possession of any such lands; and therefore, taken in its literal signification, it may seem intended to bar for ever all possessory rights and remedies. It is true, that it does not purport to transfer any right. But the question made is, whether it does not so by fair implication. Could the owner, after the act, enter into possession, and thus destroy the easement? Could he enter into possession and cultivate the soil, not obstructing the easement? The pressure of the cause appears to me mainly to rest on this point; for, if all the right of Harris, and of those under whom he claimed, to the soil, was intended to be extinguished or to be vested in the town, then the defendant is guilty of a trespass. If not, then the title belonged to Harris; and the grant of the town, except so far as it operated as an extinguishment or discontinuance of the street over the premises, was utterly void. It is plain, how the town understood the act. They acted upon it as transferring the title in the land to them; and they accordingly, by their vote in 1801, intended to grant it to the United States, so long as the navy yard should be continued in that place. This mistake, however, on the part of the town, if it be a mistake, cannot change the legal right of the parties; but the case must be decided wholly upon the terms and intent of the act of 1781.

After reflecting a good deal upon the subject, my mind has at last come to the conclusion, that the act of 1781 was not intended to pass the freehold in the lands, but to create only an easement, which might be, and probably then was, contemplated to be perpetual. I will shortly state the reasons, which have conducted me to this result. In the first place, every act of a special nature, in derogation of private rights, ought to be construed strictly. This principle of construction is founded in the common law. And in cases of this nature, it acquires additional force from the constitutional provision in the bill of rights of the constitution of Massachusetts, that, "whenever the public exigencies require, that the property of any individual shall be appropriated for public uses, he shall receive a reasonable compensation therefor." The right, therefore, to take private property for public uses is limited to cases of public exigency. If the legislature expressly, or by necessary implication, state the exigency to exist, and the extent to which the property is to be taken, that would in common cases be decisive. But if the words used be equivocal, and upon the act it stand indifferent, whether a right of way only, or a right of freehold be taken, the natural construction would be, that the legislature intended an easement only, as that would be co-extensive with the exigency of the public use. Now, it is perfectly obvious, from the preamble of the act of 1781, that the committee of the town were appointed to regulate the streets, lanes, and squares in that part of Charlestown, which was laid waste; and that they had "proceeded to lay out the same," that is, to lay out the streets, lanes, and squares. This power, thus given by the town, was an excess of municipal authority, and not within the purview of any of the general statutes for the opening or widening of streets and highways. It was, therefore, ipso facto void, unless it received the confirmation of the legislature by some new enactment. The act of 1781 gave such confirmation. But the confirmation was intended to go no farther than the original authority, given by the town, extended; or at least no farther than the acts of the committee under it had gone. There is not a word in the statute, which looks beyond the acts of the town and committee; or which purports to provide for more extensive operations. The power given by the town to the committee was, to regulate the streets, lanes, and squares, in the part of the town laid waste. It is not easy to give any very exact sense to the term "regulate" in this connexion. It ordinarily implies, not so much the establishment of a new thing, as the arrangement in proper order of such as already exist. It might have meant no more than to ascertain, and fix, the lines and limits of the existing streets, lanes, and squares. But a liberal interpretation might perhaps fairly include the power to widen, alter, and extend the streets, lanes, and squares in that part of the town, so as to provide for the public convenience,

and the mutual connexion of the whole. The committee appear to have acted upon this interpretation; and after such a lapse of time it would be too much to hold it unsound, or unjustifiable, especially when it has received a legislative sanction.

Assuming then, that the power to regulate, included the power to lay out streets, does the latter naturally or necessarily include the power to take away the freehold from the owner of the soil, or only to create an easement over it? In the construction of the ordinary statutes respecting highways, the power given to selectmen, and other public functionaries, "to lay out" streets and highways, has always been held, (as has been already stated,) not to take away the freehold, but to create an easement only. The extraordinary power given to the committee is only a substitution of them for the ordinary functionaries. The power is the same; but the persons, who are to exercise it, are different. In what manner does this change the nature or extent of the power itself? It is a great misfortune in this case, that we cannot find the original doings of the committee in the town records; nor the petition of the town, on which the act of 1781 was founded; nor indeed any other proceedings relative thereto. We are compelled to rely wholly on the preamble of the statute for every memorial of the acts of the town and the committee. Under such circumstances, it seems to me, that we are bound to construe the statute cypres, and to subject its terms to the same interpretation, as words of a similar import have in the ordinary highway laws. The legislature ought to be presumed to use the words in the common sense, and under the same limitations, which the common law implies, unless some other intention is clearly manifested. The prohibition to maintain any action for possession, or for damages, does not necessarily import such an intention. It is true, that in common cases of highways, the owner of the soil may maintain an action for possession, subject to the easement. The words of the act of 1781 seem to bar such an action. But their generality may well be limited to cases, where a possession is sought inconsistent with the easement. The same clause bars any action for damages. What damages? Clearly for laying out the streets, not for taking the fee of the lands. The fourth section of the act provides for the manner of ascertaining the damages; and, though it speaks of appraising the value of the lands and buildings taken under the act, yet the preamble to that section expressly shows, that it is the damages done "by laying out the streets," and not by transferring the fee to the town. For all the purposes of the act, the public use is just as complete and perfect by the establishment of the streets, as by a transfer of the fee. The latter was not necessary for any avowed purpose of the town, or of the committee, or of the legislature.

It has been urged, that the act of 1781 did not extend to the land in controversy; for Water or Battery street and Meeting-House street were not laid out over the premises until many years after the passage of it. If the plan and report of the committee did not in fact contain a laying out of these streets in a legal sense, (for the time of their being actually opened is quite a different consideration,) it is perfectly clear, that the act of 1781 does not apply to them; for it confirms past proceedings only in laying out, and does not purport to authorize future proceedings of a like nature. And here, again, we are in the dark; for the proceedings of the town, as to these streets in 1795 or 1796, and in 1798 and 1799, cannot be found; and we have no means of ascertaining their import or effect. The plan alone remains; and that certainly extends the lines of the streets, as they were subsequently opened. In my view of the case, the adoption of the plan by the legislature in 1781 must be deemed, in a legal sense, a laying out of streets at that time; and the subsequent proceedings of the town were not a new laying out, but merely an opening of the old streets in conformity to the plan. Upon this point the argument is not, therefore, sustained.

But, for the other reasons already stated, my judgment is, that the laying out of the streets over the premises in 1781 did not transfer the fee from the then owners of the land, but left it in them, subject to the easement. And, according to the agreement of the parties, the United States are to become nonsuit.

Case No. 15,316.

UNITED STATES v. HART.

[Pet. C. C. 390;[1] 3 Wheeler, Cr. Cas. 304.]

Circuit Court, D. Pennsylvania. April Term, 1817.

CONSTITUTIONAL LAW—MUNICIPAL ORDINANCES—RAPID DRIVING—POWER OF CONSTABLE—CARRIAGE OF MAILS.

1. If the ordinances of the city of Philadelphia, are in collision with an act of congress, the former must give way. The laws of congress, made in pursuance of the constitution of the United States, are the supreme laws of the land, any thing in the constitution or laws of any state notwithstanding.

[Cited in Re Brown, Case No. 1,980; U. S. v. New Bedford Bridge, Id. 15,867.]

[Cited in brief in American Live-Stock Commission Co. v. Chicago Live-Stock Exch., 143 Ill. 223, 32 N. E. 274.]

2. Driving a carriage through a populous and crowded street in the city, at such a rate or in such a manner, as to endanger the safety of the inhabitants, is an indictable offence at common law, and amounts to a breach of the peace; a constable is authorised, without a warrant, to prevent the peace from being thus broken.

[Cited in U. S v. Three Railroad Cars, Case No. 16,513.]

[1] [Reported by Richard Peters, Jr., Esq.]

3. The act of congress, prohibiting the stoppage of the mail, is not to be so construed as to prevent the arrest of the driver of a carriage in which the mail is carried, when he is driving through a crowded city at such a rate as to endanger the lives of the inhabitants.

[Questioned in U. S. v. Harvey, Case No. 15,320. Cited in U. S. v. Three Railroad Cars, Id. 16,513.]

[Cited in Briggs v. Light Boats, 11 Allen, 182; Elliott v. Philadelphia, 75 Pa. St. 354.]

This was an indictment for knowingly and wilfully retarding the passage of the mail. 4 Laws [Bior. & D.] 292 [2 Stat. 593]. It was proved that the defendant [John Hart], being one of the high constables of the city of Philadelphia, did on one occasion stop the mail stage having the mail in it, in its passage through Market street to the post-office, upon the ground that the stage was going at an immoderate rate, so as to endanger the lives and safety of the citizens. On another occasion, it was stopped by the defendant in Chestnut street, because the stage body containing the mail, was placed on runners in consequence of the ground being covered with snow, and no bells were placed on the horses. The evidence offered by the defendant was very strong, to prove that the stage was passing very rapidly through Market street, at the time it was stopped by the defendant; some of the witnesses supposed it to be at the rate of eight or nine miles an hour. The defendant justified his conduct under an ordinance of the city, which subjected every person to a fine, who should drive at an immoderate rate in the city, so as to endanger the citizens thereof, or who should drive a carriage on runners without bells to the horses. It was contended by the defendant's counsel, that this ordinance afforded a complete justification to the constable; or, if not, that the driving, in a populous street in such a manner as to endanger the safety of the inhabitants, amounted to a breach of the peace at common law, in which case, the constable is authorised, without warrant to arrest the party, and if he can to prevent the mischief which seems to be threatened. If so, the act of congress ought not to be so construed as to render it criminal in any person to prevent a mail driver from breaking the peace, because a stoppage of the mail may be the consequence of such prevention. Such a stoppage, it was contended, is not within the meaning of the law. It should be some act performed with the intention to stop the mail, and not one where the stoppage of the mail is the consequence of a lawful act. Secondly. It was urged, that there is no part of the constitution which authorises congress to pass laws to punish acts of this kind; and if the law be constitutional, then, thirdly, it was insisted, that the 35th section of the law, vests the jurisdiction in cases of this kind in the state courts, and that consequently this court has not jurisdiction.

WASHINGTON, Circuit Justice. It is unnecessary at this time to enter into an examination of the objections made to the constitutionality of this law, and to the jurisdiction of this court, as the defendant may have the full benefit of them on a motion in arrest of judgment, if the verdict should be against him, and there should be any thing in the objections. I shall merely observe for the present, that by passing them over, it is not to be understood that the court means, in any respect, to countenance them. If the ordinance of the city is in collision with the act of congress, there can be no question but that the former must give way. The constitution of the United States, and the laws made in pursuance thereof, are declared by the constitution to be the supreme law of the land; and the judges both of the federal and state courts, are bound thereby, any thing in the constitution or laws of any state, to the contrary notwithstanding. But, there is in truth no collision between this ordinance and the act of congress on which this indictment is founded. If the mail carrier should violate the ordinance, the act of congress does not shelter him from the penalty imposed by the ordinance. But the ordinance does not authorise any officer to stop the mail, and consequently he cannot justify his having done it, under that ordinance. The defendant's counsel have then resorted to the common law, which authorises a constable, without a warrant, to prevent a breach of the peace; and it is contended, that for any person to drive through a populous city, at such a rate as to endanger the lives or the safety of the inhabitants, amounts to a breach of the peace.

This view of the subject presents two questions. First, was the mail carrier in the act of breaking the peace, at the time when he was stopped by the defendant; and if he was, then, secondly, would this fact excuse him under a fair interpretation of the law under consideration. As to the first question the court is of opinion that driving a carriage through a crowded or populous street, at such a rate or in such a manner as to endanger the safety of the inhabitants, is an indictable offence at common law, and amounts to a breach of the peace. But, whether in the two cases stated in this indictment, the mail carrier so conducted himself as to come within this principle, is a question proper for the jury to decide. If they decide this fact affirmatively, then upon the principles of the common law, the constable was authorised without a warrant, to prevent the peace from being broken. The second question will depend upon the fair construction of the act of congress, and we are of opinion that it ought not to be so construed as to shield the carrier against this preventive remedy, because a temporary stoppage of the mail may be the consequence. Suppose the officer had a warrant against a felon who had placed himself in the stage, or that the driver should commit murder in the street in the presence of an officer, and then place himself on the box; could it be contended, that the sanctity of the

mail would extend to protect those persons against arrest, because a temporary stoppage of the mail would be the consequence? We think not. It could not be said in any of those cases, that the act amounted to a wilful stoppage of the mail.

Verdict not guilty.

Case No. 15,317.

UNITED STATES v. HARTNELL.

[Hoff. Land Cas. 207.] [1]

District Court, N. D. California. Dec. Term, 1856.[2]

MEXICAN LAND GRANTS—COLONIZATION LAWS.

Under the laws of Mexico, more than eleven leagues of land could not be granted in colonization to any one person.

Claim for eleven leagues of land in Sacramento county, confirmed by the board for six leagues, and appealed by the United States.

[This was a claim by widow, heirs, and executors of Guillermo Eduardo P. Hartnell (William E. P. Hartnell) for Todos Santos y San Antonio, five square leagues, in Santas Barbara county, granted August 28, 1841, by Juan B. Alvarado, and Cosumnes, eleven square leagues in Sacramento county, November 3, 1844, by Manuel Micheltorena, to Salvador Osio. Claim filed May 12, 1852. Confirmed by the commission August 7, 1855, for six leagues on the Cosumnes river.]

William Blanding, U. S. Atty.

Halleck, Peachy & Billings, for appellees.

HOFFMAN, District Judge. The land claimed by the appellees before the land commission was a tract of five leagues in Santa Barbara county, called "Todos Santos y San Antonio," and a tract of eleven leagues on the river Cosumnes, in Sacramento county. The commissioners confirmed to the claimant the five league tract and six leagues of the Cosumnes tract, making eleven leagues in all. From this decision the United States appeal. It is insisted on the part of the appellees, that the claim to the whole of the Cosumnes tract should be confirmed, and that the limitation of it to six leagues is erroneous. The transcript as filed in this court embraces both claims. The Todos Santos tract is situated in the Southern district; over that part of the case the court has therefore no jurisdiction. It appears from the proofs that the grant for the Todos Santos tract was duly issued; that it was occupied and cultivated by the grantee, and that judicial possession of it was formally given. It was not, however, approved by the assembly, for reasons which will presently be stated. The grant of the Todos Santos tract is dated Aug. 28th, 1841. On the third of November, 1844, [W. E. P.] Hartnell obtained another grant from Micheltorena of eleven leagues on the Cosumnes. The genuineness of both these grants is not disputed. On the sixteenth of March, 1846, these two concessions were referred by the assembly to the committee on vacant lands. On the thirteenth of April following the committee reported "that as the decree of concession for the Todos Santos tract does not express the number of leagues granted, and as another expediente has been presented for approval for eleven leagues on Cosumnes river, granted to the same party Nov. 3d, 1844, that the two expedientes be united, and as the law gives eleven leagues as the maximum, that the petitioner be required to present his title for the first named tract, in order that the number of leagues may be ascertained, and that the party may then apply for such eleven leagues in the two tracts as may suit him best." This report was approved by the departmental assembly on the twenty-second of April of the same year. The directions given to the petitioner were not complied with—not, as suggested by his counsel, because it was the governor's duty to submit the expedientes for approval, for the report expressly requires the petitioner to present his title for the Todos Santos tract, but probably because residing at a distance he had no opportunity, in the few months which intervened before the subversion of the Mexican authority, to comply with or perhaps even learn the order which the assembly had made. At all events no further action was had in the assembly on either grant. The grantee appears to have occupied his land by placing a tenant in possession of it, by whom it was cultivated soon after the date of the grant. He has also conveyed to various persons portions of it. There is nothing in the case from which any intention to abandon the land can be presumed, unless his omission to present his grant for Todos Santos to the assembly, as required, can be so construed. But such a construction is obviously inadmissible.

The only question in the case is as to the extent to which the Cosumnes title should be confirmed. It is urged that the limitation of the quantity of land which the governor was authorized to grant did not apply to grants made to Mexican citizens; and secondly, that the full powers given to Micheltorena enabled him to disregard the restriction. It is unnecessary to enter into a discussion of these points, for the supreme court has in unmistakable language recognized the restriction of the powers of the governor. In U. S. v. Larkin, 18 How. [59 U. S.] 561, the court in speaking of the decree of the court below limiting the quantity of land to eleven leagues, say: "Especially should this construction be given, as the power of the governor to grant to a single person was limited so as not to exceed this quantity, according to the twelfth section of

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

[2] [Affirmed in 22 How. (63 U. S.) 286.]

the decree of the Mexican congress of August, 1824." The grant in that case was made by Gov. Micheltorena, November 4th, 1844, only one day after that under consideration. Independently of this decision of the supreme court, I should have no difficulty in reaching the same conclusion. It is urged that Santa Anna was at that time in possession of absolute legislative and executive authority, and that his delegation of all his power to Micheltorena conferred upon the latter authority superior to that of any existing law. But the power of the most absolute despot in civilized nations is rather the power to make, alter or abrogate the laws, than to violate them. So long as the law remains unrepealed the sovereign is bound by it, and the legality of any act done by him must be tested by the laws as they exist. Such I understand to have been the theory of the Spanish jurisconsults, and though the distinction in an absolute monarchy may be rather speculative than practical, it is of some importance when the inquiry relates to the power of a subordinate to whom the despot may in general terms have delegated his authority. That portion of the colonization laws which consisted of executive regulations, Micheltorena, under his plenary powers, might perhaps have disregarded. But the decree of the Mexican congress, from which the president himself derived his authority to make regulations on the subject, must be deemed to have remained in force until expressly abrogated. The action of Micheltorena himself in submitting these grants to the assembly is an unmistakable proof that he considered the colonization laws were to be observed by him in form and in substance, and the refusal of the assembly to approve a grant for more than eleven leagues is an emphatic declaration of what was the received construction of the law, and their idea of the governor's authority. There is no reason to suppose that the refusal of the assembly to approve for the reason assigned was by any one considered an erroneous construction of the law, or an unwarrantable encroachment on the extraordinary powers of the governor.

It is zealously urged by the counsel for the appellees, that this is no longer an open question in this court, and that grants have already been confirmed in this court for a greater quantity than eleven leagues. Such may possibly be the fact. It is enough, however, to say that in the case alluded to (that of Petaluma) the decision of the board was affirmed by this court without examination, and on the statement of the district attorney in open court, that no valid objection to a confirmation existed. It is also to be observed that in that case the grant was for ten leagues, and that the additional five leagues were acquired by purchase, the grantee having paid to the government a considerable sum of money for the land. I am not aware that until the present case it has been claimed in this court that Gov. Micheltorena or any other governor had authority to make a gratuitous concession of more than eleven leagues of land to a single individual. Certainly, no ruling to that effect has been made, and even if it had been, the construction given to the law by the departmental assembly and the supreme court would expose its incorrectness. It appears from the record that Hartnell had, before the grant issued for the Cosumnes tract, obtained a grant for two-thirds of a league in a place called Alisal. This land, however, he seems to have purchased, and the grant was probably obtained to strengthen the title previously acquired. The commissioners do not appear to have noticed this grant, but confirmed the claim for the five leagues in Todos Santos and six leagues in Cosumnes. I do not think the proof sufficiently clear as to the Alisal tract to authorize the deduction of the quantity mentioned in that grant from the six leagues of Cosumnes confirmed to the appellees. A decree must be entered confirming the claim to Cosumnes to the extent of six leagues.

[The case was taken on appeal to the supreme court, where the decree of this court was affirmed. 22 How. (63 U. S.) 286.]

Case No. 15,318.

UNITED STATES v. HARTWELL et al.

[3 Cliff. 221;[1] 12 Int. Rev. Rec. 72.]

Circuit Court, D. Massachusetts. May Term, 1869.

CRIMINAL LAW—LOANING PUBLIC MONEYS—PRINCIPAL AND ACCESSARY—CONFESSIONS AND ADMISSIONS—PLEA OF NOLO CONTENDERE.

1. An officer of the United States charged with the safe-keeping of public moneys was indicted as principal defendant under the act of August 6, 1846 [9 Stat. 63], for loaning such money so intrusted to him to certain persons indicted jointly with him. Before the jury were empanelled he pleaded nolo contendere. Certain confessions of his that he had loaned the public money were offered in evidence. *Held*, they were properly admitted to show that he had unlawfully loaned a portion of the public money, but not to prove that the other defendants ever advised or participated in the criminal acts. The other defendants were charged with advising and participating in the felonious acts, but neither the declarations nor acts of the principal defendant could be admitted to prove anything against them.

2. The defendants before the court, after the principal defendant's plea, were held to be principals and not accessaries.

3. Misdemeanors do not admit of accessaries either before or after the fact, and the general rule is, that whatsoever will make a party an accessary before fact in felony will make him a principal in misdemeanor if properly charged as such.

[Cited in U. S. v. Carroll, 32 Fed. 776.]

4. The offence charged in this case was a misdemeanor, but it would make no difference if it were held to be a felony, as the defendants before the court were confederates of the prin-

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

cipal defendant in the commission of the crime. He loaned them the public moneys, and they borrowed them knowing him to be an officer of the United States charged with the custody of the moneys.

5. Acts, conduct, and declarations of each confederate made during the pendency of a criminal enterprise are competent evidence against all concerned in it; but confessions subsequent to the crime can affect as evidence only a party by whom they were made.

6. When the accessary is tried with the principal, the confessions of the principal are admissible to prove his own guilt, and where the principal confesses by pleading guilty and retiring from the bar under his recognizance, the record of the conviction of the principal was properly introduced, and was prima facie evidence of his guilt at the trial of the other defendants, and his confessions to show that he was rightfully convicted.

7. Evidence of his confessions to prove the guilt of the principal cannot be admitted under an indictment against the accessary, unless the guilt or antecedent conviction of the principal is alleged in the indictment.

8. Conviction may accrue either by confession and pleading guilty, or by being found guilty.

9. Where the guilt of the principal was admitted at the trial of the accessaries, even if the confessions of the principal were improperly admitted, still a motion for new trial ought not to prevail because the record of the conviction of the principal was properly introduced and was prima facie evidence of his guilt at the trial of the other defendants.

10. The legal effect of the plea of "nolo contendere" and "guilty" is the same as regards all the proceedings on the indictment.

11. If the defendants in this indictment had been charged as accessaries to the offence alleged against the principal, still the confessions of the principal were properly admitted to prove that he committed the offence.

Officers and other persons charged with the safe-keeping, transfer, and disbursement of the public moneys are required, by the act of the 6th of August, 1846, to keep an accurate entry of each sum received, and of each payment or transfer, and the sixteenth section of the act also provides that if any one of the said officers shall loan any portion of the public moneys intrusted to him for safe-keeping, disbursement, or transfer, every such act shall be deemed and adjudged to be an embezzlement of so much of the said moneys as shall be thus loaned, which is therein declared to be a felony; and the same section further provides that all persons advising or participating in such act being convicted thereof before any court of the United States of competent jurisdiction shall be punished as therein provided. 9 Stat. 63. Founded on that provision the indictment in this case contained nine counts, charging in substance and effect that the first-named defendant [Julius F. Hartwell], at the times therein mentioned, was an officer in the office of the assistant treasurer at Boston, in the commonwealth of Massachusetts, and that he, as such officer, then and there loaned large sums of the public moneys deposited in that office to the firm of Mellen, Ward & Co. and that [Charles] Mellen and [Charles H.] Ward, the other two defendants named in the indictment, then and there advised and participated in those several unlawful and criminal acts of loaning such portions of the public moneys so intrusted to that officer for safe-keeping, disbursement, and transfer. Subsequent to the filing of the indictment, the defendants were arraigned and severally pleaded not guilty, but, when they were set at the bar for trial on a later day in the same term, the principal defendant, Hartwell, retracted his plea of not guilty, and pleaded nolo contendere, which was accepted by the district attorney, and, it appearing that his recognizance was satisfactory, he was allowed to retire from the bar and the jury were empanelled for the trial of the other defendants. Evidence was introduced by the district attorney, showing that the public moneys of the United States, intrusted to the assistant treasurer at Boston, in this commonwealth, were kept in the vault of the depository designated for that purpose; that the room so designated and used was about ten feet square, and was divided into two apartments separated by a passageway with partitions on each side of the passage. Gold was kept in the apartment on the right-hand side of the passage in boxes, some of which contained five thousand dollars, and others only one thousand dollars, and there were also considerable quantities of silver coins and currency kept in that apartment of the vault. Six or seven millions of gold coin, sealed up in bags, were also kept in the other apartment on the other side of the passage-way, and there was a door from the passage-way into each of those apartments. Hartwell was paying teller in that office, and as such had access to both apartments of the depository. The tendency of the testimony was to show that the amount of the public moneys kept there during the period laid in the indictment was seldom or never less than twelve millions of dollars at any one time. The substantial charge of the indictment is, that the principal defendant loaned large sums of the public moneys intrusted to him for safe-keeping, transfer, and disbursement, and that the other two defendants, together with one Edward Carter, who did not appear, advised and participated in that unlawful act. The docket entries show that the principal defendant pleaded nolo contendere before the jury were empanelled, and those entries were introduced in evidence during the trial. The principal witness for the government was the chief clerk in the office of the assistant treasurer, who was called and examined by the district attorney. He testified, among other things, that Hartwell, in the afternoon of the 28th of February, 1867, stated to the witness that he wished to have some conversation with him, and that they went into the righthand apartment of the vault for that purpose, and while there he told the witness that he had

been loaning the public moneys to Mellen, Ward, & Co., as charged in the indictment. Seasonable objection was made by the defendants on trial to the introduction of that testimony, upon the ground that it was hearsay and inadmissible as against them for any purpose. They conceded that the testimony would be admissible if Hartwell was on trial, to prove his guilt as against himself, but they denied that the evidence could be properly admitted, even if the principal were on trial, to prove his guilt as against the defendants charged as having advised and participated in the criminal acts alleged against the principal defendant. But the court ruled that such evidence, if all the defendants were on trial at the same time, would be admissible to prove the guilt of the principal, both as against himself and as against the other defendants, and that the same rule must prevail as to the admissibility of the evidence where those charged with having advised and participated in the criminal acts of the principal are separately tried in consequence of the previous conviction of the principal, or because he had pleaded guilty or nolo contendere, as in this case. Repeated confessions of the principal under that ruling were admitted in evidence to the effect that he had loaned the public moneys intrusted to him for safe-keeping, transfer, and disbursement, as alleged in the indictment, but the court ruled at the same time, and subsequently instructed the jury to the same effect, that none of the confessions, admissions, or statements of the principal defendant were admissible to prove that the defendants on trial ever advised or participated in those criminal acts. Detailed statements of the confessions of the principal were given by several witnesses subject to the same objection, which were overruled by the court upon the same ground, and they were admitted in evidence for the same special purpose. Much other evidence was introduced, and the jury under the court's instructions returned a verdict of guilty against both defendants. Exceptions were duly taken to the rulings and instructions, and the case came before the court upon a motion for new trial.

G. S. Hillard, U. S. Dist. Atty.

Benjamin F. Thomas, G. C. Shattuck, and H. W. Paine, for defendants.

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

CLIFFORD, Circuit Justice. The grounds of the motion are as follows: (1) Because the confessions of the principal defendant were improperly admitted to prove that he unlawfully loaned certain portions of the public moneys as alleged in the indictment. (2) Because the verdict was not warranted by the law and the evidence in the case. Before proceeding to consider the exceptions to the rulings and the instructions of the court, it becomes necessary to examine the charge as laid in the indictment, and to ascertain its precise character as defined in the act of congress. Briefly stated, the offence charged against the principal defendant is, that he unlawfully and feloniously loaned certain portions of the public moneys intrusted to him for safe-keeping, transfer, and disbursement, to the other three defendants therein named; but the charge against the other defendants is, that they then and there advised and participated in that unlawful and felonious act. Neither the acts nor the declarations of the principal were admitted in evidence to prove anything which was charged against the other defendants. They were charged with having advised and participated in the unlawful and felonious act committed by the principal, but the court expressly ruled that neither the acts, conduct, nor declarations of the principal were admissible to prove anything charged against them in the indictment. The express ruling of the court was that the confessions of the principal defendant were admissible to prove his own criminal act as laid in the indictment, but that they were not admissible to prove anything charged against the other defendants, and the limitation contained in the ruling of the court was also embodied in the instructions given to the jury. Loaning the public moneys was the charge against the principal, and the court admitted his confessions to prove that charge, but ruled that neither the acts nor the confessions of the principal were admissible to prove the charge as laid in the indictment against the defendants on trial. None of these suggestions are controverted, but the theory of the defendants is, that the allegations of the indictment create the technical relation of principal and accessary, as between the party alleged to have loaned the public moneys, and the defendants who are charged with having advised and participated in that unlawful and felonious act as defined in the act of congress. Theories are often assumed because they are plausible, when, upon a closer examination, it appears that in point of fact they have no foundation whatever. The present theory as assumed in argument by the defendants probably has its foundation in the analogy between the word "advising" as used in the act of congress on which the indictment is founded, and the word "counselling" as usually employed in defining the meaning of an accessary to a felony before the fact as understood at common law. But there are at least two difficulties in the way of that theory as applied to this case which cannot be overcome: (1) The statute offence of loaning the public moneys was not a felony at common law, and the offence charged against the defendants of having advised and participated in that act is not declared to be a felony by the act of congress. (2) The second difficulty in the way of the theory is, that, by the true construction of the provision defining the of-

fence, the defendants before the court are principals and not merely accessaries, as supposed in the proposition. Aiders and abettors were formerly defined to be accessaries at the fact, and the rule was, that they could not be tried until the principal had been convicted or outlawed; but it has been long settled that all those who are present, aiding and abetting, when a felony is committed, are principals either in the first or second degree, and if in the second degree, that they may be arraigned and tried before the principal in the first degree, and that they may be convicted even though the party charged as principal in the first degree is acquitted. Fost. Crown Law, 347; Rosc. Cr. Ev. 214; Taylor's Case, 1 Leach, 360; Rex v. Towle, Russ. & R. 314; Reg. v. Perkins, 2 Denison, Crown Cas. 458. An accessary, says Blackstone, is he who is not the chief actor in the offence nor present at the time, but is in some way concerned therein, either before or after the fact committed. 4 Bl. Comm. 34. Accessaries before the fact are those who, being absent at the time the crime is committed, yet procure, counsel, or command another to commit it. 1 Hale, P. C. 615. The absence of the party also is necessarily implied in the definition of an accessary after the fact, who is defined to be one who, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. 4 Bl. Comm. 37; 1 Hale, P. C. 618. Persons participating in the commission of a crime are as much principals if they are present, aiding and abetting it, as those who are the immediate perpetrators of the act, differing only in degree. Nor is actual presence necessary if it appears that all were engaged in the common design, as when one commits the offence and another keeps watch to prevent surprise or to give warning or to afford relief. Misdemeanors do not admit of accessaries either before or after the fact, but the general rule is that whatsoever will make a party an accessary before fact in felony will make him a principal in misdemeanor if he is properly charged as such in the indictment. State v. Lymburn, 1 Brev. 397.

The better opinion is that the offence charged against the defendants before the court is a misdemeanor, but it would make no difference if it were held to be a felony, as the charge laid in the indictment implies and the evidence introduced at the trial shows, that they were confederates of the principal defendant in the commission of the offence with which he was charged. He loaned the public moneys to them, or to their firm, and they borrowed or received the same from him, knowing that he was an officer of the United States, intrusted with the safe-keeping, transfer, and disbursement of such public moneys.

Co-operation between the principal and the other defendants is necessarily implied in the charge as laid in the indictment, and all the testimony introduced to prove that the firm of Mellen, Ward, & Co. received the moneys loaned by the principal, tended to show that the relation which they sustained to him was that of confederates in that unlawful and felonious act, and it is no answer to this view of the case to say that the confessions were admitted in evidence before that testimony was introduced, as that merely presents a question as to the order of proof which cannot be regarded as the proper foundation for a new trial. Acts, conduct, and declarations of each confederate made and done during the pendency of such a criminal enterprise are competent evidence against all engaged in it, as each is supposed to approve and sanction all that was done or said in furtherance of the common object. 1 Greenl. Ev. §§ 111, 233; U. S. v. Gooding, 12 Wheat. [25 U. S.] 469; Fur Co. v. U. S., 2 Pet. [27 U. S.] 365. Such acts, conduct, and declarations are held to be admissible as part of the res gestæ, but subsequent narrations, confessions, or admissions stand upon a different principle, as the presumption is that they were not made in pursuance of a common design, and consequently they cannot be admitted as evidence to affect any one except the party by whom they were made. Viewed in the light of these suggestions, it is quite clear that the rulings of the court were as favorable to the defendants as they had any right to expect, as the confessions of the principal defendant were admitted for no other purpose than as evidence to prove that he loaned the public moneys as alleged in the indictment. But the defendants before the court insist that they were not indicted as principals but as accessaries to the unlawful and felonious acts committed by the principal defendant, and that, inasmuch as he pleaded nolo contendere and was allowed to retire from the bar, his confessions that he had loaned the public moneys as alleged in the indictment were not admissible in evidence even to prove his own guilt in the issue between them and the United States. Although we are not able to concur in that construction of the indictment, still we are quite willing to examine the exceptions and test the accuracy of the rulings as applied to the case in that point of view, as it is the one which was taken of it by both parties at the trial. Suppose it to be true, as contended by the present defendants, that they are charged in the indictment as accessaries to the offence alleged against the principal defendant, the question then is, Were the confessions in question properly admitted in evidence to prove that he committed that offence? Argument for the defendants is, that those confessions were mere hearsay in the issue between them and the United States, but the district attorney contends that the rules of law required that the trial should be conducted after the principal defendant retired from the bar, just as it would have been if he had not retracted his plea of not guilty,

and the three defendants then before the court had been tried together. Had the principal and the two accessaries then before the court been tried together, no doubt is entertained by the court that the confessions of the principal defendant would have been admissible to prove the charge against him as laid in the indictment.

Where the indictment includes the principal and the accessary, and they are tried together, the regular course for the prosecuting officer is to introduce all his substantive testimony against all the several parties on trial before they are required to state their defence, as in other cases where more than one defendant is on trial at the same time. Perfect protection is afforded to all concerned, in that state of the case, as well to the principal and accessary as to the government by the instructions of the court to the jury. They are instructed to consider the case of the principal defendant in the first place, and if they find him not guilty, that it is their duty also to acquit the accessary, but that if they find the principal defendant guilty, they must then proceed to examine the charge against the accessary, and determine from the evidence whether the charge against him is also sustained. 2 Hale, P. C. 222. The theory of the defendants is, that the question as to the guilt of the principal in the case supposed is presented in two separate issues; that the first issue is between the principal and the United States, and that the second is between the United States and the accessary; and the argument is, that the jury in the latter issue cannot weigh the confessions of the principal defendant even as to his own guilt. Obvious error lies at the foundation of that theory, as it overlooks the fact that the charge against the accessary is in a certain sense ancillary to the offence committed by the principal. Take a case, for example, where it appears that the felony charged had never been committed; it could not be said within the meaning of the criminal law that one charged as an accessary before the fact procured, counselled, or commanded another to commit that felony, nor could it correctly be said that a person knew that a felony had been committed by another when nothing of the kind had occurred, nor that such person had received, relieved, comforted, or assisted the felon, as the charge is in the indictment against an accessary after the fact. Unaffected by statutory regulations, the offence of the accessary is not, as contended by the defendants, altogether distinct from that of the principal. Accessaries before the statute 1 Anne, c. 9, § 2, could never be tried without their own consent before the conviction or outlawry of the principal, unless they were tried together. 1 Chit. Cr. Law, 266. By that statute, however, it was enacted that whoever shall buy or receive stolen goods may be prosecuted for a misdemeanor, and punished by fine and imprisonment, though the principal felon be not convicted. Unaided by statute they may be indicted separately, but the accessary as a general rule cannot be tried until the principal has been convicted, or they may be jointly indicted, in which case they may be tried separately or at the same time, but if tried separately the trial of the principal is required to precede that of the accessary, as the latter cannot be tried until the principal has been convicted.

These remarks are sufficient to show that the offence of the accessary, as understood at common law, is not distinct from that of the principal, although the offence of the latter and every element of which it is composed are res inter alios acta, as applied to the accessary. Whenever the accessary is indicted before the principal has been convicted, it is necessary that the indictment against him, whether they are indicted separately or jointly, should allege the guilt of the principal, as the offence of the accessary, even when charged as such before the fact, depends upon the principal's guilt, and is never to be regarded as complete unless the principal offence was actually committed. After the conviction of the principal it is not necessary in an indictment against the accessary to aver that the principal committed the felony, but it is sufficient to recite with certainty the record of the conviction, because the court will presume that everything in the former trial was rightly and properly transacted. 1 Chit. Cr. Law, 272, 273; Foster, Crown Law, 365; Holmes v. Walsh, 7 Term R. 458.

The settled rule at common law was that the accessary could not be convicted until the guilt of the principal offender was established so that the principal must be first convicted or they must be indicted and tried together, and it is beyond all reasonable controversy that when they were tried together under the same indictment the voluntary confessions of the principal were competent evidence to prove his guilt. Deliberate confessions of guilt are among the most effectual proofs in the law, and that rule is as applicable to the party who made the confession when he is tried with others as when he is tried alone. 1 Greenl. Ev. §§ 215, 233; Rosc. Cr. Ev. 37, 52. Evidence of that kind being legally admissible in the case, it is for the consideration of the jury, and their finding under the charge against the principal is at least equivalent to the record of his prior conviction, and is in fact conclusive unless the verdict is set aside on a motion for new trial. When the principal and accessary are tried together, the court will instruct the jury to consider the case of the principal first, but the jury cannot find him guilty and not guilty in the same trial, as they might do if the theory of the defendants is correct. Contradictory findings of that character would be absurd, and the fact that they might occur under the theory suggested affords strong ground to conclude that the the-

ory itself is erroneous. Apply that rule, and cases might often arise where the jury would be constrained to find the principal defendant guilty as against himself, because he was proved to be guilty by competent testimony, and yet they would be obliged to find at the same time that the accessary was not guilty because the evidence in the case did not warrant them in finding as against the accessary that the principal offence had been committed. Such an absurdity cannot be sanctioned, and consequently the theory of the defendants must be rejected.

The next inquiry is, whether any different rule prevails in a case where the principal and accessary are joined in the same indictment, but the principal pleads guilty and is allowed to retire from the bar before sentence is passed. Conviction may accrue in two ways, either by the party confessing his offence and pleading guilty, or by his being found guilty by the verdict of a jury. 4 Bl. Comm. 362. Omission to sentence the principal defendant cannot make any difference as to the effect of the plea, as it is well settled that the conviction of the principal is sufficient without any judgment to constitute prima facie evidence of his guilt in the trial of the accessary. 3 Greenl. Ev. § 46; Com. v. Williamson, 2 Va. Cas. 211; Horne Tooke's Case, 25 How. State Tr. 449. Attempt was made at the argument to set up a distinction between the plea of nolo contendere and the plea of guilty, but the suggestion is entitled to no weight as it is well settled that the legal effect of the former is the same as that of the latter, so far as regards all the proceedings on the indictment. Com. v. Horton, 9 Pick. 206; 1 Whart. Cr. Law (4th Ed.) § 533. No objection was made to the introduction of the minutes of the clerk, but as they were read subsequently to the objection made to the introduction of the testimony proving the confessions of the principal, it may be that the defendants regarded the testimony of the clerk as falling within the same objections. Conceding that to be so, then the exception before the court must be examined in two aspects: First, was the record of the conviction of the principal defendant admissible to prove that he had been convicted of the offence charged against him in the indictment; and, secondly, were his confessions admissible in evidence to prove that he was rightfully convicted? Where the principal is convicted prior to the finding of the indictment against the accessary the record of his conviction is admissible by all the authorities to prove that fact, and to that extent it is conclusive, and cannot be contradicted. Authorities to support that proposition are unnecessary, but it is not conclusive as against an accessary on trial that the principal defendant was guilty. The conviction appears to be evidence, says Mr. Roscoe, not only of the fact of the principal having been convicted, but also to be prima facie evidence that he was guilty of the offence of which he was so convicted, and the supreme court of Massachusetts decided that where the principal and accessary are joined in one indictment but are tried separately, the record of the conviction of the principal is prima facie evidence of his guilt, and that the burden of proof rests on the accessary to prove clearly that he ought not to have been convicted. Rosc. Cr. Ev. 222; Com. v. Knapp, 10 Pick. 477.

The record of the conviction, says Foster, is evidence against the accessary sufficient to put him upon his defence, for it is founded on a legal presumption that everything in the former proceeding was rightly and properly transacted, but such a presumption must give way to facts manifestly and clearly proved. Fost. Crown Law, 365. Prior to the decision in the case of Rex v. Turner, 1 Moody, Crown Cas. 347, the rule as stated by the supreme court of this state was universally regarded as correct. 1 Whart. Cr. Law, § 149; 1 Starkie, Ev. 726; 1 Russ. Crimes (7th Am. Ed.) 42; 1 Chit. Cr. Law, 273; State v. Ricker, 29 Me. 87; Simmons v. State, 4 Ga. 472; Studstill v. State, 7 Ga. 11; State v. Sims, 2 Bailey (S. C.) 34; State v. Crank, Id. 74; Ulmer v. State, 14 Ind. 52; Rex v. Blick, 4 Car. & P. 377; State v. Rand, 33 N. H. 216; People v. Buckland, 13 Wend. 592; 2 Phil. Ev. (Ed. 1859) p. 49, note 273. Special reference is made to that note in the fourth American edition of Phillipps' Evidence as the most satisfactory explanation of the discordant decisions to be found in any treatise upon the subject. Several commentators, it must be admitted, have adopted the rule actually laid down in Turner's Case without any qualification, and some have even given their sanction to what some of "the judges present at the time appeared to think" as represented by the reporter, upon a point not involved in the case submitted to their decision. The charge against the prisoner in that case was that he had received sixty sovereigns stolen by another, knowing the same to have been stolen, and the prosecutor, in order to sustain that substantive charge, offered to prove that the person alleged to have stolen the money had confessed her guilt before a magistrate. She had never been convicted and was not included in the indictment against the prisoner, and the revisory court held that the evidence of the confession under those circumstances was not admissible in evidence, which is all that was involved or decided in that case. Whether the decision was right or wrong, it is quite clear that it does not touch the question presented in the case before the court for several good and sufficient reasons: (1) The indictment was against the receiver of stolen goods for the substantive offence as authorized by statute. (2) The principal had never been convicted, and was not joined in the indictment. (3) Neither the conviction of the principal nor her guilt being formally set forth in the indictment, it might well have been held that there was no proper foundation laid to admit such proof. Unless the de-

cision can be viewed in that light, the proper answer to be made to it is that it is not good law as understood in the federal courts. If viewed as deciding that the confessions of the principal in a case where the principal and accessary are indicted and tried together are not admissible to prove the guilt of the principal, it is clearly opposed to the general course of decisions in criminal cases for centuries, and it is difficult to see why any different rule should prevail where the principal is first convicted, provided they are both joined in the same indictment.

Many cases arise where criminal justice cannot be administered if the rule is as is supposed by the defendants. Take, for example, the case of an accessary in murder where the principal is not upon trial because he pleaded guilty in the presence of the court and jury. Conviction of the accessary cannot take place without first proving the guilt of the principal, and his guilt cannot be shown without proving that he committed the homicide with malice aforethought. Previous threats are the more usual evidence of malice in trials for murder, but if those are inadmissible, then the accessary must be acquitted, however flagrant his guilt. Precisely such a case occurred before Mr. Justice Erle, sitting at Lent assizes, in the Western circuit in 1846, and he held that the statements of the principal tending to show that he inflicted the mortal wound with malice aforethought were admissible, although the principal was not on trial. Objection was made by the defendant, but the court ruled that the evidence was admissible. Reg. v. Pym, 1 Cox, Cr. Cas. 340. Malice aforethought is the characteristic criterion by which murder is distinguished from manslaughter, and many cases of secret homicide arise where there is no proof of antecedent threats or of lying in wait, and in such cases resort is necessarily had to circumstances, and frequently to the subsequent conduct and declarations of the prisoner, to prove that material and characteristic allegation of the indictment. Such evidence is clearly admissible against the principal when he is on trial, and if it is not admissible in the trial of the accessary to confirm the prima facie presumption resulting from the record of the principal's conviction in a case like the present, then there can be no such confirmation, which cannot be admitted.

Recent acts of parliament provide to the effect that an accessary after the fact, indicted in the ordinary way with the principal felon, may be tried before the principal; and the same learned judge in the case of Reg. v. Hansill, 3 Cox, Cr. Cas. 598, also held, where an accessary after the fact to a charge of sending threatening letters was tried in the absence of the principal, that the letters so written and sent by the principal were admissible to prove the guilt of the principal. Suggestion may be made that the judge in both of those cases, when referred to the case of Rex v. Turner, admitted that the confessions of the principal would not be admissible, and the defendants are certainly entitled to the benefit of that concession. But we cannot concur in it, and are strongly inclined to think that it was only made in deference to a decision which it was not competent for a judge sitting at nisi prius to overrule. Confessions of the principal are certainly admissible to prove his own guilt when the accessary is tried with him, and, if so, it cannot be admitted that the principal can acquit the accessary in cases where there is no other sufficient evidence to prove his own guilt than his confessions by pleading guilty and retiring from the bar under his recognizance. Such a rule seems to be absurd, as it would necessarily lead to absurd results. Statements of the principal in the case of Reg. v. Pym were admitted to prove that he acted from malice, because the allegation of malice was not an element in the offence charged against the accessary, and because it was allowable to prove the guilt of the principal by any testimony which would be admissible if both were on trial together. Ratcliffe's Case, 1 Lewin, Crown Cas. 121. Malice, it is said, in such a case is only a preliminary fact to be proved as the foundation to let in the evidence to prove the guilt of the accessary. We agree to that proposition, and hold that all the allegations in the indictment setting forth the guilt of the principal or his conviction, as the case may be, are to be viewed in the same light. When the principal and accessary are joined in the same indictment, it is always necessary to allege the guilt of the principal, as the joinder of the principal presupposes that he has not been previously convicted; but the regular mode of indicting the accessary, if the principal has been separately indicted and convicted, is to set out the record of the principal's conviction, unless the accessary is indicted for a substantive offence in pursuance of some statutory regulation. Where the principal felon has been convicted, it is sufficient in the indictment to state the conviction without stating the sentence, and it is never necessary to enter into the details of the evidence to prove the guilt of the principal, as the record of the conviction proves itself and affords prima facie evidence of the guilt of the principal felon. Rosc. Cr. Ev. 870; Hyman's Case, 2 Leach, 925; 2 East, P. C. 782; Baldwin's Case, 3 Camp. 265; Fost. Crown Law, 365; 1 Chit. Cr. Law, 273. Perfect security will be afforded to the innocent if these rules are properly applied, as the presumption as to the guilt of the principal is not a conclusive one, but it is always competent for the accessary to show that the principal was improperly convicted. 1 Archb. Cr. Prac. (Ed. 1860) 83; Rex. v. McDaniel, 19 How. State Tr. 806; 1 Gab. Cr. Law, 36; 4 Bl. Comm. 324.

Special attention is called by the defendants to several decisions of the state courts supposed to affirm the rule for which they

contend; but it will not be necessary to examine any one of them, except the case of Com. v. Elisha, 3 Gray, 460, as the others are founded upon the case of Rex v. Turner, which has already been examined. Concisely stated, that case shows that the defendant was indicted as the receiver of stolen goods, but that it was not alleged in the indictment that the principals had been convicted. Indicted in that form the defendant pleaded not guilty, and the prosecutor offered in evidence the record of the prior conviction of the principals on an indictment against them in which the defendant on trial was not joined, and the supreme court of this state held that the record was not admissible, because the conviction was res inter alios acta, and this court entertains no doubt that the decision was correct, because the indictment against the receiver was for the substantive offence under the statute of the state, and did not formally allege either the guilt of the principals or that they had been previously convicted. Evidence of the confessions of the principal cannot be admitted to prove his guilt in an indictment against an accessary, except when the guilt of the principal or his antecedent conviction is alleged in the indictment. Doubts have been expressed whether the evidence is admissible except when the guilt of the principal is alleged, but there is no foundation for the doubt, as the record of the conviction is only prima facie evidence for the government and is always open to opposing evidence, to be offered by the accessary. Tested by these principles, it is clear that the decision was correct, and that it is perfectly consistent with the rule laid down in Com. v. Knapp, 10 Pick. 484, that the verdict against the principal in the trial of the accessary is to be taken as prima facie evidence of the principal's guilt.

Suppose, however, that the confessions of the principal were improperly admitted, still the motion for new trial ought not to be granted for the cause under consideration, because the record of the conviction of the principal was properly introduced and was prima facie evidence of his guilt in the trial of the other defendants, and, inasmuch as there was no opposing testimony on that point offered by the present defendants, it was sufficient evidence to warrant the finding of the jury. No opposing testimony on that point was offered during the trial. On the contrary, the guilt of the principal was admitted in the opening of the defence and throughout the trial, and the defence proceeded from the opening to the close upon the ground that the crime was committed by the principal and the other member of the firm named in the indictment, and that the transactions were kept secret from the two defendants before the court. Objection may be made by the defendants that the court did not so instruct the jury, but that is no answer to the proposition, as the motion for new trial is addressed to the discretion of the court, and will never be granted when the court sees that the verdict is clearly and unmistakably right.

Injustice, it is suggested, may be done to the accessary by admitting the confessions of the principal, as the confessions may have been improperly obtained; but the answer to that suggestion is, that the plea of not guilty, pleaded by the accessary, always puts in issue the charge against the principal as well as that against himself, and, whether tried at the same time with the principal or subsequently, he may controvert the guilt of the principal as fully as the principal himself may do, even when the latter is separately indicted and tried by a separate jury. Where the principal has been convicted before the accessary is indicted, the indictment against the accessary alleges not the guilt but the antecedent conviction of the principal, so that it is quite clear that, if the record of the conviction is not admissible to prove that allegation, the accessary in all such cases must be acquitted. Such a rule cannot be admitted, and must be classed with the one before considered, which would allow the principal to be found guilty as against himself and not guilty as against the accessary when both are tried at the same time.

Certain other objections were taken, to the rulings of the court in admitting testimony, chiefly upon the ground that the evidence admitted was irrelevant and immaterial, but the exceptions are not of character to require any extended examination. Much of the testimony in the case was of a circumstantial character, and the rule is, that, whenever the necessity arises for a resort to such evidence, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Castle v. Bullard, 23 How. [64 U. S.] 187. Aided by the arguments at the bar, we have re-examined the several rulings, and are satisfied that they were correct. Convinced that the verdict was warranted by the evidence, we do not think it necessary to enter into any argument to justify our conclusion, as we are not able to see any substantial ground for a different opinion.

Motion for new trial overruled.

Judge LOWELL fully concurs in the order overruling the motion for new trial, but, in respect to the first cause assigned in the motion, he rests his decision upon the ground that the record of the conviction of the principal, as exhibited in the minutes of the clerk, was admissible, and was prima facie evidence of the guilt of the principal, and, in the absence of any opposing testimony, warranted the finding of the jury.

[NOTE. Subsequently defendants Mellen and Ward filed a motion that "the indictment be continued, and that sentence and judgment thereon be suspended," to enable them to apply

for a pardon, basing the application upon the fact that they had been called before the grand jury, and there sworn and examined as witnesses in respect to the offence charged against them. The court held that their rights had been waived by failure to claim them at the proper time. Case No. 15,319.]

Case No. 15,319.

UNITED STATES v. HARTWELL et al.

[12 Int. Rev. Rec. 50.]

Circuit Court, D. Massachusetts. Aug., 1870.

CRIMINAL LAW—WAIVER OF RIGHTS—PRACTICE—TESTIMONY OF ACCOMPLICE.

1. Admitted rights may be waived in criminal cases by laches where it clearly appears that the omission to claim their exercise was voluntary and with a full knowledge of all the circumstances.

2. By the practice of the United States courts in this circuit, it is the duty of the prosecuting officer and not of the court to determine whether the public interest requires that the testimony of an accomplice shall be received, and in general to determine whether the conduct of the accomplice is such as constitutes a compliance with the legal conditions which give him an equitable right to the executive clemency.

[This was an indictment against Julius F. Hartwell, Charles Mellen, and Charles H. Ward for embezzlement of public moneys. Defendants Mellen and Ward were tried together and convicted, and a motion for a new trial was overruled. Case No. 15,318. The case is now heard upon a motion by defendants to continue the indictment and suspend sentence and judgment.]

CLIFFORD, Circuit Justice. Mellen and Ward on the 16th day of September last filed a motion in this case to the effect that "the indictment be continued and that sentence and judgment thereon be suspended," to enable them to apply for a pardon, basing the application upon the facts stated in certain affidavits which were submitted to the court at the same time the motion was filed. Presented as the motion was near the close of the special session, delay necessarily followed, as there was not time to give the subject due consideration; and other official engagements having intervened, the justices who heard the motion have not been able to examine the merits of the application until the commencement of the present term. Taken literally, the object of the motion is accomplished by the delay which has ensued, as the case has been continued and ample opportunity has been enjoyed to present the proposed application for a pardon. But it is obvious from an examination of the affidavits that the main purpose of the defendants in submitting the motion was to deny the right of the United States to claim that judgment shall be rendered on the verdict against them, or that they shall be sentenced for the offence of which they have been convicted by the verdict of the jury. They object to the right of the United States to demand sentence against them because, as they allege, they were severally called before the grand jury of the district, and there sworn and examined as witnesses in respect to the offence charged against them in the indictment before the same was found by the grand jury and filed in the district court of the United States. Separate affidavits were filed by the defendants in support of that objection, from which it appears that they went before the grand jury and were there examined under oath respecting the matters involved in the charge, and they state that they produced the books of their firm, Mellen, Ward & Company, and that they answered all questions put to them respecting the same and the several matters involved in the accusation. Interviews took place between their counsel and the district attorney before they were called and examined in the grand jury room, and they have filed the affidavits of their counsel in respect to what occurred on those occasions. Explanatory affidavits were also filed by the district attorney, and, among others, one given by the foreman of the grand jury. He was foreman of the grand jury of the district court for the March term, 1867, and it was in that court at that term that the indictment was found, and before that grand jury that the defendants were sworn and examined. By the affidavit of the foreman, it appears that neither of the defendants came before the grand jury till after they (the jury) "had taken action upon their cases;" that before any questions were put to them they were told by the assistant district attorney that the grand jury had already taken action upon their respective cases, that any statements they might make would not alter that action; that their answers, if any were given, must be voluntary; that they had a right to decline answering any questions; that the government had no right to compel them to criminate themselves, and that the district attorney did not propose to press any inquiry which they did not wish to answer; and the district attorney assured them that any statements they might make should not be used against them. Subsequent to that caution the defendants severally signified their willingness to state what they knew in the case, and they were accordingly examined in respect to the subject matter of the accusation, but the foreman of the grand jury testifies that "the grand jury made no use of their statements, and took no action upon them, as they had previously voted upon the several cases." Officers and other persons charged with the safe-keeping, transfer, and disbursement of the public moneys are forbidden by law to loan any portion of the same under any circumstances, and the provision is that every such act shall be deemed and adjudged to be an embezzlement; and the same section provides that all persons advising or participating in such act shall be liable to the pun-

ishment therein provided. 9 Stat. 63. Large sums of the public moneys, deposited in the office of the assistant treasurer of the United States in this city, were unlawfully loaned by the first-named defendant, who was the paying teller in that office, to the firm of Mellen, Ward & Company; and the charge against the other two defendants is that they advised and participated in those unlawful and criminal acts of loaning such portions of the public moneys so intrusted to that officer for safe-keeping, disbursement, and transfer. All of the defendants were included in the same indictment, and when arraigned they severally pleaded that they were not guilty; but when set at the bar for trial at a later day in the term the principal defendant retracted his plea of not guilty and pleaded nolo contendere, which was accepted by the district attorney. Having confessed his guilt, he was permitted to retire under his recognizance, but the jury were impanelled for the trial of the other two defendants, and they were severally found guilty by the jury of the charge alleged against them in the indictment. Exceptions were duly taken by the defendants to the rulings and instructions of the court, but the motion for new trial founded thereon was subsequently overruled by the court after full hearing and mature deliberation. Throughout that period no suggestion was made to the court that any irregularity had attended the action of the grand jury in finding the indictment. Both the defendants knew what had occurred, even before the indictment was transferred from the district court into this court as fully as when the present motion was filed, and yet they pleaded to the charge without objection, went to trial, and enjoyed their chance of an acquittal; and subsequently submitted a motion for new trial upon other grounds, omitting to mention any such complaint until nothing remained to be done in the case but to pass the sentence required by law. Under these circumstances it is contended by the district attorney that the motion comes too late, and the court is strongly inclined to that view of the case. Admitted rights may be waived by laches, even in criminal cases, where it clearly appears that the omission to claim their exercise was voluntary and with a full knowledge of all the circumstances. Objections to the action of the grand jury, or to the proceedings before them, when an indictment is found, ought to be made as early as practicable, in order that the administration of criminal justice may not be unnecessarily delayed. Just excuse for the delay in this case appears to be wanting, as all the circumstances were fully known to the accused at the time the indictment was found in the district court. Besides, they were not tried upon that indictment, but upon a new indictment subsequently found in the circuit court. Suppose, however, the motion is seasonable, and that the objection is as applicable to the pending indictment as to the one found in the district court, still it is insisted by the district attorney that the objection furnishes no reason why the defendants should not receive sentence for the offence of which they have been convicted. They were convicted on the 26th of October, 1868, and on the following day they filed a motion for new trial, which was overruled on the 22d of May, 1869. Sentence was then postponed at the request of the defendants, and on the 16th of September the present motion was filed. Although the defendants do not contend that the facts alleged in the affidavits which accompany the motion furnish any ground for arresting the judgment in the case, still they insist that the question of passing sentence is a question of discretion, and that the court under the circumstances disclosed in the affidavits will refuse to sentence, and will recommend the defendants to the clemency of the executive. Authorities are referred to as sustaining that theory, and an affidavit is introduced to show that such is the practice in the supreme court of the state; but the authorities cited do not support the proposition, and the decisive answer to the affidavit is that the practice of the state courts, though entitled to the highest respect, does not furnish the rule of decision in the federal courts. Among the cases referred to is that of Rex v. Rudd, Cowp. 331, which is the strongest case in their favor, and yet it falls far short of the proposition submitted in their behalf. By that case it appears that where accomplices are admitted as witnesses for the government, and they make a full and fair confession of the whole truth, and their evidence is used in the trial of the other offenders, the practice is to suspend the prosecution against them in order that they may apply for pardon, but it is expressly stated that they are not entitled of right to the interposition of the pardoning power. Express assurances were given in that case that the witness should be exempted from punishment, but nothing of the kind was done in this case, nor was any use made of their testimony. They knew that their case had been passed upon before they were examined, and were told that their answers would not change what had been done by the grand jury. Accomplices are admitted to give evidence against their associates in guilt, in analogy to the old law of approvement; but it is not necessary as in that proceeding that the witness should be first indicted before he is accepted as a witness, nor is it necessary that he should make any disclosure respecting any other crime than the one under investigation. Persons charged with crime are not bound to criminate themselves, but they may be admitted as witnesses to convict their associates; and if they are so, and disclose the whole truth, they acquire there-

by an equitable title to a pardon, subject, of course, to the discretion of the president, who is invested, under the constitution, with the exercise of that power. People v. Whipple, 9 Cow. 711. Whether an accomplice shall be admitted as a witness or not, depends in the English practice upon the discretion of the court where his associate or associates in guilt are tried, and the same court, it seems, assumes jurisdiction to determine whether he shall be tried for the offence in which he participated; but the practice in general in the American courts is different. Rex v. Lee, Russ. & R. 361; Rex v. Brunton, Id. 454. Prosecutions in our practice are instituted and conducted by a public prosecutor appointed by law, who represents the government and protects its interests in all respects, without advice from the court. Preliminary accusations of crime are submitted to his examination, and it is a part of his duty to determine whether the public interest requires that the testimony of an accomplice should be received; and in general, he must determine whether the conduct of the accomplice, in case he is received as a witness and examined, was such as constitutes a compliance with the legal conditions which gave him an equitable right to the executive clemency. 1 Bish. Cr. Proc. § 508. American authorities undoubtedly may be found, where it is said the power is vested in the court, but the practice in this circuit is otherwise. People v. Whipple, 9 Cow. 712. Leave of the court to examine an accomplice, whether before the grand jury or on the trial of an indictment, is never asked by the district attorney, and no such practice, it is believed, prevails in the state courts. Such a discretion could not be exercised by a court without investigations incompatible with our system of criminal jurisprudence. Investigations of the kind are made by the prosecuting officer, and, in general, he must determine whether or not the accomplice used as a witness shall be further prosecuted, unless the witness sees fit to appeal to the president. Cases may perhaps arise where the court would postpone a trial or defer the sentence for a time, to give an accused person an opportunity to make such an application; but the present case is not one of that character, as there is no just pretence that their testimony was used for any such purpose, or that they have in any way been misled or deceived. They alone have been tried, as Hartwell, the principal, pleaded nolo contendere, and Carter neglected to appear and forfeited his recognizance. When tried, no allusion was made to the fact that they had been before the grand jury, and the court feels assured that they have not been prejudiced. Had any unfairness been practised, a different rule might perhaps be adopted; but they went before the grand jury by their own consent, and with the knowledge and consent of their counsel, and, having remained silent upon the subject during their trial and during the pendency of their motion for new trial, the court is of the opinion that they now have no just cause of complaint on that account.

Case No. 15,320.

UNITED STATES v. HARVEY.

[Brun. Col. Cas. 540;[1] 8 Law Rep. 77.]

Circuit Court, D. Maryland. April, 1845.

CRIMINAL LAW—OBSTRUCTION OF THE MAIL.

A warrant in a civil suit against a mail carrier is no justification to the officer executing it, on an indictment for obstructing the mail.

[Cited in U. S. v. Three Railroad Cars, Case No. 16,513; U. S. v. Sears, 55 Fed. 270.]

[Cited in Penney v. Walker, 64 Me. 434.]

James Harvey was indicted at the April term, 1845, of the circuit court of the United States for the district of Maryland for an illegal detention of the mail. The indictment charged, in the first count, "that the said Harvey did, on the 13th day of December, 1844, at the district aforesaid, knowingly and wilfully retard the progress of the mail of the United States, contrary to the form of the act," etc. The second and third counts charged that "said Harvey did arrest and detain a certain Stephen B. Miles, then and there being a carrier of the said mail, and then and there being in the due execution of his duty as such carrier, and thereby did, knowingly and wilfully, retard the passage," etc. It appeared from the evidence that the traverser was a constable of Harford county, Maryland; that he had arrested the carrier by virtue of a warrant in an action of trespass quare clausum fregit, issued by, and returnable before, a justice of the peace of said county; that said justice had jurisdiction in the case; and that the carrier was actually engaged in carrying the mail at the time of the arrest. The traverser took the carrier to the justice, who lived near the route he was traveling. The traverser was ignorant of the law of congress, and did not detain the carrier longer than was necessary for the execution of the warrant. The detention was but a short time, and the carrier got to the next office (Bel-air) at his usual hour.

Upon these facts the counsel for the traverser prayed the court for the following instructions to the jury: (1) That the traverser, being a ministerial officer, was justified by the warrant in making the arrest. (2) That if the warrant did not justify the arrest, yet the traverser, being ignorant of the law of congress, and having acted bona fide throughout, according to what he conceived to be his duty, did not "knowingly and wilfully" obstruct the passage of the mail according to the sense in which the latter term is used in

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

the act. In support of the first prayer he cited Act Assem. Md. 1715, c. 15, § 6; Sewell, Sher. 46; Law Lib. 98, 99, 437; Wats. Sher. 7; Law Lib. 53, 99, 131; Tarlton v. Fisher, 2 Doug. 671; Petersd. Bail, 10; Law Lib. 130; Nicols v. Thomas, 4 Mass. 234; Sandford v. Nichols, 13 Mass. 288; Sperry v. Willard, 1 Wend. 32, 33; Secor v. Bell, 18 Johns. 52; Ray v. Hogeboom, 11 Johns. 433; Com. v. Kennard, 8 Pick. 137; Ontario Bank v. Hallett, 8 Cow. 193, 194; 6 Gill & J. 412; U. S. v. Hart [Case No. 15,316]. In support of second prayer, he cited Dwar. St. 9; Law Lib. 658–695, 702, 736–738, 743, 756. To show the legal sense of the term "wilfully," he referred to 2 Russ. Crimes (5th Am. Ed.) 594, 597, 631; 6 Bin. 261; Hawk. P. C. bk. 1, c. 69, § 2; 3 Burn, J. P. 251; McNal. Ev. 635.

The counsel for the prosecution relied upon U. S. v. Barney [Case No. 14,525].

The counsel for the defendant, in reply, contended that the case of U. S. v. Barney was not analogous. It was the case of an innkeeper detaining horses employed in carrying the mail, for feed furnished. The defendant in that case was not a ministerial officer. There was no warrant directing him to detain the horses. He detained them by his own voluntary act.

William L. Marshall, U. S. Dist. Atty.
Coleman Yellott, for the traverser.

After hearing the argument on the prayers, THE COURT (TANEY, Circuit Justice, and HEATH, District Judge) adjourned for the purpose of giving the point stated mature consideration. Subsequently, the chief justice delivered the following as the opinion of the court:

TANEY, Circuit Justice. The point raised in this case is one of great interest and importance. The only decisions which appear to have been made in reference to the liability of mail carriers to arrest are those reported in U. S. v. Barney [Case No. 14,525] and U. S. v. Hart [Id. 15,316],—the first given by Judge Winchester, in the United States district court for the Maryland district; the second, by Judge Washington, in the United States circuit court for the circuit of Pennsylvania. These decisions seem to some extent conflicting. Regarding them in this light, we feel it our duty to follow the views expressed by Judge Winchester, the very distinguished judge who presided in the district court of Maryland, and who was therefore virtually our predecessor. We do not consider the warrant a justification to the officer. Yet the mere serving of the warrant would not render the party liable to an indictment under this law. But if, by serving the warrant, he detained the carrier, he would then be liable. We do not construe the term "wilfully" in the same sense as the traverser's counsel. If the traverser, by serving the warrant, detained the carrier, then he "wilfully" detained him in the sense that word is used in the act of congress.

The jury found a verdict of guilty, and the traverser was fined one dollar and costs.

NOTE. Obstructing the mail by arrest of carrier. Civil process will furnish no justification for the arrest of a person carrying the mails. But the rule is different as regards criminal process. See U. S. v. Kirby, 7 Wall. [74 U. S.] 487, citing above case and approving this doctrine; and U. S. v. Three Railroad Cars [Case No. 16,513], where the same is discussed and questioned.

Case No. 15,321.

UNITED STATES v. HASKELL et al.

[4 Wash. C. C. 402; [1] 2 Wheeler, Cr. Cas. 101.]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1823.

SEAMEN—REVOLT—RUNNING AWAY WITH VESSEL—FEAR AS EXCUSE—CONDUCT OF JURY—CHALLENGES—DISCHARGE.

1. To constitute the offence of running away with a vessel, it must appear that the command of the vessel must be taken from the captain by the accused, or without the consent of the captain, for some time, no matter how long, and that the act was done feloniously, and with the intent to convert the vessel and cargo to the use of the person or persons concerned in the act.

2. What constitutes a revolt?

[Cited in U. S. v. Kelly, Case No. 15,516.]

3. Fear, to excuse a person guilty of an alleged crime, must be fear of death. Such a fear as a man of ordinary courage and fortitude might yield to.

4. In a capital case, insanity of one of the jurors is a good cause for discharging the jury, without the consent of the prisoner or his counsel.

[Cited in U. S. v. Gibert, Case No. 15,204.]

[Cited in Com. v. McCormick, 130 Mass. 62; Com. v. Townsend, 5 Allen, 218. Cited in brief in State v. Dunn, 80 Mo. 682; State v. Ulrich (Mo. Sup.) 19 S. W. 658.]

5. Such discharge of the jury is in the discretion of the court, and it cannot form the subject of a plea in bar to the further trial of the prisoner.

[Cited in U. S. v. Gibert, Case No. 15,204; U. S. v. Morris, Id. 15,815.]

[Cited in Brown v. Swineford, 44 Wis. 287; Ellis v. State (Fla.) 6 South. 769. Cited in note to Lyons v. State, 1 Blackf. 311. Cited in brief in McCreary v. Com., 29 Pa. St. 324; McDonald v. State, 79 Wis. 653, 48 N. W. 864; State v. Nelson, 26 Ind. 368; State v. Reinhart (Or.) 38 Pac. 825.]

6. The meaning of the term "jeopardy," in the amendment of the constitution of the United States.

[Cited in U. S. v. Gibert, Case No. 15,204; Coleman v. Tennessee, 97 U. S. 520; Holmes v. Oregon & C. R. Co., 9 Fed. 239.]

[Cited in brief in Re Esmond, 5 Mackey, 66. Cited in Re McClaskey (Okl.) 37 Pac. 858; McDonald v. State, 79 Wis. 653, 48 N. W. 864; Price v. State, 36 Miss. 531; State v. Davis (W. Va.) 7 S. E. 26.]

7. The form of the oath to be administered to talismen, on the principal panel, when challenged for favor.

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

8. During a trial for a capital offence, the jury, after the adjournment from day to day, previous to the charge, may take refreshments; not afterwards.

This was an indictment [against Joseph Haskell and Charles Francois] containing four counts: First, for making a revolt; second, for piratically and feloniously running away with the vessel and goods, to the value of $50; third, for laying violent hands on the captain to hinder his fighting in defence of his vessel; and fourth, yielding up the vessel to a pirate. The material facts in the case were as follows: The Tatler, Nathaniel Garland, master, sailed from Baltimore on the 14th of March last, with a cargo to the value of about $5000, besides about $1600 in specie, and a crew consisting of the mate, Smith, the prisoners, and a black boy. On the night of the 17th, at sea, the captain went below to his berth, leaving Babcock, the mate, and Smith, one of the crew, the watch on deck. Soon after he had turned in, he heard a noise on deck, which caused him immediately to ascend to the companion way, where he found Babcock leaning, who informed him he was dying, and immediately fell dead on the deck. None of the crew were upon deck. Upon examining the helm, he found it fast; the sails all up, and the vessel on her course. He returned to the body of Babcock, and whilst he was stooping towards the body, he received two stabs, and turning himself about, he observed Smith close to him, who inflicted a severe wound on his neck, with a large knife which he held in his hand. He asked Smith what he was about? who answered, "I am killing you." He then seized Smith, and confined his arms; a scuffle ensued, and both fell on the deck by the side of each other. Whilst they were lying in this situation, the captain observed the knife on the deck between them, which he instantly secured, and threw overboard. Smith then extricated himself from the grasp of the captain, and got upon his feet. The captain also rose, went forward towards the forecastle, and called the hands on deck. The prisoners, and a black boy, soon afterwards made their appearance, when the captain stated to them that Smith had killed the mate, and stabbed him; and ordered them to assist him in seizing and securing the murderer; that they need not fear Smith, as he had taken his knife from him. Smith was at this time between him and the crew a short distance, and had no weapon in his hand. Instead of attempting to obey this order, Haskell went aft to the helm, and Francois disappeared, leaving Smith and the captain near to each other. The captain followed Haskell, and ordered him to clap the helm down, adding, "for we must seize this fellow, and get him out of the way." To this order, Haskell paid no regard. Smith then approached the captain with the bolt of the pump handle, and observed to him, in the presence of Haskell, who was at the helm, and near enough to be heard by him, "I have the command of this vessel; she is mine, and the men are under me." After some reproachful words addressed by the captain to Smith, the latter ordered the men to go forward, and take in the square-sail, at the same time threatening the captain to split his brains if he spoke another word to the men. Francois now made his appearance, and was observed by the captain to be forward, having hold of the haulyards of the square-sail. The captain immediately ordered Haskell (still at the helm) not to regard Smith, but to keep the sails up, and the vessel in her course. Smith then ordered the captain to go below, repeating the threat before denounced, if he did not. Finding that his orders were totally disregarded by the crew (for Haskell had gone forward to the square-sail), and that no hope remained that they would assist him against Smith, he determined to go below, and did so accordingly. After the captain got to the bottom of the steps, he determined to make one more desperate effort against Smith, and ordered Peter, the black boy, and his friend throughout, to bring him his gun. Having received it, he returned to the deck, and observed Smith and the prisoners engaged in getting in the square-sail, which was then partly in the water. They all, immediately, left the sail, and as they were coming aft to where the captain stood, and on the same side of the vessel, the captain discharged his gun at Smith, and within a few steps of him. The three men, without uttering a word, turned, and got on the other side of the vessel. The captain crossed the deck to meet them, with his gun clubbed. Haskell passed the captain, and went aft to the helm, leaving Smith and Francois standing near to each other. The captain then struck Smith on the head with the gun, which caused him to reel. He, nevertheless, caught hold of the butt of the gun, the captain retaining the other end in his grasp. A conflict now ensued between them, which terminated favourably for the captain, who succeeded in throwing Smith overboard. Both parties were much exhausted in this last conflict; the captain, by the loss of blood from his wounds, and Smith, by the contents of the gun, which he had received. After this victory obtained over Smith, the conduct of the prisoners towards the captain was unexceptionable. The captain was so much exhausted by the effusion of blood from his wounds, that he remained prostrate and helpless on the deck, until he was relieved by a pilot boat, which took the vessel into Lewistown, near the capes of Delaware.

The counsel for the prisoners contended: (1) That to constitute the crime of making a revolt, if indeed such a crime was susceptible of a definition, which they denied, it was essential to prove confederacy in the crew, which they insisted was not proved in this case. (2) That fear is an excuse in a case

of this kind, and even in treason, and that the prisoners were in that situation. Cases cited, 1 Chit. Cr. Law, 173; Mass. 251; U. S. v. Smith [unreported]; U. S. v. Sharp [Case No. 16,264]; U. S. v. Tully [Id. 16,545].

The district attorney replied: (1) That confederacy formed no part of any one of the offences charged in this indictment; and (2) That the fear which was urged as an excuse for the crimes alleged against the prisoners, must be a fear of death.

Mr. M'Ilvaine, for the prisoners.

WASHINGTON, Circuit Justice (charging jury). After summing up the evidence he proceeded: I shall make no observations upon the two last counts in this indictment, because, as to the third, the evidence is too feeble in my opinion to deserve observations respecting it. The captain merely stated on his examination, that whilst he was in the act of throwing Smith overboard, he felt the hand of some person on him, and that Francois was close to him. And as to the fourth count, it may admit at least of a doubt, whether the conduct of the crew did, in point of law, amount to a yielding up of the vessel to a pirate, notwithstanding Smith was clearly guilty of an act of piracy. As to the second count, which is for piratically and feloniously running away with the vessel, if you should be of opinion that the command of this vessel was taken from the captain and assumed by the mate, the prisoners consenting to it, and continued under this assumption for any length of time, however short, there was a running away with the vessel. But to constitute the offence, you must also be satisfied that the act was done feloniously, and with intent to convert the vessel and cargo, or either of them, to the use of the parties concerned in this business.

My observations will be confined principally to the first count, which is for making a revolt. What constitutes this offence is a question by no means settled in the courts of the United States. This court has decided that there is no legitimate or safe standard, by which to ascertain the definition of this offence, so highly penal in the punishment affixed to it. A learned judge of another court of the United States has given a definition of this offence. This court will now venture upon a definition, consistent with the one referred to, intending to obtain the opinion of the supreme court upon this important question, in case the prisoners should be convicted. If the definition which we shall give you should be condemned by the supreme court, the prisoners can sustain no injury in consequence of our error. The making a revolt then is, where the crew, or any part of them, throw off all obedience to the commander, and forcibly take possession of the vessel, by assuming and exercising the command and navigation of her, or by transferring their obedience from the lawful commander to one who has usurped the command. If this be a correct definition of the offence, then it is unimportant whether the command be afterwards regained by the prowess of the lawful commander, or by foreign aid, or whether the possession of the vessel remained with the mutineers a day, an hour, or only a few minutes. You are then to say whether Captain Garland lost the command of this vessel for any length of time, no matter how short, and whether the prisoners aided therein, by throwing off all obedience to the master, and submitting to the usurped command of Smith, thereby transferring their duty and allegiance from the one to the other. The material facts relied upon to fix this offence upon them are the following: The murder of the mate, and the attempted assassination of the captain by Smith; the disregard by the prisoners of the captain's order to assist him in seizing and securing Smith; the open and avowed assumption of the command of the vessel, and of the crew, if not of the property in the vessel, in the presence of Haskell at least, followed immediately by his order to take in the square sail, promptly obeyed by both the prisoners, in defiance of Captain Garland's order to Haskell not to mind Smith, but to keep the sails up, and the vessel in her course; and finally, the forcible expulsion of the captain from the deck, and his necessary retreat and confinement below, until he was able to obtain the means of making one last struggle to regain possession of the deck, and to recover his command.

It is contended by the prisoners' counsel, that the design of dispossessing Captain Garland of his command, in favour of Smith, was not the result of a previously concerted plan between Smith and the prisoners, and that such a confederacy is an essential ingredient of the alleged offence. Whether there existed any such previous concert would be for you to decide, if the conclusion of the counsel were correct in point of law. But it is not so. Previous confederacy forms no part of the offence. It forms no part of another offence, which this most nearly resembles. For if a band of traitors should order the inhabitants of a particular district to join them, and they should voluntarily obey the order, they would be guilty of treason, although they had nothing to do with the original conspiracy against the government. So here, if the prisoners were total strangers to Smith's designs, until the moment when they were displayed by overt acts against the captain, and they afterwards joined with him in subverting the command and authority of the legitimate commander, their former ignorance of his intentions cannot excuse them.

It is in the next place urged in excuse of the prisoners, that they acted throughout

this transaction under the impulse of fear. But the fear which could alone excuse them must be fear of death; such a fear as a man of ordinary fortitude and courage might justly yield to. Were these men in this situation? Was Smith, without a weapon of any kind in his hand when the order to assist the captain in seizing him was given, and armed only with a pump bolt six or seven inches long when he assumed the command and issued his order which was obeyed, so much an overmatch for the captain (who, though stabbed, yet courageously maintained his ground), the two prisoners and the black boy (the steady friend of the captain), as justly to excite in the prisoners a fear of death, if they should venture to disobey his order? But as a test of the sincerity of the alleged apprehensions of the prisoners, ought they not, before they yielded to them, to have refused to acknowledge the usurped command of Smith, and have waited until, by some act of Smith, a well grounded cause of fear was excited? Had they done so, is it, or is it not probable, that finding himself alone, and in a state of hostility with every person on board, Smith would have submitted, and returned to his duty? But the prisoners, without waiting for some act of Smith's to excuse their fears, had not received, from the beginning to the end of this melancholy drama, even a menace from Smith to cause them. You are therefore to say whether, upon the evidence, the prisoners had a well grounded cause to fear that death might be the consequence of their refusal to submit to Smith as the commander of the vessel. If they had not, they cannot excuse themselves in point of law by the allegation that they acted under the impulse of fear.

The jury returned twice to the bar, and being asked if they had agreed upon a verdict, answered by their foreman, that they found the prisoners guilty upon the first count, and not guilty upon the other counts. But upon being polled, one juryman, after much apparent agitation, and declaring that he was not quite collected, answered, "Not guilty." The court being satisfied, not only from the appearance and conduct of this juryman, but from the declarations of many of the jurymen as to the conduct and speeches of this person that he was insane, and totally unfit to act as a juryman, caused the following entry to be made on the minutes: "The jury having been kept together three days, and more than twenty-four hours without refreshments, and there being no prospect of their agreeing, and the court being satisfied of the insanity of one of the jurymen, discharges the jury without the consent of the counsel for the prisoners?" [2] The jury was accordingly discharged, and upon the panel being called over, at another day, for the trial of the prisoners, the counsel for the prisoners tendered to the court a special plea, stating the arraignment of the prisoners, the trial, and the other circumstances of the declarations of the jury, "that they could not agree," and the discharge of the jury by the court, without the consent of the prisoners or their counsel, and concluding that the said discharge was equivalent to an acquittal, and praying judgment of the court if they ought again to be put on their trial, and in jeopardy of their lives. The district attorney immediately demurred generally to the plea. He contended (1) that the matter of this plea is not a fit subject for a plea; and (2) that the discharge of the jury in this, as well as in all other cases of necessity, rests in the sound discretion of the court, and this discretion was soundly exercised in this case. Both these points were controverted by the prisoners' counsel, who cited the following cases: Com. v. Cook, 6 Serg. & R. 578; 2 Hale, P. C. 294, Hawk. P. C. bk. 2, c. 47; 3 Inst. 110; 1 And. 103, 104; fifth amendment to the constitution of the United States; Fost. Crown Law, 23; 2 Johns. Cas. 301; 1 Chit. Pl. 639, 169, 70, 644, as to demurrer.

WASHINGTON, Circuit Justice, delivered the opinion of the court.

The first, and the most important question which arises upon these pleadings is, is the subject matter of this plea properly pleadable in bar of a second trial of the prisoners? The importance of this point arises from the following considerations: The plea avoids stating the recorded reasons of the court for discharging the jury, and places the discharge on the single ground that the jury declared they could not agree. The district attorney had no other course to pursue, in order to bring the true case before the court, but to reply to the fact of the insanity, or the recorded reasons of the court for discharging the jury. In either case the rejoinder, by traversing the facts stated in the replication, would necessarily have submitted the truth of the facts, as well as the legality of the discharge, to the decision of a jury. To avoid so extraordinary a trial, the district attorney could do no otherwise than demur, and thus present the question which I have now to examine. Whatever name may be given to this plea, one thing is clear, that it is not a plea of autrefois acquit; nor could the counsel have ventured such a plea, because it must have stated a verdict of acquittal and the judgment of the court thereon; which the record, to which the plea must have referred, upon the replication of nul tiel record would have falsified. The plea indeed does not profess to be a plea of autrefois acquit, for it merely alleges the discharge of the jury as equivalent in law to an acquittal.

[2] See U. S. v. Perez, 9 Wheat. [22 U. S.] 579, which fully sanctions this order, and the opinion founded on it.

I shall examine this question under the following heads: First, is there a single precedent to be found to support this plea? Second, can it be supported upon principle? or thirdly, on authority of any kind?

I have met with but one precedent for this plea, and that is to be found in the case of Com. v. Cook, 6 Serg. & R. 577, from which it is probable this plea was copied. But it is to be remarked, that in that case, the plea set forth truly the whole ground upon which the jury was discharged, as recorded by the court. The prosecutor had nothing to do but to demur generally to the plea, and in this way to bring forward the question, whether the court is authorised to discharge the jury against the consent of the prisoner's counsel, upon the single ground that the jury, after remaining in their room for a certain length of time, declared that they could not, and never should agree. The question, therefore, as to the validity of the plea, did not and could not arise, nor was it once mooted, or even alluded to at the bar, or by the bench. It is further to be remarked, that in that case, the court directed the prisoner's counsel to connect with the plea a motion to discharge the prisoner. This, therefore, though giving us a precedent for such a plea, is not a precedent to support it as a valid plea. In the case of People v. Goodwin, 18 Johns. 187, the propriety of the discharge of the jury, came before the court upon a motion to discharge the prisoner. In People v. Olcot, 2 Johns. Cas. 301, the same course was pursued. In the case of Rex v. Edwards, 4 Taunt. 309, the question came before the court of exchequer, upon a point reserved by the judge at the assizes. In U. S. v. Coolidge [Case No. 14,858], the court merely gave an opinion on the subject of discharging the jury; no plea was put in in that case. In Com. v. Bowden, 9 Mass. 494, the question was discussed on a motion in arrest of judgment, and so it was in the case of Kinloch [Fost. Crown Law, 16], and in that of People v. Barrett, 1 Johns. 66. In the case of People v. Denton, 2 Johns. Cas. 275, the prisoner, on his second trial, being called upon to plead, his counsel mentioned the discharge of the jury on the first trial, and moved the court not to compel the prisoner to plead, but to discharge him. The court compelled the prisoner to plead, and he plead "Not guilty." These are all the cases. This plea then is a novelty in the law, and that circumstance of itself is a persuasive argument against its validity.

2. Is this plea to be supported in reason, and on principle? We think it is not, because we consider the authority of the court to discharge the jury, to rest in the sound discretion of the court. It can rest no where else. It is merely an incidental matter arising in the progress of the trial, in no way connected with the question before the jury, of guilty or not guilty. It is an incidental matter depending upon circumstances appearing to the satisfaction of the court, as requiring them, in the proper administration of justice, to discharge the jury. It is surely as much a matter of discretion, as the granting a new trial after a verdict is rendered. This is so much a matter of discretion, that the supreme court of the United States will not permit the judgment of the inferior court, in granting or refusing to grant a new trial, to be re-examined upon a writ of error. Now suppose, after a verdict of acquittal, the court should grant a new trial, upon satisfactory proof that the verdict had been obtained by the fraud of the prisoner. Would it be endured, that upon a second arraignment of the prisoner, he should plead the granting of the new trial, put in issue the fact of the fraud to be submitted to the jury, as well as the question whether the court exercised their discretion soundly in granting a new trial? Certainly it could not, and yet that is a stronger case than the present, because in that the prisoner had been acquitted by the jury. Would it be permitted to a jury to revise and correct the judgment of the court as to fact and law (for in criminal cases, they have the uncontrolled power to decide both in favour of the accused), when even a superior court refuses to exercise such a power? We think not. But let us follow out this subject to its consequences, for the purpose of testing its correctness. Suppose the ground of discharging the jury were the intoxication of the juryman so as to unfit him to perform his duty; one of the jurymen falling down in a fit; or the apparent exhaustion of the jurors to a certain degree, or one of them, from the want of refreshments: all which, and many more, are admitted, even in Cook's Case, to be justifiable grounds for discharging the jury, and this matter is put in issue by the prisoner's counsel compelling the prosecutor to reply, as has been attempted in this case. The question before the jury would be, whether the court exercised a sound discretion in discharging the jury, upon proof being laid before them that the juror, although intoxicated, was yet not so far gone as to be incapable of discharging his duty; that the man, though he had a fit, yet he recovered within a few minutes after the discharge; or that the exhausted jurymen were able to have continued their deliberations for a much longer time. How unsafe, how unsatisfactory would be such a course of proceeding? How absurd, how inconsistent with general principles of law, that the jury should thus sit in judgment upon the opinion of the court, to condemn it, and upon this collateral matter, to acquit the prisoner, without deciding the question of guilty or not guilty? We are then of opinion, that the practice attempted to be introduced in this case is repugnant to reason and to law.

3. Can this plea be maintained upon authority? So far from it, we believe that every case relating to this subject repudiates the plea, because they all consider the authority of the court to discharge the jury, as resting in the sound discretion of the court. In the

Doctor and Student, an ancient book, but of high authority, this is expressly stated. It is asserted and maintained in all the New York cases before referred to, and is sanctioned, as we think, by the supreme court of this state in Cook's Case. For the chief justice, after passing, what I firmly believe to be a merited eulogium upon the virtue and integrity of the state and United States judiciaries, and expressing his satisfaction that the question came on now to be decided, adds, "that other times may come when other judges might abuse their discretion." In page 587, he says "that the moment it is made to appear to the court by satisfactory evidence, that the health of a single juryman is so affected as to incapacitate him to do his duty, a case of necessity has arisen, which authorises the court to discharge the jury." The authority then exists when the court is satisfied of the fact; which can only mean, that this authority rests in the sound discretion of the court. But it is contended, that although the court may discharge in cases of misdemeanour, they have no such authority in capital cases; and the fifth amendment to the constitution of the United States is relied upon as justifying the distinction. We think otherwise; because we are clearly of opinion, that the jeopardy spoken of in this article can be interpreted to mean nothing short of the acquittal or conviction of the prisoner, and the judgment of the court thereupon. This was the meaning affixed to the expression by the common law, notwithstanding some loose expressions to be found in some elementary treatises, or in the opinions of some judges, which would seem to intimate a different opinion. Upon this subject we concur in the opinion expressed by the supreme court of New York in Goodwin's Case, although the opinion of the supreme court of this state in Cook's Case is otherwise. We are in short of opinion, that the moment it is admitted that in cases of necessity the court is authorised to discharge the jury, the whole argument for applying this article of the constitution to a discharge of the jury before conviction and judgment is abandoned, because the exception of necessity is not to be found in any part of the constitution; and I should consider this court as stepping beyond its duty in interpolating it into that instrument, if the article of the constitution is applicable to a case of this kind. We admit the exception, but we do it because that article does not apply to a jeopardy short of conviction. If we are correct in this view of the subject, then there can be no difference between misdemeanours and capital cases, in respect to the discretion possessed by the court to discharge the jury in cases of necessity; and indeed, the reasoning before urged in relation to a plea of this kind, if sound, is equally applicable to capital cases as to misdemeanours. By reprobating this plea, we do not deny to a prisoner the opportunity to avail himself of the improper discharge of the jury as equivalent to an acquittal, since he may have all the benefit of the error, if committed, by a motion for his discharge, or upon a motion in arrest of judgment.

It was asked by the prisoners' counsel: Will the court decide this question without either permitting a jury to examine into the truth of the facts which induced the court to discharge the jury, or without examining into it themselves? We answer, Yes. When the court, being satisfied that there was good ground for directing the discharge, had ordered the reasons for this direction to be entered on the minutes, the prisoners' counsel might have requested the court to examine more particularly into the alleged insanity of the juryman, and to hear evidence on that subject. But after the record made of the grounds of the discharge, and the actual discharge, it is too late to question the verity of the facts which satisfied the court. Was it ever heard of, that evidence was received on a motion in arrest of judgment? The only question on that motion, or on a motion to discharge, would be, whether the reasons assigned by the court did, or did not, authorize the discharge? As to the question, whether the court was authorized to discharge the jury on account of the insanity of one of the jurymen, we entertain no doubt. We entirely concur in the opinion of the supreme court of this state in Cook's Case, that the court ought not to discharge the jury merely upon the ground that the jury say they cannot agree, however positive the declaration may be. But that they are fully authorised to discharge in cases of necessity, and that, whether the offence be capital or a mere misdemeanour; as if the jury are so exhausted as not to be able to continue their deliberations; where the prisoner has tampered with some of the jury, or has contrived to keep back the witnesses for the prosecution; if the prisoner, on her trial, becomes insane, is taken in labour, &c.; where one of the jurymen falls down in a fit, and is unable to proceed on his duty, or is found to be insane; if a juryman, after the jury had left the bar, went out of town; intoxication of one of the jurors, rendering him incapable of performing his duty. Other cases of necessity to authorise a discharge of the jury might be mentioned, but it is deemed unnecessary. The plea must be overruled.

NOTE. Another jury being called, the court, upon application of the counsel for the prisoners, decided, that they might sever in their challenges, to the amount of twenty each, peremptorily. See 1 Chit. Cr. Law, 306; 3 Salk. 81; Fost. Crown Law, 106, 107; Co. Litt. 156b; 2 Hale, P. C. 268. The panel being exhausted by the peremptory challenges, and challenges for cause, the court ordered talismen to be called, and a list was made of twenty, which being also exhausted before a jury could be obtained, another list was ordered, and a jury at last was obtained. The talismen, as they were called, were interrogated (at the request of the prisoners' counsel), upon oath, whether they had formed and declared an opinion as to the guilt or innocence of the prisoners, previous to their

being summoned. Those who answered affirmatively, were challenged for cause, and set aside.

Case No. 15,322.

UNITED STATES v. HASKINS.

[3 Sawy. 262.] [1]

District Court, D. California. Feb. 4, 1875.

CRIMINAL LAW—ARREST IN DIFFERENT DISTRICT—REMOVAL FOR TRIAL—TERRITORIAL COURTS—JUDICIARY ACT, § 33.

1. An offender, after indictment found in one district, may, under that section, be arrested in any other district, and committed and removed, or bailed, as the case may be, for trial in the district where the indictment was found.

[Cited in U. S. v. Brawner, 7 Fed. 88; U. S. v. Rogers, 23 Fed. 661; Re Dana, 68 Fed. 895.]

2. A duly authenticated copy of the indictment is sufficient evidence, if uncontradicted, to justify the commitment of the offender, and a warrant for his removal if bail is not given.

3. For an offense against the United States committed in an organized territory, the offender may be arrested in any district of the United States, and removed to the territory for trial, if the territorial courts have cognizance of the offense.

4. Territorial courts are "courts of the United States," as that designation is applied in section 33 of the judiciary act [1 Stat. 91].

[Cited in U. S. v. Jones, 5 Utah, 552, 18 Pac. 238.]

Proceeding for the removal of an offender from one district to another for trial.

Section 33 of the judiciary act enacts: "That for any crime or offense against the United States, the offender may, by any justice or judge of the United States or by any justice of the peace or other magistrate of any of the United States where he may be found agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested, and imprisoned or bailed as the case may be, for trial before such court of the United States as by this act has cognizance of the offense. And copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate before whom the examination shall be may require on pain of imprisonment. And if such commitment of the offender, or the witnesses shall be in a district other than that in which the offense is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute a warrant for the removal of the offender, and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had. * * *" 1 Stat. 91. In the corresponding section of the Revised Statutes, section 1014, the phraseology is changed in some respects. In the first clause instead of saying the offender may be arrested for trial before such court of the United States "as by this act has cognizance of the offense," the language now is "as by law has cognizance of the offense." Section 9 of the organic act of Utah establishes district courts for the territory, and enacts: "And each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States." And section 16 provides as follows: "The constitution and laws of the United States are hereby extended over and declared to be in force in said territory of Utah, so far as the same, or any provision thereof, may be applicable." 9 Stat. 453. "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed." Const. U. S. art. 3, § 2.

In this state of the law, Joseph W. Haskins was indicted by a grand jury in the territory of Utah for an offense against the United States—the offense charged being perjury—and a warrant was issued to the marshal of the United States for Utah, for his arrest. Haskins being found in the state of California, an affidavit was made before the United States district judge, setting out the finding of the indictment, that it is still pending, and that the defendant is in the state of California; and praying for a warrant for his arrest. Upon this affidavit, and the exhibition of an authenticated copy of the indictment a warrant was issued, and the defendant arrested. At the examination before the judge, the identity of the defendant was admitted, also the authenticity of the indictment, and that it is still pending. No evidence was offered by the defendant.

Upon this, the attorney for the United States asks that the defendant be committed or bailed for trial before the court to which the indictment was returned, and if bail be not given that a warrant for his removal, to the territory of Utah, issue. For the defendant it is claimed that the thirty-third section of the judiciary act has no application to proceedings for the arrest and commitment of an offender who has been indicted; that the judge acts under that section as a committing magistrate for the purpose of inquiring whether the accused shall be held to answer before a grand jury. It is also claimed that the above-mentioned section does not and was not intended to apply to a case where it is sought to remove an offender from a district within a state to one within a territory. The defendant further insisted that the proceedings before the judge have not been conducted "agreeably to the usual mode of process against offenders" in this

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

state; and that a certified copy of the indictment did not show probable cause to believe an offense had been committed by the defendant, and was insufficient evidence, uncontradicted, to justify the arrest in the first instance, or the commitment of the defendant at the examination.

John M. Coghlan, U. S. Atty., and G. W. Gordon, for the United States.

H. H. Haight and Delos Lake, for defendant.

HILLYER, District Judge. The first question to be answered is, whether in a criminal case in which the defendant has been indicted in one district of the United States, he can be arrested and committed in another district, in the mode pursued in the present case, and upon such commitment removed to the district in which the crime charged was committed for trial.

While the practice in the several districts has not been entirely uniform, so far as I can find after a somewhat careful search, the propriety of an arrest and removal substantially in the mode pursued by the government in this case, has never been questioned by any judge. If there be any other mode, it is not regarded as the only one or as exclusive of this.

The practice is so stated in Conkling's Treatise (page 630), by the author, as well in cases of arrest after indictment found as before, if the offense is triable in some other district than that in which the arrest is made. In Murray's Treatise on Proceedings in the United States Courts (page 29), the course pursued in this case is laid down as the proper one, and neither of these authors regard a commitment as essential, if the proceeding is before the district judge, to justify him in issuing his warrant for the removal of the offender.

In Ex parte Alexander [Case No. 162], the defendant was arrested and brought before a commissioner of Massachusetts for examination, and the only evidence of probable cause was a certified copy of an indictment returned to the circuit court of the United States for Louisiana. No evidence was offered by the defendant. After the defendant had been committed, the district attorney applied to the district judge for a warrant of removal, and the question was, whether the course pursued was the true one. The learned judge of the district of Massachusetts held that the proceedings had been conducted properly, and said also that there were doubts as to whether the court in Louisiana could issue a warrant to arrest the defendant wherever found. He held further, that a certified copy of the indictment was sufficient evidence to authorize the committing magistrate to commit the accused to be bailed for trial in the district where the indictment was pending.

One Clark was arrested on a warrant issued by a commissioner of New York to answer to a charge of conspiring to defraud the United States in Michigan. A hearing was had, and the proof thereat consisted of a copy of the indictment found in Michigan, with further proof that it was still pending and that a warrant had been issued by the court before which it was found. Upon this the accused was committed. When brought before Judge Benedict on habeas corpus, that learned judge held the evidence to be sufficient and remanded him to the custody of the marshal. In doing so he said that the question was not whether the proceedings in the district court of Michigan would not have been sufficient to justify the arrest and detention of the defendant had that court seen proper to issue its bench warrant directly to the marshal of New York; that the proceeding seemed to have been an original one in which the indictment was introduced as evidence sufficient to justify the commitment for trial in Michigan. Ex parte Clark [Case No. 2,797].

An application was made to the judge of the district of Tennessee, for a warrant to arrest and remove one Jacobi to Arkansas, for a contempt committed in the Arkansas district. Jacobi had not been committed to answer, and it was held that no warrant for the removal of the accused in any case can be issued until he has been arrested and imprisoned; and that if the accused offered bail it was his right to be discharged on bail. "My opinion is also," says the judge, "that the certified copy of the proceedings of contempt and the attachment are sufficient not only to authorize the United States attorney to make complaint, but also the issuing of a warrant precisely as a certified copy of an indictment would be in any other case of crime, and also prima facie to justify the imprisonment of the defendant if he did not give bail." U. S. v. Jacobi [Case No. 15,460]. It was also held, in U. S. v. Shephard [Id. 16,273], that a removal is only authorized after arrest and commitment for want of bail. So that in the last two cases it seems to have been considered that the course taken by the government in the present case is not only the proper but the only one.

There is some correspondence between Mr. Justice Miller and Judge Love of the Iowa district, bearing upon this question, reported in 1 Woolworth, 422. A warrant had been issued by a commissioner in Illinois to arrest the defendant for examination. The warrant and copies of the affidavits used before the commissioner, were submitted to Mr. Justice Miller, in Iowa, for an order to the marshal of Iowa to make the arrest. This course seems to have been taken in conformity with the opinion of Judge Drummond. Justice Miller, however, held that the accused could not be removed before examination in the district where he was arrested. Judge Love agreed with this, and added that his practice was, in cases in

which an indictment had been found, to have the accused brought before him for identification, and upon that to issue his warrant for removal without further examination, for, he says: "I hardly suppose we could go behind the indictment."

The language of the statute is, that for any offense against the United States, the offender may be arrested, etc. Nothing is said expressly, or by fair implication, limiting the power to arrest and imprison or bail, to those offenses, only, for which no indictment has been found. The second clause of section 33, does, in my judgment, contemplate an examination before the magistrate, as a prerequisite to removal. But an examination can be had after indictment found as well as before; if after, the indictment can be used as a piece of evidence. Whether in such case the indictment is conclusive, or the merits of the charge may be gone into on the examination, are questions not necessary now to decide, as the defendant did not offer any testimony. The construction given to this section, by so many eminent judges, ought to have great weight, especially as for more than eighty years it does not seem to have been departed from.

I conclude, then, that an offender, after indictment found in one district, may, under this section, be arrested and imprisoned or bailed, as the case may be, for trial in any other district the courts of which have cognizance of the offense. This view is strengthened by the consideration that it is, if not certain, at least extremely probable, there is no other mode by which the defendant can be removed. The act of congress, respecting fugitives from justice (1 Stat. 302), in pursuance of article IV, § 2, Const. U. S., provides a mode by which offenders against state and territorial laws, who have fled from justice, may be delivered up to the authorities of the state or territory demanding them, but makes no provision for the case of those persons who have committed offenses against the United States in one district and have fled to another. If the defendant cannot be reached under this act, and in my judgment he cannot, there remains but one other course possible besides the one adopted in the case now under consideration, that is, for the judge of the district where the indictment was found to issue his warrant to the marshal of this district, where the defendant now is. Such a course has been alluded to in several of the cases above cited, but always with an expression of doubt as to the power of the judge of one district to issue a warrant which will justify the arrest of an offender anywhere in the United States, or a warrant addressed to the marshal of any particular district outside of his own.

Section 27 of the judiciary act provides that it shall be the duty of a marshal to execute throughout his district all lawful precepts directed to him, and issued under the authority of the United States. In its usual form a capias is directed to the marshal of that district in which the court issuing it has jurisdiction to try the offense, and commands him to arrest the defendant if he shall be found in his district. By the provisions of the act of March 2, 1792 (1 Stat. 333), subpœnas in criminal cases for witnesses, in any district, may run into any other district. There is no similar provision in regard to other process in criminal cases, and this gives some ground to conclude that congress having expressly declared that one kind of process might run throughout the United States, intended to exclude other process not mentioned from having such operation. This point, however, is believed never to have been judicially determined. Judge Lowell, in 1871, said he was not aware of any decision of a court or judge upon the question, but that the power of a judge to issue a warrant which would run throughout the United States had been much doubted. In Conkling's Treatise it is positively stated that a capias can only be executed within the district, and when issued by a district judge must be directed to the marshal of his district, the criminal jurisdiction of the judge being confined to his district. Conk. Prac. pp. 620, 643. The attorney-general's office, the late Chief Justice Taney being then attorney-general, decided that a judge of the District of Columbia could lawfully issue a warrant for the arrest of a person, then in Virginia, for an offense committed in the District of Columbia. He said, however, that doubts from respectable authorities having been stated, he advised an application to the chief justice of the United States for a warrant which he thought would doubtless be obeyed without question. 2 Op. Attys. Gen. U. S. p. 564. The same view was taken by the office in 1864, but in this last opinion it is also stated that "there is another procedure which may be resorted to" and reference is made to section 33 of the judiciary act. 11 Op. Attys. Gen. U. S. p. 127. Thus, while the procedure by simple warrant running throughout the United States has always been doubted and questioned when spoken of, that under the thirty-third section of the judiciary act seems never to have been doubted as proper as well in cases of arrest after indictment found as before. Certainly the proceeding by arrest and examination, in the district where the defendant is found before removal, is far more merciful than the other, for if the warrant of the district judge of Maine is authority for an arrest in California, a person may be arrested here and conveyed across the continent without an opportunity even to show that the marshal has mistaken his identity.

The defendant has admitted that the copy of the indictment is duly authenticated, and has raised no question on its form or substance. He has, however, made the point, that it is not sufficient proof of probable cause to justify the commitment of the de-

fendant. The cases cited above show that a certified copy of an indictment is always considered sufficient for that purpose if uncontradicted, and in this case no proof was offered by the defendant. Such is the evidence on which the governor of a state acts when the extradition of a fugitive from justice is demanded under the act of congress above cited. Section 1550 of the Criminal Code of California provides that a certified copy of an indictment may be received as evidence by the examining magistrate. So that if the language of section 33, that the arrest shall be agreeably to the mode of process against offenders in the state, means that all the proceedings, and not merely the process, shall be governed by the state law, this evidence may be received on an examination like the present, and, as has been shown, is sufficient, when uncontradicted, to justify commitment.

In my judgment, then, the defendant must be committed or bailed to answer for the offense charged, unless the fact that the district where the offense is triable is within the territory of Utah precludes his removal to that district.

The question for determination is, whether the provisions of the thirty-third section of the judiciary act, touching the arrest and removal of offenders against the United States, must be limited in their operation to cases arising in those districts which embrace a state or some portion thereof? And the answer must be in the affirmative if the words "district in which the trial is to be had," in the third clause of that section, refer only to districts established or organized under that act. The act of 1789 divided the United States into thirteen districts. Since that time, as states have been admitted new districts have been organized, and so far as I can ascertain it has never been questioned that the general provisions of the judiciary act applied to the new districts without any express enactment of them for such districts; although by a narrow construction of the language it might be held to apply only to those courts and districts organized, and to which cognizance of crimes is given, by that act. The provision is that if the commitment of an offender is in a district other than that in which the offense is to be tried, the judge shall issue his warrant for the removal of the offender to the district in which the trial is to be had. If, then, an offense against the United States may be tried in a district of Utah territory, there is nothing in the language of this provision necessarily forbidding a construction which will justify the removal of an offender there for trial. The organic act of Utah does extend the constitution and laws of the United States over the territory so far as the same may be applicable. It also makes provision for the organization of three district courts therein, and further provides "that each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States." Thus these courts have cognizance of all offenses committed in their respective districts, and as such an offense can only be tried in the district where it is committed, the offender, if he escapes from the territory, must go unpunished, unless he can be removed there for trial; and this only can be done under and by virtue of the provisions of the judiciary act. No other provision of law for such a case can be found, and it does not seem probable that congress has left it wholly unprovided for. For, if it is doubtful that the warrant of a district judge of the United States can be executed out of his district, it is certain that the warrant of a territorial judge cannot run out of his territory. In Clinton v. Englebrecht, 13 Wall. [80 U. S.] 434, the supreme court held that there were no "district courts of the United States," in the sense of the constitution, in the territory of Utah; that although jurisdiction was conferred upon them to try cases arising under the constitution and laws of the United States, this jurisdiction was no part of the judicial power conferred by the constitution on the general government; that these courts were the legislative courts of the territory, created in virtue of that clause of the constitution which authorizes congress to make all needful rules and regulations respecting the territories of the United States. It seems to me to follow from this, that the warrant of a judge of a territorial court, can no more run throughout the United States than can that of the judge of a state court. The case of Benner v. Porter, 9 How. [50 U. S.] 244, makes this clearer, if possible. The court there say that congress must not only ordain and establish inferior courts, but the judges must possess the constitutional tenure of office, before they can become invested with any portion of the judicial powers of the Union.

It is doubtless true that the provisions of the judiciary act are, for the most part, confined in their application to courts of the United States in the sense of the constitution. In Hornbuckle v. Toombs, 18 Wall. [85 U. S.] 648, it was held that the clause in the organic act of a territory extending the laws of the United States over the territory had the effect to import laws of a general character and universal application, but whether, when acting in the capacity of United States circuit and district courts, invested with the same jurisdiction in all cases arising under the constitution and laws of the United States, the territorial courts were to be governed by any of the regulations affecting the circuit and district courts of the United States, was a question stated but not decided. Now the provisions of section 33 are of universal application, and are plainly intended to cover every offense against the Unit-

ed States, committed within the jurisdiction of any of its courts.

Another clause in the section ought to be noticed. The language is that the offender may be imprisoned or bailed for trial before such "court of the United States" as by law has cognizance of the offense. Is this intended as a limitation of the power to arrest and imprison for any offense given in the context? I think not. The plain intention is to provide for any and every offense against the United States. The crime charged in this case is such an offense and is triable before the district court of the third judicial district of Utah. While the district courts of Utah are neither state courts nor United States courts in the sense of the constitution, they are still courts established and organized under the authority of the United States, sitting in a territory belonging to the United States and exercising their jurisdiction conferred upon them by that government. The whole territory is under the plenary control of the general government, and the districts, while they are territorial districts, are still districts within which certain offenses against the United States must be tried if tried at all.

It appears to me that, although the district courts of Utah are not courts of the United States, as defined in Clinton v. Englebrecht, [supra], they are in another sense not improperly styled courts of the United States as being organized by that government under the authority to make needful regulations for the territories. They are spoken of as such in acts of congress and in opinions of the supreme court. Thus, in Hunt v. Palao, 4 How. [45 U. S.] 589, the territorial court of Florida is spoken of as a court of the United States, in contradistinction to a state court, and in Clinton v. Englebrecht the court speak of these courts as acting, in cases arising under the constitution and laws of the United States, "as circuit and district courts of the United States." So far, then, as these courts have exclusive jurisdiction over crimes committed against the United States they may, it seems to me, be held to be included in the term "courts of the United States" as used in the thirty-third section of the judiciary act. I cannot see that any sound rule of construction is violated by so doing. The act is remedial in its character, and I do not find any good ground for giving it so narrow and technical a construction as is contended for by the defendant, the practical effect of which must be to leave offenses committed in a territory where they cannot be reached or punished if the offender succeeds in escaping to some state.

My conclusion is that the defendant must be committed, unless he give bail in the sum of $3,000 to answer to the charge against him before the court to which the indictment was returned. If bail be not given, a warrant for his removal will be issued as the law directs.

The defendant, having been committed, was subsequently brought before SAWYER, Circuit Judge, on habeas corpus. After hearing, he was remanded to the custody of the marshal.

Case No. 15,323.

UNITED STATES v. HASTINGS.

[5 Cranch, C. C. 115.] [1]

Circuit Court, District of Columbia. April 21, 1837.

CRIMINAL LAW—NEW TRIAL.

After a sentence of imprisonment has been in part executed, the court will not rescind it and grant a new trial, although moved for at the same term, it being doubtful whether the court has the power to do so.

Indictment for stealing wood from General Van Ness, of the value of seventy-five cents. The defendant [James Hastings] was found guilty on the 7th of April, 1837, in the absence of CRANCH, Chief Judge, and immediately sentenced to be imprisoned one month and to pay a fine of one dollar, the jury having recommended him to mercy and his counsel having waived the usual delay of four days, given to move in arrest of judgment or for a new trial. On the 10th of April, 1837, his counsel filed a motion for a new trial founded upon the uncertainty of the evidence, and upon affidavits discrediting the principal witness, Samuel Martin. On motion of the district attorney, a day was given to obtain affidavits to sustain the credit of the witness. On the —— day of April, the motion was heard, and a new trial refused, CRANCH, Chief Judge, saying that he did not think the grounds stated in the affidavits to be sufficient, but not giving any opinion as to the merits of the case as it appeared upon the trial, as he was not then present.

The motion was now (April 19th) renewed upon a strong representation of many of the most respectable men in Georgetown, as to the good character of the defendant.

CRANCH, Chief Judge, and THRUSTON, Circuit Judge, were of opinion that a new trial might be granted, but MORSELL, Circuit Judge, did not concur.

Mr. Key, the district attorney, doubted whether the court has the power to rescind a judgment partly executed and grant a new trial. The defendant has been imprisoned under the sentence ever since the 7th of April, and cannot be tried again. When the judgment is recorded it cannot be altered by the court. It is in civil cases only that judgments are under the control of the court during the term. 1 Chit. Cr. Law, 700, 722, 724, 726.

April 21st, Mr. Hoban, for defendant, moved the court to rescind the residue of the sentence.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Mr. Key did not object, except as to the costs.

Mr. Hoban cited 1 Chit. Cr. Law, 722; Rex v. Loveden, 8 Term R. 615; 2 Hawk. P. C. c. 48, § 20; Redding's Case, T. Raym. 376.

THE COURT (THRUSTON, Circuit Judge, absent) remitted the remaining part of the sentence of imprisonment, but not as to the costs.

THE COURT had previously (nem. con.) refused a new trial, having great doubt of their power to rescind the sentence after it was in part executed. CRANCH, Chief Judge, however, was inclined to the opinion that the court had the power to do so, and to grant a new trial.

Case No. 15,324.

UNITED STATES v. HASWELL.

[Whart. State Tr. 684.]

Circuit Court, D. Vermont. May 5, 1800.

SEDITIOUS LIBEL—TRUTH IN JUSTIFICATION—PROOFS.

[Where a justification is relied on, the proofs must fully sustain the charges of the publication; otherwise the defense fails. Hence an offer to prove that certain officers of the government had acknowledged the policy of occasionally appointing Tories to office is not a justification of a charge that the government was selecting Tories, "men who shared in the desolation of our homes, and the abuse of our wives and daughters."]

[This was an indictment under the act of July 14, 1798 (1 Stat. 598), against Anthony Haswell, for a seditious libel.]

The alleged libellous matter which the defendant was indicted for publishing was as follows: "To the Enemies of Political Persecution in the Western District of Vermont: Your representative (Matthew Lyon) is holden by the oppressive hand of usurped power in a loathsome prison, deprived almost of the right of reason, and suffering all the indignities which can be heaped upon him by a hard-hearted savage, who has, to the disgrace of Federalism, been elevated to a station where he can satiate his barbarity on the misery of his victims. But in spite of Fitch (the marshal) and to their sorrow, time will pass away; the month of February will arrive, and with it bring liberty to the defender of your rights? No. Without exertion it will not. Eleven hundred dollars must be paid for his ransom. This money it is impossible for Col. Lyon to raise in an ordinary way. A contribution is talked of, but this is an uncertain, humiliating, and precarious method. Col. Lyon has adopted a plan which accords with his feelings, and he hopes it may be with those of his friends. The plan is this: He has purchased a grant for a lottery, upon which he has formed a scheme whereby he designs to sell his tickets for money to the amount of his fine and consequent losses; and pay the prizes in land, houses, and such other property as he has to dispose of. May we not hope that this amount may answer the desired purpose, and that our representative shall not languish a day in prison for want of money after the measure of Federal injustice is filled up? At the same time the administration publicly notified that Tories, men who had fought against our independence, who had shared in the desolation of our homes, and the abuse of our wives and daughters, were men who were worthy of the confidence of the government."

April 28, 1800. The defendant appearing in court with his counsel, Mr. Israel Smith and Mr. Fay, a motion for a continuance was made by them on the ground of the absence of material witnesses. The defendant filed an affidavit to the effect that he expected to prove by General Darke, of Virginia, and Mr. McHenry, the secretary of war, that the government had on one occasion acknowledged the policy of occasionally appointing Tories to office; and that every effort had been made to obtain the attendance of these gentlemen, but in vain. The affidavit also stated that two witnesses from the immediate neighbourhood were expected, but had not yet arrived, one being detained by accident, and the other by sickness.[1]

The continuance was resisted by the district attorney on the ground, 1st, that due diligence had not been shown in collecting the wanting testimony; 2d, that even if it could be got, it would be inadmissible.

PATERSON, Circuit Justice, with whom was HITCHCOCK, District Judge, said that the first item of evidence would not be admissible, even if present, as it would not be a flat justification; but that in order to permit the defendant to avail himself of the attendance of other witnesses whom he momentarily expected, a postponement of several days would be granted.

May 5th. The case being called, the district attorney opened the case on the part of the United States.

Evidence was produced to show that the passages in the indictment had been published in a newspaper called the Vermont Gazette, edited by the defendant; the first being part of an advertisement issued by a committee of Colonel Lyon's friends, the second being an extract from the Aurora.

In justification of the first paragraph, the defendant called witnesses to prove circumstances of peculiar hardships attending Lyon's imprisonment.

The jury were addressed by the district attorney and the defendant's counsel, and afterwards by the defendant himself.[2]

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[1] Among the papers in my hands is a series of very curious letters from the defendant to Mr. Duane and Mr. Lyon, asking for evidence by which the charges in the indictment could be justified. This they were unable to furnish, at least in a legal shape.

[2] The following passages are extracted from a manuscript defence written by Mr. Haswell,

PATERSON, Circuit Justice, charged the jury, that, though the statute had beningly altered the common law, in so far as to permit the truth to be given in evidence, yet, unless the justification came up to the charge, it was no defence. Here it was for the jury to determine whether the violent language applied to the marshal as descriptive of his treatment of Colonel Lyon, had been sustained by the evidence. If it had not, no defence had been made out. As to the charge against the administration of selecting Tories "who shared in the desolation of our homes," &c., no attempt at justification has been made. If the jury, therefore, believe, beyond reasonable doubt, that the intent was defamatory, and the publication was made, they must convict. Nor was it necessary that the defendant should have written the defamatory matter. If it was issued in his paper, it is enough.

The jury, after a short deliberation, returned a verdict of guilty, and the court sentenced the defendant to a fine of two hundred dollars, and an imprisonment of two months.

In 1844 an act passed congress refunding this fine to the representatives of the defendant, with over forty years' interest.

Of Mr. Haswell himself, who for some time was an active and useful citizen of Vermont, I have gathered the following particulars: He was born at Portsmouth, England, in the year 1756. His family were attached to the navy of Great Britain, and he had several brothers who became officers in that service. Taking a dislike to a seafaring life, he found his way to the New World, under the protection of some friends, and landed at Philadelphia, where he met his cousin, Susannah Haswell, who had married a gentleman by the name of Rawson. Mrs. Rawson was distinguished for her literary acquirements, and was the author of one of the first of American novels, entitled "Trials of the Human Heart." Soon after the arrival of Mr. Haswell in this country, the war of the Revolution broke out, and, as he had determined to make America his home, he engaged in the Continental service, in defense of her liberties, and periled his life at the battle of Monmouth. After leaving the army, he went to Boston, and thence to Worcester, where he became acquainted with Isaiah Thomas, the celebrated veteran of the press, who was then extensively engaged in the business of printing, and, under the patronage of Mr. Thomas, acquired a thorough knowledge of the printer's art. Shortly after this, on Mr. Thomas' relinquishing his business, his office passed into the hands of Mr. Haswell, who did not long retain it, but went first to Hartford, Connecticut, and thence to Springfield, Massachusetts, in the prosecution of his affairs. Not meeting in either place with the success he desired, he was induced by earnest solicitation, and offers of pecuniary advantage, to turn his attention to the state of Vermont, then called the "New Hampshire Grants." He accordingly removed to Bennington, and, in the month of June, 1783, in connection with Mr. David Russell, he established the Vermont Gazette, which, from that time to the present, has been published by Mr. Haswell and his descendants, and is probably one of the oldest newspaper establishments in the United States. After the adoption of the constitution, and the admission of Vermont to the Union, Mr. Russell was appointed by General Washington collector of the revenue for the district of Vermont, and disposed of his interest in the Gazette to Mr. Haswell, who thus became sole proprietor. At the period of the commencement of the Gazette, in 1783, the Revolutionary War had indeed been brought to a close, but there remained for the "New Hampshire Grants" a controversy with New York and New Hampshire, respecting the rightful jurisdiction over the territory, which was scarcely less embittered than the national struggle, in securing the glorious issue of which Vermont had borne so conspicuous a part. This contest, surviving the Revolution, had been

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and read to the jury, which is now in my hands: "With respect to the first count, gentlemen, I believe you will entertain a doubt at least whether I am, in fact, the publisher of it, in the common acceptation and real meaning of the term. It is true, gentlemen, that it was published in my paper, that I am sole editor and printer, and that I was at home at the time; but it is equally true that the publication was made by Elias Buel, as manager, and James Lyon, as clerk, of Col. Lyon's lottery, and that, if any consequences flowed from it, both they and I rationally expected they must bear them. If either of you, gentlemen, should publish in a newspaper that you would reward in a pecuniary manner any person who should perform a certain business, could a person performing claim his reward of the printer? If either of you, being sufficiently responsible, should publish, with your name, anything that operated to your neighbor's injury, could an action lie against a printer? If he could not, gentlemen, in the case stated, call on the printer for his reward, due in consequence of another person's publication, on what grounds of reason can a printer be called on in a case affecting not merely interest, but personal liberty, the dearest privilege of life, for a publication avowed by responsible men, and accompanied with their names. But even allowing that I was the publisher of the advertisement on which I stand indicted, I believe it will be admitted by you all, gentlemen, as a principle founded on the reason and fitness of things, that no inference ought to be drawn from a passage on which a citizen is indicted that does not clearly flow from the premises; that the plain and obvious meaning of the written or printed words ought not in any wise to be evaded, nor any construction to be put upon it, in order to criminate the citizen, but what it will clearly and unequivocally bear; much less should any innuendo or exemplification be admitted that does not spring spontaneously from the writing itself. With this impression, gentlemen, I must beg you to read with attention the first section of the advertisement published by Major Buel and James Lyon as aforesaid, on which I stand indicted; I mean from the beginning to the first close, or partial close, of a sentence; that is, to the first semicolon. If you can do this, and on your oaths declare that Major Buel and Mr. Lyon as publishers, or myself as their humble agent, meant to call in question the authority of the United States, and did not mean to refer to an assumption of power, and undue vigour, in the marshal and his agents, solely and exclusively, I shall acknowledge myself more deceived with respect to the general application of meaning to printed and written language than I ever remember to have been at any former period of my life. I am persuaded, gentlemen, that whatever may have been your judgment with respect to the meaning of the clause in question, and the intention of its authors, when you attend to the evidence of Mr. Hicks, of Mr. Fitch himself, that you will be sensible that I had conceived the idea that a federal officer had usurped a power of adding to the vigour of the law by unnecessary severity, a total failure of politeness, and ungentleman-like behaviour, and in this idea, whether true or false, I was fully confirmed by his conduct subsequent to the letter I wrote to him, relative to the sentiment of a judge of this honorable court."

marked by measures on the part of the enemies of the "grants," which were calculated to subject to severe tests the firmness and patriotism of the people. Yet they had rejected with scorn the offers of annexation to the neighboring province of Canada, which were made to them by the emissaries of Britain. Under the guidance of their statesmen, the Allens, Chittendens, and others, they had found time and inclination, in the midst of a strife for existence itself, to contribute largely to the success of our national arms. By the time the constitution was adopted, however, this controversy with New York and New Hampshire had been closed, and the state of Vermont was admitted into the Union on the 4th of March, 1791. In bringing about this result, the public press contributed largely, and Mr. Haswell was conspicuous among those who conducted it, both for his devotion to the cause of independence, and his ability in maintaining it. He possessed the unlimited confidence of the leading men of the state, and rewarded it by a faithful support of the public interests. Previous to the admission of the state, post-offices were established at various places in it, and Mr. Haswell was appointed postmaster-general for the "grants." Bennington was at this time the focus of the state. Here the committee of safety held their most important sessions. Governor Chittenden resided in the neighbouring town of Arlington, and Col. Ethan Allen was for some time an inmate in the family of Mr. Haswell. After the admission of Vermont into the Union, and until near the close of Washington's administration in 1797, there existed comparatively little diversity of political opinion; but, when the next presidential election approached, the people were soon marshalled in the two great parties, into which the country began to be divided. Mr. Haswell attached himself with great earnestness to the Democratic ranks, and the publication of the alleged libellous passages, given in the text, was not an unnatural consequence. The indignities with which he was treated were for a long time the subject of bitter party agitation. "He was arrested," it was said, "at night, and notified to prepare for a journey to Rutland early in the morning. Accordingly, at a very early hour, Mr. Haswell, although in very poor health, and totally unaccustomed to riding, was compelled to mount a horse, and ride sixty miles through the rain on a cold day in October, to the jail at Rutland. Here he was thrown into a filthy prison at midnight, notwithstanding his entreaties to be permitted to dry his clothes, which were saturated with the rain, and to repose himself in decent quarters, after the fatigue of his journey. Several of the most responsible men in Rutland offered any security the marshal might demand, to induce him to grant these requests, but in vain. The prisoner was thrown into the prison, and never afterwards recovered entirely from the shock thus given to his health. From Rutland he was taken the next morning to Windsor, where he was to be tried. His sentence was rigidly carried out, and he was remanded to the jail at Bennington to fulfil his imprisonment. At the expiration of his sentence, an immense concourse of people from the neighbouring county assembled to welcome him back to liberty, and to signalize their disapprobation of his imprisonment. He marched forth from his quarters at the jail to the tune of Yankee Doodle, played by a band, while the discharge of cannon signified the general satisfaction at his release." Mr. Haswell immediately resumed the publication of the Gazette, which he continued nearly down to the time of his death, which occurred on the 22d of May, 1816, in his 60th year. Mr. Haswell was highly respected, not only by his friends, but by his political opponents. He was distinguished in private life by exemplary conduct in the discharge of his duties, and by his devotion to the moral and religious improvement of society.

Case No. 15,325.

UNITED STATES v. HATCH et al.

[1 Paine, 336.] [1]

Circuit Court, D. New York. April Term, 1824.

SHIPPING—STATUTORY BOND—ALTERATIONS—LEAVING SEAMEN IN FOREIGN PORT—CERTIFICATE OF CONSUL.

1. A bond given by the master of a vessel, conditioned for the exhibition of the list of his ship's company to the first boarding officer, at the first port of his arrival in the United States, and for the production of the crew, was *held* to be a valid bond under the act of February 28, 1803 [2 Stat. 203], although it was not expressed to be taken in pursuance of said act, and although it was not stated on the face of the bond which of the obligors was the principal and which the surety. And the declaration on the bond was *held* good although it did not refer to the statute.

2. An alteration in the bond, made by one of the clerks of the custom-house, after its execution, for the purpose of rectifying it, but which did not affect its construction, was *held* to be the act of a stranger, and immaterial, and not to avoid the bond.

3. The certificate of the consul, to excuse the master, under the proviso of this act, must state that the seamen were left in a foreign port with his consent.

4. A certificate that they were left in a hospital unable to return, and that the master had paid for their maintenance, and left the amount of their wages, was *held* insufficient, and parol evidence of the consent of the consul or seamen inadmissible.

[Cited in U. S. v. Parsons, Case No. 16,002.]

5. The sum of 400 dollars, in which the bond is to be taken, is intended as a forfeiture, and not as a penalty to cover such damages as may be assessed. Impossibility of assessing the damages contemplated by the act.

[Cited in Marble v. Fulton, Case No. 9,059. Approved in U. S. v. Montell, Id. 15,798. Cited in brief in U. S. v. Cutajar, 59 Fed. 1001.]

Error from the district court of the United States for the Southern district of New York.

Joseph Hatch, master of the ship India, of New York, and Caleb Barstow, his surety, on the 8th day of December, 1821, executed a bond to the United States in the sum of 400 dollars, with the following condition:

"Whereas the above bounden Joseph Hatch, hath delivered to the collector of the customs for the district of New York, in the state of New York, a verified list, containing, as far as he can ascertain them, the names, places of birth, residence, and description of the persons who compose the company of the said ship, called the India, now lying in the said district, of which he is at present master or commander, of which list the said collector has delivered to the said Joseph Hatch a certified copy. Now the condition of this obligation is such, that if the said Joseph Hatch shall exhibit the aforesaid certified copy of the list to the first boarding officer, at the first port in the United States at which

[1] [Reported by Elijah Paine, Jr., Esq.]

he shall arrive on his return thereto, and then and there also produce the persons named therein, to the said boarding officer, except any of the persons contained in the said list who may be discharged in a foreign country with the consent of the consul, vice consul, commercial agent, or vice commercial agent there residing, signified in writing, under his hand and official seal, to be produced to the collector of the district within which he may arrive as aforesaid, with the other persons composing the crew as aforesaid, or who may have died or absconded, or who may have been forcibly impressed into other service, of which satisfactory proof shall be then also exhibited to the said last mentioned collector, then, and in such case, the above obligation shall be void and of no effect, otherwise it shall abide and remain in full force and virtue."

The plaintiffs below declared on this bond, without referring to any statute, assigning as breaches that the India departed on a foreign voyage, and on the 27th day of April, 1822, returned to the United States, arriving first at the port of New York, but did not produce to the first boarding officer the persons named in the list of his crew, nor exhibit to the collector satisfactory proof of the death, absconding, or forcible impressment into other service of such persons.

The defendants pleaded the general issue with notice of special matter.

At the trial the plaintiffs offered the bond in evidence as taken under the act entitled "An act supplementary to the act concerning consuls and vice consuls, and for the further protection of American seamen." The subscribing witness who was called to prove the execution of the bond, also proved, that after its execution he altered the word "of," between the words "certified copy of the list," and the words, "the first boarding officer," to the word "to." This he did of his own accord and without the knowledge or concurrence of the defendants. It was objected to the bond as evidence, that it was rendered void by this alteration, and also, that it did not purport to be taken pursuant to said act, and that there was no averment of the fact in the declaration; and that therefore a recovery under said act could not be had upon it. It was also objected that the bond did not purport to be made by Hatch as principal and Barstow as surety, but was joint and several. These objections were overruled.

It appeared that the India had made a voyage to Lisbon, and that two of the crew did not return with the vessel to the United States. To justify this, the defendant offered in evidence the following certificate of the consul of the United States at Lisbon.

"I, J. Pemberton Hutchinson, consul of the United States of America for the city of Lisbon, &c. do hereby certify, that Joseph Hatch, master of the ship India, of New York, has left in the hospital of this city, George Gardner and John Williams, (two American seamen as appears from the Roll d'Equipage,) in consequence of their being unable to proceed on the voyage, caused by sickness. I further declare, that Captain Hatch has not paid any extra wages, as the act for the protection of seamen directs to provide passage for those seamen home: he has paid for their maintenance in the hospital, and has left the amount he says is due them for services on board the ship India. Given under my hand and seal of office, in Lisbon, this twenty-third of March, one thousand eight hundred and twenty-two. J. Pemberton Hutchinson."

They also offered to prove that the two seamen were left at the hospital in Lisbon by their own request, being sick and unable to return with the vessel; that the master was very desirous to bring them back with him, and that the consul verbally expressed his satisfaction at their being left behind. They also offered to prove that different consuls of the United States at foreign ports, had granted their consent in writing to the master, that seamen should be left, where they were left under circumstances like those in this case. This evidence the court rejected, and the defendants excepted to the decision.

The court charged the jury that the alteration in the bond was immaterial and did not avoid it, and that they were not to assess damages for the breaches, but find a verdict for the sum of four hundred dollars, as upon a bond taken in pursuance of said act of congress. The defendants excepted to the charge. The jury found a verdict for four hundred dollars debt and six cents costs. [Case unreported.] These proceedings were brought before this court by a bill of exceptions.

H. Ketchum and T. Fessenden, for plaintiffs in error.

R. Tillotson and C. G. Haines, for defendants in error.

THOMPSON, Circuit Justice. This case comes up on a writ of error to the district court for the Southern district of New York, and the error assigned grew out of a bill of exceptions, taken at the trial, and may be arranged under the following heads: (1) Whether the bond upon which the suit is founded may be considered as taken under and by virtue of the act of congress of February 28, 1803, entitled "An act supplementary to the act concerning consuls and vice consuls, and for the further protection of American seamen." (2) Whether the alteration made in the bond after its execution by the defendants made it void. (3) Whether the certificate of the American consul at Lisbon, and the parol testimony offered, showing the reason why the seamen were left, were properly rejected. (4) Whether the

four hundred dollars named in the bond, is to be deemed a penalty, and damages to be assessed by a jury, or whether it is to be considered in the nature of stipulated damages, and the whole sum recoverable if the bond is forfeited.

Under the first point it is alleged, that it ought to appear upon the face of the bond that it was taken under the statute, and if it does not so appear, it ought at least to be averred in the declaration that it was so taken. The act of congress does not prescribe the form of the bond. It points out the duty to be performed by the master, before he can obtain a clearance on a foreign voyage. He is required to deliver to the collector of the customs, a list containing the names, places of birth, residence, and description of the persons who compose his ship's company, as far as he can ascertain them, to which he is to annex his oath verifying the same. The collector is to deliver to the master a certified copy of this list; and the master is required to enter into bond with sufficient security, in the sum of four hundred dollars, that he shall exhibit the said certified copy of the list to the first boarding officer, at the first port in the United States at which he shall arrive on his return thereto, and produce the men named in the list. The act however, contains a proviso, that the bond shall not be forfeited, on account of the master not producing any of the persons contained in the list, who may be discharged in a foreign country, with the consent of the consul, vice consul, commercial agent, or vice commercial agent there residing, signified in writing under his hand and official seal, to be produced to the collector with the other persons composing the crew, nor on account of any such person dying, or absconding, or being forcibly impressed into other service, of which satisfactory proof shall be exhibited to the collector.

The bond describes Joseph Hatch as master or commander of the ship called the India, of New York, and lying in the district of New York, and it is recited in the condition, that he had delivered to the collector of the customs for the district of New York a verified list of his ship's company, and concluding with a condition, substantially, according to the provisions of the act. I can perceive no reason why the bond should expressly refer to the act; no form is prescribed by the act; that is left in the discretion of the collector. It is not necessary for the information of the obligors. The authority under which it is taken grows out of a public law, with a knowledge of which the defendants are chargeable, and it is not to be presumed they were ignorant of the duty imposed upon them. The condition of the bond which points out the obligations assumed by them is in strict accordance with the law.

It was urged in argument under this point, that the bond does not distinguish who was principal and who security. A sufficient answer to this would be simply that the act does not require it. But another, and decisive answer may be given; that the objection is not warranted by the fact. The bond does not to be sure, say in terms who was principal and who security, but it states what is equivalent to it. It describes Hatch as the master of the ship, and recites that he has furnished the collector with a verified list of his ship's company, and performed the duty required by the law before he could obtain a clearance, all which are amply sufficient to show that he was the master and of course the principal in the bond; and it follows as a necessary consequence, that the other must be the security, as there cannot be two masters of the ship. Nor is there any ground for the objection that the declaration contains no averment that the bond was given pursuant to the statute.

2. The alteration made in the bond after it was executed, consists in erasing the word "of" and inserting the word "to" in that part which requires the master on his return to the United States, to exhibit the certified copy of the list of the ship's company which he had received of the collector. In the bond as it stood originally, it read thus: "If the said Joseph Hatch shall exhibit the aforesaid certified copy of the list of the first boarding officer," &c. The word "of" immediately preceding the words "the first," was changed for the word "to," so as to read as the bond now stands, "shall exhibit the aforesaid certified copy of the list to the first boarding officer," &c. The alteration was made by the witness to the bond, and who was a clerk in the custom-house in New York, but must be considered a mere stranger so far as relates to the custody or taking of the bond. This duty is by the law entrusted to the collector; and even admitting his acts to be deemed the acts of the United States, it would be carrying the principle to an alarming extent, to consider all the clerks in the custom-house the agents of the United States, and their acts as the acts of the United States.

The alteration must therefore be considered as made by a stranger, and the inquiry will be whether it was such an alteration as the law denominates material; and I think it was not. Looking at this clause in the bond in connexion with the context, the meaning and construction must be the same with or without the alteration. The bond would be incongruous and absurd, with the word "of" instead of "to." The recitals showed the certified list to be that of the collector and not of the boarding officer. No such document existed, and to require the exhibition of such a list, would be requiring an impossibility. The document to be exhibited was the aforesaid certified list. This of course referred to a paper before mentioned and described

as the certified copy of the list delivered by the collector to the master. The concluding part of the sentence shows likewise that such was the clear and obvious intention, and must have been the construction had the word "of" been left in the bond. The master is also to produce the persons named in the list, to the said boarding officer; showing obviously that the person to whom the certified copy of the list of the ship's company was to be exhibited and to whom he was to produce the persons named in the list, was the same, to wit, the first boarding officer. It is very evident therefore, that the alteration was immaterial, both because it did not alter the meaning and construction of the bond, and because the condition was absurd with the word "of" in the place of "to." The alteration did not therefore in my opinion invalidate the bond.

3. There was no error in excluding the consul's certificate, and the parol evidence offered to show the reason why the seamen were left at Lisbon. This evidence was offered for the purpose of bringing the case within one of the exceptions in the act, which would excuse the master for not producing the seamen on his return to the United States, and save the forfeiture of his bond. But the testimony did not satisfy the requisitions of the act. The law excuses the master for not producing any person contained in the list who was discharged in a foreign country, with the consent of the consul, vice consul, commercial agent, or vice commercial agent there residing, signified in writing, under his hand and official seal. The certificate of the consul offered in evidence, states that the two seamen, Gardner and Williams, were left in the hospital at Lisbon, in consequence of their being unable to proceed on the voyage, by reason of sickness; that the captain had paid for their maintenance in the hospital, and left the amount he said was due them for wages, but that he had not paid any extra wages as the act for the protection of seamen directs, to provide for their passage home. This certificate does not state in terms, nor any thing that will admit of the construction, that these seamen were left with the consent of the consul; on the contrary, the necessary conclusion to be drawn from it is, that he did not consent. For the master had not complied with what the law required of him. By the third section of the act already referred to, it is provided among other things, that, when any seaman, or mariner, a citizen of the United States, shall, with his own consent, be discharged in a foreign country, it is made the duty of the master to produce to the consul, vice consul, commercial agent, or vice commercial agent, the certified list of his ship's company, and pay to the consul, &c. for every seaman so discharged, being designated on said list as a citizen of the United States, three months' pay over and above the wages then due. The case shows that these seamen were American citizens, and the master offered to prove, that they were left in the hospital at Lisbon by their own request, which must be taken as equivalent to a consent to be discharged in a foreign country. If all this had been shown to the consul, and three months' wages advanced, he would no doubt have certified his consent to their being left at Lisbon, and the case would then have been brought within the act. That the consul would have given the requisite certificate, is fairly to be inferred, from the parol evidence offered on the part of the defendants, that the consul verbally expressed his satisfaction at the course pursued by the master in relation to these seamen. The law has very wisely placed American seamen in foreign countries, under the protection and guardianship of some of our public agents, to guard against their being left destitute and in want. It is very probable these seamen were left at Lisbon by their consent; but the requisite evidence to establish that fact was not produced. It required the sanction of the consent of a public agent, and that signified in writing and under his official seal. This being the evidence required by the statute, the parol evidence, both as to the consent of the seamen and the satisfaction of the consul, was not admissible to establish the fact.

4. The next and more difficult inquiry relates to the question of damages. In the case of Taylor v. Sandford (in the supreme court of the United States), 7 Wheat. [20 U. S.] 17, the chief justice in delivering the opinion of the court observes, that "in general a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages, which the party in whose favour the stipulation is made may have sustained, from the breach of contract by the opposite party." It will not be considered, of course, as liquidated damages, and it will be incumbent on the party who claims them as such, to show they were so considered by the contracting parties, and considerable stress is laid upon the circumstance in that case, that the gross sum named is called by the parties a penalty. Taking the general rule to be as here stated, the proposition admits that the inquiry in every case must be in a great measure a question of intention, and whatever right is attached to the circumstance that the gross sum is called a penalty, does not apply to this case. The act does not call it a penalty. It directs a bond to be taken in the sum of four hundred dollars, and then goes on to point out the duty imposed on the master, to secure the performance of which the bond is intended. The act does not expressly declare that the bond shall be forfeited if he fails to perform the duty. But this is a necessary inference; and the proviso points out what shall save the forfeiture, although the master does not, in point of fact, comply with the stipulation. I consider, therefore,

the construction to be given to this section of the act, the same as if it had expressly declared that if the master did not comply with the duties therein required, he should forfeit the sum of four hundred dollars. And the reason why a bond is to be given is, that security is required; and there must be some way in which the security shall signify his assent to the undertaking.

It may, I think, be laid down as a general rule, admitted in all the cases on this subject, that where, from the nature of the case, damages cannot be ascertained, the gross sum agreed upon between the parties, must be understood as stipulated damages. If actual damages must be proved in cases arising under this section of the act, the law is a dead letter, for there is no rule by which they can be ascertained. Questions of national policy were undoubtedly taken into view in the passage of this law. It was wise and prudent to guard against our seamen being left in a foreign country. Our national strength is intimately concerned in the question; and by what rule can a jury estimate damages on this account? It is too limited and narrow a view to take of this provision in the law, that it was intended to indemnify the United States against payment of the passages of seamen on their return to this country, or for whatever assistance should be afforded them in a foreign country. Higher and more important considerations, in a national point of view, dictated the policy of this provision. This is evident from other provisions in the act. The United States could be under no obligations to provide for the return of our seamen who voluntarily quit the vessel and remained in a foreign country; yet masters of vessels are not even in such case permitted to discharge them without paying to the consul or commercial agent, for each seaman, three months' wages, over and above what may thus be due; and two thirds of this advance is to be paid to the seamen, upon their engagement on board a vessel to return to the United tates. This is held out as a premium to induce their return, and not as a mere indemnity for the expenses of a passage. If the bond is only to indemnify for actual damages sustained, when does the right of action accrue? The master returns to the United States, having left his whole crew in a foreign country, and without being furnished with the documents or evidence required by the act to save the forfeiture of the bond. If actual damages must be shown, no suit can be brought until the United States are damnified by payment of passage money, or for some other expenses. Such never could have been the policy or intention of the law; and the alternative must necessarily follow, that a non-compliance by the master with his engagements, works a forfeiture of his bond, and subjects him to the payment of four hundred dollars.

The judgment of the district court must therefore be affirmed.

Case No. 15,326.

UNITED STATES v. HATHAWAY.

SAME v. TUTTLE.

[3 Mason, 324.] [1]

Circuit Court, D. Maine. May Term, 1824.

SHIPPING — PUBLIC REGULATIONS — TONNAGE AND LIGHT DUTIES — LIABILITY OF CONSIGNEE — SHIPS FROM BRITISH COLONIES.

1. Where, by mistake, fraud, or accident, the tonnage and light duties, payable by law, are not paid by the owner of a vessel, an action of debt lies against him to recover them.

2. But not against a mere consignee of the vessel, for he has no interest or special property in the vessel.

[Cited in Knox v. Devens, Case No. 7,905; The George T. Kemp, Id. 5,341.]

3. Neither by the British treaty of July 3, 1815 [8 Stat. 228], nor by any act of congress, nor by the president's proclamation of 24th August, 1822, are British ships, coming from ports in British colonies, entitled to enter American ports, on payment of the same tonnage and light duties as American vessels; but they are to pay the full duties on foreign vessels. The treaty of 1815 applies only to vessels coming from European ports.

Error to the district court of the United States for the district of Maine.

Debt [against Warren Hathaway, and Tuttle] for tonnage and light money, of 50 cents per ton, as due from certain British vessels coming from Novia Scotia. Plea, nil debet, upon which a trial was had, [case unreported,] and a bill of exceptions taken at the trial, to the opinion of the court given pro forma, in order to bring the points upon a writ of error to the circuit court.

Mr. Orr, for the defendants, made three points: (1) That no action of debt lay in such a case against any person, though owner of the vessel, even admitting the duties due and unpaid; (2) that if debt would lie against the owner, it did not lie against a person who was only consignee of the vessels; (3) that upon a true exposition of the acts of congress, no higher tonnage duties were due on vessels coming from the provinces, than from European British ports, both being, by the treaty of 1815, and the acts of congress, put on the same footing.

Mr. Shepley, U. S. Dist. Atty., argued: (1) That debt did lie in such a case as this for duties, and cited U. S. v. Lyman [Case No. 15,647]. (2) That it lay against a consignee, as the substitute for the owner; and for this he cited Attorney General v. Weeks, Bunb. 224. (3) That the acts of congress made vessels coming from British ports in the provinces and colonies liable to the tonnage and light duties of 50 cents per ton. He cited all the acts of congress on the subject, viz.: Act July 20, 1789, c. 3, § 1 [1 Stat. 27]; Act July 20, 1790, c. 30 (57) [1 Stat. 135]; Act March 2, 1799, c. 128, § 63 [1 Story's Laws, 573; 1

[1] [Reported by William P. Mason, Esq.]

Stat. 627, c. 22]; Act March 27, 1804, c. 57, § 6 [2 Stat. 300]; Act July 1, 1812, c. 112, § 3 [2 Stat. 768]; Act March 3, 1815, c. 758, § 1 [4 Bior. & D. Laws, 824; 3 Stat. 224, c. 77]; Act March 3, 1819, c. 75, § 2 [3 Stat. 510]; British Treaty of July 3, 1815, art. 2 [8 Stat. 228]; Act April 27, 1816, c. 107, §§ 6, 8 [3 Stat. 314]; Navigation Act of April 18, 1818, c. 65, § 1 [3 Story's Laws, 1677; 3 Stat. 432]; Act May 15, 1820, c. 122, § 1 [3 Story's Laws, 1800; 3 Stat. 602]; Act May 6, 1822, c. 56, § 1 [3 Story's Laws, 1847; 3 Stat. 681]; President's Proclamation of August 24, 1822.

STORY, Circuit Justice. Upon the first point made at the bar I have no difficulty. If the tonnage and light money, by fraud, accident, or mistake, remained unpaid by the owner, when legally due, my opinion is, that this is a proper form of action to enforce the payment. The general principle was much discussed in U. S. v. Lyman [Case No. 15,647], and to that opinion I deliberately adhere. It is true, that the act of 1799, c. 128, § 63 [1 Story's Laws, 629; 1 Stat. 675, c. 22], provides, "that the duties imposed by law on the tonnage of any ship or vessel shall be paid to the collector, at the time of making entry of such ship or vessel; and it shall not be lawful to grant any permit, or unlade any goods &c. whatever from such ship or vessel, until the said tonnage duty is first paid." But this is merely directory to the collector, and no penalty or forfeiture for the non-observance of the provision is inflicted. Surely, it will not be contended, that if the collector should, by mistake, grant a permit to unlade before these duties were paid, it would be so far illegal, as to forfeit the goods or the vessel, within the 50th section of the revenue act of 1799, c. 128 [1 Story's Laws, 617; 1 Stat. 665, c. 22]. To say, that the United States cannot recover duties, not paid to them, by any action, is in effect, to assert that they have rights without a remedy. If there is any remedy, it is an action or information of debt.

The second point is, whether the action lies against the consignee of the vessel, or against the owner only. My opinion is, that it lies only against the owner. It is a charge on the vessel itself, and is to be borne by the proprietor thereof. A mere consignee is not, in any just sense of law, a general or a special owner. The act of 1790, c. 30, § 1 [1 Stat. 135], provides, that on all vessels of the United States, &c. &c., a certain tonnage duty shall be paid; "and on the other ships or vessels at the rate of 50 cents per ton." The act of March 27, 1804, c. 57, § 6 [2 Stat. 300], provides, that a duty of 50 cents per ton, to be denominated "light money," shall be levied and collected in the same manner as tonnage duties, "on all ships and vessels not of the United States, which, after &c., may enter the ports of the United States." It is clear from these provisions, that the charge is confined to the vessel, and binds the owner; and in no respect applies to the importer of the cargo, or the consignee of the vessel; consequently the court cannot extend the charge to any person but the owner, who, in all cases of this nature is, by implication, personally bound, as the vessel itself is incapable of payment.

The case of Attorney General v. Weeks, Bunb. 223, 224, has been cited in support of a different doctrine. That case turned altogether upon the construction of acts of the British parliament respecting importations. It was an information of debt for nonpayment of duties. One question was, whether, in such an information of debt for duties, any person can be charged but the actual importer. The court held: "That in such a case the person to be charged as importer, must have such an interest in the goods, as to be liable to pay the duties, and it will not extend to a mere agent or servant. But if he is jointly interested with another, the crown may recover the whole against one &c. &c. A factor for a person abroad is in this case undoubtedly liable, because the crown cannot get at the principal; and a factor for a merchant here has some sort of interest in the goods, and has some share and allowance for his factorage, and has a special property in the goods. He is to take the goods and pay the duties, and therefore must be taken to be the importer; aliter, in case of a mere agent or servant." The most, that can be said of this case, is, that a factor under the British laws is an importer within the sense of those laws, as having a special property in the goods. But a consignee of the vessel has a mere agency, and no special property, and therefore is not in the same predicament.

As to the third point, I am of opinion, that the tonnage duties &c., payable on foreign vessels, are not changed by the British treaty of July 3, 1815, or the acts of congress and the president's proclamation pursuant thereto, so far as respects vessels coming from British colonies. The treaty of 1815, putting British vessels, coming into our ports, as to duties and charges, on the same footing as American vessels, extends to vessels coming from European ports, and not to vessels coming from the West Indies, or the British possessions in North America. The act of 1816, c. 107, § 6 [3 Stat. 314], continued the existing tonnage duty; and authorized the repeal of the discriminating duties, tonnage, as well as others, created by that act, in the manner provided by the act of 1815, c. 758 [4 Bior. & D. Laws, 824; 3 Stat. 224, c. 77]. The latter act authorized the president to announce the repeal, when he was satisfied, that the countervailing and discriminating duties of the foreign nation, in whose favour the repeal should apply, were repealed by such nation. The act of May 6, 1822, c. 56 [3 Stat. 681], authorized the president, by proclamation, to open trade and intercourse with the British colonies under such reciprocal rules

and regulations, as he might make, notwithstanding the prohibitions of the navigation act of April 18, 1818, c. 65 [3 Story's Laws, 1677; 3 Stat. 432], and the supplementary act of May 15, 1820, c. 122 [3 Story's Laws, 1800; 3 Stat. 602], which closed such trade and intercourse. Accordingly, the president, by his proclamation of the 24th August, 1822, exercised this authority; and thereby, among other things, opened trade and intercourse with the British North American provinces through certain ports thereof, under certain rules and regulations, viz., that the vessels should be British or American built, and British armed and manned, and the goods imported from such ports should be of the growth, produce, or manufacture of such provinces. The navigation acts, and their suspension by this proclamation, did not in any manner affect the question of discriminating tonnage and other duties; but left these duties in full force under the general laws. Nothing has ever been done, as to the repeal of these duties, by the president, under the act of 1815, or the act of 1816, already adverted to. The result of this summary examination of the treaty, the laws, and executive acts is, that the tonnage duty of 50 cents per ton on foreign vessels, remains in full force, as to British vessels coming from the British provinces in North America.

The judgment in the case of U. S. v. Tuttle is therefore affirmed, as he is a mere consignee, and not an owner; and the judgment in the Case of Hathaway is reversed, and judgment is to be entered for the United States, for the amount of the foreign tonnage duties, &c. Judgment accordingly.

Case No. 15,327.

UNITED STATES v. The HATTIE JACKSON.

[18 Leg. Int. 348.] [1]

District Court, S. D. New York. 1861.

PRIZE — VIOLATION OF BLOCKADE — PRESUMPTION FROM BILL OF LADING—NEUTRAL PROPERTY.

[1. If a bill of lading imports prima facie that the consignors are owners of the goods, that presumption is so feeble and inconclusive, particularly in a prize case, as to demand, under any equivocal circumstances, explanations by proofs produced on the part of the consignor.]

[2. The property of a neutral merchant, who participates with an enemy in any undertaking or device to violate a blockade, must share a common fate with that of the enemies themselves.]

[3. A vessel approaching an effectively blockaded port with intent to violate the blockade is not entitled to be warned off.]

[This was a libel against the brig Hattie Jackson and cargo to procure a condemnation for attempting to violate the blockade.]

BETTS, District Judge. This vessel was captured on the high seas near Tybee light, on the coast of Georgia, by the United States steamship Union, on June 10, 1861. Bernardi Sanches appeared and claimed the vessel, but did not state his residence or citizenship. Arganequi, Gonzales & Co., of Cuba, claimed the cargo, alleging that they chartered the brig to take the cargo to Savannah, if it was not blockaded, and if it was, to some other port of the United States, and they denied any notice that Savannah was blockaded. The proofs showed that the vessel was owned by a resident of Georgia, and had been employed in sailing for him before between Savannah and Matanzas. She left Savannah on this last trip after the proclamations of April 15, 19 and 27, and May 3, 1861, were issued, and were known of by the owner and the ship's company. She sailed under the secession flag, used it in Matanzas while there, and on her trip home, till the master, fearing United States vessels, ordered the American flag to be substituted, and when the Union approached he ordered the mate to hide it.

HELD BY THE COURT: That these facts show not only that the vessel belonged to an enemy, but his purpose to navigate her as such, in defiance of the laws and the government of the country to which he owed allegiance. As to the cargo, there was some evidence that it belonged to the owner of the vessel. The bill of lading indeed consigned the cargo from the claimants to the owner of the vessel or assigns. A charter of the vessel was executed three days before the signing of the bill of lading, but does not vary the matter materially, except that it provides that the vessel was to go "to Savannah, or as near therein as she may safely get," and deliver the cargo to the charterer's agent. Held: That if the bill of lading imports prima facie that the consignors were owners of the goods, yet that intendment is so feeble and inconclusive, particularly in prize cases, as to demand in any equivocal case, explanations by proof on the part of the consignor. That the proximity of Matanzas to Savannah, and the large commercial intercourse between those ports, would leave a presumption that these parties understood the state of hostilities pending between the United States and all the ports of Georgia; that they contemplated a blockade of Savannah as then existing, and meant to provide a resource in this stipulation in case the vessel should not succeed in evading it. The neutral merchant becomes a participator with the enemy in any undertaking or device to violate a blockade, and his property is thereby made to share a common fate with the enemy's itself. The arrest of the vessel shows that the blockade was effective, and she was not entitled to be warned off, if approaching with intent to violate it. Wheat. Mar. Capt. 193, 194, 203, 207. The vessel is therefore condemned as enemy's property and because she undertook to violate the blockade. The cargo, also, is held to have

[1] [Reprinted by permission.]

been the property of her owner, and is condemned as enemy's property; or if it belonged to the claimants, it was shipped by them to Savannah with an intent to violate the blockade, and therefore must be condemned. Decree forfeiting vessel and cargo.

Case No. 15,328.

UNITED STATES v. HAUKEY.

[2 Cranch, C. C. 65.] [1]

Circuit Court, District of Columbia. Dec. Term, 1812.

LARCENY—LOCUS OF CRIME.

A person who steals goods in Maryland and brings them here, is guilty of larceny here. Quære.

[Cited in Worthington v. State, 58 Md. 407.]

Indictment for stealing a horse. The horse was stolen in Maryland and brought by the prisoner into this county.

CRANCH, Chief Judge, stated that this court had decided that such a case was cognizable here. U. S. v. Tolson [Case No. 16,530]. See U. S. v. Mason [Id. 15,738], at Alexandria, May term, 1823.

Case No. 15,329.

UNITED STATES v. HAUN.

[8 Am. Law Reg. 663.]

Circuit Court, S. D. Alabama. June 30, 1860.

AFRICAN SLAVE TRADE—LAWS FOR SUPPRESSION—WHO INDICTABLE.

1. An indictment under the sixth section of the act of congress of April 20, 1818 [3 Stat. 452], for the suppression of the African slave trade, can be sustained against one who holds, sells, or disposes of an African illegally brought into the country from any foreign kingdom, place, or country, or from sea, no less than against any person who shall illegally bring such African into the country.

2. The word "or" in this statute is not to be construed "and."

3. Property in persons entering the United States with their own consent, and mingling with property and persons in the States, in some manner and to some extent fall under state authority, and in some manner and to some extent are not subject to federal control; but the case is otherwise with regard to property imported contrary to law, or smuggled, or persons imported against their will.

4. Some account of the federal slave laws, and their history.

[This was an indictment against John H. Haun.]

CAMPBELL, Circuit Justice. This indictment contains three counts, and charges that the defendant held, sold and disposed of, in this district, negroes, as slaves, illegally imported into the United States in 1859, from a foreign place, by some person unknown. The district attorney, in moving for process for the arrest of the defendant, suggested that the opinion had been expressed upon a similar indictment in this court, by my colleague, the judge of the district court, that the offence charged did not subject the defendant to a criminal prosecution, and that if that opinion was concurred in by the presiding judge, process ought not to issue. My colleague of the district court was of counsel for this defendant before his appointment to the bench, and does not sit in this case. I have considered the subject with care, and shall proceed to express my opinion at large, in consequence of the importance of the subject and the condition of opinion in this tribunal.

The indictment must be supported under the sixth section of the act of April 20, 1818, for the suppression of the African slave trade. The section is: "If any person or persons whatsoever shall, from and after the passage of this act, bring within the jurisdiction of the United States, in any manner whatsoever, from any foreign kingdom, place, or country, or from sea, or shall hold, sell, or otherwise dispose of any such negro, mulatto, or person of color so brought in, as a slave, or to be held to service or labor, or be in anywise aiding or abetting therein, every person so offending shall, on conviction thereof by due course of law, forfeit and pay a sum not exceeding ten thousand dollars, nor less than one thousand dollars, one moiety to the use of the United States and the other to the person or persons who shall sue for such forfeiture and prosecute the same to effect; and, moreover, shall suffer imprisonment for a term not exceeding seven years, nor less than three years." The object of this section of the act was to prevent the introduction of persons who, for the purpose of this discussion I will denominate Africans, and their employment, sale, or other disposition as slaves within the United States. This introduction or use is made penal, however, or by whomsoever made. By the language of the section, the act of importation and the acts of holding, selling, or disposing of the African, the subject of importation, are distinct offences. It is, "if any person," "shall bring," "in any manner" from abroad, "or shall hold, sell, or dispose of any negro so brought in" as a slave. Neither is it necessary that the offenders under the one clause shall be in any relation of accessories or accomplices under the other clauses of the act. "Every person aiding or abetting" in either of the criminal acts, is denounced as criminal in the degree of his principal, by its plain language. The manifest import of this section of the act is, that if any person shall import an African, as a slave, into the United States from abroad, (i. e. foreign kingdom, place, or country, or by sea,) or be in anywise concerned therewith, or shall hold, sell, or otherwise dispose of as a slave, an African, being illegally import-

[1] [Reported by Hon. William Cranch, Chief Judge.]

ed, he shall suffer the penalties prescribed. Now, upon this construction of this section of the act there is charged against this defendant acts that are criminal, and which subject him properly to a presentment of the grand jury. But it is said that the act must be limited to such as were concerned with the importation, and that a proprietor by purchase ex post facto, is not embraced within the terms of this section of the act. An analysis of the section shows that "if any person or persons whatsoever" "shall bring within the jurisdiction of the United States" any African as a slave, "or be in anywise aiding or abetting therein," "or shall hold, sell, or dispose of such African as a slave, or be in anywise aiding or abetting therein, every person so offending shall forfeit and pay," &c. To justify the argument relied on, the word "and" should be substituted for the word "or," and the act should read. "If any person shall bring within the jurisdiction of the United States, 'and' shall hold, sell, or dispose of any African as a slave." But the exigency must be imperious which will justify this court to take such a license with an act of congress as to substitute the one word for the other.

This section was reported in the form in which it stands (in so far as this question is concerned) from a committee of the senate, was considered by both houses of congress, and amended in other particulars, and became the law of the land by the concurrence of congress and the president. The intention of congress must be very clearly contrary to the language of the act to authorize so important a change in the signification of the words employed. But a change of the word "or" to "and" would leave the importer and his accessories guiltless, unless there was some holding or other act of dominion subsequently. A sale of the cargo, before the importation accompanied by delivery, without more afterward, would be unprovided for in this section of the act. But the whole series of the slave trade acts show that the simple act of importation was regarded by congress as a high misdemeanor. The fifth section declares that neither the importers nor any person claiming from or under them, shall hold any right, interest, or title whatsoever in, or to any negro, mulatto or person of color, nor to the service or labor thereof, who may be imported or brought into the United States in violation of the provisions of this act. The sixth section, previously quoted, provides for the punishment of the importer,—he who brings within the jurisdiction of the United States the African,—and for the punishment of those who hold any right or title under him; that is, those who hold, sell, or otherwise dispose of the African imported. This section is the vindicatory complement of the fifth section. The importer and those who hold, sell, or otherwise dispose of the African, and their accomplices, comprise all who contribute to foster or encourage the prohibited traffic. And this conclusion is corroborated by the eighth section of the act. This is, that "in all prosecutions under this act the defendant shall be holden to prove that the negro, mulatto, or person of color, which he shall be charged with having brought into the United States, or with purchasing, holding, selling, or otherwise disposing of, and which according to the evidence in such case, the said defendant shall have brought in aforesaid, was brought into the United States at least five years previous to the commencement of this prosecution, or was not brought in, holden, purchased, or otherwise disposed of contrary to the provisions of this act." Congress, by this section, imposes upon all persons the obligation to make a diligent inquiry into the integrity of every right or interest, asserted or exercised over the person of an African before acquiring it. They evidently infer that but few, if any, derivative claims to Africans, illegally imported, would be bona fide, and that every holder, vendor, or employer of such persons, would be conscious of the infirmity of their estate, and therefore of their criminality under the laws of the United States. The slave trade at the date of the act of 1818 had been prohibited ten years.

It was a rational hypothesis, that those Africans, who were then in the United States, might be easily discriminated from those who might be imported illegally afterwards. The African is a rational being, and may communicate to an interested inquirer the conditions under which he came from his native continent. If this was not an unreasonable hypothesis in 1818, it is an assured fact now. The African, legally imported prior to 1818, and residing in the United States since that date, must be readily distinguished from the African imported in 1859. The importer, or the most casual inquirer, must be able to say of the latter class, "Surely thou art one of them; for thy speech betrayeth thee." Before leaving this part of the inquiry, I will examine the seventh section of this act, as it is intimately connected with this subject. This section is: "If any person or persons whatsoever shall hold, purchase, sell, or otherwise dispose of any negro, mulatto, or person of color, for a slave, or to be held to service or labor, who shall have been imported or brought, in any way, from any foreign kingdom, place or country, or from the dominions of any foreign state immediately adjoining to the United States, into any port or place within the jurisdiction of the United States, every person so offending, and every person aiding or abetting therein, shall severally forfeit and pay for every negro, mulatto, or person of color so held, purchased, sold or disposed of, one thousand dollars, one moiety to the Unit-

ed States, and the other to the person or persons who may sue for such forfeiture and prosecute the same to effect, and to stand committed until the same is paid." It is assumed that all persons holding, purchasing, selling or disposing of an imported African, as a slave, without reference to the place whence imported, is comprehended in this section, and that its operation is not limited to Africans imported from territories adjoining the United States. For the purpose of this discussion, I shall concede this. It will be perceived, then, that the words employed in this section embrace a portion of the same acts that are included in the sixth section, and that other offences are embraced, which makes the seventh section a complement of the sixth section—the two sections embracing every case of title derived from an illegal importation. The sixth section provides for the punishment of an importer from a foreign kingdom, place, or country, and from sea, and the seventh adds the dominions of a foreign state adjacent to the United States. The two sections embrace the same offence of holding, selling, or disposing of slaves. The penalties are dissimilar, and the mode of their recovery is different. The penalties of the sixth section can attach only after the presentment of a grand jury; those of the seventh may be recovered in an action of debt. The questions arise upon the view of the act I have been taking, whether the penalties are cumulative or alternative, or must we find some distinct subject upon which each shall have a distinct operation, and is this distinct subject to be attained by changing a word in the act of congress for one of a different meaning? It is not important to settle whether the penalties are cumulative or alternative. The latter inquiries are the only ones of importance in this case. I have before stated there is no ambiguity in the language of the act. The doubt, if one exists, originates in the uncommon fact that there are apparently distinct penalties, differing in degree and mode of prosecution, for the same offence. That double penalties will not be inferred from equivocal words, is admitted, and that the rules of interpretation discourage implications favorable to them.

But this rule is subordinate to that primary rule that directs us to find in the plain language of the legislature their purpose. Now, the act under consideration, and statutes of a similar nature, furnish instances of congressional legislation, in which double, cumulative and alternative penalties are inflicted against the same person for the same act. U. S. v. Sixty-Seven Packages, 17 How. [58 U. S.] 85. The several sections of this act exhibit a forfeiture of the ship built and equipped for, or employed in, the slave trade, and the owners, builders, and persons manning, or loading, or interested in the importation, are punished with fine and imprisonment. These various penalties may, in supposable cases, all overtake the same offender. This proves that congress were aware of the difficulty of detecting and convicting the persons engaged in this trade, and have sedulously and ingeniously legislated to enlist the cupidity of detectives and informers to aid the moral sense and public spirit of the country to bring them to justice. But if the seventh section were construed as applying only to importations from states or dominions adjacent to the United States, and the sixth section to places more remote, there would be a distinct field for the operation of the sixth and seventh sections, and there would be no question concerning double penalties. I leave that part of the act open until a case shall arise for judgment. The circumstances accompanying the enactment of the act of 1818 may be considered in ascertaining the policy of congress on the subject. Congress were informed that the slave trade was vigorously prosecuted by citizens of the United States, and particularly through the Spanish settlements of Florida and Texas, and that Africans, to the number of thousands, had been illegally imported into the United States. The correspondence of the collector of the port of New Orleans (Mr. Chew) with the treasury department was placed before congress, in which the names of planters, probably connected with the importation of slaves, may be found. Mr. Forsyth, of Georgia, in a report from the committee on foreign relations, informed congress: "The experience of ten years has evinced the necessity of some new regulations being adopted in order effectually to put a stop to the further introduction of slaves into the United States. In the act of congress prohibiting this importation, the policy of giving the whole forfeiture of vessel and goods to the United States, and no part thereof to the informer, may justly be doubted. This is an oversight which should be remedied. The act does, indeed, give a part of the personal penalties to the informer. but these penalties are generally only nominal, as the persons engaged in such traffic are usually poor. The omission of the states to pass acts to meet the act of congress, can only be remedied by congress legislating directly upon the subject themselves, as it is clearly within the scope of their constitutional power so to do." Congress, thus counselled, employed committees, who carefully revised the act of 1807 [2 Stat. 426] for the same object, amplified its scope, and increased its penal provisions, and their bill was, after proper deliberation and some amendment, adopted, and forms the act of April 20, 1818.

When I consider the mischief to be removed, the variety of sentiment to be addressed to secure co-operation for that object, the subtle artifices employed to evade the laws,

and the difficulty experienced in their enforcement, I am not able to say that the variety of the penalties and of the modes of pursuit and prosecution creates surprise. It is evident that congress did not discover any great difference in the misdemeanor of the different persons who might be concerned in the importation or holding of Africans illegally introduced into the country, and considering this opinion, the design they wished to accomplish, and the embarrassments in the way of its accomplishment, I find myself quite unable to discover that incompatibility in their enactments and sound principles of legislation, that should lead me to do violence to their language to set them aright. Regarding the language of the act of 1818 alone, my opinion is, that the indictment charges an indictable offence against the defendant.

But another rule is invoked which is entitled to consideration. It is said that the power of congress is limited to a cognizance of the acts of the importer, and those concerned with him. That Africans, whether considered as persons or as property, after they come within the jurisdiction and limits of a state, cease to be under the dominion of the federal authority. They are no longer subject to the commercial power of congress which alone applies to the subject, and the crime of holding them as slaves is a state, not a federal crime. The cases of Brown v. Maryland, 12 Wheat. [25 U. S.] 438; Norris v. City of Boston, 7 How. [48 U. S.] 283, and the popular opinion and judgment on the alien law of 1798, are supposed to confirm this opinion. It may be admitted that property or persons introduced or entering the United States by their consent; and mingling with property and persons in the states, in some manner and to some extent, fall under state authority, and in some manner and to some extent, are not subject to federal control. The decision of Brown v. Maryland was a case of property legally introduced through the custom-house of the United States. The supreme court of the United States held that it was not subject to state taxation until it had ceased to exist as in the condition of an import, and had not become confused or mingled with the common property of the state. The case of Norris v. City of Boston recognized a similar limitation on state authority as to persons, and that passengers on a foreign ship could not be taxed by state authority until they were fairly separated from the ship and voyage. But these cases only prove when state authority may begin to operate, and not when the federal authority terminates, upon property or persons legally introduced into the country. But suppose the case of merchandise imported contrary to law, or smuggled, would it be contended that the federal authority was at an end when the property became mingled with the property of the state, and had gone into the hands of bona fide purchasers? This is not an open question. In U. S. v. 1,960 Bags of Coffee, 8 Cranch [12 U. S.] 398, the claimants alleged, and the demurrer of the United States admitted, that the coffee was regularly entered and the duties secured, and that they were bona fide purchasers of it for value. The supreme court said: "We are of opinion that the question rests altogether on the wording of the act of congress, by which it is expressly declared that the forfeiture shall take place upon the commission of the offence." If the phraseology were such as in the opinion of a majority of the court to admit of doubt, it would then be proper to resort to analogy, and the doctrine of forfeiture at common law, to assist the mind in coming to a conclusion. The court declare the power of congress over the subject in the following impressive language: "In the eternal struggle between the avarice, enterprise and combinations of individuals on the one hand, and the power charged with the administration of laws on the other, severe laws are rendered necessary to enable the executive to carry into effect the measures of policy adopted by the legislature. To them belongs the right to decide on what event a divesture of right shall take place, whether on the commission of the offence, the seizure, or the condemnation." Other cases of a similar nature have arisen, in which acts of congress have been interpreted as establishing the one or the other period when the forfeiture attached, and in no case has the authority of congress to legislate been disputed. U. S. v. Grundy, 3 Cranch [7 U. S.] 337; U. S. v. Caldwell, 8 How. [49 U. S.] 367. The power of congress to provide for the seizure and removal of persons coming to the country illegally and without their consent, has been asserted as fully in judicial decisions as it has been in regard to property.

The most signal instance of this arises under the extradition laws and treaties requiring the surrender of a fugitive from the justice of foreign nations. Metzer's Case, 5 How. [46 U. S.] 176; In re Kaine, 14 How. [55 U. S.] 103. In Holmes v. Jennison, 14 Pet. [39 U. S.] 540–570, the chief justice says: "All the powers which relate to our foreign intercourse are confided to the federal government. Congress have the power to regulate commerce; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to declare war; to grant letters of marque and reprisal; to raise and support armies; to provide and maintain a navy; and the president is not only authorized, by and with the consent of the senate, to make treaties, but he also nominates, and by and with the consent of the senate, appoints ambassadors and other public ministers, through whose agency negotiations are to be made and treaties concluded. He also receives ambassadors sent from foreign countries;

and everything that concerns our foreign relations, that may be used to preserve peace or wage war, has been committed to the hands of the federal government. The power of deciding whether a fugitive from a foreign nation should or should not be surrendered, was necessarily a part of the powers granted." It would seem to follow irresistibly, that if congress might provide for the arrest and removal of foreigners who had evaded the justice of a foreign nation, by flight to the United States, notwithstanding his domicil within any of the states, they might provide for the removal of those who had been imported, or had entered the United States contrary to their own laws, and that state authority could afford such a person a sanctuary or shelter. Nor do I perceive any contradiction of this conclusion in any of the opinions in the Passenger Cases, nor is it opposed to the opinion of any accredited tribunal, political or judicial, on the alien law of 1798 [1 Stat. 570]. The complaint against the alien law was, that it authorized the president to remove from the country a foreigner legally domiciled in the United States, and belonging to a nation with which the United States were at peace, upon an opinion that he was dangerous to the government, without an accusation under oath, or affording him the opportunity of making a defence. The case before the court is one in which the power of congress to pass laws to prohibit the importation of Africans, or slaves, cannot be denied. The subject entered into the debates of the continental congress, and forms one of the compromises on which the constitution rests. Under the constitution the "migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited (by congress) prior to the year 1808." On the first day of the year 1808, by an act of congress made to meet the approach of their plenary authority, the importation of Africans as slaves, or the purchasing of them from the importer, became illegal. In 1814 [8 Stat. 218], in the treaty of peace negotiated at Ghent with Great Britain, the trade was declared to be "contrary to humanity and justice," and an obligation was then entered into to discourage it. The act of 1818 was subsequently passed, and the more severe act of May, 1820, completed their penal legislation on the subject. No system of measures exists in our legislation that has been more carefully considered, or which obtained more completely the deliberate, impartial and conscientious approbation of states and statesmen. It requires no small measure of moral and intellectual intrepidity to impugn them. A few have expressed the opinion that the power of congress was derived only from their control over foreign commerce. But in the early debates in congress this was denied, and it was said "that a reference to the constitution would expose the fallacy." Among the powers delegated by that instrument to congress, was the power to define and punish offences against the law of nations. It was afterwards added that the migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited prior to 1808, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person. Before 1808 this last provision would expire, and the first provision would be reinstated in full efficacy, which unquestionably gave congress a full power over the subject, independently of that derived from their right to regulate commerce.

Unquestionably, President Jefferson, when he congratulated congress at the approach of the period at which they might interpose their authority constitutionally to withdraw the citizens of the United States from all further violations of human rights which have been so long continued on the unoffending inhabitants of Africa, and which the morality, the reputation and the best interests of our country, have been long eager to proscribe, supposed that something beyond a regulation of commerce was concerned in the action to be taken. President Madison in accepting, and the senate of the United States in unanimously ratifying, the treaty of Ghent, before mentioned, probably agreed with the argument I have quoted. The act of May, 1820, declaring the slave trade by American citizens to be piracy, and the treaty of Washington of 1842, in which the United States agreed with Great Britain to unite in all becoming representations and remonstrances with any and all powers within whose dominions such markets (markets for Africans) are allowed to exist, and that they will urge upon all such powers the propriety and duty of closing such markets effectually, at once and forever evidently imply that the suppression of the slave trade has become a part of the domain of international law, and belongs to the jurisdiction of congress as a part of that foreign intercourse of the Union which is submitted to its exclusive control. I do not consider this question of any importance in the solution of the present inquiry, for, considered merely as a commerce that the congress may suppress or prevent, they are clothed with powers adequate to the accomplishment of their policy. They are not dependent upon the state governments for ancillary legislation, nor can they be obstructed by their inaction or opposition. "No trace," say the supreme court of the United States, "no trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot con-

trol, which another government may furnish or withhold, would render its course pernicious, the result of its measures uncertain, and create dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution." [McCulloch v. Maryland] 4 Wheat. [17 U. S.] 316, 424. No more striking illustration of the force and accuracy of this opinion of the supreme court can be adduced than might be afforded by the concession that the power of congress over the slave trade terminates after the introduction and sale of the Africans in the states. The slave trade might be as a matter of fact reopened, by the neglect or refusal of a state to enact or enforce prohibitory laws; for it can hardly be supposed that every port and inlet of the United States will always be properly guarded, so as to prevent their introduction and sale.

The expectations of the states which framed the constitution, and stipulated that after 1808 congress might abolish the trade at once and forever: the solemn treaties, binding the nation to employ moral and material force to effect throughout the world the closing of slave markets for Africans forever: the acts of congress prohibiting the trade, and confiscating the implements and machines employed in it, as if they were accomplices in the guilt—acts passed with unanimity, and sanctioned by an approving people, might be frustrated and defeated if the African could be held, sold, or otherwise disposed of, without responsibility to those in whom the constitution has conferred the power of making these laws and treaties. No such consequences can follow. The constitution has not left the power of the federal government to employ the means requisite to fulfil its obligations, and to execute its authority to cavil or question. It confers upon congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof." The power to inflict punishment for the infraction of laws is incidental to the power of making laws. This is the usual as it is the appropriate means, by which a government secures obedience, and upon this foundation the criminal jurisdiction of the United States reposes. Before the enactments under consideration had been made, philosophic and practical statesmen had discovered "that the true origin of the slave trade was not in the place it was begun at, but at the place of its final destination." If there were not men who held, sold, or otherwise disposed of Africans, after the termination of the slave voyage, and the act of importation completed, there would be no building, equipping and manning of ships, no voyages to the African coast for slaves, no barracoons to supply American vessels, no piratical seizures, no confinements or detentions of Africans as slaves, no mortuary lists of the victims of such acts to startle and shock humanity, no need of African squadrons, or slave trade treaties, no illegal entries or importations. A complete preventive of the holding, selling or disposing of Africans within the limits of the United States, or by the citizens thereof, would remove the stain which has fallen upon our country by the abuse of its flag. This legislation of congress, then strikes at the root of this evil. If enforced it would extirpate a large share of the mischief. Such being the case, I am unable to bring myself to the conclusion that the means congress have selected by imposing penalties upon an offender against their laws are not necessary and proper to the end. I cannot assent to the conclusion, that they cannot execute their obligations to suppress a trade which they have declared to be contrary to humanity and justice, by punishing the citizens who hold and dispose of the subjects of that trade anywhere within their jurisdiction.

After the act of 1807 had been passed, an apprehension was expressed, that the eighth section of that act applied as well to domestic slaves as to slaves imported contrary to law; a committee was raised to inquire of the subject, and Mr. John Randolph, of Virginia, reported an explanatory bill. It is, that "Whereas doubts have arisen, or may arise, touching the construction of the eighth section of the act of which this is explanatory, and whereas, congress disclaim and disavow all constitutional authority whatsoever, by any legislative act, in anywise to abridge, modify, or affect the right of property of masters of slaves not imported into the United States contrary to law, in and to such slaves; be it enacted," &c. &c. The bill proceeds to declare that the act of 1807 shall be construed according to the principle announced in the preamble, and that no fine or penalty or forfeiture should be incurred in reference to any act prohibited in the eighth section, except in respect to slaves imported contrary to law. This report seems to draw the line between federal and state jurisdictions with exactness. The power of congress to enforce their laws in respect to slaves imported contrary to their policy, and in violation of their enactments was not disputed, while the authority to interfere with domestic slavery, legally existing in the states, was disavowed and disclaimed in this report. And it cannot be doubted that this was the sense of congress, although it adjourned without acting upon this bill. I have declared that the offence created by the sixth section of the act is an indictable offence. The sixth section provides that on conviction, by due course of law, the offender shall forfeit and pay for every such offence a sum not exceeding ten thousand dollars, nor less than one thousand dollars; and moreover shall suffer imprisonment for a term not ex-

ceeding seven years, nor less than three years. Within the limits assigned, it is clear that the court would determine the fine and imprisonment, and if there were nothing more in the act, that an indictment would be a proper mode of prosecution. But the same section contains a clause that distributes "one moiety of the fine to the use of the United States, and the other moiety to the use of the person or persons who shall sue for such forfeiture and prosecute the same to effect." But the mode of suit or prosecution is not explicity declared, nor is any limitation imposed upon the United States to proceed by action of debt or case, or by information. Nor is the interposition of an informer indispensable to the prosecution. The United States may proceed on the information of its own functionaries. The punishment attached to a conviction for this offence places it in the grade of offences for the robbery of the mail, when the life of the courier is not threatened, and stealing of the mail, of the offences of being accessories after the fact to murder, and piracy on the high seas, and the embezzlement of public property and misprision of felony. The constitutional, safe, regular and usual method of a proceeding against such offenders is by indictment or presentment of a grand jury, and I should require words of explicit direction, before I should feel authorized in saying that congress had prescribed a different method. The distribution of the penalty follows the conviction, and can be as well done after a criminal prosecution as a civil action. It would be a strange anomaly in the course of procedure in the courts of the United States that would terminate in a judgment of fine and imprisonment upon an action of debt or case. I think I am hardly justified by any rule for the judicial interpretation of statutes in pronouncing that the terms employed in this section of the act were designed to make so grave an alteration in the law of criminal procedure. The rights and interests of the accused are promoted by adhering to that system which is preferred by the constitution, and has been consecrated by usage.

I have thus exhibited my views upon this statute and upon the considerations that have been opposed to them. I have stated upon different occasions here, and in other courts of this circuit, the opinions that are here examined. The indictments returned in this and other cases in this court, and in other courts of this circuit, were found by the grand jury in accordance with them. Regarding this act as within the competency of congress, my duty is performed, when I have ascertained their meaning, and declare it, whenever a question is raised in a case at law upon it. This I have done in this case. The order of the court is, that process issue to the marshals of the state of Mississippi, as well as to the marshal of this district, for the arrest of the accused.

Case No. 15,330.

UNITED STATES v. HAVEN.

[See Case No. 16,788.]

Case No. 15,331.

UNITED STATES v. The HAWKE.

[Bee, 34.] [1]

District Court, D. South Carolina. July 4, 1794.

SHIPPING—VIOLATION OF LICENSE LAW—CONDEMNATION AND SALE TO ALIEN.

1. By the licensing act of the United States of February 18th, 1793 [1 Stat. 305], no coaster can be sold in a foreign port, unless her license be previously surrendered; nor is her American character changed by such transfer.

2. But if she be condemned for violation of that law, and sold under order of court, she may become foreign property. So if the purchaser under the first insufficient title comply with the requisites of the act of congress of Aug. 4th, 1790 [1 Stat. 145]. In either case she may be a lawful privateer under a foreign commission.

Before BEE, District Judge.

This suit, on the part of the United States is founded on the 8th and 32d clauses of the act for enrolling and licensing vessels employed in the coasting trade, passed February 18th, 1793. The 8th clause enacts that if any vessel enrolled and licensed conformably thereto shall proceed on a foreign voyage without first giving up her enrolment and license, and obtaining a register, she shall be liable to seizure and forfeiture. The 32d clause enacts that if any licensed ship or vessel shall be transferred in whole or in part to any person who is not at the time of such transfer, a citizen of and resident within the United States; or if such ship or vessel shall be employed in any other trade than that for which she is licensed, she shall, with her tackle, furniture and cargo found on board, be forfeited.

To support the libel, one witness, the deputy-collector, was called, who proved that this schooner on the 14th of May, during the continuation of the embargo, cleared out, by virtue of her license as a coaster, for St. Mary's, in Georgia.

It appeared from an exhibit filed by the claimant that the schooner Hawke was sold on the 10th of June at Port-de-Paix, to Bolchos, the claimant, by Cooke, captain of the schooner, in pursuance of orders from the owner, Gohier.

The district attorney contended that this vessel was proved to have departed to a foreign port, without having delivered up her license, as the 8th section of the act directs; that she was, therefore, forfeited. That when in a foreign port, she was sold to a foreigner, for which she is declared by the 32d clause to be forfeited. And that on these

[1] [Reported by Hon. Thomas Bee, District Judge.]

grounds she must be condemned in this court.

It was insisted on the part of the United States that upon proof of a violation of the revenue laws, the court cannot inquire into the motives or causes thereof. That if no fraud is intended, the secretary of the treasury has power to mitigate or remit penalty, upon being satisfied by the judge of the probable innocence of the party. But that the court, in the first instance, is bound to decree according to the letter of the law. That the general rules for construction of penal statutes do not apply here; and that great injury would arise to the United States by practices of this sort. That though by the 9th clause there was some appearance of relief, which might be brought forward as operating against the 32d clause, yet that upon a careful investigation it would be found not to apply: 1st. Because the sale contemplated in the 9th clause can only mean sale to a citizen of the United States, and not to a foreigner; otherwise the law would be inconsistent. 2d. That sale to a foreigner being prohibited, the words "any district" must be construed to mean sales at sea, which are expressly mentioned in the act of December, 1792 [1 Stat. 287]. That by the rule of law, all the clauses of the act must be construed together, to make them consistent, and that the condemnation of this vessel must then follow of course.

The 5th and 9th clauses of the act having been relied on as explanatory, and as doing away with the 8th and 32d, we must examine them. The 5th only says that licensed vessels shall be no longer privileged when they cease to be wholly owned and commanded by citizens of the United States. The 9th clause provides that the license shall be delivered up within three days after the expiration of the year for which it was granted, to the collector of the district where it was granted, if the vessel be at that time within that district; if not, within three days after her next arrival within that district. If such vessel be sold out of the district, the license must be delivered up within three days after the arrival of the master, within any district, to the collector of such district; under penalty of fifty dollars. This relates only to expired licenses; and neither of these clauses applies to the present case. In the 7th clause of the act for registering vessels we find that if registered vessels are sold or transferred in a foreign port or at sea, the master is obliged, within seven days after his arrival within any district (the same words used in the 2d clause of the licensing act) to deliver up the certificate to the collector of such district. This furnishes a clue to the intention of the legislature. The registering act permits sales of vessels in a foreign port, or at sea, to foreigners. The licensing act prohibits a sale to foreigners altogether. The licensed owner may indeed dispose of his vessel, upon delivering up his license; but not otherwise. The 9th clause restrains all sales, out of the district, to citizens and residents of the United States; and as the 8th clause makes liable to forfeiture all licensed vessels proceeding with their license to a foreign port, the place of sale can never be extended so as to include those ports; but must mean at sea, on the coasts of the United States, or on the fishing banks, where many of these vessels are employed, and, probably, often transferred: in either of which cases the master must report the sale and deliver up the license within three days after the arrival of the vessel in any district. To this view of the licensing and registering acts, and of the different clauses of each, we may with advantage apply the rules for reconciling statutes with themselves, and with others in pari materia.

To justify the proceeding in this case, the French consul has certified that he hired this vessel to carry despatches to St. Mary's, in the state of Georgia. This was lawful: but it will not be supposed that the consul meant thereby to assist an evasion of our laws. The certificate, therefore, can avail nothing. Two letters have been filed as exhibits which give reason to conclude that the schooner cleared out for St. Mary's merely to colour other designs. The answer states that the vessel was to go first to St. Mary's, and if the Las Casas was not there, was to be further directed by Bolchos, who carried the consul's despatches. It also appears from the answer that she never went to St. Mary's at all, but proceeded immediately to Port-de-Paix, where, on the 10th of June following, she was sold to Bolchos who went in her as passenger, and whose directions the captain was ordered, by his owner, to follow. These circumstances, and the caution of the captain in returning his coasting license as soon as the vessel was sold, prove clearly that the plan was fixed before she was sold. Both captain and owner knew that the license ought to have been given up before the vessel sailed on any other than a coasting voyage; but then the embargo stood in their way. To evade this they had recourse to the contrivance of which they must now abide the consequence. The libel rests on the 8th and 32d clauses of the licensing act. The answer admits a transgression of both. But the claimant says he was an innocent, bona fide purchaser in market overt; that the forfeiture must relate back to the time of sale; that it could not attach, unless the vessel remained of the same description as when first licensed; that the breach of the law preceded the transfer, and, as no decree of forfeiture had passed previously to the sale, the vessel did not come within the act.

If arguments of this sort should receive weight in this court, the laws would be nugatory. "Such an exposition of statutes must be made as to prevent their being eluded; and if their meaning is doubtful, the consequences are to be considered, in the construction of them; but if the meaning be

plain, no consequences are to be regarded, for that would be assuming legislative authority." Bac. Abr. 652. In this case there is sufficient proof that the 8th and 32d clauses of the act of congress for licensing coasters have been infringed. I decree therefore that the schooner Hawke, with her tackle, furniture, and apparel, be condemned as forfeited to the United States.

It appears from the preceding decree that the Hawke was sold on the 10th of June last at Port-de-Paix to Bolchos, by Cooke, who was master of her when she cleared out as a coaster to St. Mary's. On the same day, 10th June, Cooke informs his owner of this sale, by letter; and incloses him the schooner's American papers, obviously for the purpose of having his custom-house bond cancelled. Two days after, 12th June, Cooke, with a French commission, sailed from Port-de-Paix, in this very schooner, then called La Parisienne, armed, and having Bolchos on board, as owner. On that day they made prize of the Prosperity, a British vessel from Jamaica; and on the 27th following, brought her into this port.

Before BEE, District Judge.

On plea to the jurisdiction, the judge recapitulated the circumstances of fraudulent contrivance by which this pretended privateer had evaded the embargo, and escaped from this port by means of her coasting license. He was decidedly of opinion that the sale of this coasting vessel at Port-de-Paix was illegal, and did not change her neutral character. That upon her return infra præsidia of this court, she must be considered as American property, never divested out of the original owner. Bolchos could have no just title, but from the court, after condemnation, and compliance on his part with the requisites of the act. He observed that if our coasters could thus, under French commissions, capture neutral vessels, they would all be converted into privateers, and the laws of this country set at defiance.

The plea to the jurisdiction was dismissed.

Bolchos afterwards availed himself of the 66th clause of the act of congress of August 4th, 1790 [1 Stat. 175], and petitioned to have the schooner Hawke delivered up to him as owner, on his giving bond with sufficient security to abide the decree of the court. A warrant of appraisement was accordingly issued, the other requisites of that act were complied with, and the vessel with every thing belonging to her was transferred to the claimant accordingly. She then sailed from this port as French property, with the same equipment, crew, and commission, that she had obtained at Port-de-Paix. On the 12th March, 1795, she captured the British brig Favourite, and brought her into Charleston, where the British consul libelled her. Bolchos pleaded the 17th article of the treaty with France, in bar to the jurisdiction of this court.

The judge sustained the plea, and dismissed the libel with costs.

Case No. 15,332.

UNITED STATES v. HAWTHORNE.

[1 Dill. 422.] [1]

Circuit Court, D. Kansas. 1871.

CRIMINAL LAW—COMPETENCY OF THE DEFENDANT TO TESTIFY.

In the courts of the United States, a defendant in a criminal case cannot testify in his own behalf although by statute his testimony is admissible in the courts of the state.

[Cited in Home Ins. Co. v. Stanchfield, Case No. 6,660; U. S. v. O'Brian, Id. 15,908; Logan v. U. S., 12 Sup. Ct. 629.]

Indictment for having in possession counterfeit treasury notes, with intent, &c., contrary to the acts of congress. By a statute of the state of Kansas, defendants in criminal cases are allowed to testify in their own behalf. On the trial, the defendant's counsel offered the defendant as a witness to testify in his own favor, relying on the aforementioned statute of the state.

Mr. Horton, U. S. Dist. Atty.

Merrill & Case, for defendant.

PER CURIAM (MILLER, Circuit Justice, and DILLON, District Judge, concurring). Crimes against the United States are wholly withdrawn from the domain of state legislation. They are created solely by congress, and congress has provided for their prosecution and the mode of procedure. Under section 34 of the judiciary act, as construed by the supreme court (U. S. v. Reid, 12 How. [53 U. S.] 361), and under the act of July 6, 1862 (12 Stat. 588), and of July 2, 1864 (13 Stat. 351), it is clear that the right of a defendant, in a criminal case, to testify in his own favor does not exist. On the contrary, the language used manifests an evident intention on the part of congress to exclude such evidence. Testimony excluded.

NOTE. Right of parties to testify in civil cases, Berry v. Fletcher [Case No. 1,356]; in chancery cases, Rison v. Cribbs [Id. 11,860]. In the Case of 10,000 Cigars [Id. 16,451], it was decided by Mr. Justice Miller that the phrase "civil action" in the act of July 2, 1864, "includes actions at law, suits in chancery, proceedings in admiralty, and all other judicial controversies in which the rights of property are involved, whether between private parties, and such parties and the government, and is used in contradistinction to criminal actions"; and he accordingly held that the claimant of property seized for a violation of the internal revenue laws was made by the general act a competent witness in his own behalf, and that

[2] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

his right to testify was not repealed or modified by the act of February 28, 1865, § 2 [13 Stat. 442], or by the act of July 13, 1866, § 9 [16 Stat. 98]. A defendant, in a civil action brought by the government, is competent to testify in his own behalf under the act of July 2, 1864. Green v. U. S., 9 Wall. [76 U. S.] 655, 1869. So a relator in habeas corpus. Ex parte Reynolds [Case No. 11,722]. Under Act March 3, 1865 (13 Stat. 533), the court will not make an order for examination of a party, when such an order would not be allowed by the laws of the state. Robinson v. Mandell [Case No. 11,959].

Case No. 15,333.

UNITED STATES v. HAYDEN et al.

[52 How. Prac. 471.]

District Court, N. D. New York. March, 1877.

VIOLATION OF ELECTION LAWS—ELECTION INSPECTORS—FRAUDULENT CERTIFICATE—NEGLECT OF DUTY.

[Where the inspectors of an election in New York, at which a member of congress was voted for, pursuant to a long-standing custom of the election district, intrusted the keys of the various ballot boxes, during the time of the voting, to a police patrolman on duty at the polling place, instead of to one of their number, as required by the state law, and in canvassing the ballots, by general desire of all present, opened the ballot boxes in a different order from that prescribed by the state statute, *held*, that this was insufficient to warrant a conviction for making a fraudulent certificate, or for fraudulent neglect or violation of duty, under Rev. St. § 5515, in the absence of any evidence to connect them with any fraudulent act or neglect, although in fact, by the fraud of some person unknown, ballots were unlawfully taken from the congressional box and fraudulent ballots substituted therefor, so that the certificate was in fact not a true statement of the votes actually cast.]

A bill of indictment was found against the defendants [John Hayden, John Grady, and Robert Parker] at the last January term of this court. It contained two counts. The first charged that the defendants, as inspectors of election of the Western election district of the Eighth ward of the city of Albany, on the day of election, held on the 7th day of November, 1876, knowingly, wrongfully and unlawfully, fraudulently made a false certificate of the result of the election in said election district in regard to representative in congress whereby they allowed one Terence J. Quinn 945 votes and one Hamilton Harris 50 votes, when in truth and in fact, said Harris received more than said 50 votes, and said Quinn less than said 945 votes. The second charged, that while it was the duty of said defendants, as such inspectors to make a true certificate of the result of such election, in said election district, in regard to said representative in congress; yet that said defendants neglected their duties in not immediately, at the final close of the poll, taking possession of the ballot-box containing the votes cast for representative in congress, and immediately open and canvass the ballots therein contained; and that with intent to affect such election in said election district, in regard to representative in congress, knowingly suffered and permitted the said ballot-box to go out of their possession, and knowingly suffered and permitted ballots in said box for representative in congress to be wrongfully taken from said ballot-box and destroyed and false and fraudulent ballots to be inserted in lieu thereof. The defendants plead not guilty.

At this term of the court a jury was impanneled and the trial of the prisoners under said indictment took place. The material facts, proved by the prosecution, are as follows: The prisoners, chosen under the laws of the state of New York, constituted the board of inspectors of election in and for the Western district of the Eighth ward of the city of Albany (a portion of the Sixteenth congressional district of said state of New York), on the general election, held on the 7th day of November, 1876. The other officers of election were two poll clerks, appointed by the police commissioners of the city, two supervisors of election and two marshals, appointed pursuant to section 2012 of the United States Revised Statutes. The polling place was designated by the common council of said city. Before the polls were opened, said police commissioners provided prisoners with six ballot-boxes; one each for electoral, state, congressional, judiciary, assembly, and constitutional amendment ballots. All the boxes were examined and locked, and in the presence of all the officers of election, without objection, the keys of all the said boxes were delivered by one of the prisoners, Hayden, to one Michael Nolan, one of the patrolmen assigned to perform police duty at that poll that day, under the direction of the police commissioners of the city, and were retained until returned by him in the evening to open the boxes that the ballots in each might be canvassed. It had been the custom, in this and other election districts in said city, for at least six years prior, to make one of the patrolmen attending the poll the custodian of the ballot-boxes and their keys, except during the taking of the ballots and the time the ballots in a particular box were being canvassed. Nine hundred and ninety-five ballots were cast in that district for representative in congress. At sun-set the polls were closed and the ballot-boxes were placed, by the authority of the prisoners in the custody of the patrolmen, now three in number, and retained by them until the prisoners, as such inspectors, called for a particular box, when it was delivered to them. Besides the officers of election and patrolmen, four citizens designated by the police commissioners of said city were present to witness the canvass. The politics of the witnesses and officers of election were four Democrats and five Republicans. The electoral ballots were

first canvassed, with this result: Democrat, 678 votes; Republican, 316 votes. Next, the assembly ballots, as follows: Democrat, 593 votes; Republican, 392 votes. It was shown that by the general desire of those present at the canvass, and as one of the candidates lived in the ward, the assembly ballots were canvassed out of the regular order. Next, the congressional ballots, as follows: Democrat (T. J. Quinn), 945 votes; Republican (H. Harris), 50 votes. The other boxes were canvassed with substantially the same result as that of the electoral ticket. It was shown that after the polls were closed that evening, and before the congressional ballots were canvassed, the room in which the canvass took place was, for a short time, somewhat dark; that all the boxes were placed in the back part of the room, near an open window, at which, during the evening, the shadow of a man was, for an instant, seen by one of the witnesses of the canvass. The prosecution called 100 voters, residents of the election district, who each testify that on the 7th day of November, 1876, they voted for Hamilton Harris for representative in congress. It was proposed to call 116 additional voters to testify to same effect, but the court thought it unnecessary to accumulate evidence upon that point. It was shown, also, that one elector voted a peculiar, silver-backed, greased congressional ballot, upon which was the name of Hamilton Harris, and this was not found in the congressional ballot-box during the canvass. Some of the ballots in this box looked clean, and had the appearance of being little handled. Each of the witnesses who was present at the canvass, testified that the counting of the votes in all the ballot boxes was fair and correct, and that they saw nothing done wrong, nor did they see the prisoners deviate from an honest course of action. Upon the conclusion of the proof for the prosecution, a motion was made by the prisoners' counsel, requesting the court to instruct the jury to acquit the prisoners, as it was not shown that either of the prisoners had committed a criminal offence.

Mr. Crowley, U. S. Atty., and Messrs. Pound and Murray, Asst. U. S. Attys., for the prosecution.

Henry Smith, Edward J. Meegan, J. Thomas Spriggs and E. Countryman, for the prisoners.

WALLACE, District Judge, said, in substance: The indictment is found under section 5515 of the Revised Statutes of the United States, which reads as follows:

"Every officer of an election at which any representative or delegate in congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any state, territorial district or municipal law or authority, who neglects or refuses to perform any duty, in regard to such election, required of him by any law of the United States, or of any state or territory thereof, or who violates any duty so imposed, or who knowingly does any acts thereby unauthorized with intent to affect any such election or the result thereof, or who fraudulently makes any false certificate of the result of such election in regard to such representative or delegate, or who withholds, conceals or destroys any certificate of record so required by law respecting the election of any such representative or delegate, or who neglects or refuses to make and return such certificate as required by law, or who aids, counsels, procures or advises any voter, person or officer to do any act, by this or any of such sections, made a crime, or attempts to do so, shall be punished as prescribed in section fifty-five hundred and ten."

The duties of inspectors of election, under the laws of the state of New York, so far as material to this case, are as follows:

"Section 26. Each box shall be provided with a sufficient lock, and shall be locked before the opening of the poll, and the key thereof delivered to one of the inspectors to be appointed by the board, and shall not be opened during the election except in the manner and for the purposes hereinafter mentioned." 1 Rev. St. (6th Ed.) 438.

"Section 37. Immediately after the final closing of the poll at all general elections hereafter to be held in this state, in the several election districts, except in the city of New York, the ballot-boxes used at such elections shall be opened and the votes therein canvassed in the manner now provided by law, but as nearly as may be in the following order: 1. The box containing the ballots indorsed 'Electors.' 2. The box containing the ballots indorsed 'State.' 3. The box containing the ballots indorsed 'Congress.' 4. The box containing the ballots indorsed 'Senate.' 5. The box containing the ballots indorsed 'Assembly.' 6. The box containing the ballots indorsed 'Judiciary.' If any other ballot boxes shall have been used at any such election in pursuance of law, such other boxes shall be opened and the votes therein canvassed immediately after those hereinbefore specified, in such order as the inspectors of elections at the several polls shall respectively determine." 1 Rev. St. (6th Ed.) 439.

The prisoners' counsel refer to the Albany police law (chapter 77, Laws 1870; 1 Sess. Laws 1870, p. 208), upon this subject, as follows:

"Section 32. It shall be the duty of said board (police board) to detail on the day of any election in said city of Albany, at least two patrolmen to each election poll, and to provide ballot boxes for use at any and all such elections, and to provide for the custody of said boxes at all times, except dur-

ing the taking, receiving and counting, of the votes. Said city of Albany shall pay the expenses of procuring and taking care of its boxes.

"Section 33. It shall be the duty of said board to prevent any booth or box, for the distribution of tickets at any election, from being erected or maintained within one hundred and fifty feet of any polling place within said city, and to see that the arrangements for voting are such as to prevent any avoidable crowding of voters at such polls, and that the challengers of both and all parties have fair and equal room, rights and privileges for the discharge of their duties at each poll, and that the canvassing of the votes be conducted in an orderly, fair, open and public manner, and no person or officer shall have power to interfere with said board in their discharge of the duties imposed on them by this section."

To warrant a conviction under the first count of the indictment, it must appear that the prisoners made a fraudulent certificate of the result of the election in the district in question. The proof in this case does not authorize any such conclusion. With reference to the charge contained in the second count of the indictment, it should appear, in order to justify a conviction, that the inspectors of election intended to perpetrate some wrongful act, or omission of duty, or were guilty of some palpable neglect that would lead to the conclusion that a violation of law was designed, and of course this could be inferred in many instances, from their conduct. There is no doubt that a glaring fraud was perpetrated by some person or persons, but it was so slyly and shrewdly done that it cannot be traced, and, while the prisoners may be the guilty persons, the testimony fails to show it. This canvass seems to have been conducted by the inspectors as carefully as canvasses usually are, and with as much regard for the requirements of the forms of the law. The inspectors, in delivering the keys of the ballot-boxes to one of the policemen attending the polls, acted pursuant to the custom prevailing in the district for many years, and this was at least approximately authorized by the police law of the city. There is no proof impeaching the character of the policemen, nor that any of them was an improper person to hold the keys. The canvassing of the "assembly" box was made by the general consent, or at least the acquiescence of all present, and its substitution in place of the "state" box facilitated the canvass of the "congressional" box. I have made it a rule to direct a verdict of not guilty where, in my opinion the evidence will not authorize the jury to find a verdict of guilty, or, if so found, I would set aside the verdict as contrary to evidence. I think this is a case of that class, and I therefore direct the jury to find a verdict of not guilty.

Case No. 15,334.

UNITED STATES v. HAYNES.

[9 Ben. 22.] [1]

District Court, E. D. New York. Jan., 1877.

OFFICIAL BOND — SUBSTITUTION OF NEW BOND — APPROVAL—LIABILITY OF SURETIES.

H., a pension agent who had given an official bond, received permission to substitute a new bond; which he did, but the bond was not approved by the secretary of the interior for two months thereafter. Two days after the approval, H. resigned, and upon a settlement of his accounts with the department was found indebted to the amount of $6,000, for which suit was brought against the sureties on the first bond. *Held*, that the approval by the secretary of the interior endorsed on the second bond did not constitute an acceptance of it to stand in lieu of the first bond, the rule of the department being proved that an accounting is required before a new bond is accepted; the bond in suit therefore was the existing bond of H. in force at the time of his resignation, and the sureties thereon are liable to the United States for the deficiency shown upon accounting.

At law.

A. W. Tenney, U. S. Atty.

E. T. Wood and A. H. & W. E. Osborn, for defendants.

BENEDICT, District Judge. This is an action brought upon a pension agent's bond, and tried before the court without a jury. The bond sued on was given by the defendant Haynes upon his appointment to be pension agent for Brooklyn, in March, 1869. It is in the sum of $150,000, and is executed by the defendant Haynes and the four other defendants. The condition of the bond is: "That whereas the president of the United States hath, pursuant to law, appointed the said Dudley W. Haynes for four years and until his successor has been appointed and qualified, an agent for paying pensions to those persons who are now on or may be hereafter inscribed on the roll of the agency at Brooklyn in the state of New York: Now, if the said Dudley W. Haynes shall truly and faithfully discharge all the duties of said office according to law and instructions, and he, his heirs, executors, or administrators, shall regularly account, when required, for all moneys received by him as agent aforesaid with such person or persons as shall be duly authorized on the part of the United States for that purpose, and also refund at any time, when required, any public moneys remaining in his hands unaccounted for, then this obligation shall be null, void and of no effect; otherwise to remain and be in full force and virtue."

The breach alleged is as follows: "That between the said 22d day of March, 1869, and the 1st day of February, 1871, the said Dudley W. Haynes as such agent received from the plaintiff the sum of $9,056.56 which

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

he has neither accounted for nor paid over to the plaintiff nor any part thereof, although duly required and demanded so to do on or about the 1st day of February, 1871."

The evidence shows that in 1870 Haynes obtained permission to substitute another bond in lieu of his original bond, the one in suit. Accordingly he tendered a bond similar in condition to the bond in suit, but it was for the sum of $300,000, and was executed by Haynes and two of the persons who were on the original bond. This second bond was dated Nov. 21, 1870. It was given to the commissioner of pensions on Nov. 25, 1870, and was on the same day referred by him to the secretary of the interior for approval. No further action appears to have been taken in the matter until January 21st, 1871, when the bond appears to have been endorsed "approved" by the secretary of the interior.

Two days afterwards, Haynes resigned his office, and was found indebted to the government for moneys unaccounted for in the sum of $6,006.36, which he was unable to refund on being then required so to do. It is to recover this sum that the present action is brought upon the first bond. On the part of the defendant it is contended that the secretary of the interior had the power to accept from Haynes a new bond in place of the first one; that in the due exercise of this power the secretary approved and accepted the bond tendered by Haynes on Nov. 25, 1870, which bond became binding as of and from the time of its delivery and thereupon the sureties upon the first bond were released from all obligation as to future defalcation, or failure to refund, and consequently, inasmuch as no requisition to refund was made until after the delivery of the second bond, no liability, it is said, has attached to the sureties upon the first bond.

It has not been contended and plainly could not be held that as matter of law the approval of a second bond, worded so as to be security for the future only, would have the legal effect to extinguish the prior bond which, by its terms, covers the whole of the agent's term. Postmaster-General v. Munger [Case No. 11,309].

The defence must rest upon a question of fact, namely, whether the second bond was ever accepted to stand in lieu of the first bond and to constitute the sole security of the government from the time of its delivery. This fact, it is supposed, has been conclusively shown by the evidence that the bond was approved by the secretary of the interior without qualification. But I am of the opinion that the mere approval of the secretary, made under the circumstances above stated, does not show such an acceptance of the second bond. Under the circumstances there was another act necessarily preliminary to such an acceptance, namely, to adjust the agent's account up to that time and determine the amount of money then in his hands unaccounted for. Without such an accounting it would be improper, to say the least, to accept a new bond such as was here tendered, to stand in lieu of the existing security, because the second bond was drawn to be security for the future and not for the past, and from an acceptance of the second bond without an accounting it would result that while the sureties upon the second bond would only be liable for a misappropriation of the moneys in the hands of the agent at the time of accepting their obligation (U. S. v. Boyd, 15 Pet. [40 U. S.] 206) the sureties on the first bond would be wholly discharged. And so it has here been contended that no recovery can be had upon the bond in suit, because no requisition to pay over money was made prior to the approval of the second bond. Plenary evidence is therefore required to satisfy the mind that the second bond, drawn as it was to cover the future only, was accepted in lieu of the security then existing under the circumstances stated. The mere approval by the secretary, given under the circumstances stated, is not sufficient to warrant finding such an acceptance. The word "approved" endorsed on the bond by the secretary does not necessarily import more than that the bond is deemed a sufficient security to be accepted. It does not necessarily include a direction that the bond is to stand in lieu of the existing bond and that the existing bond be discharged; and in the absence of any evidence showing an intention that the endorsement should have that effect, it cannot be supposed that such was the intention. Moreover there is evidence in this case repelling such a supposition, for it appears in proof that it is an invariable rule of the department to require an accounting before a new bond is accepted in lieu of a former one. In the absence of any special circumstances this evidence tends to repel the idea that the endorsement on the second bond was intended to mean more than it says and to include an acceptance of the new security in lieu of the old. Besides this, the long delay that occurred between the tender and the approval of the bond renders it improbable that it was intended to accept it in lieu of the former one without an accounting, and the fact that the second bond was not sent to the treasury department where the agent's accounts were kept and the security therefor entered, but remained in the office of the secretary until after the commencement of this suit, tends further to show affirmatively that the approval endorsed on the second bond was but a part of the transaction that was never consummated.

A reason for its non-consummation by an accounting and order thereon may be found in the fact that when an accounting was had it disclosed the agent to be a defaulter.

My conclusion, therefore, is that the bond in suit was the subsisting bond of the agent Haynes in force at the time of his resigna-

tion, and it follows that the sureties upon the bond are liable for the deficiency shown by the treasury transcript, namely, $6,006.36 with interest.

Let judgment be entered for the plaintiff accordingly.

Case No. 15,335.

UNITED STATES v. HAYNES et al.

[2 McLean, 155.] [1]

Circuit Court, D. Ohio. July Term, 1840.

APPEALS FROM DISTRICT TO CIRCUIT COURTS.

1. An appeal from the district, to the circuit court, must be prayed for and allowed, to the next circuit court held within the district.

[Cited in The Oriental, Case No. 10,570.]

[Cited in The Zephyr v. Brown (Wash.) 3 Pac. 187.]

2. Appeals from the district, to the circuit court, are limited to cases of admiralty and maritime jurisdiction. All other cases from the district, to the circuit court, are removed by writ of error.

[Cited in Ruddick v. Billings, Case No. 12,110; Wheaton v. U. S., Id. 17,487; U. S. v. Thirty-Seven Barrels of Rum, Id. 16,467.]

[Appeal from the district court of the United States for the district of Ohio.

[This was an action by the United States against E. S. Haynes and others brought in the district court (case unreported), on an official bond. The case is now before the court on appeal.]

The District Attorney, for the United States.

Mr. Swayne, for defendant.

OPINION OF THE COURT. This is an appeal from the judgment of the district court. A motion, to dismiss the appeal, is made by the defendants' counsel, on two grounds: First, because it does not appear that any appeal was prayed or allowed by the district court; second, because an appeal does not lie in such a case.

By the twenty-first section of the judiciary act of 1789 [1 Stat. 83], in case of an appeal from the district, to the circuit court, it must be entered and allowed to the next circuit court held within the district. Montgomery v. The Betsey [Case No. 9,734]; Norton v. Rich [Id. 10,352]. This is an action brought on an official bond, and, in such a case, no appeal lies from the district, to the circuit court.

In the case of U. S. v. Nourse, 6 Pet. [31 U. S.] 495, the supreme court say, the jurisdiction of the district court is limited to cases at law, and of admiralty and maritime jurisdiction. From all decrees over a certain amount, in the latter, appeals may be taken to the circuit court; but judgments of law must be removed by writ of error. The act of 1803 [2 Stat. 244], which provides that, "from all final judgments or decrees in any of the district courts, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars, shall be allowed in the circuit court," the supreme court, in the above case, say, made no alterations in the law of 1789, as it respects appeals to the circuit court, except in reducing the sum or matter in controversy from three hundred, to fifty dollars, on which such appeals shall be allowed. [U. S. v. Cox] 11 Pet. [36 U. S.] 166.

The appeal must be dismissed on both grounds taken in the motion.

[1] [Reported by Hon. John McLean, Circuit Justice.]

Case No. 15,336.

UNITED STATES v. HAYWARD.

[2 Gall. 485.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1815.

NONIMPORTATION ACTS — REPEALS — INFORMATIONS — NEUTRAL VESSELS — BURDEN OF PROOF — PORT IN POSSESSION OF ENEMY — CASES OF ACCIDENT AND DISTRESS.

1. The repealing clauses in the act of 1814, c. 115 [2 Story's Laws, 1412; 3 Stat. 123, c. 56], did not operate strictly as repeals of the act of March 1, 1809, c. 91 [2 Story's Laws, 1114; 2 Stat. 528, c. 24], so far as revived by the act of March 2, 1811, c. 96 [2 Story's Laws, 1187; 2 Stat. 651], but as exceptions to the general provisions of those acts in favor of British goods emported in neutral vessels.

2. In an information on those acts, for an importation of goods in a vessel not neutral, quære, if it be necessary to negative in the information the neutrality of the vessel.

3. A traverse to an averment, in such an information, that the goods were imported in a vessel not neutral, merely in the negative is bad.

4. On whom the burthen of proof lies in cases within the exceptions of a statute prohibition. In cases of negative allegations, the burthen of proof rests on the party holding the affirmative, especially where the facts lie particularly in his privity and knowledge. See 1 Greenl. Ev. §§ 79, 80, and cases there cited.

[Cited in U. S. v. Twenty-Five Cases of Cloths, Case No. 16,563.]

[Cited in Doe v. Burnham, 31 N. H. 430; Raynor v. State, 62 Wis. 298, 22 N. W. 434; State v. Adams, 6 N. H. 534; State v. McGlynn, 34 N. H. 426; State v. Perkins, 53 N. H. 437; State v. Whittier, 21 Me. 349.]

5. The burthen of proof of the vessel's being neutral, in an information on the statutes before recited, rests on the claimant.

6. By the conquest and occupation of Castine by the enemy, that territory passed under the temporary allegiance and sovereignty of the enemy; and of course, the sovereignty of the United States was, during the same period, suspended, and the laws of the United States could no longer be rightfully enforced there. Castine, during such occupation, was not a port of the United States with reference to the non-importation acts. Therefore, the bringing of British goods from Halifax to Castine, during that occupation, was not an offence against those acts. See, as to what the phrase "foreign port" means, The Eliza [Case No. 4,346]; The Rhadmanthe, 1 Dod. 201.

[Cited in U. S. v. Stark, Case No. 16,378.]

[Cited in Watson v. Stone, 40 Ala. 451.]

[1] [Reported by John Gallison, Esq.]

7. No person can be permitted to set up the defence, that goods unladen within the 27th section of the act of March 2, 1799, c. 128 [Story's Laws, 597; 1 Stat. 648, c. 22], were unladen by unavoidable accident, necessity or distress, unless he has made the requisite proofs thereof stated in that section, before the collector, or has been prevented by inevitable accident, &c., from furnishing such proofs.

8. It is no legal evidence of such proofs having been furnished to the collector, that he has admitted the goods to entry; nor is such entry any legal evidence of the existence of such accident, necessity or distress. The belief of the collector is no legal evidence of the existence of such accident, necessity or distress. The presumption, which the law makes in favor of the good faith and integrity of the collector, is for his own protection; but it can, in no respect, vary the rights of third persons, or change the general rules of evidence applicable to such rights.

[Cited in Bottomley v. U. S., Case No. 1,688.]

9. It is a good defence under the 50th section and 92d section of the act of March 2, 1799, c. 128 [1 Story's Laws, 573; 1 Stat. 627, c. 622], that the party has been prevented, by inevitable accident, necessity or distress, from complying with the requisitions thereof. But such defence is not allowable under a plea, which simply puts in issue a denial of the facts constituting a forfeiture within those sections.

[Distinguished in U. S. v. The Sarah B. Harris, Case No. 16,223.]

10. If the proper port of entry for the district be in possession of the enemy, the collector of the customs has a right to remove the custom-house to some other convenient port within the district, and there to admit vessels to entry. If an unlivery of a foreign vessel, at the port of entry for the district, become impossible from the port being in possession of the enemy, and such unlivery be indispensable for the preservation of the property, it may be lawfully made at a port of delivery only.

[Cited in Devato v. Eight Hundred and Twenty-Three Barrels of Plumbago, 20 Fed. 514.]

11. What constitutes a case of unavoidable accident, necessity or distress. An imminent and immediate danger of capture, &c. constitutes such a case; but not if the danger be remote, or not instant and pressing. To authorize an unlading under the 27th section of the act of 2d March, 1799, as in a case of accident, necessity or distress, the danger of capture must act directly on the goods or vessel, and the circumstances must be such, as render an immediate unlading indispensable to the safety of the goods, and not merely such as render it hazardous or impracticable to carry the goods to their port of destination.

[Error to the district court of the United States for the district of Massachusetts.]

This was a writ of error from the district court of Massachusetts, upon an information in rem against one hundred and forty-nine packages of goods seized upon land for an alleged illegal importation into the United States. The information contained six counts. The first alleged, that the goods, being articles the importation whereof into the United States, in any other than neutral vessels, was prohibited by the act entitled "An act to interdict the commercial intercourse between the United States, &c." (March 1, 1809, c. 91 [2 Story's Laws, 1114; 2 Stat. 528, c. 24]), were imported in some vessel not being a neutral vessel, the name whereof was unknown to the district attorney, into the United States, to wit, the district of Penobscot, from a place situated in a colony and dependency of Great Britain, to wit, from some place in Nova Scotia, against the statutes in such case made and provided. March 1, 1809, c. 91 [2 Story's Laws, 1114; 2 Stat. 528, c. 24]; May 1, 1810, c. 56 [2 Story's Laws, 1169; 2 Stat. 605, c. 39]; March 2, 1811, c. 96 [2 Story's Laws, 1187; 2 Stat. 651, c. 29]; April 14, 1814, c. 115 [2 Story's Laws, 1412; 3 Stat. 123, c. 56]. The second alleged, that after the arrival of said vessel from a foreign port within the limits of the United States, to wit, the district of Penobscot, and before the said vessel had come to the proper place for the discharge of her cargo or any part thereof, and before she was duly authorized by the proper officers of the customs to unlade the same, the said goods were unladen from out of said vessel for some purpose, without any unavoidable accident, necessity or distress of weather, against the statute, &c. March 2, 1799, c. 128, § 27 [1 Story's Laws, 597; 1 Stat. 648, c. 22]. The third alleged, that the goods were imported into the United States, from a port or place in the actual possession of Great Britain, in certain vessels, which were not, at the time of said importation, neutral vessels, and the said goods not being a part of the cargo of American vessels, which had cleared out for the Cape of Good Hope, &c. prior to the 10th of November, 1810, against the statutes, &c. March 1, 1809, c. 91 [2 Story's Laws, 1114; 2 Stat. 528, c. 24]. The fourth alleged, that the goods, being foreign goods, subject to duties upon importation, were brought from some foreign port or place into the United States, to wit, the district of Penobscot, in other manner than by sea, the same not having been brought into or through any district in the northern, northwestern, or western boundaries of the United States, adjoining to the dominions of Great Britain in Upper and Lower Canada, nor into or through any district on the river Ohio or Mississippi, against the statute, &c. March 2, 1799, c. 128, § 92 [1 Story's Laws, 597; 1 Stat. 648, c. 22]. The fifth alleged, that the goods, being liable to duties, were imported into the United States, from some foreign port or place, and were afterwards unladen and delivered from the vessel in the district of Penobscot without a special license or permit, against the statute, &c. March 2, 1799, c. 128, § 50 [1 Story's Laws, 617; 1 Stat. 665, c. 22]. The sixth alleged, that the goods, being of foreign growth and liable to duties, and not having been brought into or through any district on the northern, northwestern or western boundaries, of the United States, &c. were brought in some vessel from some foreign port or place into the district of Penobscot, and there unladen and landed from said vessel at a port other than a port

directed by the act of congress made and passed on the 2d of March, 1799, entitled "An act, &c." to wit, at a port called Orrington, in said district of Penobscot, against the statute, &c. March 2, 1799, c. 128, § 92 [1 Story's Laws, 656; 1 Stat. 697, c. 22].

To the first count the claimant pleaded, that the goods were imported into the district of Penobscot, on the 9th of November, 1814, in a neutral vessel called the Christina, without this, that the goods were laden and put on board of a vessel, not being a neutral vessel, with the knowledge of the master and owner of said vessel, and with intent to import the same into the United States, and that the same were imported in pursuance of such intention into the district of Penobscot in said vessel, as the United States had alleged, and thereof put himself upon the country: and the United States did the like.

To the second count he pleaded, that the goods were not unladen from any vessel for any purpose in the district of Penobscot, before the said vessel had come to the proper place for the discharge thereof, without any unavoidable accident, necessity or distress of weather, in manner, &c.; and thereof put himself on the country: and the United States did the like. To the third he pleaded, that the goods were not imported into the United States from a port or place in the actual possession of Great Britain, in vessels, which were not, at the time of such importation, neutral vessels in manner, &c.; and thereof put himself on the country: and the United States did the like. To the fourth he pleaded, that the goods were not brought from some foreign place into the district of Penobscot in other manner than by sea, contrary to the form of the statute, in manner, &c.; and thereof put himself upon the country: and the United States did the like. To the fifth he pleaded, that the goods were not unladen and delivered without a special license or permit in manner, &c.; and thereof put himself on the country: and the United States did the like. To the sixth he pleaded, that the goods were not unladen and landed from said vessel, in which they were imported from said foreign port, at a port other than a port directed by said act of congress, or any other act or law of the United States, in manner, &c.; and of this, he put himself upon the country: and the United States did the like.

Upon the trial in the district court all the issues were found in favor of the claimant, and the cause came to the circuit court upon a bill of exceptions, tendered and sealed at the trial. There was a mass of testimony and documents attached to the bill of exceptions, from which such facts and circumstances only are abstracted, as materially affect or explain the opinion of the court. It appeared, that Castine was taken possession of by the British troops, on the first of September, 1814, and was held in their possession until after the treaty of peace. After taking possession, the governor of Nova Scotia issued a proclamation claiming the whole country east of the Penobscot river, as attached to the British sovereignty by right of conquest. Orrington is on the east side of the river, but had never surrendered to the British arms, and always continued to assert and claim its American rights and privileges, and to obey the laws of the United States. After the capture of Castine, the collector removed the customhouse to Hampden, on the west side of the river, and there continued until the treaty of peace. The goods in question were bought in Halifax, Nova Scotia, on the first of October, 1814, by a Mr. John Nyman, who afterwards at Hampden, on the 11th of Nov. 1814, made a bill of sale of them to the claimant. How or when the goods were brought from Halifax did not distinctly appear; but they were found on land at Orrington, about the beginning of the same month of November, and were there seized, and soon afterwards released from seizure. They were then shipped on board of a small sloop, called the Christina, commanded by a Mr. William P. Unger, and transferred to Hampden, and were there, on or about the ninth of November, admitted to an entry by the collector of the district, as foreign goods imported in a foreign vessel from Orrington, and accordingly the foreign duties were secured, as in ordinary cases of importations from foreign ports. The sloop was American built, and was, until the 14th of October, 1814, enrolled and licensed for the coasting trade in the district of Penobscot, by the name of the Union. On that day, she was sold to Mr. Unger, the master, who called himself a Swedish subject, although it was in proof, that he had been for several years domiciled in the United States. At the time of the transportation of the goods, the sloop was navigating under a pass from Mr. Soderstrom, the Swedish consul, dated the 14th of the same October, and recognising her as entitled to the benefits of the Swedish flag, but her crew, with the exception of the master, were all Americans.

The directions of the judge, who tried the cause, are thus stated in the bill of exceptions: "The district judge did declare and deliver his opinion to the jury under the first and third counts aforesaid, that upon the evidence aforesaid they were bound to consider Orrington as in possession of the United States, and the bringing of the said goods, claimed by said Hayward, from said Orrington to Hampden, was not a violation of either of the acts on which the first and third counts in the information were founded, whatever might be the national character of the vessel, in which the said goods were so brought; that if the goods were brought to Orrington from a British port in a vessel not neutral,

they were liable to forfeiture, but that it was incumbent on the United States to prove to the satisfaction of the jury, that the vessel, in which the goods might have been brought, was not neutral; that Castine was to be considered as a foreign port, and that it was not sufficient, as to all the purposes of this libel, to entitle the United States to a verdict on these counts, to prove that the goods were brought from Halifax, a place in a British colony, to Castine, and with these directions he left the evidence upon the first and third counts to the jury. And the said judge did, then and there, deliver his opinion, and direct the said jury, that, under the other counts, it being admitted that the goods claimed were purchased at Halifax, in the province of Nova Scotia, and soon after found at Orrington, it was a fair presumption, that the goods were imported into Orrington from Halifax, no account or explanation being given by the claimant; that the goods must have been brought thither either by land or by sea; if by land, they were liable to forfeiture under the fourth count; if by sea, the goods were liable to forfeiture under the second, fifth and sixth counts, unless the case should be found by the jury to be a case within the purview of the 27th section of the act, entitled 'An act to regulate the collection of duties upon imports and tonnage,' and they should acquit the goods upon the ground of unavoidable accident, necessity, or distress of weather, according to the terms of the exception contained in that section of the said act, which the jury might do, although the specific evidence of such unavoidable accident, necessity or distress of weather, which is pointed out by the said twenty-seventh section of the said act, had not been shown on the trial; and that, if the jury should so acquit the goods, upon the said last mentioned grounds, on the second count, it would be their duty to acquit them also upon the fifth and sixth counts in the information; that as the goods had been admitted to an entry by the collector at Hampden, it would be competent for the jury to presume from that circumstance, not only that the goods were unladen through unavoidable accident, necessity, or distress of weather, but that notice thereof was given to the collector at Hampden, and oath made before the said collector, agreeably to the requisition of the twenty-seventh section of the act aforesaid, though such presumption might indeed be repelled by facts and circumstances, given or appearing in evidence in the cause. And the said judge did, then and there, furthermore deliver it as his opinion, and accordingly direct the jury, that inasmuch as the government of the United States had, prior to the importation in question, manifested by a proclamation from the president of the United States, and by a repeal of the non-importation acts theretofore existing, a strong disposition to encourage importations of merchandize in neutral vessels; and as there was existing, at the time of this importation, a blockade by the enemy of all the ports in the eastern country, and as the only port of entry in the district of Penobscot was then actually in the military possession of the enemy, whereby the approach of neutral vessels to the ports in that section of the country in the usual and ordinary course was rendered extremely hazardous, if not actually impracticable; an emergency arising from such a state of things might, in reference to the importation in question, fairly be considered by the jury, as constituting a case of unavoidable 'accident, necessity, and distress,' within the fair intent and meaning of the exception in the 27th section of the fact before mentioned. And if the jury should find reason to believe that the goods in question were, under such circumstances, considered by the collector as innocently or excusably landed at Orrington under the 27th section of the act aforesaid, and were thereupon admitted to entry, that condemnation could not now be had in this prosecution, for that cause. And with the above directions, as to the second, fourth, fifth and sixth counts to the jury, the said judge left with them the cause."

Mr. Blake, Dist. Atty., argued in support of the exceptions, and Prescott & Hubbard, contra.

Blake & Richardson, for the United States.
Prescott & Hubbard, for claimant.

STORY, Circuit Justice. Several exceptions have been taken in the argument to the directions of the court. It is contended in behalf of the United States, that the charge as to the first and third counts is erroneous, (1) because, under the circumstances, it was not incumbent on the United States to prove, that the vessel, in which the goods might have been brought, was not neutral; (2) because it was sufficient to maintain these counts, to prove that the goods were brought from Halifax to Castine.

In order to understand the first of these objections, it is necessary to review the provisions of the acts, upon which these counts are founded. The act of the 1st of March, 1809, c. 91, § 4 [2 Story's Laws, 1114; 2 Stat. 528, c. 24], provides, that "it shall not be lawful to import into the United States, or the territories thereof, any goods, wares or merchandise whatever from any port or place situated in Great Britain or Ireland, or in any of the colonies or dependencies of Great Britain, nor from any port or place situated in France, or in any of her colonies or dependencies, nor from any port or place in the actual possession of either Great Britain or France. Nor shall it be lawful to import into the United States, or the territories thereof, from any foreign port or place whatever, any goods, wares or merchandise whatever, being of the growth, produce or manufacture of

France, or of any of her colonies or dependencies, or being of the growth, produce or manufacture of Great Britain or Ireland, or any of the colonies or dependencies of Great Britain. or being of the growth, produce or manufacture of any place or country in the actual possession of either France or Great Britain."—The first clause, therefore, prohibits the importation of any goods whatever from the British dominions and possessions, and on this the first and third counts are founded. The only substantial difference between these counts is, that in the first the goods are alleged to be imported from a place in a colony or dependency of Great Britain; in the third, from a place in the actual possession of Great Britain. The second clause prohibits the importation of goods of British growth or manufacture, from any foreign port or place whatever. This act was repealed, as to Great Britain, by the president's proclamation issued under the 11th section of the act, which repeal was confirmed by the act of the 28th of June, 1809, c. 9; and the whole act expired by its own limitation on the first day of May, 1810. The act of 1st of May, 1810, c. 56, § 4 [2 Story's Laws, 1169; 2 Stat. 605, c. 39], authorized the president to revive certain sections (including that already recited) against Great Britain or France, in case of a revocation of the edicts of either, which violated our neutral commerce. And accordingly, by the president's proclamation, these sections were revived against Great Britain, to take effect on the 2d of February, 1811; and the act of 2d of March, 1811, c. 96, § 3 [2 Story's Laws, 1187; 2 Stat. 651, c. 29], confirmed this revival, and directed these sections to be immediately carried into effect "against Great Britain, her colonies and dependencies." These sections accordingly remained in full force, until by the act of 14th of April, 1814, c. 115 [2 Story's Laws, 1412; 3 Stat. 123, c. 56], it was enacted, "that so much of any act or acts, as prohibits the importation of goods, wares or merchandise, of the growth, produce or manufacture of Great Britain or Ireland, or of any of the colonies or dependencies thereof, or of any place or country in the actual possession of Great Britain, and so much of any act or acts as prohibits importation into the United States or the territories thereof, in neutral ships or vessels, from any port or place situated in Great Britain or Ireland, or in any of the colonies of Great Britain, be and the same is hereby repealed," with a proviso, prohibiting any importation of goods, the property of the enemies of the United States.

Much difficulty has resulted from this inartificial mode of legislation. It is oftentimes a subject of peculiar embarrassment, as well as delicacy, to give a consistent construction to language so loose, as that employed to designate the revival and repeal of the above mentioned acts. The language of the provisions of the act of 1809, c. 91 [2 Story's Laws, 1114; 2 Stat. 528, c. 24], is directed against Great Britain and France, their colonies and dependencies, and places in the actual possession of either. The act of 1811, c. 96 [2 Story's Laws, 1187; 2 Stat. 651, c. 29], revives these provisions as to "Great Britain, her colonies and dependencies" only, leaving out the words "places in the actual possession of Great Britain." To give any construction, therefore, to this act, we must in fact strike out of the act of 1809, every word relating to France, her colonies and dependencies, and perhaps also to all places in the actual possession of France or Great Britain. This is indeed a perilous procedure, and it is not quite certain, that it can, in all cases, be done, and yet preserve the sense and integrity of the text. But the act of 1814, c. 115 [2 Story's Laws, 1412; 3 Stat. 123, c. 56], is yet more embarrassing. The first clause, which has been cited, explicitly repeals the second clause of the fourth section of the act of 1809, c. 91 [2 Story's Laws, 1114; 2 Stat. 528, c. 24]. And yet it is very clear from the proviso, that the legislature meant to except importations upon account of the enemies of the United States. British goods imported into the United States during the war, upon British account, must still be deemed within the penalties of the act of 1809, (and of course the act must remain in force for this purpose,) as well as be subject to the forfeitures arising from the law of war.

In respect to the second repealing clause of the act of 1814, there is yet more difficulty; for there is no part of any act of congress, which, in terms, prohibits importations in neutral vessels, from Great Britain, her colonies or dependencies. Construing the clause, therefore, in its literal sense, it is utterly void, for there is no descriptio rerum, if I may so say, to which it can attach. To give it any legal effect, we must construe it, not as a repeal of any existing provision, but as a qualification or exception, enabling neutral vessels, notwithstanding the existing laws, to import goods from Great Britain and her colonies. And, in this view, it operates as a proviso upon the first clause of the fourth section of the act of 1809, c. 91. In aid, therefore, of the manifest intention of the legislature, however incautiously expressed, we must deem both of the repealing clauses of the act of 1814, c. 115, not as repeals of the act of 1809, but as positive exceptions to the general provisions of that act. Upon any other construction, the act of 1809 would be completely repealed, even as to cases directly excepted from the repealing clauses, to wit, importations in vessels not neutral, and of goods the property of enemies. But, upon the construction now stated, all the words have an effect, and the objection urged at the argument is avoided, (viz. that British and American vessels are not now authorized to import British goods) because, by the treaty of peace, the charac-

ter of enemy is extinguished, and the British and Americans must be held neutral to each other.

Having thus settled the construction of the acts, on which the first and third counts are founded, we may now recur to the objections already stated to the charge of the court.

The first objection depends upon the solution of the point, upon whom the burthen of proof rested, as to the neutrality of the vessel, in which the goods were imported. It is very doubtful, whether it was necessary, in the count, to allege that the goods were imported in a vessel not neutral; for the general rule of law is, that it is sufficient to negative the exceptions in the enacting clause of a statute, and exceptions, which come in by way of proviso, or in subsequent statutes, are properly matter of defence for the defendant. Rex v. Jarvis, 1 Burrows, 148, 1 East, 643, note; Spieres v. Parker, 1 Term R. 141; Rex v. Stone, 1 East, 639; Rex v. Pemberton, 2 Burrows, 1035. The present case seems to fall within the rule, and is not easily, if at all, distinguishable. But it is not necessary to decide this point, because the count does, in fact, negative the vessel's being neutral.

It is argued on behalf of the United States, that, notwithstanding the averment, the defendant is bound to prove the affirmative, because in his first plea he has expressly alleged, that the goods were imported in a neutral vessel, called the Christina. But this averment is mere inducement to a traverse of the averment in the first count. In general, the inducement to a traverse is not of itself traversable; much less is the matter of it to be proved in any issue founded upon the traverse. In the present case, the traverse was intended to deny the whole of the material averment in the count, and accordingly it concludes to the country. To be sure, it was open to the objection of being too broad in its terms, and not sufficiently pointed to the averment in the count, and perhaps also of putting in issue a negative allegation; but these objections were available only upon demurrer, and the attorney for the United States, by joining the issue, has waived the benefit of them. By the mere shape of the pleadings, therefore, the onus probandi is not thrown upon the claimant.

Is it thrown upon him by the rules of law applicable to a case of this nature? In general, the party claiming a forfeiture or penalty is bound to make out his case precisely. Nor it is a necessary exception, that it involves the proof of a negative allegation. For if the law presume the affirmative, the party may still be put to the proof of the negative. Gilb. Ev. 146; Wilson v. Hodges, 2 East, 312; Frontine v. Frost, 3 Bos. & P. 302. Therefore, if the charge consist in a criminal neglect of duty, as the law presumes the affirmative, the burthen of proof of the contrary is thrown on the other side. Williams v. East India Co., 3 East, 192; Bull. N. P. 198; Frontine v. Frost, 3 Bos. & P. 302. But in other cases, as where the negative does not admit of direct proof, or the facts lie more immediately within the knowledge of the defendant, he is put to his proof of the affirmative. And where the general facts, which constitute a forfeiture within a statute, are proved, and there are exceptions to its operation in particular cases, the better opinion certainly is, that the party, who would avail himself of the exception, must prove it; although from the forms of pleading it may be necessary to negative every exception in the indictment or information. Such negative allegation is, in such cases, to be repelled by affirmative proof on the other side. Therefore, in an action on the game laws, (which must negative that the party has any of the qualifications of the statute) it is not incumbent on the plaintiff to prove the disqualifications of the defendant; for this is negative matter, and the affirmative comes more properly in the defence. Rex v. Stone, 1 East, 639; Frontine v. Frost, 3 Bos. & P. 307, note b; Rex v. Crowther, 1 Term R. 125; Spieres v. Parker, Id. 141; Attorney General v. Sheriff, Forrest, 43; Rex v. Turner, 5 Maule & S. 206.

Let us compare the present case with these rules. The act of 1809 prohibited all importations of goods from British ports. The act of 1814 excepted importations from British ports in neutral vessels. From the evidence in the case it does not appear, that the plaintiffs knew in what vessel the importation was made, but this was a fact peculiarly within the knowledge of the defendant. Besides, the fact of importation being proved, from a British port into the port of Orrington, (which must be taken as a necessary preliminary, so far as respects this part of the charge of the court) the case fell within the general words of the act of 1809, and the exception, that they were imported in a neutral ship, was properly matter of defence. The law did not presume that the vessel was neutral in favor of the defendant. The charge was not against the defendant personally of a criminal neglect of duty, but against the goods only, of a positive act, to wit, an illegal importation. And to call upon the plaintiffs to prove that the vessel was not neutral, was to require the proof of a negative allegation, which the plaintiffs had no means in their power to prove, and proofs of the contrary of which, if they existed, were within the reach of the defendant. I cannot distinguish the present case in principle from those, which have been decided on the game laws. There, the declaration must allege, that the defendant is not duly qualified, negativing specifically all the exceptions of the statute; and yet it seems admitted, that if the act of killing game be proved, the burthen of proof of his being within the exceptions of the statute is thrown on the defendant. It is perhaps not easy to reconcile with these decisions some of the general doc-

trines stated in some of the authorities. Such, for instance, as the doctrine, that wherever the charge involves criminality, the law will not easily suppose it; and therefore, if the charge contains a negative, the law will presume the affirmative without proof. If this were universally true, then, under the game laws, the proof of the not being qualified ought to be shown by the plaintiff, for the charge is clearly of a criminal nature. Without pretending to reconcile all the dicta in the books, it seems to me, that in respect to negative allegations, the reasonable rule is, that the burthen of proof shall rest on the party, who holds the affirmative; and especially where the facts are peculiarly within his privity and cognizance: and that this rule applies more strongly, where the party seeks to shelter himself under an exception, which was not incorporated into the original prohibition of the statute creating the offence. See Attorney General v. Sheriff, Forrest, 43. An exception may, perhaps, properly hold, where the charge substantially consists in a criminal neglect or omission of duty. It seems to me, therefore, that the burthen of proof, in the case at bar, that the vessel in which the goods were imported was neutral, lay on the claimant and not on the United States, and that in this respect the charge of the learned judge was erroneous.

The second objection is, that the court directed the jury, that Castine was, under the circumstances, a foreign port. By "foreign port," as the terms are here used, may be understood a port within the dominions of a foreign sovereign, and without the dominions of the United States. The port of Castine is the port of entry for the district of Penobscot, and is within the acknowledged territory of the United States. But, at the time referred to in the bill of exceptions, it had been captured, and was in the open and exclusive possession of the enemy. By the conquest and occupation of Castine, that territory passed under the allegiance and sovereignty of the enemy. See Dod. 451. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced, or be obligatory upon the inhabitants, who remained and submitted to the conquerors. Castine, therefore, could not, strictly speaking, be deemed a port of the United States; for its sovereignty no longer extended over the place. Nor, on the other hand, could it, strictly speaking, be deemed a port within the dominions of Great Britain, for it had not permanently passed under her sovereignty. The right which existed was the mere right of superior force, the allegiance was temporary, and the possession not that firm possession, which gives to the conqueror plenum dominium et utile, the complete and perfect ownership of property. It could only be by a renunciation in a treaty of peace, or by possession so long and permanent, as should afford conclusive proof, that the territory was altogether abandoned by its sovereign, or had been irretrievably subdued, that it could be considered as incorporated into the dominions of the British sovereign. Until such incorporation, by a recapture or repossession, the territory would be entitled to the full benefit of the law of postliminy. If then by the term "foreign port" were intended a port absolutely within the dominions of a foreign sovereign, and incorporated into his realm, it might be very doubtful, if the direction of the court could be sustained. But it seems to me, that taking the whole direction together, in reference to the first and third counts, it meant no more, than that Castine, being in the possession of the enemy by right of conquest, it was no longer to be considered as a port of the United States, with reference to the non-importation acts, but that, so far as respected the obligatory force of the laws of the United States, it was to be considered a "foreign port," or port "extra ligeantiam reipublicæ." And in this view the direction may well, in point of law, be supported.

This leads me to the third objection, viz. that the bringing of the goods from Halifax to Castine was sufficient to all purposes, to entitle the United States to a verdict on the first and third counts, whereas the court directed the jury to the contrary. Without stopping to examine, whether the single fact of bringing the goods from Halifax to Castine was of itself, "to all the purposes of this libel," sufficient to entitle the United States to a verdict on these counts, as the opinion guardedly expresses it, let us attend to the substance of the objection. It rests altogether upon the assumption, that Castine was to be deemed a port of the United States, in which the laws had their full operation, notwithstanding it was, at the time of the supposed importation, in the actual possession of Great Britain. This position, however, is utterly inadmissible upon every principle of the law of nations. By the conquest and occupation, the laws of the United States were necessarily suspended in Castine; and by their surrender the inhabitants became subject to such laws, and such laws only, as the conquerors chose to impose. No other laws could, in the nature of things, be obligatory upon them, for where there is no protection or sovereignty, there can be no claim to obedience. This objection, therefore, must be also overruled.

The next exception is to the instruction of the court to the jury in respect to the second, fifth and sixth counts. It is argued, that this instruction is erroneous, because the court directed the jury: (1) That the jury might acquit the goods upon the ground of unavoidable accident, necessity or distress of weather, although the specific evidence thereof, which is pointed out in the 27th section of the collection act (March 2, 1799, c. 128), had not been shown on the

trial. (2) That, as the goods had been admitted to an entry by the collector, they might presume from that circumstance, not only that the goods were unladen through unavoidable accident, necessity or distress of weather, but that notice thereof was given to the collector at Hampden, and oath made before him agreeably to the requisitions of the 27th section of the collection act of 2d of March, 1799, c. 128, whereas no such presumption could be legally made. (3) That if they should acquit the goods upon the ground of unavoidable accident, necessity or distress of weather, upon the second count, it was their duty to acquit them also upon the fifth and sixth counts, whereas no such legal consequence followed. (4) That considering the president's proclamation inviting neutral trade, the repeal of the non-importation acts, the blockade of the whole eastern coast of the United States by the enemy, the military possession of Castine by the enemy, which was the only port of entry of the district of Penobscot, whereby the approach of neutral vessels was rendered extremely hazardous, if not impracticable; an emergency arising in such a state of things might, in reference to the importation in question, be deemed as a case of unavoidable accident, necessity and distress, within the intent and meaning of the said 27th section of the act aforesaid.

To understand these objections, it will be necessary to advert to the acts, upon which the second, fifth and sixth counts are founded, and to the points put in issue by the pleadings to the same counts. The second is founded on the 27th section of the act of 2d of March, 1799, c. 128, which provides, that if, after the arrival of any ship laden with foreign goods and bound to the United States, within the limits of any of the districts of the United States, or within four leagues of the coast thereof, any part of the cargo shall be unladen, for any purpose whatsoever, from out of such ship, before such ship shall come to the proper place for the discharge of her cargo or some part thereof; and shall be duly authorised, by the proper officer of the customs, to unlade the same, the master, &c. shall forfeit, &c., and the goods so unladen shall be forfeited and lost, except in the case of some unavoidable accident, necessity or distress of weather; of which unavoidable accident, necessity or distress of weather the master, &c. shall give notice to, and together with two or more of the officers or mariners, &c. on board such ship, shall make proof upon oath before the collector, &c. of the customs of the district, within which such accident, necessity or distress shall happen, &c. &c. The count charges that the goods were so unladen without any unavoidable accident, necessity or distress of weather; and the plea alleges, that the goods were not so unladen without any unavoidable accident, necessity or distress of weather, and concludes to the country. This is plainly, a negative traverse, and would have been bad upon special demurrer, but is aided by the joinder of the issue.

The first objection supposes, that the proofs, required to be made before the collector, of the unavoidable accident, necessity or distress, were indispensable prerequisites, to entitle the claimant to avail himself of such defence. At the argument, the inclination of my mind was strongly against the validity of this objection. It struck me, that it sounded harsh, to deprive the party of his defence at common law, unless the proofs had been made pursuant to the 27th section of the statute. But, upon further reflection, that opinion has been changed. The prohibition of unlading goods without unavoidable accident, &c. was intended to guard the revenue against the fraudulent practice of smuggling. To prevent impositions under false and frivolous pretences of accident, &c. it was deemed proper to interpose as a check, that the facts should be immediately notified and proved before the collector. But the whole object of the provision would be completely defeated, if the party might wantonly omit to give such proofs, and yet avail himself of the defence. It seems necessary, therefore, to effectuate the manifest intention of the act, to hold, that a compliance with these requisites should alone entitle the party to the benefit of the exception. And this construction is corroborated by the 28th section, where the notification and proof, to be made before the collector, are incorporated into the very terms of the exception.

Nor is it any hardship upon the party, to deprive him of a defence, which he has not chosen originally to set up and establish, and in respect to which he has been guilty of a culpable omission of duty. If, indeed, inevitable accident, necessity or distress, prevent a compliance with the law, or the collector refuse to receive the proofs, the party ought not to be prejudiced, and will be restored to his defence. All, that is required, is good faith and diligence. Nor are the proofs so made before the collector conclusive upon any party. It is still competent to the United States to show, that the transaction is founded in fraud, and that the accident, necessity and distress, is a mere fiction ingeniously contrived to cover an illegal traffic. And, on the other hand, it is competent for the claimant, at the trial, to supply any defect of his former proofs, and relieve the cause from every shadow of suspicion. Still, however, the law puts the burthen of proof of the accident, necessity or distress, upon the party, who would avail himself of the defence; and, if he has not complied with the directions of the act, by making the proofs before the collector, and does not satisfactorily explain and excuse the omission, it makes a conclusive pre-

sumption against him. The opinion, therefore, of the district judge, that the jury might acquit upon the ground of unavoidable accident, necessity or distress, although the specific evidence stated in the act was not produced, though, under circumstances, it might be correct, is stated in too broad and unqualified a manner; and this objection of the counsel for the United States must therefore prevail.

The second objection seems as well founded. The law presumes, that every public officer does his duty; and therefore it will not impute to him, without evidence, a voluntary and known deviation from it; much less, a connivance in any illegal transactions. But the law does not go further, and in favor of third persons impute to the collector a knowledge of all the facts attending an importation, of which facts he might be reasonably ignorant; much less, does it impute to him knowledge of a special defence, of which no proofs appear to have been submitted to his inspection. And if the law were otherwise, the mere circumstance, that a collector, acting bona fide, in the discharge of his office, believed in the existence of such facts, is no legal proof or presumption of their actual existence before a court or jury, to whom the question is submitted. The presumption, which the law makes in favor of the good faith and integrity of the collector, is for his own protection; but it can, in no respect, vary the rights of third persons, or change the general rules of evidence applicable to such rights. If the collector be not satisfied of the existence of any unavoidable accident, necessity or distress, his opinion raises no legal presumption against the truth of the defence; nor can it be admitted in evidence for this purpose. And the same rule must equally apply in the converse case. The opinions of third persons are not admissible, to prejudice the rights of parties litigating before judicial tribunals. In the present case, the collector admitted the goods to an entry; and it is, therefore, a fair presumption, that, at the time, he knew of no illegality in the importation. But I cannot yield to the doctrine, that from this entry alone, it is to be presumed, that the goods had been unladen from unavoidable accident, necessity or distress, or that the requisite oaths, and proofs thereof, were made before the collector. If it had been shown, that such a defence had been set up before the collector, and that, after a full knowledge and inquiry, he had admitted the goods to entry, there might have been reason to hold, that the collector was satisfied of that fact; and that the requisite proofs were made before him. Even then his opinion would not be legal evidence of the fact upon the trial of this information. But the opinion of the learned judge of the district court does not contain even this qualification. It imputes to the entry per se a legal effect as evidence, which does not seem to me properly to belong to the act of any ministerial officer. The collector may have acted innocently, though erroneously, in admitting the goods to entry; and it is more consistent with the facts in evidence, to presume that he acted under a mistake of law, viz. that Orrington, as well as Castine, was a foreign port, from which goods might be imported into the United States; than to presume that the goods were unladen from unavoidable accident, necessity or distress, when there is no evidence, that such a defence was set up before him. At all events, if the admission to an entry would support both presumptions, the instruction to the jury, which confined it to one, cannot be supported. And upon the more general ground, which has been stated, I am also of opinion that it was erroneous.

We are now led to the third objection, which is to the charge of the court, that if the goods were landed from unavoidable accident, necessity or distress, and the jury acquitted them on that ground on the second count, they were bound to acquit them also under the fifth and sixth counts. The fifth count is founded on the 50th section of the act of 2d of March, 1799, c. 128, which provides, that if any goods shall be unladen from any vessel, without a special license or permit, they shall be forfeited. The count alleges, that the goods were unladen and delivered without a special license or permit. The plea contains a negative traverse, viz. that the goods were not unladen or delivered without a special license or permit; and concludes to the country; and upon this plea issue was joined. The sixth count is founded on the 92d section of the act of 2d of March, 1799, c. 128, which provides, that, exception in certain districts, no foreign goods shall be brought into the United States from any foreign port or place in any other manner, than by sea, &c.; nor shall be landed or unladen at any other port, than is directed by the same act, under the penalty of forfeiture. The count alleges, that the goods were unladen and landed at a port, other than a port directed by the act of congress. The plea traverses the allegation negatively, viz. that the goods were not unladen and landed at a port other than a port directed by the said act of congress; and concludes to the country; and issue is joined thereon.

It is contended on behalf of the claimant, that the plea of unavoidable accident, necessity or distress of weather, is a good defence under every provision of the revenue laws, whether it be specially stated in the public statutes or not; and in support of this argument, the case of Peisch v. Ware, 4 Cranch [8 U. S.] 347, is cited, as directly in point. To the doctrine there stated by the court, I cordially subscribe, "that it is unquestionably a correct legal principle, that a forfeiture can only be applied to those cases, in which the means, that are prescribed for the prevention of a forfeiture, may be em-

ployed." And therefore, it is clear, that where these means cannot be employed from unavoidable accident necessity or distress of weather, the party is exempted from forfeiture under the 50th section and 92d section of the act of 1799. But the difficulty, in the present case, is not in the principle of law, but in its application to the issues between the parties on the fifth and sixth counts. The single point in issue on the fifth count was whether the goods were unladen without a permit; and on the sixth count, whether they were unladen at a port not authorized by the act of congress. No question could legally arise under those issues, as to the excuse of unavoidable accident, necessity or distress of weather. The question was, whether the unlivery was in fact made without a permit, or in an unauthorized port, and not whether the omission was excused or justified by accident or necessity. With reference, therefore, to the issues between the parties, the proof of unavoidable accident, necessity or distress, could not legally authorize an acquittal. Such proof was completely dehors the record. The opinion of the district court on this point must therefore be overruled. There can be no doubt, that that opinion was delivered upon the general principle of law without reference to the pleadings, to which the attention of the court below was not probably directed by the counsel at the trial, as indeed it has not been at the argument in this court. The point of view, in which that opinion has been principally contested here, is in applying the general principle to cases within the 92d section of the act of 1799.

Hitherto, the opinion of the district court has been considered as referring to an unlading at Orrington. But, as the language of it is general, the counsel for the United States have argued, that it is too broad, and that the unlading at Hampden was equally within the purview of the second, fifth and sixth counts, and especially of the latter; because it is not a port, at which vessels from foreign ports could be admitted to make an entry, nor at which foreign vessels could be admitted to unlade at all. In the view, which has already been taken of this case, it may be not be absolutely necessary to decide this point. But, as it has been fully argued, and there are several other causes, in which it is presented, in this court and the court below, and a decision is very much pressed, it may not be unfit to decide it. By the act of congress (March 2, 1799, c. 128, § 2), Castine is declared to be the only port of entry for the district of Penobscot, and Frankfort, Bluehill, Hampden and Deer Island, are annexed to said district, as ports of delivery only. By the same act (section 18), no entry is to be allowed of any vessel from a foreign port elsewhere than at a port of entry, nor any cargo to be unladen elsewhere than at a port of delivery; and none but ships or vessels of the United States are admitted to unlade, except at certain specified ports, among which Hampden is not enumerated, but Penobscot is. Before the act of 1799, the collection of duties was regulated by the act of 4th of August, 1790, c. 35 [1 Stat. 145]. Under this last act, Penobscot was the port of entry for the district, and was enumerated among the ports, at which foreign vessels might unlade. In the intermediate time between the passing of these two acts, the township of Penobscot was divided by an act of the legislature of Massachusetts (Act Feb. 10, 1796, 2 Mass. Sp. Laws), into two distinct towns, and the southerly part of it was incorporated by the name of Castine, leaving the residue of the old town a corporation under its old name. It is not necessary to decide, whether Castine, under these circumstances, was a port, at which foreign vessels might ordinarily unlade; but it is very clear, that if admitted at all, foreign vessels must have made entry at Castine, for that was the only port of entry for the district; and could not unlade at Hampden, for that was not a port of delivery for this purpose. If, therefore, the case fell within the ordinary rules, an entry at Hampden was an illegal act, and a permit to unlade there equally illegal, and of course utterly void. But by the occupation of Castine by the enemy, the laws of the United States were suspended there, and it was no longer a port of entry for any purpose connected with those laws. Under such circumstances of superior force the collector was bound to remove the custom-house to some other convenient place within the district. He was not at liberty to refuse an entry of any vessel entitled to make it, for such vessels had a right to unlade their cargoes at the ports of delivery within the district; and, as the vis major prevented the exercise of his authority in the proper place, the doctrine, analogous to that of cy pres, applied to the case. Suppose Castine had been sunk by an earthquake, and there was a physical, as well as moral, impossibility of making an entry there, could it be pretended that an entry could not be admitted by the collector at any other port in the district? The provisions of the law presuppose a moral, as well as physical, possibility of complying with them; and in this respect are directory to all parties; but if a literal compliance be impracticable from the presence of superior force, or unavoidable accident, necessity or distress, it stands excused upon the principles of law, as well as the immutable dictates of justice. And the same observations apply to the unlivery at Hampden, for if it became indispensable for the preservation of the property, and the proper port was morally inaccessible, whether it was Penobscot or Castine, or both, such unlivery would stand excused or justified in the same manner. Upon the supposition, therefore, that such an uncontrollable necessity or vis ma-

jor existed, the collector's act, in admitting even a foreign vessel to entry, and to unlivery at Hampden, was not an illegal act, but stands completely justified.

If then the instruction of the district court could be applied to the entry and unlivery at Hampden, so far as it stands upon the general principles of law, independent of the pleadings, it might have been difficult to shake it.

The last objection is to that part of the instruction of the court, which declared certain circumstances, therein enumerated, as constituting a case of unavoidable accident, necessity and distress, within the 27th section of the act of 1799, ch. 128. The circumstances enumerated are: (1) The encouragement held out to importations in neutral vessels by the president's proclamation, and the repeal of the non-importation acts; (2) the blockade by the enemy of all the ports in the eastern country; and (3) the actual military occupation by the enemy of the only port of entry in the district, whereby the approach of neutral vessels to the ports in that section of the country was rendered extremely hazardous, if not actually impracticable. As I understand the charge, and as it was understood at the argument by the counsel, the learned judge considered these circumstances as constituting per se a case of unavoidable accident, necessity and distress, within the statute, and entitling the goods to an acquittal upon the second, fourth, fifth and sixth counts. For the reasons, which have been already stated in reference to the pleadings, this direction cannot be supported, as to the fourth, fifth and sixth counts; for no question, as to such accident, necessity or distress, was in issue between the parties. It remains, therefore, to be considered with reference to the pleadings on the second count.

It has been urged on behalf of the United States, that the only excuse, admitted by the statute, is of marine accidents, or necessities occasioned by stress of weather. But the words of the statute do not admit or require this narrow interpretation. They apply to any unavoidable accident or necessity, arising from any other cause, as well as from distress of weather. And there can be no doubt, that a capture by an enemy is an unavoidable accident or necessity, casus fortuitus, within the purview of the clause. And an unlivery, occasioned by an actual capture, or an imminent and pressing danger of immediate capture, which left no time or opportunity to obtain authority from the proper officers, would be just as good a justification, as if it were occasioned by a tempest or a shipwreck. But it is not sufficient to constitute a case of unlivery by unavoidable accident, necessity or distress, that there is danger of a capture or a tempest. The danger must be immediate, and operating directly on the subject matter. The peril must be so instant and pressing as to leave no hope of escape, or of preserving the property by ordinary means, or by delay for the ordinary authority; for in no other case, can it be considered as unavoidable. And there is great force in the argument of the counsel for the United States, that the accident, necessity or distress, intended by the 27th section of the statute, is such as renders it indispensable to unlade the goods immediately, and not merely such, as renders it hazardous or impracticable to carry the goods to their port of destination. In short, that it must be an accident, necessity or distress, affecting the condition of the ship or goods, and not the voyage merely; for, in the latter case, the unlivery may still be duly authorized by the proper officer of the customs. What is it, that the accident, necessity or distress excuses? Not the proceeding on the voyage, for that the party may always legally abandon; not the unlivery merely, but the unlivery without being duly authorized by the proper officers of the customs. If, therefore, there be time and opportunity to procure such authority, and it is not done, the party cannot shelter himself behind this section of the statute. Now it seems to me, that neither the blockade of the eastern ports, nor the military possession of Castine, were of themselves perils operating directly and immediately upon the goods in this case, so as to present an immediate necessity for their unlivery, without being authorized by the proper officer of the customs. There might have been danger of capture by delay, but it was remote; and the excuse, quia timet, is not such an excuse, as is contemplated in the statute. The blockade of the coast, and the military possession of Castine, might, with other pressing circumstances of accident or injury, have combined to form a case within the statute, but of themselves they could not constitute one. These could not but be known to be the ordinary perils of the voyage, and would, of themselves, no more justify or excuse an unlivery of the goods at one place, than at another. And the policy of the law would be completely defeated, if, after an arrival within the limits of the United States, goods could be unladen without proper authority, because they might be otherwise exposed to capture by the enemy, when no instant and pressing necessity existed, to prevent an application for such authority. In the present case too, there seems less reason for the application of the principle; for, as the goods were brought from Halifax in a manner wholly unexplained in the evidence, the presumption of the danger of capture was not so great as in ordinary cases, and the case was left open to the suggestion, stated by counsel, that they might have been imported under the protection, or by the connivance of the enemy. However, I lay no stress on this suggestion, but for the other reasons, which have been previously urged, I feel myself compelled to overrule the opinion of the district court upon this point.

Upon the whole, the judgment of the district court must be reversed, and a new trial had at the bar of this court.

Case No. 15,337.

UNITED STATES v. HAZARD.

[3 Cent. Law J. 653; 22 Int. Rev. Rec. 309; 14 Alb. Law J. 236, 264; 9 Chi. Leg. News, 20.] [1]

Circuit Court, D. Rhode Island. Sept. 25, 1876.

INTERNAL REVENUE — INCOME TAX — ACTION FOR EXCESS OVER AMOUNT ASSESSED.

In an action to recover income tax alleged to be due from defendants to the United States by virtue of section 13 of the act of congress approved March 2, 1867 [14 Stat. 477], the defendant pleaded in bar that his income for the year in controversy was assessed by the assistant assessor of the district, and a penalty of 50 per cent. imposed for his failure to make return of his income. *Held*, on demurrer, that the plea was bad, and that the assessment so made was not conclusive on the United States. [Following Dollar Sav. Bank v. U. S., 19 Wall. (86 U. S.) 227.]

[Cited in U. S. v. Tilden, Case No. 16,519; U. S. v. Little Miami, C. & Z. R. Co., 1 Fed. 701. Followed in U. S. v. Cobb, 11 Fed. 80.]

[This was an action of debt by the United States against Rowland G. Hazard.]

J. A. Gardner, U. S. Dist. Atty.

Chas. S. Bradley, for defendant.

Before CLIFFORD, Circuit Justice, and KNOWLES, District Judge.

KNOWLES, District Judge. Questions more novel, interesting, and important than those arising under the demurrers in this case are in this district but rarely presented for consideration. Of this the learned counsel of the parties seem to have been mindful, and accordingly in their arguments (by agreement, submitted in writing) have discussed those questions with commendable fullness, painstaking, and vigor. The action is one of debt, to recover the sum of $17,451.05 for a tax on defendant's income, alleged to be due to the United States for the year 1868, by virtue of section 13 of the act of congress approved March 2, 1867 (14 Stat. 477). The suit was entered at the June term, 1875, of this court, and by order of the treasury department was continued, though not answered, until the November term following, when, by leave, the defendant made reply, filing with the general issue three special pleas, each of them, in substance, setting up as a bar to recovery the payment by the defendant of the assessment upon him for income for the year 1868, made by the assistant assessor of the district, together with the fifty per cent. penalty imposed on account of his failure to make return of his income for that year. To these three special pleas the plaintiff demurs seriatim; but in their briefs and arguments the learned counsel of the parties treat the three as in fact substantially one only.

In support of the demurrers the plaintiff avers that the principles of construction and decision established and promulgated by the supreme court of the United States in Dollar Sav. Bank v. U. S., 19 Wall. [86 U. S.] 227, clearly recognize and affirm the right of action in this case as against the bar set up in said special pleas; and to substantiate this averment, and repel all assaults upon it, was throughout the endeavor of his learned counsel, and, on the other hand, to weaken and overthrow this position of the plaintiff was the endeavor of the learned counsel of the defendant throughout his elaborate and ingenious argument. Indeed, it may be said that the only point of contestation presented was the correctness or soundness of this proposition of the plaintiff. As the court should rule upon this point for the plaintiff or the defendant, it was in fact conceded, must it sustain or overrule the plaintiff's demurrers?

To the question thus presented the court has given consideration, with a result which renders it unnecessary to recapitulate, canvass or criticise the arguments of the learned counsel of either party. Its conclusion is that the case above cited is, as claimed by the plaintiff, a case directly in point, to be construed and respected as a precedent decisive of the point presented, controlling the action of this court, and compelling a sustaining of the plaintiff's demurrers. And this, too, even were the principles embodied in that precedent as unaccordant with the views of the presiding judge as with those of his associate of this term. The comments and suggestions of the learned counsel of the defendant, in regard to the decision and opinion of 19 Wall. [supra], it cannot be denied, are forcible and persuasive as well as ingenious; but until they shall have been adopted and promulgated by the supreme court, that opinion, in the judgment of this court, must be construed as already stated—that is, as necessitating the sustaining of the demurrers in this case.

Demurrers sustained.

[1] [Reprinted from 3 Cent. Law J. 653, by permission. 14 Alb. Law J. 236, contains only a partial report.]

Case No. 15,338.

UNITED STATES v. HECKSCHER.

[3 Hunt, Mer. Mag. 71.]

Circuit Court, S. D. New York. 1840.

CUSTOMHOUSE BONDS—ESTOPPEL OF SURETY—EXPORTATION OF SUGARS — DRAWBACK — RELANDING IN UNITED STATES.

[1. The surety on a customhouse bond conditioned that certain sugars, entered for exportation for benefit of drawback, should not be relanded in the United States, is estopped by the recitals of the bond to deny that the quantity

therein specified was in fact laden upon the vessel.]

[2. Where the sugars, after being laden on the vessel, are fraudulently relanded on the dock, the marks obliterated, and other marks substituted, and then replaced on the vessel, in the presence of the customs officials, so as to show on their return a greater number of casks and a larger quantity of sugar than was actually put on board, the transaction is a relanding, within the meaning of the bond, and constitutes a breach thereof.]

At law.

This was an action brought by the United States against Charles A. Heckscher to recover a debt alleged to be due on a bond executed by defendant as one of the sureties of John Doering, dated December 4, 1830, in the penalty of $1,605.20, conditioned that 20 casks of domestic refined sugar, weighing, net, 16,052 pounds, laden by said Doering on board the brig Calliope, and entered for exportation for the benefit of drawback, should not be relanded within the limits of the United States, but should be duly exported to the port of Leghorn, or some other place out of the limits of the United States. The condition of this bond was now alleged to have been broken.

It appeared, from the evidence for the United States, that Doering, who was, in 1830, a sugar refiner in this city, made five separate entries of sugars to be exported, for the benefit of the drawback, by the Calliope, and that other like entries were made by other persons, the whole amounting to 170,896 pounds, the drawback on which, at five cents per pound, was paid by the collector upon the production of the regular certificates of the weighmasters and inspectors. When Messrs. De Yough & Co., the consignees at Leghorn, opened the sugars described in Doering's entries, 45 barrels of them were found to be only partly filled, and 20 other barrels, though full, were found to have been substituted for larger casks, so that there was a deficiency of 44,453 pounds of sugar in that part of the cargo described in Doering's entries. For the defense, it was alleged that no part of the sugar laden on board the Calliope had ever been relanded, within the meaning of the bond; that a fraud had been practiced by the persons who made the entries and owned the cargo, upon the officers of the customs, by means of which the returns to the custom house, from which the bonds were filled up, state a larger quantity of sugar to be on board than was actually put on board the vessel; and that the defendant was merely a surety, and had no knowledge or participation in the fraud.

The manner in which it was effected, as appeared in evidence, was thus: After some of the casks of sugar had been weighed, inspected, marked, and put on board the vessel, the shipper had them relanded on the dock, in the presence of the weighmaster and inspector, and the marks completely obliterated from the casks, and new marks put upon them. They were then weighed again in presence of the customhouse officers, and again put on board the vessel, thus showing upon the returns of the customhouse officers a greater number of casks, and a larger quantity of sugar, than was actually put on board. And in order that the number of casks put on board should correspond with the number of casks in the customhouse officers' return, a number of casks equal to those from which the marks were obliterated, were put on board without the knowledge or inspection of the customhouse officers, which casks contained a far less quantity of sugar than those from which the marks had been obliterated.

From a memorandum on the bond, it appeared that it had been regularly discharged by the customhouse in April, 1831, and it may therefore be contended that it had been regularly discharged in law,—that no action could be maintained on it. But it was shown by the cross-examination of the subscribing witness to the bond that this memorandum was made by him, as a clerk in the customhouse, upon the production of a landing certificate signed by Messrs. De Yough & Co., of Leghorn, with the oath of the master and mate of the vessel and the consular certificate, which papers were produced in evidence. And it was shown, on the part of the United States, that this landing certificate was untrue in point of fact.

Mr. Butler, U. S. Dist. Atty.
James A. Hamilton, for defendant.

THE COURT (THOMPSON, Circuit Justice) charged the jury that the defendant, having admitted, by the recitals contained in his bond, that the 20 casks of refined sugar referred to in the bond and in the corresponding entry, had been had on board the Calliope, and that the net weight of the sugar contained therein was 16,052 pounds, he was estopped from denying these facts, and that, if the jury believed, from the evidence, that the casks, or any part of them, described in said entry, after having been weighed and laden on board the vessel, have been taken and replaced on the dock, in the manner and for the purpose described by the witnesses, such relanding, though before the sailing of the vessel, would be a relanding within the United States, within the meaning of the condition of the bond, and of the acts of congress under which it was taken.

The jury found a verdict for the United States for the amount of the bond.

Case No. 15,339.

UNITED STATES v. HEDGES.

[2 Cranch, C. C. 43.] [1]

Circuit Court, District of Columbia. June Term, 1812.

SEAL ON JUSTICE'S WARRANT.

The word "seal" in a scroll is a seal to a justice's warrant. Quære.

Indictment for assault and battery upon Bates, a constable, in the execution of a justice's warrant for debt. The warrant had only a printed scroll and the word "seal," thus (SEAL).

Mr. F. S. Key, for defendant, objected that it was not a seal.

THE COURT (FITZHUGH, Circuit Judge, absent) said that in this part of the country it is a seal according to common usage. Quære.

Case No. 15,340.

UNITED STATES v. HEINEGAN.

[1 Cranch, C. C. 50.] [1]

Circuit Court, District of Columbia. Jan. Term, 1802.

COURTS — JURISDICTION — DISTRICT OF COLUMBIA.

1. This court has jurisdiction of prosecutions for gaming under the law of Virginia, although that law directs the prosecution to be had before a justice of the peace.

2. An offence against the commonwealth of Virginia, committed in Alexandria before the first Monday of December, 1800, may be prosecuted in this court as an offence against the United States.

3. When the penalty is fixed by law, the fine is not to be assessed by the jury.

Indictment for gaming contrary to the act of Virginia (Rev. Code, p. 184, § 5). Motion to quash the indictment, because the statute points out the mode of prosecution, namely, by conviction before a justice of the peace.

For the traverser it was contended that where another mode of recovering the penalty is provided than by indictment, there indictment cannot be supported; nor can an indictment be maintained unless there be a prohibitory clause. 2 Hale, P. C. 171; Rex v. Robinson, 2 Burrows, 803; Rex v. Royall, 2 Burrows, 832. The act of assembly says "that if any person shall play, &c., every such person, upon conviction thereof before any justice of peace in any county in this commonwealth, by the oath of one or more credible witness or witnesses, &c., shall forfeit and pay twenty dollars, to be levied by distress and sale of the offender's goods, by warrant under the hand of the justice before whom such conviction shall be, and for the use of the poor of the parish wherein such offence shall be committed. And, moreover, every person so convicted shall be committed to the county jail, there to remain until he give sufficient security for his good behavior for twelve months." The 5th section of the act concerning jurors (Rev. Code, 107) does not extend to the district courts, nor does it necessarily imply that indictment is in all cases a proper mode of recovering a penalty. A presentment is a mere informal accusation. It only denounces the fact in order that it may be punished in legal form. The transfer of jurisdiction has not altered the laws of Virginia in this part of the district. But by the first section of the act concerning the District of Columbia, February 27, 1801 (2 Stat. 103), those laws are expressly declared to remain in force. And although, by the 5th section, this court has cognizance of all offences, yet, by the 11th section, the justices of the peace here are to have the same cognizance as justices of the peace in Virginia. By the letter of the act of assembly the penalty does not accrue until a conviction before a justice of the peace has taken place. By the third section of the supplemental act of congress of 3d March, 1801 (2 Stat. 115), this court is to exercise the same power and jurisdiction as the district courts of Virginia. But those courts have no jurisdiction of this offence. The 2d section of that act did not mean to limit the mode of prosecution, but to alter the style. Besides, the fact is stated in the indictment to have been committed before the 3d of March, 1801, and therefore the act of that date cannot alter the mode of prosecution then existing. The penalty was to accrue to the poor of the parish, and upon the commission of the offence the right to the penalty vested in the parish. The subsequent act of congress could not take away this vested right. If the remedy by indictment is cumulative, it ought not to be countenanced by the court. 2 Hawk. P. C. 301, c. 25, § 4, 7 Coke, 36a; Castle's Case, Cro. Jac. 644.

Mr. Mason, contra. The powers of this court are not limited by those of the district courts of Virginia. The words of the 5th section of the act of congress concerning the District of Columbia are peremptory. This court shall have cognizance of all offences, &c. But the district courts of Virginia had cognizance of this offence by the act of 1797 (chapter 2). No penalty can be recovered but by indictment, presentment, or action of debt. Act of congress of 3d March, 1801, § 2 (2 Stat. 115). The case cited from 2 Burrows only shows that the remedy by indictment is not the best mode. By the constitution of the United States the trial of all criminal cases must be by jury. If the act of Virginia giving cognizance to a justice of peace is repugnant to the constitution, the latter must prevail. The act of 3d of March is not ex post facto, it only directs the mode of prosecution.

THE COURT refused to quash the indictment, relying on the 2d section of the act of 3d of March, 1801. The jury found a ver-

[1] [Reported by Hon. William Cranch, Chief Judge.]

dict against the traverser, stating the fact to have been committed before the first Monday in December, 1800, the day appointed by the act of congress of 1790 for the removal of the seat of government of the United States to the District of Columbia.

Mr. Mason moved for judgment on the verdict, and contended that there never had been a time when the laws of Virginia were not in force in this part of the district.

Mr. Swann, for the traverser, contended that this was an offence against the commonwealth of Virginia, and not against the United States, and that the penalty accrued to the commonwealth, who might maintain an action of debt for it.

Before KILTY, Chief Judge, and MARSHALL, Circuit Judge.

KILTY, Chief Judge. The question to be determined, is, whether on the motion of the attorney for the United States, judgment shall be given on the verdict of the jury. The effect of the verdict is admitted to be that the offence was committed before the 1st Monday of December, 1800, and within one year from the presentment, so that the question will turn upon the jurisdiction of this court, as to an offence committed within the corporation of Alexandria before the said 1st Monday of December, 1800. I think it necessary to recur to the origin of the jurisdiction of the United States within this district. By the 8th section of the 1st article of the constitution, congress are empowered "to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States." In December, 1789, an act passed in Virginia declaring that a tract of country as therein described, should be forever ceded and relinquished to the congress and government of the United States, in full and absolute right and exclusive jurisdiction, pursuant to the 8th section of the 1st article of the constitution of the United States, with a proviso that the jurisdiction of the laws of Virginia, over individuals residing within the limits of such cession, should not cease or determine until congress, having accepted the cession, should by law provide for the government thereof. The congress, by an act passed in 1790 (1 Stat. 130), did accept the cession of Virginia and Maryland, of a district as therein described, which was altered, by an act passed in 1791 (1 Stat. 214), so as to include Alexandria, and in the act of 1790, it was provided that the operation of the laws of the state within such district, should not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until congress should otherwise by law provide. The particular place for the seat of government, was afterwards established by the president's proclamation dated the 30th of March, 1791. I lay it down as a consequence flowing from these several public acts, that from the date of the proclamation, all the laws of Virginia then in existence, or thereafter to be made respecting persons and property, within the cession, were made subject to the future controlling power of congress, in such manner as they might exercise it after the 1st Monday in December, 1800; and that the security of persons and rights, and the punishment of offences within the said district, were liable to the said jurisdiction of congress under any laws to be constitutionally made.

In this situation of the inhabitants of this district, there never was any period of time at which the law had not operation to punish offences, or at which breaches of the laws committed, but not prosecuted, or commenced to be prosecuted, would cease to be offences, or cease to be punishable. It appears to me that when the operation of the laws was reserved in the acts of cession and acceptance, the reservation included a power in the state courts to put those laws in execution, and therefore I have formed the opinion that the power of those courts remained complete until the 27th of February, 1801, when the act respecting the District of Columbia passed, establishing this court and thereby providing otherwise by law. Under the act of 1790, the congress had no power to affect the operation of the laws of Virginia until the 1st Monday of December, 1800. They then had the power, but the operation of those laws was not affected till congress provided otherwise by law. It must have occurred to the framers of those laws, that no point of time could be fixed on for the change of jurisdiction, when all offences would be acted upon and tried, and when there should be no offences remaining committed and not tried. The courts of Virginia, while they possessed the power of trying offences, might have exercised it as expeditiously as their laws would admit, so as to leave few cases undecided. But when the jurisdiction of the United States courts commenced, that of the Virginia courts ceased; for by the words "the operation of the laws shall not be affected until the time fixed for the removal, and until congress shall otherwise by law provide," we must understand that when these events happened, the operation was affected. The question arises, then, as to the manner of punishing offences committed before the removal, or the assumption, and not acted upon in any manner by the Virginia courts. I cannot admit the supposition that such offences were to remain unpunished. To suppose that they were to be punished by the courts of Virginia out of the district, would be to defeat the purposes for which the jurisdiction was taken, and would tend to prevent the exercise of it.

The 14th section of the act concerning the district provides for the continuing over to this court all actions, process, &c. depending

in the hustings court; but the omission of an express provision does not prevent the exercise of a power which necessarily flows from the nature of the jurisdiction. I therefore consider that all offences which were committed and not tried, or in which the trial or prosecution had not commenced, are cognizable by this court. The congress, in providing by law for the regulation of the district, had a right to take the state laws in whole or in part. They have said that the laws of Virginia should be in force here, and they have declared that all fines accruing under these laws should be recovered in the name of the United States in this court. I give the word "accruing" a very unlimited sense, and consider that the moment an offence is committed, a right accrues in the government by its courts to prosecute for the penalty provided by a prior law, and that all penalties which had not been exacted, were, by the change of jurisdiction, accruing to the United States.

MARSHALL, Circuit Judge, assented to the judgment, upon the grounds that the jurisdiction of the court of hustings (it being but an exercise of the corporate power of the town of Alexandria) continued notwithstanding the transfer of the jurisdiction from Virginia to the United States.

After the opinion of the court was given, Mr. Jones moved in arrest of judgment, and assigned general errors only; and requested that his motion might be continued for argument till next term. But THE COURT refused the continuance, and ordered the motion to be argued at this term—upon which Mr. Jones withdrew his motion. He then objected to the rendition of judgment for the penalty of $20, because the jury ought to have assessed the fine under the law of Virginia, p. 112. But the penalty being certain, and not discretionary, THE COURT ordered the judgment to be entered.

Case No. 15,341.

UNITED STATES v. The HELENA.[1]

[24 Hunt, Mer. Mag. 71.]

District Court, D. Michigan. Oct. 21, 1850.

JURISDICTION OF DISTRICT COURTS—CUTTING TIMBER RESERVED FOR NAVAL PURPOSES—LIBEL OF FORFEITURE AGAINST VESSEL—CONSTRUCTION OF STATUTE.

[1. The district court has exclusive jurisdiction, by virtue of the 9th section of the judiciary act of 1789, of a libel of forfeiture against a vessel seized for carrying away timber reserved for naval purposes, and which has been cut from public lands in violation of the act of March 2, 1831.]

[2. All kinds of timber cut upon public lands held by the United States for the purpose of supplying timber to the navy are included in the prohibition of the statute, and, in a libel of forfeiture against a vessel for carrying the same away, it is not necessary to allege of what kinds the timber was.]

This was a libel filed against the vessel in this case, under the 2d section of the act of 2d of March, 1831 [4 Stat. 472], and which charges that the master, owner, or consignee had taken on board, and transported from Muskegon, in the state of Michigan, to Chicago, in the state of Illinois, a large quantity of timber cut on lands belonging to the United States, which timber had been transported "with the knowledge of the owner, master, or consignee, that the same had been cut on the United States lands." The claimant of the vessel interposed an answer to the libel in the nature of a plea to the jurisdiction, and which answer avers that the court had no jurisdiction under the act aforesaid, because the second section of said act was limited to the transportation by vessels of timber cut on lands reserved or purchased for naval purposes, or live oak and red cedar timber which is reserved for purposes of the navy, and that as there was no pretence that the timber carried was cut from lands purchased or reserved for naval purposes, nor was live oak or red cedar, that the case was not within the statute.

George C. Bates, Dist. Atty.

Robert D. Wilson and Henry T. Backus, for respondents.

On the opening of the court his honor, WILKIN, District Judge, delivered his opinion sustaining the libel, and overruling the plea to the jurisdiction. His honor decided the following points:

1. That under the 9th section of the judiciary act of 1789 (1 Stat. 77), the district court has exclusive jurisdiction of cases of this kind, as they are brought for seizures made pursuant to the 9th section, and to recover penalties and forfeitures that have accrued to the United States.

2. That the 2d section of the act of 2d March, 1831 (4 Stat. 472), embraces all and every kind of timber specified in the first section, the enacting clause of the statute, and that vessels engaged in carrying lumber, cut on United States lands, with a knowledge of the fact on the part of the owner, master, or consignee, are liable to seizure and condemnation, pursuant to said 2d section. That the decision of the supreme court in the case of U. S. v. Briggs, 9 How. [50 U. S.] 351, had settled the question that all kinds of timber cut on lands belonging to the United States were embraced in the enacting clause of the act, and that the word "aforesaid" in the second section embraced all the various kinds of timber specified in the first section.

As this is the first decision ever made upon the statute, and a large number of seizures have been made for violation of the second section, and the prosecutions have been awaiting a decision, it has been looked for with much anxiety, as well by the vessel

[1] [Reversed in Case No. 15,342.]

owners as the government. The law is now settled, and it is very important that all should bear in mind:

1. That persons trespassing on the public lands are liable to indictment, and, if found guilty, to punishment by a fine equal to three times the value of the timber cut, and also to imprisonment for a year for each offense.

2. That all vessels that are engaged in carrying lumber so cut on the lands of the United States, with a knowledge of the fact on the part of the owner, master, or consignee, are liable to forfeiture for each offense, and the captain of such vessel to a fine of one thousand dollars for each cargo.

[From this decree an appeal was taken to the circuit court, where the decision of this court was reversed, and the libel dismissed. Case No. 15,342.]

Case No. 15,342.

UNITED STATES v. The HELENA.

[5 McLean, 273.] [1]

Circuit Court, D. Michigan. June Term, 1851.[2]

CUTTING TIMBER RESERVED FOR NAVAL PURPOSES —FORFEITURE OF VESSEL.

To bring a case within the second section of the act of congress of March 2, 1831 [4 Stat. 472], entitled an act to provide for the punishment of offenses committed in cutting, destroying, or removing live oak and other timber or trees for naval purposes, the libel must allege that the timber transported by the vessel, &c., to incur a forfeiture, was knowingly by the master, &c., taken from lands reserved for naval purposes, or that the timber so transported, was cut on lands of the United States, not so reserved, and was "live oak or red cedar."

[Cited in Leatherbury v. U. S., 32 Fed. 782; Teal v. Walker, 111 U. S. 242, 4 Sup. Ct. 422.]

[See U. S. v. Schuler, Case No. 16,234.]

[Appeal from the district court of the United States for the district of Michigan.]

In admiralty.

Mr. Bates, Dist. Atty., by Mr. Watson, for the United States.

Mr. Wilson, for defendants.

OPINION OF THE COURT. The libel in this case states that the schooner Helena was, on the 1st of August, 1850, seized by the collector of Detroit, within the district of Michigan, as forfeited to the United States for having, with the knowledge of the owner of the vessel, taken on board timber cut on lands belonging to the United States, without proper authority in writing, &c., to transport the same to a port or place within the United States, to wit, from the state of Michigan, to Chicago in Illinois, &c.; that said schooner transported, as aforesaid, thirty thousand feet of lumber, manufactured from timber cut on the lands of the United States, &c., with intent to defraud the United States, and contrary to the force, form, and effect, of section 2 of the act of congress of March 2, 1831, &c. Theodore Newell, owner and claimant of the schooner, by his attorney, filed his answer, that he had not taken on board with the knowledge of the master, owner, or consignee, and transported any timber prohibited by the above act, and for which a forfeiture of his vessel had been incurred, and averred a want of jurisdiction under the act. This answer and plea were subsequently overruled by the court, and the jurisdiction of the court was sustained, and a forfeiture of the vessel was, pro forma, decreed [Case No. 15,341], from which an appeal was taken by the defendant, to this court.

The decision of this case depends upon the construction of the act of congress above stated. When we look to the title of the act, and the third and last sections, it would seem to have for its object, the protection of timber specially reserved for the navy. The title is, "An act to provide for the punishment of offenses committed in cutting, destroying, or removing live oak and other timber or trees reserved for naval purposes." And the third section provides, "that all penalties and forfeitures under the provisions of this act shall be sued for, recovered, and distributed, and accounted for, under the directions of the secretary of the navy; and shall be paid over, one half to the informer or informers, if any, or captors, where seized, and the other half to the commissioners of the navy pension fund," and the said commissioners are authorized to remit, in whole, or in part, any fine, penalty, or forfeiture incurred under the act.

The act, as construed, punishes, on indictment and conviction, by fine and imprisonment, any one who shall cut timber on the public lands. Now it would seem to be rather an anomaly in legislation, to place under the control of the commissioners of the navy pension fund, and for the special benefit of such fund, all prosecutions by indictment for cutting timber upon the public lands, which comprise several hundred millions of acres. We can readily conceive why timber reserved for the navy should be under their control, the subject being intimately connected with that branch of the public service. But no reason is perceived why they should exercise the power to remit all forfeitures and penalties arising under the act. Such a power could never have been intended by congress to extend to trespasses on all the lands of the United States. And when we consider the policy of congress in giving, for more than twenty years past, pre-emptive rights to settlers upon the public lands, who have made improvements thereon, it would not seem to comport with a prosecution by indictment, fine, and imprisonment, under this law. This may be speaking against authority, as

[1] [Reported by Hon. John McLean, Circuit Justice.]

[2] [Reversing Case No. 15,341.]

the supreme court decided, in the case of U. S. v. Briggs, 9 How. [50 U. S.] 351, that for cutting "other timber" than that which has been reserved for naval purposes, an individual under this law may be indicted, fined, and imprisoned. There has not been a settler upon the public lands for the last twenty years, who might not have been indicted, if prosecuted before the pre-emption right to the land was given to him by law.

Now here the act of trespass upon the public lands is very differently treated by congress, according to this construction. In the one case an individual is indicted, fined, and imprisoned. In the other, the law gives him a right to the land over all others, where he has made an improvement upon it. An improvement cannot, very well, be made in a timbered country, without cutting timber. And one cannot but reflect how fortunate one individual is, who secures the land by his trespass, over the other who is punished, by indictment, fine, and imprisonment. Could congress have intended to punish in the one case, and reward in the other, trespasses, equally in violation of law? It is true, some trespassers cut the timber and convey it off the ground, whilst others remain on the ground, and continue the trespass, by cutting the timber, and using it for their own purposes. To the trespasser with a continuando the land is given, whilst the other is indicted, fined, and imprisoned. The settler will of course select the most valuable tract, in reference to the soil and timber, the other selects the best timber without reference to the soil.

In view of the liberal policy of congress to settlers upon the public lands, I had supposed that the above act might be so construed, as intended to protect, by the stringent means provided, only timber reserved for naval purposes; or, at least, timbers used for the navy, as "live oak and red cedar."

The first section of the act declares, "that if any person shall cut, &c., any live oak or red cedar tree or trees, or other timber, standing, growing, or being on any lands of the United States, which, in pursuance of any law passed, shall have been reserved or purchased for the use of the United States, for supplying or furnishing therefrom, timber for the navy of the United States," "or, if any person shall remove, &c., from any such lands which shall have been reserved or purchased as aforesaid, any live oak or red cedar tree or trees, or other timber," &c., "or if any person or persons shall cut, &c., any live oak or red cedar tree or trees, or other timber on, or shall remove, &c., any live oak or red cedar trees, or other timber, from any other lands of the United States, acquired or hereafter to be acquired, every person so offending," &c. In the case above cited of U. S. v. Briggs, under the words, "other timber," from any other lands of the United States, or "hereafter to be acquired," &c., the person charged was held liable to be indicted for cutting timber under the statute, and that is the extent of the decision. It must be admitted that the words referred to, if not restrained by other provisions of the act, may be so construed. And this construction having been given to them by the supreme court, it concludes all inferior jurisdictions.

But the question as to the forfeiture of the vessel, is governed by the second section. That provides, "that if the master, owner, or consignee of any ship or vessel shall, knowingly, take on board any timber cut on lands, which shall have been reserved or purchased as aforesaid," &c.; "or shall take on board any live oak or red cedar timber cut on any other lands of the United States, with intent to transport the same, the ship or vessel on board of which the same shall be taken or seized, shall, with her tackle, apparel, &c., be forfeited to the United States," &c. Now, the question here arises, whether the vessel incurs a forfeiture under the above provision, by transporting, &c., any timber not taken from lands reserved for naval purposes, or if taken from other lands of the United States, not so reserved, which is not "live oak or red cedar." The words of the section are so explicit, that there would seem to be no doubt of their meaning. The first part of the provision undoubtedly applies to lands reserved, and it is equally clear that the second part embraces lands not reserved. A forfeiture is incurred if the vessel take on board any timber cut on the lands reserved; but to incur a forfeiture, under the second provision, for taking timber from lands not reserved for naval purposes, it must be "live oak or red cedar."

It is insisted that the words in the second section, "purchased as aforesaid," refers to the words of the first section, "or other timber from any other lands of the United States, acquired or hereafter to be acquired." That under the construction given to the first section, these words subject the person removing the timber to an indictment, fine, and imprisonment, is admitted; but the words "purchased as aforesaid" cannot, by any fair interpretation, be made to refer to any other words in the first section, than the identical words which are there used. "Or if any person or persons shall remove, &c., from any such lands which shall have been reserved or purchased as aforesaid." is the language of the first section. And they are the same words used in the second section, and are used in the same connection. That this is the correct construction is manifest from the fact, that the second section also provides, in the words which follow, that "live oak or red cedar" taken on board from other lands than those reserved, shall cause a forfeiture of the vessel. Now, if the words in the second section, "purchased as aforesaid," refer, as contended, to lands not reserved, this provision was unnecessary. It

limits the forfeiture to "live oak and red cedar;" but if the reference contended for be the true construction, then the forfeiture of the vessel is incurred, for transporting any kind of timber cut on the public lands. If timber of any kind, even for fire-wood, were taken on board from an improvement of an occupant, to whom a pre-emptive right was subsequently given by law, the vessel would be forfeited. Such a construction would make the second section inconsistent in its provisions, which ought never to be done by construction. It would impose a forfeiture of the vessel for taking on board timber from reserved lands, from lands not reserved, and then only for taking from unreserved lands, "live oak and red cedar."

It is immaterial what an attorney general may have suggested as necessary or proper to prevent trespasses, at one time, or what may be supposed to have been the intention of congress, from circumstances or facts out of the law; their meaning must be ascertained from the language of the act. And where that language is susceptible of but one construction, no other can be given. As now construed, the law punishes trespassers by fine and imprisonment, when convicted on an indictment; civil actions for trespass may be brought, and under an early act, the troops of the United States may be used in forcing trespassers from the public lands. These remedies would seem to be ample to protect the public property. If, in addition to these, the forfeiture of the vessel used be necessary, congress can so provide. It is enough to say that, in the act under consideration, they have not so provided, in regard to the vessel which shall transport timber from public lands not reserved for naval purposes, unless it be "live oak or red cedar." And such a provision shows that they did not intend to embrace other timber.

The charge against the vessel in the libel is general, of having taken on board a large amount of lumber, and transported it, &c., without an allegation that it was taken from lands reserved for naval purposes, or that it was "live oak or red cedar;" the case, therefore, is not brought within the statute; the procedure for the forfeiture of the vessel cannot be sustained. The decree of the district court is, therefore, reversed, and the libel is dismissed. This decision will not interfere with the procedure of the government against the timber on board of any vessel, which has been taken from the public lands

Case No. 15,343.

UNITED STATES v. HELLMAN.

[23 Int. Rev. Rec. 387.]

District Court, S. D. New York. 1878.[1]

INTERNAL REVENUE—REPEAL OF LEGACY TAX.

[The act of July 14, 1870 (16 Stat. 261), repealing the legacy tax, did not affect the government's rights to a tax which had accrued by the happening of the contingency upon which the legacy passed prior to the date of the repealing act, although the legatee did not become entitled to the possession or enjoyment of the legacy until after that date.]

[Cited in U. S. v. Rankin, 8 Fed. 875.]

This action is brought [against Angelo Hellman] to recover a legacy tax under section 1245, Act June 30, 1864 (13 Stat. 285), as amended by Act July 13, 1866 (14 Stat. 140), the fact being that the tax accrued,—that is, the contingency upon which it arose, the passing of the legacy, occurred,—before October 1, 1870, although the party interested became entitled to the possession or enjoyment of the legacy, and to the beneficial interest in the profits accruing therefrom, after October 1, 1870. The question presented is whether the act of July 14, 1870, § 3 (16 Stat. 257), repealing the tax on legacies and successions on and after October 1, 1870, applies to this case, or is it saved by section 17 of that act (16 Stat. 261)?

Roger M. Sherman, Asst. U. S. Atty.
Lauterbach & Spingarn, for defendant.

BLATCHFORD, District Judge. I do not think the decision in Clapp v. Mason, 94 U. S. 589, covers this case. The facts in this case are like those in Mason v. Sargent [Case No. 9,253], and I concur with Judge Shepley in the views announced by him in his decision in that case. The defendant, being executor, is made liable or "subject" to the tax, and was bound to pay it before paying over the legacies, after the legatees became entitled, in February, 1875, to the possession and enjoyment of the legacies. Judgment is ordered for the plaintiffs on the demurrer, with leave to the defendant to answer in twenty days on payment of costs.

[Subsequently a writ of error was sued out from the circuit court, where the judgment of this court was affirmed. Case No. 6,341.]

[1] [Affirmed in Case No. 6,341.]

UNITED STATES (HELLMAN v.). See Case No. 6,341.

Case No. 15,344.

UNITED STATES v. HELRIGGLE.

[3 Cranch, C. C. 179.][1]

Circuit Court, District of Columbia. Nov. Term, 1827.

INDICTMENT — OMISSION OF PROSECUTOR'S NAME.

The court in Alexandria county will, on motion, quash an indictment for misdemeanor, unless the name of a prosecutor be indorsed thereon, according to the Virginia statute of the 13th of November, 1792, § 24, although the defendant should have been bound by the recognizance before a justice of the peace to appear in this court to answer for the offence.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Indictment for assault and battery. The defendant had been bound by recognizance before a justice of the peace to appear in this court to answer for the offence.

Mr. Taylor, for the defendant, moved the court to quash the indictment, because the name of a prosecutor was not written at the foot of the indictment before it was sent to the grand jury, according to section 24 of the Virginia act of November 13, 1792, p. 105.

Mr. Swann, for the United States, said that where the party has been recognized to appear in this court to answer for a misdemeanor, his practice has been to send up an indictment to the grand jury without the name of a prosecutor. By section 24 of the act of November 13, 1792, it is enacted as follows: "No information for a trespass or misdemeanor shall be filed in any court but by express order of the court entered on record, nor unless the party supposed to be culpable shall have failed to appear and show good cause to the contrary, having been required to do so, by a summons appointing a convenient time for that purpose, served upon him or left at his usual place of abode; and the name and surname of the prosecutor, and the town or county in which he shall reside, with his title or profession, shall be written at the foot of the information before it be filed; and of every bill of indictment for any trespass or misdemeanor before it be presented to the grand jury." And by section 38 of the same act (page 106), it is enacted, "that in all indictments for assaults and batteries, and other offences not capital, now depending or hereafter to be prosecuted, it shall be lawful for the court before whom the same shall be depending, upon good cause to them shown, to compel the prosecutor to find security for payment of the costs; and if such prosecutor shall fail to give security accordingly, the indictment shall be dismissed with costs." By section 2 of the act of Virginia of December 2, 1795, it is enacted, "that when any presentment shall be made of any offence, by the grand jury, upon the knowledge of two of their body, the names of the grand jurymen giving the information shall be indorsed at the foot of the presentment; and when any presentment, information, or indictment shall be made, by the grand jury, of any offence, upon the testimony of a witness called upon by the court or grand jury to give testimony concerning the same, the name of such witness shall likewise be indorsed thereon; but in none of the cases above mentioned shall the person or persons, so informing, be liable to costs." On the 28th of January, 1802, after the separation of this county from Virginia, the legislature of that state passed an act (page 431) stating that "doubts have arisen whether any information can be filed, or indictment for trespass or misdemeanor be sent to a grand jury, unless the name of a prosecutor be written at the foot of such information or indictment;" and providing that no prosecutor should be required on an information or bill of indictment for a trespass or misdemeanor filed, or sent to a grand jury, on and in consequence of a previous presentment of a grand jury made on their own knowledge, or on the information of any two of their own body.

THE COURT (MORSELL, Circuit Judge, contra) quashed the indictment.

See the twenty-ninth rule of practice of this court; U. S. v. Shackelford [Case No. 16,260], in this court at April term, 1828; U. S. v. Hollinsberry [Id. 15,380], at November term, 1829; Virginia v. Leap [Id. 16,964], in this court, April term, 1801; U. S. v. Sandford [Id. 16,221], July 14, 1806; U. S. v. Jamesson [Id. 15,466], January, 1802; U. S. v. Singleton [Id. 16,293], June, 1805; U. S. v. Willis [Id. 16,728], November, 1808; U. S. v. Carr [Id. 14,729], November, 1823.

Case No. 15,345.

UNITED STATES v. HEMMER et al.

[4 Mason, 105.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1825.

REVOLT OF SEAMEN—CONFINEMENT OF MASTER—CONSPIRACY.

1. A confinement of the master within the statute of 1790, c. 9, § 12 [1 Stat. 115], is not limited merely to a seizure of the master, and preventing the movements of his body, or to locking up in a particular place, as a cabin or stateroom, but extends to all restraints of personal liberty in freely going about the ship, by present force or threats of bodily injury.

[Cited in U. S. v. Huff, 13 Fed. 641.]

2. A revolt is an usurpation of the authority and command of the ship, and an overthrow of that of the master or commanding officer. Any conspiracy to accomplish such an object, or to resist a lawful command of the master for such purpose, and any endeavor to stir up others of the crew to such resistance, is an endeavor to commit a revolt within the meaning of the same section of the statute.

[Cited in U. S. v. Haines, Case No. 15,272; U. S. v. Peterson, Id. 16,037.]

Indictment: 1. For confining the master of the ship Mentor, on board of which the defendants [Henry Hemmer and others] were seamen: 2. For endeavoring to commit a revolt on board of the same ship. The facts, as they appeared in evidence, are fully detailed in the opinion of the court on the libel for wages by the same seamen, and need not be here repeated. See The Mentor [Case No. 9,427].

Mr. Blake, U. S. Dist. Atty.

Gay & Bassett, for defendants.

STORY, Circuit Justice, in summing up the facts to the jury, said:

The indictment charges two distinct offences: 1. An unlawful confinement of the

[1] [Reported by William P. Mason, Esq.]

master of the ship: 2. An endeavour to commit a revolt on board of the ship. The language of the act of congress on which the indictment is founded (Act 1790, c. 9, § 12) is, that "if any seamen shall confine the master of any ship or other vessel, or endeavour to make a revolt in such ship," such person or persons shall, on conviction, suffer the punishment prescribed by the act. What is a confinement within the meaning of the statute? I conceive it not to be limited to mere personal restraint by seizing the master and preventing the free movements of his body, nor to imprisonment in any specific place, as locking him in a state-room or cabin. It is equally a confinement, within the statute, to prevent him from free movements about the ship, by force, or intimidation, as by limiting him to walking on a particular part of the deck by terror of bodily injury, or by present force. If he is surrounded, and prevented from moving, where he pleases, according to his rights or duty as master, under threats of force, or if he is restrained from going to any part of the ship by an avowed determination of the crew, or of any part of them, to resist him, and to employ force adequate to prevent it, these fall within the meaning of confinement. They are restraints of his personal liberty, destroying his authority on board of the ship, and compelling him to limit his movements to the space allotted him. The case of U. S. v. Bladen [Case No. 14,606], before Mr. Justice Washington, is directly in point.

As to the other offence, of an endeavor to commit a revolt, it has heretofore come before this court for consideration in several cases. A revolt is, in the sense of the statute, an open rebellion or mutiny. It is an usurpation of the authority and command of the ship, and an overthrow of that of the master or other commanding officer. Wherever the crew, or any part thereof, take possession of the vessel against the will, and in defiance of the authority of the master, or put another person in command, and control her navigation against his will or orders, that is a revolt. And any act done with intent to accomplish such an object is an endeavor to commit a revolt. If the crew, or a part thereof, conspire to refuse to do any further duty on board, and to disobey all further orders of the master, with a view to compel him to yield up the command of the ship, or to grant to them any allowance inconsistent with his duty as master, or to prevent him from exercising his lawful authority in the navigation, management, or police of the ship, it is an endeavor to commit a revolt. And a general conspiracy or combination among the crew, or a part thereof, to resist a single lawful order of the master, for the like purposes, and any act done in pursuance of such conspiracy or combination, and any endeavor to stir up others of the crew to such resistance, would, in my opinion, fall within the same predicament. In this exposition of the statute, I am authorised to say, that the district judge also concurs. See U. S. v. Smith [Case No. 16,337]; The Exeter, 2 C. Rob. Adm. 261, and particularly under page 273; U. S. v. Sharp [Case No. 16,264]; U. S. v. Bladen [supra].

The defendants were found guilty.

NOTE. The case of U. S. v. Kelly, 11 Wheat. [24 U. S.] 419, may be thought to narrow the doctrine here stated as to endeavors to commit a revolt. But it is understood, that such was not the intention of the court; and that the language employed was not designed to exclude cases, where the endeavor is to obstruct or prevent the master from the free exercise of his command on board, in any thing touching the management, police, or navigation of the ship.

Case No. 15,346.

UNITED STATES v. HENDRIC.

[2 Sawy. 476; [1] 6 Chi. Leg. News, 224.]

District Court, D. Oregon. Dec. 20, 1873.

VIOLATION OF ELECTION LAWS—INDICTMENT—COUNSEL AND ADVICE.

1. An allegation that the defendant offered a party $2.50 to vote, is equivalent to an allegation that he counseled and advised such party to vote.

[Followed in U. S. v. O'Neill, Case No. 15,949. Cited in U. S. v. Johnson, Id. 15,488.]

2. Allegations in the first count in an indictment may be adopted in the second one by referring to them; and the words "said Johnson" in a second count indicate the Johnson mentioned and described in the first count, including his status or condition as therein stated, with reference to the charge made in the indictment.

[This was an indictment against Robert Hendric.]

Addison C. Gibbs, for the United States.

Richard Williams, for defendant.

DEADY, District Judge. This indictment was found December 9, and contains two counts.

The first count charges that at an election held on October 13, 1873, at South Portland precinct, in the county of Multnomah, and state of Oregon, for representative in the congress of the United States, the defendant "did then and there knowingly, etc., offer to give to one James Johnson (he, the said Johnson, then and there not being entitled to vote at said election, for the reason that he was not twenty-one years of age), the sum of $2.50, as a gift, bribe and reward to him, the said Johnson, to vote at said election for representative in congress of the United States," contrary to the statute, etc. The defendant demurs to this count, and for cause of demurrer says, "that it does not appear that he counseled or advised said Johnson to vote." This indictment is found under two provisions of the act of May 31, 1870 (18 Stat. 144), which, taken together, provide: "That if, at

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

any election for representative * * * in the congress of the United States, any person shall * * * aid, counsel, procure or advise any person * * * to vote without having a lawful right to vote, * * * such person shall be deemed guilty of a crime." It not being alleged that Johnson voted at this election, of course the defendant could not have aided or procured him to vote. But if the defendant counseled or advised Johnson to vote, then, although the latter did not vote, he would be guilty of the crime defined in the clauses of the act above cited.

The sufficiency of the count then turns upon the question whether it appears therefrom that the defendant counseled or advised Johnson, under the circumstances, to vote. In U. S. v. Bachelder [Case No. 14,490], it was held that "it is not in general necessary in an indictment for a statutable offense to follow the exact wording of the statute. It is sufficient if the offense be set forth with substantial accuracy and certainty to a reasonable intendment. The cases cited from the common law, where a different rule is supposed to prevail, do not apply." The words "counsel" or "advise" are not used in the count, and unless it contains equivalent terms, it is insufficient. Worcester defines the verb to counsel as follows: (1) To give advice to; to admonish. (2) To propose to be done; to recommend. Now it is alleged in this count that the defendant offered to give Johnson $2.50 to vote, and it seems to me that he thereby proposed to him to vote —not only counseled him by words, but added the persuasive argument of a bribe. If it was alleged that the defendant counseled Johnson to vote, or proposed to him to vote, or recommended or advised him to vote, there can be no question but that the allegation would be in substantially the same language as that of the statute, and sufficient; but when he offered Johnson money to induce him to vote, he necessarily proposed to him and counseled him to vote, he thereby did all this and more. When the defendant offered this bribe to Johnson to induce him to vote, he necessarily proposed to him and counseled him to vote. The only criticism that the count is open to in this respect is, that it states more than is necessary, and is a departure from the generally safe rule of following the words of the statute. The demurrer thereto is overruled.

The second count is in all respects like the first one, except that it is there alleged that the defendant "did then and there knowingly, etc., give to said James Johnson $2.50 as a gift, bribe," etc., without otherwise stating that Johnson was not a qualified voter. It is usual and proper where an indictment contains two counts, instead of repeating the allegations which are common to both, to adopt them in the second one by referring to them, thus making them a part of the latter. By the use of the relative "said" in this count before James Johnson, the pleader indicates a James Johnson, not only of the personal description, if any, given in the first count, but also one being in like condition or status with reference to the charge made in the indictment. The phrase, said James Johnson, in this count, is then equivalent to an allegation that the Johnson indicated is a person under twenty-one years of age. The conclusion that he was therefore not entitled to vote is a mere conclusion of law, and although proper and logical to be stated, is not absolutely necessary.

The demurrer to this count, which is similar to the other, except in respect to this objection, is overruled.

[See Case No. 15,347.]

Case No. 15,347.

UNITED STATES v. HENDRIC.

[2 Sawy. 479.] [1]

District Court, D. Oregon. Dec. 20, 1873.

INDICTMENT—ILLEGAL VOTING.

An allegation that a party claimed a right to vote at an election, is not equivalent to an allegation that such party is a qualified voter.

[This was an indictment against Robert Hendric.]

Addison C. Gibbs, for the United States.
Richard Williams, for defendant.

DEADY, District Judge. The indictment in this case contains two counts. The first one charges that at an election held on October 13, 1873, at South Portland precinct, in the county of Multnomah and state of Oregon, for representative in the congress of the United States, the defendant did there and then, knowingly, etc., offer to give one Robert Bruce (he the said Robert Bruce claiming a right to vote at said election), the sum of $2.50 as a gift, bribe and reward to him, the said Bruce, to vote at said election for representative, etc., to prevent said Bruce from exercising the right of suffrage, contrary to the statute, etc. The second count is similar to the first, except that it alleges that the defendant gave said Bruce the sum of $2.50 for the purpose and with the effect aforesaid.

The defendant demurs to the indictment, because it does not appear therefrom that said Bruce was a qualified voter of the state of Oregon. The indictment is found under section nineteen of the act of May 31, 1870 (16 Stat. 144), which defines quite a number of crimes in relation to elections.

The crime intended to be charged in the indictment is defined in these words: "That if at any election for representative * * * in the congress of the United States, any person shall * * * by * * * bribery, reward, or offer or promise thereof * * *

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

prevent any qualified voter of any state of the United States * * * from freely exercising the right of suffrage, * * * such person shall be deemed guilty of a crime."

Assuming that this provision was intended to prohibit the giving or offering any bribe or reward to induce or procure a voter to vote one way or the other, or at all, or not to vote, as I think it was because such reward or offer thereof, if accepted and acted upon by the voter, necessarily prevents him from exercising his right of suffrage freely, still this indictment is insufficient, because it does not charge in either count that said Bruce was a qualified voter—a person qualified to vote at the election in question—but only that he claimed a right to vote thereat.

It does not follow, because Bruce claimed a right to vote, that he was entitled to it. The one expression is not the equivalent of the other. The act provides in a separate clause for the offense of voting by a person not entitled to vote, or for aiding, procuring, counseling or advising any such person to vote, which includes hiring him to do so. But it cannot be said that any one is prevented by any act from exercising his right of suffrage freely, unless he has such right at the time; and that fact must be averred, by stating in the language of the act or other equivalent terms that such person was then and there a qualified voter.

The demurrer must be sustained.

[See Case No. 15,346.]

Case No. 15,347a.

UNITED STATES ex rel. CASTRO v. HENDRICKS.

[2 Hayw. & H. 293.] [1]

Circuit Court, District of Columbia. June 10, 1858.[2]

MANDAMUS TO LAND COMMISSIONER—ISSUANCE OF PATENT—DUTIES OF COMMISSIONER.

1. A mandamus will not lie to compel the commissioner of the general land office to issue a patent to the petitioner for more land than, in the judgment of the commissioner, he was entitled to, the quantity of land to which petitioner was entitled being a question to be determined by the commissioner upon all the evidence and facts.

2. The decision of the commissioner of the general land office ordering a further examination, on the ground that the return of a survey made by the surveyor general of California represented the tract as containing more than the quantity sold and confirmed was a proper exercise of the duties of his office.

[This was a petition by Salvador Castro for a writ of mandamus, to be directed to Thomas A. Hendricks, commissioner of the general land office, and to require him to issue a patent for certain land in California.]

R. J. Dent and Hyatt P. Hepburn, for petitioner.

Mr. Kerr, for commissioner.

The petitioner states in his petition that he claimed title to a part of a tract of land granted by the government of Mexico to one Antonio Buelna; that to confirm his title he filed his claim before a board of land commissioners established by an act of congress of March 3, 1851 [9 Stat. 631]; that for the want of sufficient evidence it was rejected by the said commissioners, but upon an appeal taken to the district court of the United States for the Northern district of California, the necessary evidence was supplied, and the said court, by its final decree, confirmed the claim to the tract of land described in the survey made by the surveyor general of California by metes and bounds; that the commissioner of the general land office refuses to issue a patent for said land; that the petitioner is greatly prejudiced and hindered in his just rights and legal title; that the proceedings on the part of the commissioner of the general land office are illegal and without warrant of law, and in violation of the plain ministerial duty imposed on him; that the decree of the district court and the survey of the surveyor general are final and conclusive upon the ministerial officers of the government.

The following is the communication sent to the secretary of the interior, by the commissioner of the general land office, a copy of which was given to the petitioner. It contains the facts in the case:

"In the case of the eastern portion of the 'San Gregerio' ranch, confirmed to Salvador Castro, being for 'one league,' this office prepared instructions to the surveyor general of California, ordering a further examination, upon the ground that the return of survey made by that officer represented the eastern portion as containing an excess of two and one-half leagues over the quantity sold and confirmed. From that proceeding the counsel for Castro took an appeal, followed by a communication dated the 13th of March, 1858, from the secretary of the interior, approving our proposed action in the premises. Subsequently H. P. Hepburn, Esq., attorney, asked, for reasons stated, a rehearing. This application having been referred from the department on the 26th. I have the honor to return herewith Mr. Hepburn's application, the printed argument presented by him and the Hon. Robert J. Dent, counsel, and in addition to the views presented in our instructions of February 3, 1858, respectfully submit the following: It is not disputed that the district court has authority to fix boundaries as well as to confirm titles, but it is contended that the court has no power to enlarge or go beyond the limits of the original grant, and that its proper function is to execute the contract entered into in this case by the Mexican authorities, and nothing more. The

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

[2] [Affirmed in 23 How. (64 U. S.) 438.]

original grant to Buelna contained four square leagues. The plats returned for that grant, viz: for the claim of Castro the eastern portion, and that for Rodrigues the western, embrace six and one-half square leagues, an excess of two and one-half leagues over the said Buelna grant, thus awarding, as we think, that quantity of the public lands of the United States as an excess to said grant. We do not in the proposed proceeding resist the decree, but assert that in making the survey under it the surveyor has erred in taking a wrong initial point, and we suggest a further examination to find the proper initial point at another locality along the mountains, that by so doing the survey would be made to harmonize with the original grant, with the diseno, and at the same time conform to the decree. We have alleged no error in the decree, and our object is properly to determine its effect and construction. Had the estimate been twice the quantity we should not of course go outside of established well defined boundaries to make up the quantity where the original grant and decree affirmed those boundaries, but if the confirmee could show that his quantity was cut short by such an error of the surveyor, as we think has occurred in this Castro case, by taking a wrong starting point, and it appeared that by taking a point suggested the terms of the decree would be complied with, and he would get his full quantity named therein, we should certainly direct a re-examination of the survey to do full justice to the claimants. There is no rule for preferring quantity to boundaries, where the original grant and confirmation both fix the boundaries as the controlling data, just the reverse of this assumption in any case of that class would obtain. But where, as is a matter of universal notoriety, the general mode of distributing public lands in California restricts the grant to quantity, 'a little more or less' on account of the rude and defective system of fixing limits, in the absence of a surveying system in that country, either under the dominion of Spain or Mexico the quantity for the most obvious reason became the governing rule, and to obtain generally in the original grants and decrees of confirmation. Wherever quantity and limits can be reconciled with the original grant and confirmation, it is of course our duty to have it done. It is not contended by this office that the confirmation extended beyond the grant, but that the error is with the surveyor in locating the claim. The decree recites that this is 'a portion of the four league grant' to Buelna, and that it is the 'same land described in the conveyance to claimant filed,' &c. This is part of the decree, the whole of which, with the grant itself, must be examined and satisfied in locating the tract. It is maintained that all the general land office has to do is to see that there is a final confirmation and a location of that confirmation. We agree with this with the understanding that we shall be satisfied the location is a lawful and proper one, but, if satisfied that it is neither lawful nor proper, will it be maintained that we should convey such a location into patent, upon the ground that it is merely a ministerial act? In a case analogous in principle, in the language of the learned Attorney General Wirt,—Bates' Case (Oct. 10, 1825) 2 Op. Attys. Gen. 15,—upon an assumption like this, 'the president, whose peculiar constitutional function it is to see that the laws are properly enacted, is himself to become instrumental in a conscious breach of the laws, by signing the patent, because an inferior officer has ignorantly or inadvertently taken a false step.' It is now proposed to review the Castro survey, on the ground that it is outside of the original grant, or at least that portion of it has been so located, and the government thus deprived of the excess above mentioned. If it is ascertained that in locating both the Castro and Rodrigues within the grant, there is not found the quantity of four leagues, the loss in damages must fall upon Rodrigues, as the deed to Castro referred to in the decree carries one league, and is a relinquishment, to that extent in favor of Castro, the boundaries fixing the locus of the claim to that extent within the original grant. This office looks to the reorganization act of July 4, 1836 [5 Stat. 107], for its authority of 'supervision and control' (see case of Bernard v. Ashley, 18 How. [59 U. S.] 45, and Bell v. Hearon, 19 How. [60 U. S.] 262), in this matter, and understands the attorney general's opinion of September 29, 1857,—Case of Citizens of Butte Co. (Cal.) 9 Op. Attys. Gen. 108, —according to its plain terms and import to wit: 'A person who claims land in California under a title from Mexico is entitled to have a patent for it issued out of the general land office here, whenever he shows that his claim has been finally confirmed by the commissioners, by the district court or the supreme court, if he at the same time accompanies that proof with a survey certified and approved by the surveyor general of California.' That is, he is to have a patent for his 'Mexican' claim, not for something not included in but outside of that claim. In view therefore of the whole matter, and after careful consideration of the whole argument of the counsel of Castro, this office feels constrained to adhere to the views presented in the proposed instructions."

Answer of the commissioner of the general land office to the rule of the court, to show cause why mandamus should not issue for the execution and delivery of a patent.

"The undersigned is bound by law to perform the duties of his office under the direction of the secretary of the interior and the president of the United States, so far therefore as the proceeding may be intended to control him in the discharge of his official function, by substituting the direction and control of others for that of the secretary or

president, he protests against it as unauthorized and illegal. Protesting that your honors have no authority to control his official action as prayed, nor to make him as commissioner of the general land office, and through him the executive of the government of the United States, a party to this proceeding, or to require him to make answer therein, in discharge of the rule of the court he says: That on the 2d day of May, in the year 1839, a grant of land was made by Alverado, the governor of the department of California, pursuant to Mexican laws and regulations, to Antonio Buelna of four square leagues, a little more or less, situate on the north side of the establishment of Santa Cruz, &c. That after the death of said Buelna, to wit: on the 29th of January, 1849, Madam Rodrigues (widow of Buelna) and her husband Francisco Rodrigues, with a view to the payment of the debts of the said Buelna, and in consideration of $500, made a deed to the petitioner (Castro) for one league of the said land, describing the same as 'one league of land in the location known by the name of San Gregoria, situated on the coast to the north of Santa Cruz, and which land consisted of four leagues, was the property of Antonio Buelna,' &c. It appears that it was afterwards considered necessary for Rodrigues and his wife to execute another deed for the same land 'for more definite boundaries,' which they did bearing date August, 1852. It does not appear, nor is it believed that the said last deed was given for any new or additional consideration, nor with a view to an enlargement of the grant to the petitioner. It is shown that it was made without any new consideration, and for the one league of land mentioned in the first deed. Three leagues of the land granted to Buelna were retained by Madam Rodrigues, widow of Buelna, and the same has been confirmed to and surveyed for her, giving her that quantity.

"It is true that the proceedings were had relative to the claim of the petitioner before the board of land commissioners in California, and before the district court of the United States for the Northern district of California, and the confirmation was made in favor of the petitioner, as stated by him in his petition and in the said decree of confirmation. But it is not admitted, nor is it believed to be true, that it was intended by the said confirmation, or that the said confirmation had the effect to give to the petitioner any lands outside of the proper limits of the Buelna grant, or to give to the petitioner a greater quantity of the lands of the said grant than was contemplated by the parties in the execution of the said deeds. It is further true that after said confirmation a survey was made on behalf of the petitioner, under the authority of the surveyor general of California, and by him approved and returned to the general land office. But it is not admitted, nor is it believed to be true, that the said survey was a correct survey of the lands of the petitioner as described in said decree of confirmation. On the contrary thereof, the undersigned believes the same to be an incorrect survey, and that it exceeds in quantity the real claim of the petitioner by nearly two and one-half leagues, and that a proper survey thereof may and ought to be made according to the description of the lands in said deeds and in said decree of confirmation, so as to give the petitioner all the lands to which he is entitled, and at the same time not to pass the proper limits of the Buelna grant, and include lands of the United States, nor to any portion of the three leagues reserved by Madam Rodrigues. It is true that after said survey was reported to the general land office, the undersigned did carefully examine the same in connection with the grant to Buelna, the two deeds and the decree of confirmation, and did come to the opinion that the said survey was not a true and correct survey of the land of the petitioner, nor in accordance with the said grant, deeds and confirmation; but the same through fraud or gross mistake and inattention had been made so as to include nearly two and one-half leagues of land that did not belong to the petitioner, and that would not fall within the lines of the claim if properly run, and the same did include nearly two and one-half leagues of land of the United States, and being satisfied that according to law and good conscience he ought not to cause the same to be carried into patent without further and thorough investigation, the undersigned did on the 3d day of February, 1858, cause to be prepared, and did sign, with a view to transmission, instructions to the surveyor general, to the effect that he should cause a further and careful examination to be made in the whole matter, and report the result, with his decision as to the true boundaries of the league confirmed to Castro and the three leagues to Madam Rodrigues. It is true that the petitioner did appeal from the action and decision to the secretary of the interior, and that the secretary after fully considering the subject did overrule said appeal and affirm the decision of the general land office and did confirm the instructions aforesaid, and that afterwards the undersigned did refuse to cause to be issued to the petitioner a patent, upon said erroneous and defective survey, and did so inform the petitioner through his attorney, and he does still refuse to issue any patent upon said survey, as he believes it to be his duty in law to do. It is not disputed that the district court had authority to fix the boundaries as well as to confirm the title to this claim, but it is insisted by the undersigned that by the act of 3d of March, 1851, no authority was conferred upon the board of commissioners, or upon the court to enlarge and nearly double the real claim, in other words to give away of the public lands of the United States a quantity of land nearly equal

to two and one-half leagues greater than was contained in the original Mexican grant, as is virtually claimed shall be done in this case, neither the treaty, the laws of nations, nor the legislation of congress contemplate such a thing. Nor does the undersigned concede that the court intended to, or did, by its decree, enlarge the Buelna claim from four to six and one-half leagues, or the claim of the petitioner from one to three and one-half leagues, and upon no legal principle can such a construction to that decree be given, on the contrary thereof he does insist that a correct and proper survey in accordance with the terms of the decree of confirmation will give to the petitioner about one league of land, and Madam Rodrigues three leagues, all within the proper limits of the Buelna grant, with a view to such a result the instructions of 3d February, 1858, were prepared.

"The undersigned does insist: (1) That the honorable court has no authority of law to direct him in the discharge of any of his duties as commissioner of the general land office, and therefore cannot issue the writ prayed by the petitioner. (2) That by the first section of the act of July 4, 1836, 'to reorganize the general land office,' the undersigned is required to discharge the duties of his office 'under the direction of the president of the United States,' and that if under the circumstances of the case it is his duty to cause the patent sought by the petitioner to be issued, then the remedy of the petitioner is to obtain from the president the order therefor, and therefore he has a direct and sufficient remedy, without the intervention of this court, and the writ prayed ought not to issue. (3) That by the section of the law above mentioned the survey of the public lands, and also of 'private claims of lands' are made, 'subject to the supervision and control of the commissioner of the general land office, under the direction of the president of the United States,' which supervision and control are not taken away by the act of March 3, 1851, and therefore when the survey of the claim of the petitioner was reported to the general land office, it was the duty of the undersigned thoroughly to examine the same, and if he should find it correctly made in accordance with the grant and decree, then to approve it, but if he found the same to be erroneous and through fraud or mistake to have been incorrectly made, then it became his duty to reject or suspend the same, or to give such orders for its correction as the facts and the law should require, subject of course to the president of the United States, and over the judgment of the undersigned in such a case this honorable court could exercise no control. (4) That the survey upon which the petitioner seeks a patent, through fraud, negligence or mistake was not correctly made, but is erroneous and includes nearly two leagues and one-half of land as aforesaid, to which the petitioner is not entitled, and therefore the court ought not to issue any writ requiring the issue of a patent thereon.

"The undersigned prays to be discharged from further answer either to the petition of the petitioner or the order of the court.

"Thos. A. Hendricks, Commissioner.

"General Land Office, May 20, 1858."

Decree discharging rule.

This cause being set for hearing upon the petition, answer and exhibits and agreement filed, and the arguments of counsel being heard as well on behalf of the petitioner as the respondent, and the premises being fully considered: Therefore it is this 10th of June, 1858, by the said circuit court ordered, adjudged and directed that the cause shown by the respondent why the writ of mandamus should not be ordered as prayed is sufficient in the premises, and that the petition of the relator be and the same is hereby dismissed with costs.

[NOTE. The case was taken on an appeal to the supreme court, where the decree of this court was affirmed, with costs. 23 How. (64 U. S.) 438.]

Case No. 15,348.

UNITED STATES v. HENNING.

[4 Cranch, C. C. 608.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

MISDEMEANORS — COMMON LAW AND STATUTORY OFFENCES—SELLING FREE MULATTO AS SLAVE.

1. Quære? Whether it is an indictable misdemeanor to attempt to commit an offence, which, if carried into execution, would not go to corrupt the fountains of justice, of legislation, or the executive administration of the law; or involve actual violation or breach of the peace.

2. It makes no difference whether the attempted offence be at common law, or created by statute.

3. To attempt to sell a free mulatto as a slave for life, is not an indictable offence in the District of Columbia.

The defendant, Washington Henning, alias Haney Hedley, was convicted upon an indictment for attempting to sell a free mulatto boy as a slave for life, contrary to the fifteenth and sixteenth sections of the Maryland act of 1796 (chapter 67). The indictment contained three counts, each concluding against the form of the statute. The first count charged that the defendant unlawfully and fraudulently attempted to carry out of this county and district, forcibly and fraudulently, a free mulatto boy named Thad Key, knowing him to be free. The second count charged that the defendant brought into this county a certain free mulatto boy, under the age of twenty-one years, named Thad Key, bound to service until he was twenty-one years of age, and fraudulently and illegally attempted to sell him as a slave for life to Washington Roby and

[1] [Reported by Hon. William Cranch, Chief Judge.]

George Gray, the defendant knowing him to be entitled to freedom at twenty-one years of age. The third count charged that the defendant brought the free boy into this county, and attempted to sell him as a slave for life to the said Washington Roby and George Gray, the defendant then knowing the boy to be free.

W. L. Brent, for defendant, moved in arrest of judgment, and contended that there was no indictable offence charged in the indictment; that the statute does not punish the attempt to commit the offence therein mentioned; and that it is not a misdemeanor at common law to attempt to commit an offence created by statute. He cited 1 Russ. Crimes, 44, 47; Rex v. Cartwright (Easter Term, 1806) Russ. & R. 106; 3 Chit. 994, 1140–1142.

Mr. Key, U. S. Dist. Atty., contra, cited 3 Chit. 683, 696, 699, 1131, 1190b, and note; Rex v. Higgins, 2 East, 5–7, 11, 18, 19, 21; Rex v. Philipps, 6 East, 464; 1 Russ. Crimes, 46. It is an indictable offence to attempt to do an act prohibited by statute, as much as it is to do an act prohibited by the common law. But the act of selling a free mulatto as a slave is an offence at common law; it is a cheat by false tokens. The possession and color of the boy are tokens corroborating the assertion of title. Common prudence could not guard against the deceit.

THE COURT (CRANCH, Chief Judge, contra) arrested the judgment.

MORSELL, Circuit Judge, was of opinion that an attempt to commit an offence, created by statute, which was not an offence at common law, is not indictable.

THRUSTON, Circuit Judge. The following remarks are rather an answer to the point made and attempted to be sustained by the attorney for the United States, than an opinion on the indictment itself. I came into court after the indictment was read, and did not hear it; but the two positions stated at the head of the following opinion, were taken by Mr. Key, and as they involved considerations of great importance, I wrote (with little time for deliberation, and without the means of consulting books) the suggestions which are stated below.

U. S. v. Haney Hedley (otherwise Washington Henning). Indictment at common law, for attempting or offering to sell a free colored boy as a slave.

The attorney for the United States endeavored to support this indictment, on a motion to arrest the judgment by the traverser's counsel, on two grounds: (1) That every attempt or offer to commit any crime or misdemeanor at common law, or by statute, is an indictable offence. (2) That the act itself was, per se, an indictable offence, because it amounted to a common-law cheat or fraud.

As to the first position: Its universality, if carried out, would lead to great absurdities, such as neither the law nor common sense can tolerate, and, therefore, I cannot agree to it; but am of opinion that there is a rational limit to it, beyond which we ought not to go; and this limit is well defined by certain rules and principles, which, if attended to, will direct us into the path to be pursued; this limit embraces only those attempts, or offers, to every day indictments for both; but I have never read of, heard of, or known an indictment for an attempt to commit an assault. Suppose a man were to threaten another that he would beat him, and make demonstrations to that effect, and is held back by others, so as to prevent an assault even, would this be indictable? If so, out of the million of cases of assault and battery in the books, and in this court, we should have heard of, read of, or actually witnessed such a prosecution. These considerations are applicable so far to common-law offences only. Next, as to an attempt, or offer, to violate a penal statute. I endeavored to show to what absurdities this position would lead, if carried to the fullest extent. Instanced the case of attempting to sell a gill of whisky without license; who can imagine such an attempt only, not carried into effect, would be indictable? So in a multitude of parallel cases. There are laws to prevent the hunting of deer, or fishing at certain seasons. Suppose a man proposes to another, to go to hunt or fish in such seasons, and actually provides arms or nets, and they go part of the way and turn back, would this be indictable? My reason and common sense forbid an affirmative reply. The first position, then, of the attorney of the United States, does not amount to a universal rule; it is too broad. Show me an universal rule of law, holding in all possible cases, and you will show me a phenomenon that my Lord Coke never dreamed of. I cannot see any distinction between an attempt to violate a penal statute, or to commit a common-law offence; if there be any, my reason is too obtuse to discover it. I cannot discern what gives this dignity to a statutory penalty, or prohibition, which cannot be equally claimed by the good old common law. In fact, there is no difference; and the line of demarcation which I have drawn as to common-law offences, ought to be the fixed boundary between punishable and dispunishable attempts to violate penal statutes. Without repeating the class of cases which are indictable, and those which are not, I refer to the numerous specifications of those cases which I have set out in my consideration of them under the common law. The indictment before us, was for a fraud in attempting to sell a free negro as a slave, contrary to the provisions of the penitentiary law. The argument first started on the broad ground, that an attempt to violate any penal statute was an indictable offence; this, I think, I have answered suf-

ficiently; such a broad assumption cannot be sustained.

Secondly, it was urged that the attempt to sell a free man for a slave, was a fraud at common law, and therefore indictable; but the multitude of cases, never yet contradicted, that a mere overreaching, or misrepresentation, in a private sale, is not an offence at common law, seems to me to furnish a clear refutation of this argument. It was then contended in the case in question, that false tokens were used, or false pretences. I heard of none, of nothing more than false representations, or assertions that the negro was free; it was precisely like all those offences, which, though morally wrong, were left entirely, for redress, to civil tribunals, and were not indictable; such as false warranty of a horse which proves unsound; selling wine of inferior quality, for wine of better quality; asserting a right to sell a horse, or other commodity, which turned out to be the property of another, et omne id genus; but it was also urged, with much earnestness, that the case in question was one of great moral turpitude; this goes only to the degree of moral guilt, but does not vary the case from others just enumerated, and alluded to, as civil injuries only, but cannot be distinguished from them, as to its legal characteristics. But the transaction was said to be gross and flagrant turpitude and injustice, and deserved punishment; so it does, but it cannot be punished here. Our sympathies were appealed to in behalf of the poor negro; but we can have none to bestow; and if we had, perhaps a few drops might have fallen to the poor ignorant traverser who probably did not know his danger, and who, if the opinion of the court had been against him, would have been doomed to a lot worse than slavery. Therefore it behooved us to reflect well before we decided.

It seems to me from this, and some other cases which I have remarked, during this court, that the sword of criminal justice is longer than it used to be; it sweeps over a larger space. Offenders have either multiplied astonishingly, or the scale of offences is unusually extended; our grand juries are wielding it with a liberal hand. I did not hear the charge of the Chief Judge at the opening of the court, and therefore cannot say whether they are acting within the scope of his instructions or not; but I must say, from the number of presentments, and the character of some of them, that there is scarcely a hole or a corner of the county, where offenders might skulk, that their inquisitorial eyes have not inspected, and dragged out the offenders to light. This is as it should be, provided due regard be had, not to involve the innocent (innocent, I mean, in the eyes of the law) with the guilty, which I confess it is not easy for gentlemen not skilled in the law, always to avoid. If all, or any large proportion of presentments and indictments made, and which probably will be made during this court, be sustained, they display a woful amount and increase of crime. But to return to my subject. I am willing to lay down this rule, and without some rule we are afloat in an ocean of uncertainty, "that all attempts to commit an offence, which, if carried into execution, would go to corrupt the fountains of justice, of legislation, or the executive administration of the law; or, if perpetrated, would involve actual violence or breach of the peace, whether statutory or common-law offences, are indictable, otherwise not." We have adjudged that to incite another to commit an assault and battery is indictable. This is the only case of the kind that I am aware of, and there I think we have gone to the utmost limit; but I look upon the inciting another to commit a breach of the peace of more aggravated criminality than an attempt to break the peace one's self. I hardly know how such a case can well be manifested. A man might, in a passion, say and threaten that he would beat another, but is held back by friends and others present; or he might approach another in a threatening manner, and that other might have the heels of him, and run away. I should question much whether either of these demonstrations of hostility are indictable. We have not gone that far yet, and I shall think more of it when the case occurs. Finally, the penitentiary law has provided for the case of attempting to sell a free man for a slave, and declared under what circumstances it shall be punishable. Here we have all that is wanted, or deemed by the sovereign authority to be wanted; and shall we legislate too on the same subject, and declare that an act or acts, not coming up to the statutory description of the offence, are punishable? I cannot, for it does not fall within my rule as I have before laid it down, nor, in my opinion, within the sound principles of law; nay, I reserve to myself the privilege of considering even this rule a little further, and when a case occurs within it, shall deem myself at liberty to narrow it, if, after more reflection, I shall think it right to do so. I have suggested it, for the present, as safe to steer by, so far as it touches the case before us.

[See Case No. 15,349.]

Case No. 15,349.

UNITED STATES v. HENNING.

[4 Cranch, C. C. 645.] [1]

Circuit Court, District of Columbia. Jan. 16, 1836.

SELLING FREE NEGROES—KIDNAPPING.

1. In an indictment under the 17th section of the penitentiary act [4 Stat. 450] for the District

[1] [Reported by Hon. William Cranch, Chief Judge.]

of Columbia, it is not necessary to aver that the defendant was a "free person."

2. That section does not apply to negroes kidnapped out of the district, and brought within it.

3. Quære, whether it applies to the seizure or seduction of any free negro or mulatto, not a resident of the district.

This was an indictment under the 17th section of the penitentiary act for the District of Columbia, of the 2d of March, 1831 (4 Stat. 450), by which it is enacted: "That if any free person shall, in the said district, unlawfully, by force and violence, take and carry away, or cause to be taken and carried away; or shall, by fraud, unlawfully seduce, or cause to be seduced, any free negro or mulatto from any part of the said district to any other part of the said district, with design or intention to sell or dispose of such negro or mulatto, or to cause him or her to be kept or detained, as a slave, for life, or a servant, for years, every such person so offending, his or her counsellors, aiders, and abettors, shall, on conviction thereof, be punished by fine, not exceeding five thousand dollars, and imprisonment and confinement to hard labor in the penitentiary, for any time not exceeding twelve years, according to the enormity of the offence."

The first count charged that the defendant [Washington Henning] did, with force and arms, unlawfully, by force and violence, take and carry away, and cause to be taken and carried away, a certain free mulatto boy named Thad. Key, from a certain part of the said district, to wit, from the shore of the Potomac river, in the city of Washington, in the said county and district, to a certain other part of the said district, to wit, to the Pennsylvania avenue, in the said city, in the county and district aforesaid, and to the house of one W. R. in the said county, and to divers other parts of the said county and of said district, with the design and intention, then and there, to sell and dispose of said free mulatto, and to cause him to be kept and detained as a slave, for life, against the form of the statute, &c. The second count charged that the defendant, "with force and arms, did unlawfully, by fraud, unlawfully seduce, and cause to be seduced a certain free mulatto boy," &c., as in the first count, "from a certain part of the said district," to wit, &c., "to a certain other part of the said district," to wit, &c., "with the design and intention," &c., as in the first count.

The defendant demurred to the indictment, because it did not aver that the defendant was a "free person," and Mr. W. L. Brent, his counsel, contended that as the word "free" was not inserted in the other sections of the act, congress must have had some reason for inserting it in this section which did not apply to the other sections; which reason could only be that they intended to confine it to free colored persons; for the word "free" is seldom applied to a white man.

Mr. Key, for the United States, contra, contended that the only use of the word "free," in this section, was to prevent it from being applied to slaves, as in the fourth and fifth sections of the act, where it is also used for the same purpose; and that, in each of those sections the word "free" became unnecessary by the addition which was made to the last clause of the act, namely, "that this act shall not be construed to extend to slaves;" but it was not thought worth while to strike the word out of those sections; and it would be a strange construction to say that congress intended to punish a free colored person for an offence which is rarely committed by that class of persons, and not to punish a free white man for the same offence, which was almost universally committed by persons of that description.

THE COURT (THRUSTON, Circuit Judge, doubting,) was of opinion that the seventeenth section of the act was applicable to free white persons as well as to free colored persons; and that it was not necessary in the indictment to aver that the defendant was a "free person," especially as he is therein called "yeoman."

The defendant thereupon had leave to withdraw the demurrer and plead the general issue.

At the trial of that issue, the defendant's counsel moved the court to instruct the jury, "that if they believe, from the evidence, that the boy was removed from a place from without the District of Columbia, to a place within it, in the vessel of the defendant, and there taken from said vessel and carried to another place in said district, and offered for sale, with the criminal intent as stated in the indictment, then the jury must acquit the defendant."

THE COURT (MORSELL, Circuit Judge, doubting,) refused to give the instruction; but said that if the verdict should be against the prisoner, they would hear a motion for a new trial, upon this question.

The jury found the defendant guilty on the second count, and his counsel moved for a new trial, on the ground of the court's refusal to give the instruction as prayed; and contended that the seventeenth section of the penitentiary act, was only applicable to an original seizure or seduction within the district; not to the case where the kidnapping was in one of the states, and the kidnapped person brought into this district by a continuation of the same force and violence, or seduction.

Mr. Key, for the United States, contended that the case was exactly within the words of the statute; and equally within its spirit.

THRUSTON, Circuit Judge. This is an indictment for attempting to sell a free negro for a slave, contrary to the provision of the seventeenth section of the penitentiary law. If the court should be of opinion that the argument, in favor of arresting the judgment,

drawn from the inapplicability of the law to the case of free negroes brought from another state, is invalid for any reasons as yet presented to the court, there is still a further reason, founded on another view of the clause in question, which appears to me very strong. In the construction of a written law, it is necessary, to understand its true import, to gather the intention of the framers of the law, not only from what they have done, but also from what they have not done; for example, from the consideration of the seventeenth section of the penitentiary law, it is clear that the selling of a free negro, without removal by force or violence, or without seduction, from the place where such free negro may be; for instance, if a man designing to perpetrate such a villanous act, were to take a negro-buyer to some place or spot where his intended victim may be found, without removing him, it is not questioned but that such a case is not criminal under the said seventeenth section. Now, is not this surprising? Is not the guilt the same as if the free negro was removed from the said place, say one hundred or any less number of feet or yards by force, &c.; or seduced thither? Can any reason be assigned, but one, for this? Is it possible that all the guilt consists in the removal? Can any man of reflection say this? Then why is this apparently absurd and senseless distinction made, unless there be at the bottom something not discernible at the surface? Could any thing have been more easy or more simple, if congress did really design to punish the act of attempting to sell a free negro for a slave, than in few words to have enacted, "that whoever shall, in the said district, attempt to sell a free negro for a slave, within this district, shall be punished so and so?" Surely it did not require all this long paragraph of the seventeenth section to effect this end. Then there must have been some very peculiar and more limited object in view. Now what could this have been? For, if we cannot discover some rational cause for all this, we must mark the provision of the law, as it stands, with the impress of nonsense and absurdity. Would it not be more becoming and more reasonable to endeavor to find out some design or purpose, in this seemingly strange enactment; in which case we shall relieve the law from those imputations. Now, in casting it about in my mind to account for this inconsistency, I have discovered, I think, that there is no inconsistency at all; and that the framers of the law meant really to provide only for the cases of an attempt to sell by removal by violence or seduction; in which case my other reasons for believing that the law did not design to embrace foreign free negroes, is fortified. Now, it must be observed that it would be a difficult matter to sell a free negro at his own domicil or place of abode, or even in the public highways, or at any place in which he may be ordinarily found; because every such free negro has friends or relatives who would most probably detect seduction, if attempted, or resist violence, and expose it to public observation so as to prevent the consummation of such a nefarious crime; but if he could be enticed or forced to some receptacle of negro-dealers, or some retired spot where the intended victim was not known, there would be imminent danger of such consummation. If this be not a probable solution of the difficulty, then what is? Now an imported free negro, being a stranger, has neither friends nor relations, (unless by accident in some special cases,) and therefore is as much exposed to fraud in one place as another; and the violence or seduction may have been perpetrated and consummated before the arrival of the intended victim within our borders.

For these reasons, in addition to others urged before, I am strongly inclined to believe that the legislature meant to make provision only for the district free negroes, leaving those of other states to be taken the same care of by their governments as congress has thought proper to bestow upon those of our territory; and which governments have powers to provide for the case of abduction of free negroes from within their limits, or from one place to another, within the same, by force or seduction, as congress has within our district.

Another reason, too; our district is small, and one hour is sufficient to transport a free negro into a slave state on either side of the Potomac. The danger, therefore, was great to those persons; and, hence, I suppose the severe penalty for such an attempt provided by law. Not so with negroes of other states, who, I am firmly of opinion were not within the contemplation of the framers of the law, nor, in my opinion, within the statute, unless we give a construction to it pregnant with absurd results.

The other judges took time to consider till Saturday, January 16th, 1836.

CRANCH, Chief Judge. The motion for a new trial is grounded upon the refusal of the court to give the instruction prayed by the prisoner's counsel; which instruction the court ought not to have given, unless the circumstance, that the free boy had been brought into this district in the defendant's vessel, takes the case out of the statute. The count, in the indictment upon which the defendant has been convicted, states that the defendant did, by fraud, unlawfully seduce the free mulatto boy from a certain part of this district, (naming it,) to a certain other part of this district, (naming it,) with the design and intention to sell and dispose of the boy to a certain person, (named,) as a slave for life. And the statute says: "That if any free person shall, in the said district, by fraud, unlawfully seduce any free negro or mulatto from any part of the said district, to any other

part of the said district, or to any other place, with design or intention to sell or dispose of such negro or mulatto, as a slave for life; every such person so offending shall, on conviction thereof, be punished by fine, not exceeding $5,000, and imprisonment and confinement to hard labor, in the penitentiary, for any time not exceeding twelve years." The case stated in the indictment is the exact case stated in the statute; and the court must refuse the new trial, unless the defendant can show that his case is clearly out of the spirit of the act.

The spirit of the act is to punish the intention to sell a free colored person as a slave, when that intention is manifested by the overt act of removing him by force or fraud from any part of the district, to any other part of the district, or to any other place. The intent was not only to prevent the sale of free negroes and mulattoes, resident in the district, by persons resident in the district, but to throw an obstacle in the way of kidnappers who should have seized free negroes in any of the states, and who should be passing through the district with their prey. I say this was the intent of the statute, because the words of the statute comprehend both cases; the parties in both are in æquali delicto; and both classes of free colored persons are equally entitled to protection.

For some time previous to the passing of this act, we know that there were rumors of kidnappers passing through this district from the state of Delaware, and the eastern shore of Maryland, to the Southern states, with their booty; and applications had been made, from time to time, to the court and to the judges, to stop them by writs of habeas corpus, and injunction, which, when granted, only served to hasten their departure. This statute furnished the ground of issuing a warrant to arrest the parties in the first instance. Before this statute there was no law to which they were amenable here, or by which their flight could be arrested. The act of kidnapping was not committed here; the mere intent to sell was not punishable anywhere; there might be no attempt to sell here; and if there should be, it was not the offence which congress intended to punish. The offence intended to be punished by the 17th section of the act, was the having a free negro in possession with an intention to sell him here or elsewhere, provided that intention should be accompanied here by the overt act or acts of coercion or control, mentioned in the statute. If it had enacted that every person who should bring into this district a free negro or mulatto with intent to sell him as a slave, it would have excluded an intention to sell, formed after he arrived here; and would also have excluded the intention to sell resident free negroes and mulattoes. If it had enacted that whoever should, "in the said district, attempt to sell a free negro as a slave within this district, should be punished," &c., it would have excluded a class of cases of equal atrocity, and in my opinion equally within the spirit of the act, and which are now within the letter of the act; namely, the cases of kidnappers found, with their prey, in the district, or on their passage through it, having no intent to sell it in the district, and not attempting to sell it in the district, but intending to spirit it away into some distant slave-holding state, where the claim of freedom would be lost by the difficulty of procuring the evidence to support it. The act does not purport to punish the attempt, eo nomine, but it punishes certain acts done in the district, with intent to sell, either in the district or elsewhere. The words of the statute are very peculiar; and are exactly adapted to the supposed case, as well as to other cases within the same mischief. If the statute had been confined to kidnappers who should bring their booty from a place out of the district, it would have excluded acts of kidnapping within the district; but the words now include both. If the statute had been confined to the attempt to sell in the district, it would not have reached acts done in the district with intent to sell elsewhere, and it would have left the case open to much litigation upon the question, what acts in the district would amount in law to an attempt to sell. If the statute had merely applied to kidnappers passing through the district with their victims, the offence would not be complete until they were out of our jurisdiction; hence, in order to make it complete within the district, it required a removal from one part of the district to another; and in order to provide for the case of passing through the district, it says, from any part of the district to any other place.

Thus the act punishes the kidnappers who bring the free negro into this district for sale, here or elsewhere; for he cannot well be brought into the district without being removed from one part of the district to another part of the district. If he is brought to the city of Washington by water, he enters the district below Alexandria, and is removed from the district line to Washington. If he passes through the district without stopping, he is removed from one part of the district to another place. If kidnapped out of the district, it is hardly possible that he should be sold in the district without having been removed from one part of the district to another part thereof; it could only happen by the kidnapper's bringing him up just to the line of the district, and selling him there, without passing over it. If kidnapped within the district, it would rarely happen that he could be sold within the district, without having been removed by the kidnapper from one part of the district to another. If such a case could happen, although it would not be within the words of the stat-

ute, yet it would be within its spirit, and it would be more certainly within the rules of construction of statutes, to say that it should be construed to be within the letter, than that the other cases, provided for by the express words of the statute, should not be within its spirit. Neither the act of kidnapping, (that is, the original seizure of the free negro,) nor the actual sale, is expressly within the provisions of the statute; but no argument against the validity of the statute can be drawn from that circumstance; for it cannot be inferred that congress meant to do nothing, because they have not done every thing. It appears to me that they only intended to legislate in regard to kidnappers; and principally in regard to foreign kidnappers bringing their spoils here, in transitu, and that their omission to provide for other cases, cannot derogate from what they have done. No rule of construction will justify us in saying that the omission to provide for cases equally within the spirit of an act, will exclude those which are expressly provided for by it. If this act has not provided for the punishment of the kidnapper in the district, who shall have sold his victim without having removed him from one part of the district to another part thereof; or, of the importer of a free negro, with intent to sell him as a slave, both of which cases are as much against the spirit of the act as any of those which it has provided for, we cannot thence infer that congress did not mean to provide for those cases which are within both the letter and the spirit of the act. If congress chose to make the overt act of intention consist in the removal of the free negro from one place in the district to another place, in or out of the district, rather than in the importation, I cannot see how it makes void the express enactment of the 17th section of the statute; or why the omission of congress to provide for the punishment of the offence of actually selling a free negro or mulatto as a slave, (when the case of selling was already provided for by the Maryland act of 1796, c. 67, in force in this part of the district,) should annul the express words of that section. The object and intent of the act is the protection of free colored persons, and to throw an obstacle in the way of their being sold as slaves. Congress are as much bound to protect strangers and sojourners in this district, as to protect those persons who are resident herein. This principle applies as strongly to colored strangers, and sojourners, as to colored residents. Why, then, should we apply to one class, only, the protection which congress has, in words, extended to both? If we have a right to apply the protection to either, we have a right, (and in a case made out within the words, are bound,) to apply it to both.

Can it be said that congress cannot punish an act done in the District of Columbia, with a criminal intent, if that intent be to do a criminal act out of the district? Suppose an insurrection of slaves in Virginia, and that the free negroes of Maryland should assemble and arm themselves, with intent to go into Virginia and aid the insurgents; would it not be in the power of congress to forbid them to pass through the District of Columbia, or to purchase arms or provisions therein with that intent? Suppose there were in Bladensburgh, wagon-loads of inflammatory libels, calculated and intended to be distributed in Virginia with intent to excite insurrection; would not congress have authority to pass a law prohibiting their transportation through the district, with that intent? Cannot congress prohibit, by law, the purchase of arms in the District of Columbia, with intent to commit murder or robbery in Virginia? If congress have a right to pass laws prohibiting those acts to be done in the district, they have a right to affix penalties and punishment to the violation of those laws; and they are not limited in the degree of punishment, if it be not "cruel and unusual" within the meaning of the 8th article of the amendments of the constitution. If, then, congress may punish some acts done in the district, by persons passing through the district, with intent to commit a crime out of the district, what other acts, done in the district, by such persons, with the like intent, may they not punish? Where shall the line be drawn? It seems to me that no such line can be drawn; and that congress has power to pass a law for the punishment of any act done in the district, with intent to commit a crime out of the district.

If it should be said that the original criminal intent was formed and to be consummated in Virginia, and that the acts, done in the district, were done with that original intent, which was continued uninterruptedly through all those acts, yet it seems to me that the case is not thereby taken out of the statute; for it still remains true, that those acts were done with the intent stated in the indictment. It does not seem to me like the case of the thief who had committed larceny in Maryland, and who was found here with the stolen goods in his possession; nor like the case of the forged papers inclosed in an envelope in one of the states, and forwarded by mail to this district; in which cases the court decided that the offences charged, namely, larceny, and the uttering of forged papers, were not committed in this district; for there was no question in those cases whether congress might not have made a law punishing the thief for bringing the stolen goods into this district, or for removing them from one part of the district to another, with intent to appropriate them to his own use, or to sell them in some place out of the district. Nor, in the case of uttering forged papers, was there any question whether congress had not the power to prohibit and punish a person for using the mail for knowingly transporting forged papers with intent to

defraud any person; or to punish any act done, in the district, with a like criminal intent. If, at the time when the case of larceny was tried, there had been such an act of congress as is above suggested, and the thief had been indicted under it, and the court had decided that congress had no power to pass such an act, the case would have been in point. So also in the case of uttering the forged papers. But as the cases existed, they seem to me to bear no resemblance to the present case. If this defendant had, previous to the penitentiary act, been indicted for kidnapping the free negro here, and the prosecutor had proved that the defendant kidnapped him in Virginia, and brought him here by force or fraud; then the question would have occurred here, as it did in the case of larceny in Maryland, whether the offence would not continue and accompany the kidnapped person into this district, so as to make it a case of kidnapping here; and the court must have decided, as they did in the case of the larceny committed in Maryland, that the offence was complete in Virginia, and that he could not be punished here for the offence of kidnapping which was complete there. But if, as before mentioned, congress, by law, made it penal for the thief, who had stolen goods in Maryland, to bring them into the district, with intent to appropriate them to his own use, or for sale, and he had been indicted and convicted under that law, the court must have given judgment against him; for it was a new and different offence, committed under a different jurisdiction. So, in the present case, although the defendant cannot be convicted and punished here for the kidnapping in Virginia, he may be convicted and punished for the new offence committed here under a different jurisdiction.

The offence of forcibly or fraudulently transporting, or carrying out of the district, any free negro or mulatto, knowing him to be free, and the offence of knowingly transporting or carrying out of the district any negro or mulatto entitled to freedom at a certain age, and selling him out of the state, as a slave for life, or for a longer term than he has to serve by law, were already provided for by the Maryland statute of 1796, c. 67, § 15, which was adopted by the act of congress of the 27th February, 1801 (2 Stat. 103). Neither of these offences, however, could be complete until the parties were out of our jurisdiction, and, therefore, could seldom be punished. The offence of importing into this district any free negro or mulatto, or any person bound to service for a term of years only, and knowingly selling him as a slave for life, or for a longer term than he was by law bound to serve, was also provided for by the same Maryland statute (section 16). By that statute, each of those offences was punishable by a fixed and absolute penalty of eight hundred dollars; or by confinement to labor for a period not exceeding five years if the penalty should not be paid, or secured to be paid, within thirty days after judgment. There was, therefore, no necessity for congress to legislate in regard to those offences; and no argument can be drawn from their having omitted, in the penitentiary act, to provide for what was already provided for; unless it should be supposed that the punishment by fine and imprisonment and labor in the penitentiary, (which may, at the discretion of the court, not exceed a fine of one cent, and imprisonment of one day,) is more severe than an unmitigable penalty of eight hundred dollars, and confinement to labor for a period not exceeding five years, if the penalty should not be paid or secured in thirty days after judgment. I confess it might be difficult to say which chance would be preferred; but I should incline to think that a punishment open to all equitable and mitigating circumstances would be preferable to an absolute penalty of eight hundred dollars, accompanied by the alternate confinement to labor; so that whatever weight the argument can have, it must be small, and, in my opinion, ought not to make void the positive and express provisions of the statute.

I think the case stated in the second count, upon which the defendant was convicted, is exactly in the words and spirit of the seventeenth section of the act upon which the prosecution is founded; that the instruction was properly refused, and, therefore, that the new trial ought not to be granted.

I would observe, also, that there are other objections, to the prayer, which justified the court in rejecting it; but which have not been noticed in the argument. It does not state that the defendant brought the free negro to the district; it states that he was removed from a place without the district to a place within the district in the defendant's vessel; but whether he came as a hired seaman, or in any other capacity, does not appear; nor does it appear that the defendant had formed any intent to sell him until after he was landed. My opinion, however, is not founded upon either of these objections; but upon the ground above stated.

THRUSTON, Circuit Judge. As this case depends entirely on one section of the act of congress, namely, the seventeenth section of the penitentiary act, and the fate of the prisoner depends upon the proper construction of that section, it behooves us, on account of the terrible penalty inflicted on its transgressor, to look at it in every point of view which can aid us in unravelling its meaning. Now this section prohibits, &c., (here the judge read it.) Let us suppose the case of an actual sale of a free person so carried, &c.; what would be the result? This act provides no punishment for the

sale, but for the attempt. The Maryland law provides a punishment for the actual sale. Could you punish the seller under both laws because a sale necessarily includes an attempt? If not, under which? Would it be optional with the prosecutor? But the Maryland act punishes the offence of selling with not a tenth part of the severity which the act of congress does the mere attempt to sell. It is true the seventeenth section leaves it discretionary with the judges to impose a less punishment than the maximum fixed in the act; but as this depends on the arbitrary discretion, and the mere caprice of judges, whose moderation or severity will be in proportion to their sense of the turpitude of the crime, it is no argument to show that the seventeenth section inflicts a less punishment than the Maryland act, even for the consummation of the crime. I state this only to show another strange inconsistency in the law; to punish with unexampled severity an attempt to commit a crime, which, if consummated, is subjected to a punishment much more mild and lenient.

But, another strong view of the case has occurred to my mind, since my last imperfect sketch of my opinion of the true construction of the said seventeenth section; and it is this. Suppose the prisoner or traverser, in the case before us, had, instead of attempting to sell in the district, traversed the district with the boy, after landing him at the wharf, and carried him immediately on to Virginia, whence he brought him, how would the matter have stood then? Here would be the case of seduction begun in Virginia, and the attempt to sell also in Virginia; the whole offence perpetrated in Virginia, except the mere transit through the district, which is free to every citizen of the United States, and the world even; and still this case would be within the words of the law; but is it possible that it can be within its spirit? Here is no crime committed against the law, except the mere passage through the district; nay, can it be within the spirit of the act? Was it competent for congress to punish the act done out of their jurisdiction? not only consummated, but actually commenced out of their jurisdiction? Can it be doubted that if the jury had been instructed that if the intent and seduction were conceived and commenced in Virginia, the traverser was not within the statute, they would not have acquitted him? Because I put it to the candor of my brother judges to say that there was any more evidence that the seduction began here, than that it did in Virginia; is there a doubt that there was a preconceived intent, when the boy was put aboard the vessel, before its arrival at our shores? or even when he was enticed from Virginia, to bring him here to sell him? What evidence was there that this intent was suddenly conceived after the landing of the boy at the wharf? On the contrary, was not the evidence in favor of the seduction having commenced in Virginia as well as the intent. From the smallness of the boy he was no use aboard; there was no evidence that there was any obvious purpose of taking him aboard as a hand, (not that I remember.) I have no doubt, from the whole evidence, that both the intent and seduction were conceived and commenced in Virginia; and if so, the offence is not within the jurisdiction of this court, as Plympton's Case.

I return to the supposed case of the boy's having been taken through the district and attempted to be sold in Virginia, from whence he was brought. His case is, nevertheless, within the words of the statute. But is it within the spirit? It cannot be; for congress could not, constitutionally, punish such an act; both the commencement and consummation of the offence, if it be one, would take place out of the jurisdiction of congress over such subjects; then all the offence, in such case, would be the passing through the district. Why, can it be imagined that if I pass through this district, with an intent to commit even murder or robbery, and attempt both, beyond the district, that congress could punish it, because, in passing through their territory, I had such an intent in my mind? They surely could do that as lawfully and constitutionally as they can punish me for passing through their territory with a free person, seduced from Virginia, and attempting to sell him after getting back to Virginia; yet this case, according to the opinion of Mr. Key and the Chief Judge, is within the law.

I state these various views of the case, to show how unsafe it is to depend on the words of a statute, if when you come to consider the cases that come within the words, there are a number which, if taken to be within the spirit also, would lead to the most absurd consequences; such as the instances I have stated in this, and in my former remarks. I say, again, that congress are not competent to punish any offence within the jurisdiction of state tribunals, perpetrated in any of the states; they belong to state sovereignties to punish. Then it is clear they cannot punish one who seduces a slave, or brings him, under any pretence or circumstances from Virginia, and passes through this district with him, and attempts to sell him, in Virginia; no more can they do so, where the person is a Virginian, seducing a free boy from that state, and entertaining the intent there; and brings him to this district, and attempts to sell him, with the intent so conceived in Virginia before his arrival within our jurisdiction. The essence of the offence, the seduction and intent, took place out of this jurisdiction, and therefore there is only the act of attempting to sell, without the seduction and intent; which, if conceived and ex-

ecuted in Virginia, is no violation of the statute; and if the jury had been so instructed, they could not, from the evidence before them, have convicted the traverser; but for the reasons given in this and my former opinion already given, I am satisfied that the act cannot, consistently with any reasonable construction of it, apply to citizens of other states, bringing such free person from such states, by force or seduction, and attempting forthwith to sell him here, and therefore I should arrest the judgment; but at all events it seems clear to me that a new trial ought to be granted.

MORSELL, Circuit Judge, said that he had not written any argument, but was of opinion, that if the seduction and intention to sell commenced in Virginia, and continued until the arrival of the boy in the district, the case was not within the spirit of the statute; which he thought was confined to forcible seizures, or fraudulent seductions commenced and completed in the district. But, as the prayer of the prisoner's counsel for the instruction to the jury, did not state the fact that, in this case, the seduction and intent to sell, were formed in Virginia, or anywhere else out of the district, he was of opinion that a new trial ought not to be granted.

The prisoner was sentenced to one year's imprisonment and labor in the penitentiary.

[See Case No. 15,348.]

Case No. 15,350.

UNITED STATES v. HENRY.

[3 Ben. 29.] [1]

District Court, S. D. New York. Nov., 1868.

INDICTMENT — INTERNAL REVENUE — FRAUDULENT WAREHOUSE BOND.

1. The general rule is that, in an indictment for an offence created by statute, it is sufficient to describe the offence in the words of the statute. If the defendant insists upon greater particularity, it is for him to show that the case falls within some exception to the general rule.

[Cited in State v. Bennett, 102 Mo. 365, 14 S. W. 865.]

2. In an indictment under the 42d section of the internal revenue act of July 13th, 1866 (14 Stat. 162), for executing a fraudulent bond, it is not necessary to set out the particulars in which the bond is fraudulent, or the particular manner in which the payment of the tax was evaded, or in which the bond was used, or attempted to be used, in fraud of the revenue law, or in which the accused executed the bond or procured it to be executed, or connived at its execution.

3. Under the 27th section of that act, the proper person to give the warehouse bond there provided for is the person who, under the 24th section, gives the notice to the government that he is the person engaged in the business of a distiller, at the distillery in question.

At law.

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

B. K. Phelps and J. Bell, for the United States.

E. Cooke and E. Blankman, for defendant.

BLATCHFORD, District Judge. This is a motion in arrest of judgment and also for a new trial. The defendant [Nicholas Henry] has been convicted on an indictment founded on the 42d section of the internal revenue act of July 13th, 1866 (14 Stat. 162). That section, so far as it applies to the present case, provides, that any person who shall execute any fraudulent bond required by law or regulations, or who shall fraudulently procure the same to be executed, or who shall connive at the execution thereof, by which the payment of any internal revenue tax shall be evaded or attempted to be evaded, or which shall in any way be used or attempted to be used in fraud of the internal revenue laws and regulations, on conviction thereof, shall be imprisoned, &c. The statute does not make the offence a felony. The first count of the indictment avers that the defendant, on a day and at a place named, unlawfully, knowingly, and willfully did execute, and fraudulently procure to be executed, and connive at the execution of, a certain bond, which said bond was then and there required by law and regulations to be given by one Raedle, Raedle then and there being the owner of a distillery, and then and there being the owner of a bonded warehouse provided by him for the storage of bonded spirits of his own manufacture, which said bond, so executed, as aforesaid, was then and there fraudulent, and by which said fraudulent bond the payment of a certain internal revenue tax, to wit, the tax on the spirits distilled by such person as such owner of a distillery as aforesaid, was evaded and attempted to be evaded, then and there, with intent to defraud the United States. The bond is set out in hæc verba, and the count avers that the defendant then and there knew the said fraudulent bond to be fraudulent, against the peace, &c. The second count is in all respects like the first, except that, instead of the averment as to the evasion and attempt at evasion of the payment of a tax, it is averred, that said bond was then and there used and attempted to be used in fraud of the said internal revenue laws and regulations.

It is urged in support of the motion in arrest of judgment, that the indictment does not sufficiently describe the offence, and that it is defective in not setting forth in what particulars the bond was fraudulent, and how the payment of the internal revenue tax was evaded and attempted to be evaded, and how the bond was used and attempted to be used in fraud of the internal revenue laws and regulations, and how the defendant executed, and procured to be executed, and connived at the execution of the bond.

The offence specified in the statute is one created by the statute. It was not an offence at common law. The general rule is

well settled, that, in an indictment for an offence created by statute, it is sufficient to describe the offence in the words of the statute, and that if the defendant insists upon a greater particularity, it is for him to show that, from the obvious intention of the legislature, or the known principles of law, the case falls within some exception to such general rule, but few exceptions to the rule being recognized. Whart. Cr. Law (2d Ed.) c. 5, § 8, p. 132; U. S. v. Gooding, 12 Wheat. [25 U. S.] 460, 474; U. S. v. Mills, 7 Pet. [32 U. S.] 138, 142; U. S. v. Staats, 8 How. [49 U. S.] 40, 44; U. S. v. Pond [Case No. 16,067].

In the present case, the indictment, in charging the offence, uses all the words which the statute employs. It is not claimed that the words of the act are not pursued, but it is claimed that the indictment should contain more than the words of the act. In the case of U. S. v. Gooding, 12 Wheat. [25 U. S.] 460, the indictment was founded on the act of April 20th, 1818 (3 Stat. 450), concerning the slave trade. It is alleged that the defendant fitted out for himself, as owner, a certain vessel named, with intent to employ it in procuring negroes, &c. The offence was a misdemeanor. The objection was taken that such allegation was not a legal charge of an offence, and that it was necessary to specify in the indictment the particular equipments, in order that the defendant might have notice of the particular charge against him. The judges of the circuit court were divided in opinion on this question, and it was certified to the supreme court. In the opinion of the court (page 473), delivered by Mr. Justice Story, it is said: "It is contended that there ought to have been a specification of the particulars of the fitting out, and that it is not sufficient to allege the act itself without them. The indictment in this respect follows the language of the statute, and is as certain as that is. We cannot perceive any good reason for holding the government to any greater certainty in the averments of the indictment. The fitting out of a vessel may and must consist of a variety of minute acts and preparations, almost infinite in their detail, and their enumeration would answer no valuable purpose to the defendant to assist him in his defence, and subserve no public policy. * * * The particular preparations are matters of evidence and not of averment. * * * In general, it may be said that it is sufficient certainty in an indictment to allege the offence in the very terms of the statute. We say, in general, for there are doubtless cases where more particularity is required, either from the obvious intention of the legislature, or from the application of known principles of law. At the common law, in certain descriptions of offences, and especially of capital offences, great nicety and particularity are often necessary. * * * So again, in certain classes of statutes, the rule of very strict certainty has sometimes been applied where the common law furnished a close and appropriate analogy. Such are the cases of indictments for false pretences, and sending threatening letters, where the pretences and the letters are required to be set forth, from the close analogy to indictments for perjury and forgery. Courts of law have thought such certainty not unreasonable or inconvenient, and calculated to put the plea of autrefois acquit or convict, as well as of general defence, at the trial, fairly within the power of the prisoner. But these instances are by no means considered as leading to the establishment of any general rule. On the contrary, the course has been to leave every class of cases to be decided very much upon its own peculiar circumstances. Thus, in cases of conspiracy, it has never been held necessary to set forth the overt acts or means, though these might materially assist the prisoner's defence. So, in cases of solicitation to commit crimes, it has been held sufficient to state the act of solicitation, without any averment of the special means. And in endeavors to commit a revolt, which is by statute in England made a capital offence, it has always been deemed sufficient to allege the offence in the words of the statute, without setting forth any particulars of the manner or the means. These cases approach very near to the present, and if any, by way of precedent, ought to govern it, they well may govern it." These principles are held to be especially applicable to indictments for offences which are misdemeanors, or are not felonies. U. S. v. Mills, 7 Pet. [32 U. S.] 138, 142. The rule applied by the supreme court in U. S. v. Gooding [supra] is one applicable in all respects to the present case. The fitting out of a vessel with intent to employ her in the slave trade is a crime created wholly by statute, and its criminality depends always, in a material degree, upon the character of the fitments of the vessel. If the vessel is fitted out with appliances for engaging in the slave trade, an important step toward the crime is made out; and, in every trial for such a crime, the character of such fitments and appliances becomes a material issue. For that reason it was urged, that the fitments or equipments ought to be particularly specified in the indictment, in order that the defendant might have notice of the particular charge against him. But the court held that that was not necessary, and that a simple allegation of fitting out, in the words of the statute, was sufficient. So, too, it is no more necessary to set out in the present case the particulars in which the bond is fraudulent, or the particular manner in which the payment of the tax was evaded and attempted to be evaded, or the particular manner in which the bond was used and attempted to be used in fraud of the internal revenue laws and regulations, or the particular manner in which the defendant executed and procured to be executed and connived at the execution of the bond, than it is to set out the acts or means in cases of conspiracy, or the special means in cases of solicitations to commit

crimes, or the particular manner or means employed in an endeavor to create a revolt.

It is not alleged in the present case that the defendant has suffered from any surprise, or mistake, or absence of witnesses, by reason of the omission of any averment in the indictment. If such a fact were established, while it would not affect the validity of the indictment, it would be a proper ground to urge in favor of a new trial. This court, while seeking to uphold the law and the rights of the government, will always sedulously endeavor to secure to every person indicted or tried for crime a full and fair opportunity to meet the allegations brought against him. No injustice is suggested in the present case. The trial was deliberate and full, the jury considered the guilt of the defendant established, and the court is entirely satisfied with their verdict.

In regard to the point made that the defendant, and not Raedle, was the owner of the distillery in question, the owner of the distillery and the owner of the warehouse, named in the 27th section of the act of July 13th, 1866, as the proper person to give the warehouse bond there provided for, is the person who, under the 24th section of the same act, gives the notice to the government that he is the person engaged in the business of a distiller at the distillery in question. That person in this case was Raedle, and not the defendant. Raedle was the owner quoad the government. It could know no one else. The defendant may have been the owner in a private sense, as between him and Raedle, but Raedle was the owner in a public sense. The evidence of the making of the returns by Raedle was in fact given on the part of the defendant, and was competent evidence under the first and second counts, and would have been competent if given on the part of the government.

The question as to the defendant's guilty knowledge of the worthlessness of the sureties to the bond was a question of fact for the jury. The evidence was, in the judgment of the court, sufficient to fully warrant the verdict. The motion in arrest of judgment and the motion for a new trial are denied.

Case No. 15,351.

UNITED STATES v. HENRY.

[4 Wash. C. C. 428.] [1]

Circuit Court, D. Pennsylvania. April Term, 1824.

CRIMINAL LAW — ACCOMPLICES AS WITNESSES — SHIPPING — REVOLT AND CONFINEMENT OF CAPTAIN.

1. An accomplice, separately indicted, is a competent witness in favour of or against a person indicted for the offence.

2. To constitute the offence of confining the captain, the act of confinement must be feloniously done.

[Cited in U. S. v. Huff, 13 Fed. 641.]

[Cited in Shay v. Com., 36 Pa. 308; State v. Stotts, 26 Mo. 307.]

3. What constitutes a person an accomplice upon a charge of confining the captain.

The defendant was indicted, in the first count, for endeavoring to make a revolt; in the second count, for confining the captain. Black and two others were separately indicted for the same offences, committed at the same time. The defendant offered to examine Black and the others, and the question as to their competency was submitted to the court by the counsel for and against the prosecution. The court admitted the evidence, leaving the credibility of the witnesses to the consideration of the jury. See 1 Chit. Cr. Law, 493, who cites 2 Hale, P. C. 281; 1 Hale, P. C. 305; Fost. 247; 2 Camp. 333; Hawk, P. C. bk. 2, c. 46, § 19,—in support of the opinion. An accomplice is also a good witness against the prisoner, if separately indicted. 1 Chit. Cr. Law, 492. Upon the indictment for endeavoring to make a revolt, the court gave to the jury the definition stated in U. S. v. Sharp [Case No. 16,264], stating to the jury that the object was to adjourn the case to the supreme court if they should find the defendant guilty. On the other indictment, the evidence was, that whilst the other accomplices were engaged with the mate, the captain came on deck, and, as stated by defendant's witnesses, collared Black, and they both fell and remained for a considerable time clinched, the captain keeping hold of Black all the time, who was heard frequently calling on the captain to release him. On the other side, the witnesses stated, that as soon as the captain came on deck, he repeated the order which the mate had given to the refractory seamen to go forward; instead of doing which, Black collared the captain, and threw him on the deck, where he remained confined for twenty or thirty minutes, and the other three attacked the mate.

WASHINGTON, Circuit Justice, charged the jury that, upon this indictment there were two questions: 1. Was the captain confined at all? 2. Was he confined by Henry? That the first question depended upon the credit which they might give to the witnesses for the prosecution, and to those for the defendant. If they believed the former rather than the latter, the fact of confinement was fully made out; if otherwise, it was not, as it did not then appear but that the captain was at liberty, at any moment, to extricate himself from Black, if such had been his wish. The offence does not consist in the mere act of forcibly restraining the master; it must be feloniously done, and whether felonious or not, was to be judged of by the jury from all the circumstances of the case;

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

as if it be done with violence, and without a justifiable cause, &c.

2. Although the captain was not actually confined by Henry, if confined at all, still, if Henry aided and abetted in the act, he was constructively guilty, and is considered in law as a principal offender. But to charge him as an accomplice, the jury should be satisfied from the evidence that such was his intention. As to the quo animo which governed him throughout the affray, the jury are alone to judge. If his attack on the mate was intended to favour that of Black on the captain, then, in point of law, he is guilty of confining the captain, provided Black is guilty. If they were in reality distinct affrays, arising from distinct causes, as may be inferred from the evidence of the witnesses for the prisoner, then he cannot be implicated in the offence charged against him of confining the captain.

Case No. 15,352.

UNITED STATES v. The HENRY.

[4 Blatchf. 359; 16 Leg. Int. 316; 4 Wkly. Law Gaz. 175; 41 Hunt, Mer. Mag. 708.] [1]

Circuit Court, S. D. New York. Sept. 22, 1859.

SLAVE TRADE—SEIZURE OF VESSEL—CERTIFICATE OF PROBABLE CAUSE—STIPULATIONS.

1. Where, on dismissing a libel filed against a vessel for a violation of the act against the slave trade, the district court granted a certificate of reasonable cause of seizure, and it appeared that no seizure had in fact been made, but that it was omitted, to save expense and delay, at the request of the counsel for the claimant, and on a written stipulation by him that a seizure had been made, *held* that, under the 89th section of act of March 2, 1799 (1 Stat. 696), the stipulation was a sufficient foundation for the order of reasonable cause of seizure, and that the district court had authority to make such order.

[Cited in U. S. v. Ninety-Two Barrels of Rectified Spirits, Case No. 15,892.]

2. The practice of instituting penal suits on behalf of the government by stipulation or compromise, rebuked.

[Appeal from the district court of the United States for the Southern district of New York.]

This was a libel of information, filed in the district court, by the United States, against the brig Henry, upon a charge of having been fitted out in the port of New York, for the purpose of engaging in the slave trade, contrary to the act of congress, and praying forfeiture and condemnation of the vessel. The district court, after a hearing on proofs, dismissed the libel, but, upon the facts disclosed on the hearing, granted a certificate of reasonable cause of seizure, to the collector or person making the seizure. [Case unreported.] The claimants took an appeal to this court, to review the order granting the certificate of reasonable cause of seizure.

Charles H. Hunt, Asst. U. S. Dist. Atty.

Mr. Beebe, Mr. Dean, and Charles Donohue, for claimants.

NELSON, Circuit Justice. The principal objection urged to the order of the court below is, that no seizure of the vessel took place by the collector or any officer of the customs, and that, hence, the case was one in which the court below had no jurisdiction or authority to make the order, under the 89th section of the act of congress of March 2, 1799 (1 Stat. 696). It appears, from the record, that an actual seizure of the vessel was omitted at the request of the counsel for the claimants, and that the assistant district attorney, Mr. Joachimssen, in the absence of his superior, Mr. Sedgwick, agreed to take a stipulation of the counsel that a seizure had been made, and waived the formality of one, in order to save expense and delay. The stipulation is in writing, and was given in evidence in the court below. It is now insisted, that the stipulation was designed to furnish evidence of the seizure, so far as that fact was essential to maintain the suit for condemnation, but was not to be urged as a ground for the granting of an order of reasonable cause of seizure. The act of congress, already referred to, makes the seizure a material fact to the maintenance of the suit for condemnation and forfeiture, and provides for a certificate of reasonable cause, in case judgment shall be given for the claimant, in which event the claimant is denied costs, and the person making the seizure is exempt from suit. Now, the stipulation in this case is unqualified, and, if it is to be regarded as sufficient to establish the fact of seizure for the purpose of the suit for condemnation, which is admitted, I do not see how it can be held insufficient as a foundation for the order for a certificate of reasonable cause. There is nothing on its face indicating any such qualified use, or that any such modified sense of the instrument existed in the minds of the parties at the time; and, certainly, there is nothing in the nature of the transaction, or in the circumstances of the case, to persuade the court to give to the instrument a strained or mitigated construction, to the prejudice of the party who has accepted it in good faith, and acted accordingly. It may be said, that if no seizure of the vessel was actually made by the collector, the certificate of reasonable cause was unnecessary and immaterial. But, if so, then this attempt to get rid of it is equally unnecessary and immaterial. How this may be, cannot be determined on the facts before the court. It may be that there was such an interference with the vessel by the officers of the customs, resulting in this stipulation, as would, though falling short of a technical seizure, subject them to an action by the claimant or owner of the vessel.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. 16 Leg. Int. 316, and 41 Hunt, Mer. Mag. 708, contain only partial reports.]

Upon the other question in the case, namely, whether there was ground for the certificate of reasonable cause, I concur with the court below. I cannot forbear the expression of an opinion, that the mode adopted in this case for initiating the proceedings for the condemnation and forfeiture of the vessel, is not such as should be entitled to any very favorable consideration. Public officers had better follow out the requirements of the law, and assume all the responsibility belonging to their acts Very great abuses might arise from the institution of penal suits on behalf of the government by stipulation or compromise.

The decree of the court below is affirmed.

Case No. 15,353.

UNITED STATES v. The HENRY C. HOMEYER.

[2 Bond, 217.] [1]

District Court, S. D. Ohio. Oct. Term, 1868.

WAR OF THE REBELLION—TRADE WITH INSURGENTS — TREASURY REGULATIONS — CONTRABAND ARTICLES—CONQUERED TERRITORY.

1. The policy of the legislation of congress and the action of the executive department of the United States, in reference to commercial intercourse between the loyal and insurgent states prior to March 31, 1863, was to prohibit trade with the insurrectionary states, not only in all articles contraband of war in the strict sense of the term, but all other articles which could be used by the insurgents to strengthen and support the rebellion.

2. Under rule 20 of the regulations of the treasury department of September 11, 1863, loyal persons were authorized to obtain permits to purchase for money, other than gold or silver, any of the products of the country within the lines of national military occupation, except when prohibited by order of the general commanding the department or other special military order, and to transport said products to market.

3. Dry goods, groceries, and medicines, sold to the inhabitants along the Mississippi river, in the year 1864, were not articles contraband of war by the legislation of congress or the regulations of the treasury department, or by the law of nations.

4. A steamboat having a permit from a special treasury agent to engage in purchasing cotton along the borders of the Mississippi river, within the limits of the states of Mississippi and Arkansas, was fully authorized in May, 1864, under the statutes of the United States, the president's proclamations and the instructions of the secretary of the treasury, to make such purchases, and the forfeiture of said boat and her cargo was not incurred by engaging in such trade.

In admiralty.

The District Attorney, for the United States.

Lincoln, Smith & Warnock, for claimants.

LEAVITT, District Judge. This is a libel of information against the steamboat Henry C. Homeyer and cargo, including some nineteen thousand dollars in United States treasury notes. The grounds on which a decree of condemnation is claimed, are stated in different forms in the libel, not necessary to be minutely noticed. They embrace substantially the charge that the steamboat was engaged in illicit trade and commerce in violation of law and the regulations of the secretary of the treasury: 1. In having on board goods and merchandise intended for sale and barter to rebels at places and within states in rebellion, which were contraband of war, and designed to give aid and comfort to the rebellion; 2. That the employés and agents of the owners of the boat purchased cotton from persons and in states in rebellion, and attempted to transport the same to a loyal state, without lawful authority.

Edward Parkman and Jesse W. Page, a mercantile firm at Memphis, in the state of Tennessee, have intervened as claimants of the boat and cargo, and have filed their answer, denying, in general terms, all the allegations of the libel charging illicit or unlawful trade or commerce.

The facts, in outline, are that the steamer left the port of Memphis, in April, 1864, and proceeded to Vicksburg, where purchases of various articles of merchandise were made by the agent of Parkman & Page for barter and sale in procuring cotton along the banks of the Mississippi river, in the states of Mississippi and Arkansas, then in rebellion against the United States. These purchases were made of different persons, and amounted to $7,917.71. The articles consisted chiefly of dry goods, groceries, boots and shoes, and medicines. The bills of these articles are exhibited in evidence, each bill indorsed by Milton Kennedy, as local special agent of the treasury department at Vicksburg, as approved by him. In connection with these bills of purchase is a permit, signed by said Kennedy, in his official capacity, in which the articles are designated as family supplies, and are permitted to go to the states of Mississippi and Arkansas "to be exchanged for cotton with loyal citizens, subject to the approval of the commanders of gunboats." It is also a fact in the case, that Parkman & Page had furnished their agent with, and placed on board the steamer, $25,000 in United States currency, intended to be used in the purchase of cotton. The steamer proceeded to several points on the Arkansas side of the Mississippi, and had purchased one hundred and nineteen bales of cotton, when the boat and cargo, including $19,000 in greenbacks, were seized under a military order, as engaged in unlawful trade with rebels, to be libelled and proceeded against as forfeited to the United States.

The question for the decision of the court is, whether this property is forfeited under the acts of congress and the treasury regulations applicable to the transactions in question. The first legislation on the subject of commercial intercourse with states and persons in rebellion requiring the notice of the court, is found in section 5 of the act of con-

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

gress of July 13, 1861 [12 Stat. 257]. It provides, that when the president by his proclamation shall have declared the inhabitants of any state, or any part of a state in insurrection against the United States, "all commercial intercourse by and between the same and citizens thereof and the citizens of the rest of the United States shall cease and be unlawful, * * * and all goods and chattels, wares and merchandise, coming from said state or section into other parts of the United States, and all proceeding to such state or section by land or water, shall, together with the vessel or vehicle conveying the same, * * * be forfeited to the United States: provided, however, that the president may, in his discretion, license and permit commercial intercourse with any such part of said state or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such time and by such persons, as he in his discretion may think most conducive to the public interest; and such intercourse, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the secretary of the treasury." In pursuance of this law, the president issued his proclamation August 16, 1861 [12 Stat. 1262], declaring what states were then in rebellion, excepting, however, from its operation West Virginia and such other of the enumerated seceded states as might return to their allegiance, or might from time to time be controlled by the forces of the United States; and in the language of the above-recited section of the act of congress, declaring all commercial intercourse unlawful, and all property attempted to be transported without license or permission of the president through the secretary of the treasury, forfeited to the United States.

The next act of congress on this subject was that of May 20, 1862 [12 Stat. 404], supplementary to the act before referred to. Section 3 of the act authorized the secretary of the treasury to prohibit the transportation of any goods, wares, and merchandise, of whatever character and whatever might be their ostensible destination, whether by land or water, in all cases in which he might have reason to believe they were intended for any place in the possession or under the control of the insurgents, or there was imminent danger that they might fall into their possession or under their control. And the secretary of the treasury was authorized to make such rules and regulations as were necessary to carry out the objects of the law. And all property transported, or attempted to be transported, in violation of the law or the rules of the secretary, was to be forfeited to the United States.

The next act of the government requiring notice in this question is the proclamation of the president of March 31, 1863, declaring all commercial intercourse between the inhabitants of the insurrectionary states, with certain exceptions stated, unlawful, unless licensed and conducted according to the act of July 13, 1861, and the rules of the secretary of the treasury; and declaring that "all cotton, tobacco, and other products, and all other goods and chattels, wares and merchandise, coming from said states, with the exceptions aforesaid, into other parts of the United States, * * * without the license or permission of the president, through the secretary of the treasury, will, together with the vessel or vehicle conveying the same, be forfeited to the United States."

The next proclamation of the president is that of the same date as that just referred to. It is noteworthy as indicating a change in the policy of the government, and a relaxation, in some respects, of the rigid rules which had before been regarded as necessary in reference to the commercial intercourse between the states and sections in insurrection and the loyal states. After referring to the act of July 13, 1861, and the previous proclamations prohibiting all commercial intercourse between the people of the insurgent states, and the people of the other parts of the United States except as it should be carried on under the regulations of the treasury department, it recites, "that a partial restoration of such intercourse between the inhabitants of sundry places and sections heretofore declared in insurrection, * * * and the citizens of the rest of the United States, will favorably affect the public interests," and declares as lawful "such commercial intercourse between the citizens of loyal states and the inhabitants of such insurrectionary states, in the cases and under the restrictions described and expressed in the regulations prescribed by the secretary of the treasury bearing even date with these presents, or in such other regulations as he may hereafter, with my approval, prescribe."

The legislation of congress and the action of the executive department of the government, in reference to commercial intercourse between the loyal and insurgent states, is noticed as indicative of its policy up to the date of the two proclamations of March 31, 1863. That policy was obviously to prohibit trade with the insurrectionary states, not only in all articles contraband of war in the strict sense of the term, but all other articles which could be used by the insurgents to strengthen and support the rebellion. It was obviously of the greatest importance that stringent measures should be adopted to prevent the shipment or transportation of all breadstuffs, meat, and other agricultural products of the fertile North, which could be used to support the armies and the people of the rebel states, and to prohibit all other commercial intercourse which should give aid and comfort to the rebellion. But as the war progressed, and military possession and control of large portions of the rebellious states were gained, it was obvious that some modification of the previous restrictions was demanded by

the public interests. The government and the people of the North were greatly in need of cotton, the staple product of the rebellious states, and great inconvenience and injury were experienced in the North from the deficient supply and high price of that article. The president of the United States, in the proclamation of March 31, 1863, says distinctly that the public interests require a partial restoration of commercial intercourse "between the inhabitants of sundry places and sections heretofore declared in insurrection," and in express terms, under the authority of the act of congress, sanctions and licenses such intercourse, subject to the restrictions and regulations that may be prescribed by the secretary of the treasury. On September 11, 1863, the secretary of the treasury, with the approval of the president, promulgated regulations by which this permitted commercial intercourse was to be carried on. These rules are numerous and somewhat complicated in their character. I do not propose to notice the various rules thus prescribed, which have been referred to in the argument; nor to discuss or decide the point strenuously insisted on by the counsel for these claimants, namely, that some of these involve the exercise of legislative powers, which congress has not delegated to the executive department of the government, and which are, therefore, of no validity. I do not think it necessary to pass on this question in the present case. I shall, therefore, limit myself to the question, whether, conceding the authority of the treasury department to adopt the rules in question, the property libelled in this case is subject to forfeiture. The claim of the government asserted in the libel, as already noticed, is the forfeiture, not only of the steamboat, the cotton on board, and the merchandise purchased at Vicksburg, but also nineteen thousand dollars in United States treasury notes. The total value of these is large, and a decree of forfeiture will seriously affect the interests of these claimants. This being a proceeding under a highly penal statute, it is a case in which the right to such a decree must be made out strictissimi juris. And no presumptions or conclusions are allowable, unfavorable to the claimants, unless based on clear and indisputable facts, and sustained and demanded by the positive and explicit requirements of the law. And further, if the facts show clearly that the parties charged with the violation of the trade regulations applicable to the Western rivers, have been actuated by no disloyal motive, and have evinced a purpose and a desire to conform strictly to those regulations in all the transactions involved, the court will not, on grounds purely technical, base a decree of condemnation. A just government does not demand such an invasion of the great principles of justice.

The first inquiry presented is, was the steamboat Homeyer legally authorized or permitted to purchase cotton along the shores of the Mississippi river, in the states of Arkansas and Mississippi? The twentieth rule of the treasury regulations of September 11, 1863, declares that "all proper and loyal persons may apply in the prescribed form to the proper supervising special agent, or an assistant special agent designated by him, for authority to purchase for money, other than gold or silver, any of the products of the country within the lines of national military occupation in his agency, except when prohibited by order of the general commanding department, or other special military order, and to transport the same to market." Then follow certain regulations, directory to the treasury officials, pointing out specifically the preliminaries necessary before granting authority to engage in this trade. It was under this rule that the claimants, Parkman & Page, applied to, and obtained, from the proper treasury official at Memphis, a permit to purchase cotton along the Arkansas side of the Mississippi, and convey the same to market. This permit as granted was not exhibited in evidence at the hearing of this case, not being at that time, as I understood the claimants' counsel, in their possession, or within their control. Parol evidence, however, was offered, and admitted without objection, that such permit had been issued to the claimants; and also that the steamer had procured the proper clearance from the surveyor of customs at Memphis. In the argument, the non-existence of the permit was insisted on by the counsel for the government as one ground of forfeiture. The objection to the parol evidence of the permit not having been made when it was offered at the hearing, I suppose it can not be relied on as available to exclude it from the consideration of the court. The presumptions are strong, if not conclusive, that the boat was fully and legally authorized to engage in this trade. Memphis was then under martial law, and, it may well be inferred, the military authorities were vigilant in preventing any boat from leaving, unless assured that proper license had been granted, and that she was not about to engage in illicit trade. Moreover, there was on board a treasury official, called an agency aid, whose special duty it was to supervise the doings of the boat, and to detect all violations of law and of the treasury regulations. In addition to this, the steamer was under the surveillance of every gunboat on the river, and liable at any moment to be arrested for any act committed or omitted, in disregard of the law and the rules governing the trade. It is not reasonable to presume that the steamer would have been permitted to depart from Memphis, and to engage in the cotton trade, without due authority. But if there were any reasons to doubt the sufficiency of the evidence offered at the hearing, in relation to the permit granted to the claimants, I think they are now removed. It now appears that their counsel have procured sundry permits issued to them during the latter part of the winter of 1864, which, by agreement of counsel, have been ex-

hibited to the court. There can be no rational doubt that the steamer engaged in this trade under one of these permits. That the specific cotton purchased in the early part of May, 1864, which is in controversy in this case, was not reported to the treasury official at Memphis, is accounted for by the arrest of the boat and cargo, and their transfer to the custody of the law.

Without noticing in detail the numerous rules and regulations applicable to this trade, it is obviously within their spirit and intention to sanction and legalize the purchase and transportation of cotton by loyal citizens. So far as this could be done without giving aid, comfort, or support to the rebellion, it was not only permissible, but desirable. It was to be limited to places within the lines of our military occupation. The regulations prohibited payments for cotton in gold, or in articles declared to be contraband. The distinguished gentleman who was at the head of the treasury department, gives his views very clearly and distinctly on this subject, in his letter to Mr. Mellen, supervising special agent at Memphis, of July 3, 1863. He says: "There does not seem to me to be so much danger in intercourse which does not involve the furnishing of supplies." And he adds: "Intercourse such as this, it seems to me, might be safely permitted co-extensively with our lines of military occupation." Again, he states it as the object to be kept in view: "1. Non-intercourse between loyal states or districts and states or districts controlled by insurgents; and, 2. Modified intercourse between loyal states and districts, and states or districts partially regained to the Union." And in his letter of instruction to the special agents of the treasury of September 11, 1863, in relation to the regulations of that date, the secretary remarks as follows: "The following regulations are prescribed for the government of the several supervising assistant and local special agents and agency aids, * * * for the purpose of conducting the commercial intercourse licensed and permitted by the president, and preventing the conveyance of munitions of war or supplies to insurgents," etc. These instructions afford the clue to the true construction of the trade regulations of the treasury department in regard to the purchase and transportation of cotton. It was not intended to restrict or prohibit the purchase of cotton within the lines of "our military occupation." Within those lines it could "be safely permitted" upon the condition simply, that payments therefor should not be made in gold, or in articles contraband of war, or in supplies for rebels in arms.

Now, it is a well known historical fact connected with the late rebellion, that in May, 1864, the government of the United States had the undisputed and entire military possession of, and control over, the Mississippi river from the mouth of the Ohio downward. Vicksburg and Port Hudson had fallen in the summer previous. The government, for the double purpose of protecting persons and property in transitu upon the river, and of preventing illicit trade and intercourse with the rebels on its borders, had wisely placed a sufficient number of gunboats to insure the safety of persons and property afloat, and to prevent all unlawful intercourse with rebels in arms which could in anywise strengthen or give aid and comfort to the rebellion. There can be no question that the river, and the shores of the river through its entire extent were within the lines of the military occupation of the Union forces. This military occupation was even more effectual and complete than if the government had established a cordon of forts and fortifications at short distances on both shores of the river, through the whole territory of the states in rebellion. Within the letter and spirit of the treasury instructions, then, the trading and procurement of cotton along the banks of the river was not prohibited, unless it involved the furnishing of supplies to the rebels; that would add to the military power of the rebellion. All munitions of war, and all articles of food, were within the inhibition, as were also all payments in gold in the purchase of cotton. Subject to these exceptions and limitations, the secretary did not deem it expedient to interfere with or prohibit the purchase and shipment of cotton. It was precisely the "modified intercourse between loyal states and districts, and states or districts, partially regained to the Union," as expressed in the secretary's letter of instruction before referred to, and which he thought could "be safely permitted." The court is not informed what other rules and regulations were promulgated by the secretary of the treasury, after the capture of Vicksburg and Port Hudson. It may be assumed, however, none were adopted more restrictive of trade and intercourse on the Mississippi than those already referred to. It would seem indeed to have been the true policy of the government, after that river came under its complete military control and supervision, to relax and modify the previous rules, so as to have afforded greater facilities for the procurement of cotton in the states of Mississippi and Arkansas. It is certain from the facts before the court, that in the spring of 1864, the officials of the treasury department, at Memphis, Vicksburg, and other points were disposed to give greater facilities for the procurement of cotton than at previous periods. It is in proof that Mr. Mellen, who was charged with the general superintendence of trade and intercourse upon the Mississippi, stated to one of these claimants that persons licensed to purchase cotton could buy of disloyal persons and rebels, if they chose to do so. And Mr. Yeatman, a treasury official at Memphis, swears that his instruc-

tions were not to require that those licensed to purchase cotton should be restricted in their purchases to persons known to be loyal.

Construing the statutes, the president's proclamations, and the instructions of the secretary of the treasury, in the light of the facts referred to, I can adopt no other conclusion than that the Homeyer was fully authorized to engage in the business of purchasing cotton, along the borders of the Mississippi, within the limits of the states of Mississippi and Arkansas. The owners, Parkman and Page, were men of undoubted loyalty. I do not think there is room for a doubt on this subject. The attempt to impeach them on this ground has wholly failed. It is also in proof that they were to an unusual extent rigidly observant of all the laws and regulations governing the trade in question, and gave to their employés and agents strict injunctions not to violate them in any case.

But it is insisted by the counsel for the United States, that the property in question is liable to forfeiture, on the ground that Kennedy, the local special treasury agent of the treasury, had no authority to grant the permit to the steamer Homeyer to receive and barter, in exchange for cotton, the merchandise purchased at Vicksburg. It is not controverted that Kennedy was a special agent of the treasury, but it is argued that he had no authority to grant the permit. It is certain he did assume that authority, and did give the permit. It is equally certain that the agency aid of the treasury, placed upon the steamer for the special purpose of supervising the conduct of the boat, and taking care that the law and the treasury regulations should not be violated, recognized the permit by Kennedy as valid and sufficient. And it is equally certain that the masters of the various gunboats along the river, specially charged with the duty of preventing violations of law and the treasury rules, took no exception to the authority under which the Homeyer acted, but recognized it as valid and legal. In view of all these facts, it is no strained or unreasonable presumption, in the absence of all proof to the contrary, that Kennedy's permit was valid. This presumption is not weakened by the consideration that the claimants, Parkman and Page, and their agents and employés on the steamer, acted in good faith in this transaction, and under the belief that the authority was sufficient. On a ground so purely technical as that urged, I am unwilling to have a decree for the condemnation of this property. Acting as a court of admiralty, I am fully justified in viewing the point adverted to in its equitable aspects, and avoiding such a stringent application of legal principles as will subvert the ends of justice.

I must also overrule the objection to the validity of Kennedy's permit, based on the fact that it had not the sanction and approval of the military commandant at Vicksburg. There is satisfactory proof that at the date of this permit, there was an understanding between the civil and military authorities that at Vicksburg everything connected with trade and commercial intercourse should be managed by the civil department. There is every reason to presume that while the approval of the military was not procured, the purchase of the merchandise, and the departure of the boat on her trading expedition was by permission of that authority. Certain it is there was no military order forbidding it. Vicksburg was then under martial law, and there is no reason to suppose a boat would be permitted to leave the port in violation of any law or rule civil or military.

It is also insisted, as a ground for a decree for the forfeiture of this property, that the boat, under the pretense of family supplies, had taken on board articles contraband of war, with the intention to barter them, in exchange for cotton, to rebels in arms, and thus to give aid and comfort to the rebellion. This ground is not sustained by the evidence. It would seem that a very small portion, if any, of these articles of merchandise were disposed of at the time the boat was seized. As stated already, the invoices of all these articles amounted, at the high prices at Vicksburg, to less than $8,000, and the appraisement at the market value at Cincinnati was $7,500. It would seem probable from a comparison of these values, taking into view the difference in the prices at Vicksburg and Cincinnati, that no sales were made. I think no actual sales are proved by any witness. But still if the goods shipped were contraband, and intended for sale to rebels in arms, it would undoubtedly be a good ground for a decree of forfeiture. There is, however, no reason for the conclusion that there was any purpose of giving aid and comfort to the rebellion in the purchase and shipment of these goods. The quantity was small, consisting of an assortment of dry goods, groceries, boots and shoes, and some medicines. The amount forbids the inference that there could have been any intention to dispose of them as supplies for any organized force of rebels. On the contrary, they could only be viewed as intended for sale as family supplies, and to families and individuals. And so far as they were not contraband, the sale of such goods was not prohibited. The treasury officials were authorized to grant permits for this purpose, subject to the restrictions imposed by the rules of the treasury department. It was known that the inhabitants along the Mississippi were greatly in need of such articles, and to facilitate the purchase of cotton, it was deemed expedient to permit them to be sold They were not contraband of war, either under the law of nations, or by the legislation of congress, or the regulations of the treasury department. But there is no reliable evidence that any of these articles were sold, or intended to be sold, to rebels in arms against the government. At Gaines' Landing, in Arkansas, and at some other points

at which the steamer stopped, there were persons at the landings, some of whom came on to the boat. Many of them carried revolvers, which was an almost universal custom in that region. But the proof fails to show that any one of those who came on board the boat were officers or soldiers in the rebel service. It is true, on one occasion some twenty men on horseback, with cavalry arms, appeared for a short time on the bank of the river. They withdrew without attempting to molest the boat, or to afford any other demonstration of hostility. Whether guerrillas or not, does not appear from the evidence. There is no proof that any attempt was made to trade with them, or that they procured any supplies from the boat. Nor is there any proof that there were any organized rebel forces at any point in the vicinity of the places where the boat landed. One witness—who for reasons hereafter to be stated, is deemed unworthy of credit—states that the lines of the rebel army were within a short distance of Gaines' Landing. Another witness states substantially the same. But neither of these witnesses pretends to know the fact from any personal knowledge. It must have been a mere conjecture, or an inference derived wholly from hearsay or report. Other witnesses swear that they had no knowledge of any rebel force in that vicinity. It is certain that the master of the gunboat Romeo, lying near by, and by whose express permission the Homeyer landed at Gaines' Landing, had no knowledge of any rebel troops in the vicinity. And it is certain no permit to land would have been granted, had there been any danger that the persons or cargo on the steamer would have been in danger. Doubtless there were persons who came on board the boat that were disloyal, and pernaps rebels, but the testimony shows conclusively that it was impossible to distinguish by their dress or otherwise the loyal people from the rebels.

I must conclude, therefore, without going further into details, that there is not sufficient evidence to prove that the Homeyer was engaged in any illicit trade or intercourse, or that there was any intention in taking on board the steamer the merchandise referred to, to dispose of it in violation of law, or to give aid and comfort to the Rebellion. It was precisely the "modified intercourse between loyal states or districts, and states or districts partially regained to the Union," which the secretary of the treasury declared to be permissible. As before stated, the Mississippi river and the shore of the river on either side were within the control of Union military and naval forces.

There are some general views of this case which strike me with great force, as conclusive to show there was nothing, either in the animus or the acts of these claimants, which should subject this property to forfeiture. I will advert very briefly to some of these:

1. As before remarked, there is no reason to entertain a doubt as to the loyalty of either Mr. Parkman or Mr. Page. Some of the witnesses, particularly Eames, say they have heard it impeached. But these general imputations can not weigh against the overwhelming testimony in the other direction. And I must say here, that in respect to the evidence of the witness just named, I can not give it entire credence. He has been active in all the measures and proceedings taken to procure the condemnation of this property, and, as the law was when this proceeding was instituted, would have been entitled to one-fourth of its proceeds as an informer. He now, doubtless, looks for a very liberal share in the event of a decree against the claimants. He has also had a fierce personal quarrel with one of the claimants, and is no doubt now hostile to him. But what is still more conclusive against his credibility is the fact, that he is positively contradicted in some material statements made by him on oath, by witnesses whose veracity is wholly unimpeached. Under these circumstances, the court is fully justified in rejecting his testimony.

2. The evidence is conclusive that in the transaction directly involved in this suit, and in all similar prior transactions, these claimants evinced the desire and the intention that the laws and regulations governing the trade on the Mississippi should be scrupulously observed. In regard to the trip of the steamer now in question, explicit instructions were given to this effect to all their agents and employés on the boat.

3. Mr. Yeatman, a special local treasury agent at Memphis, who, of all others, had the best opportunity of noticing, and whose official duty it was narrowly to watch their doings, says explicitly that they were unusually careful and anxious not to violate or evade any law or regulation applicable to the trade referred to. And he states it as his opinion that the reason of their success was mainly attributable to the fact that their course was so strictly patriotic and honorable. There is other testimony in the same direction.

4. The agency, and an official of the treasury department placed on the steamer for the express purpose of guarding against any violations of law or rules, swears that he knows of no illicit or forbidden trade by the boat, or of any attempt to violate or evade any of these laws or regulations.

5. The master of the gunboat Romeo testifies, and others witnesses testify, that the Homeyer did not land at any point, or attempt to land, except under the protection of a gunboat, or by express permission for that purpose.

Now, in view of all the evidence of the good faith, the law-abiding character, and the loyalty of these claimants, I can not reconcile it with my duty in the case, to enter a decree for the forfeiture of this large amount of property. Sitting as a judge in

admiralty, I hold it to be allowable to avoid as far as possible in the rigid application of legal principles, the defeat of the ends of justice. The government of the United States ought not certainly to insist on a judgment against any of its citizens which will involve such a result. And now especially, when the formidable Rebellion with which it was confronted has been so effectually suppressed, its action should be guided by a just and considerate leniency. No greater reproach to the government can be conceived of than the unjust and unsparing pursuit of a citizen for the mercenary purpose of putting money into its coffers.

There is one transaction connected with this case to which, before concluding, I may briefly advert. It does appear that Elkins, who was on the steamer as the agent of the claimants for the purchase of cotton, entered into a contract with one Montgomery for the purchase of five hundred bales of cotton, for which payment was to be made in part with gold. This was a transaction which was in violation of one of the rules of the secretary of the treasury, prohibiting the payment of gold for cotton. This contract was entered into by Elkins in his own name, and, as it would seem, for his own individual benefit. The contract, however, was abandoned, and no cotton was delivered or placed on the boat under it. It was entered into not only without the knowledge but against the orders of the claimant, Parkman. It is in evidence that the claimants placed no gold in the hands of Elkins, and that there was none on the boat belonging to them. Now, as this contract was never carried into effect, and was entered into by Elkins on his own individual account, without the knowledge of the claimants and against their instructions, I do not see on what ground it can implicate them, or afford a basis on which a decree of forfeiture of their property can be justified.

These are the views which occur to me, after a careful consideration of this case. Libel dismissed.

Case No. 15,354.

UNITED STATES v. HERBERT.

[5 Cranch, C. C. 87.] [1]

Circuit Court, District of Columbia. Nov. Term, 1836.

INDICTMENTS—COMMON LAW AND STATUTORY OFFENCES—ASSAULT AND BATTERY WITH INTENT TO KILL—MALICE—FORMER CONVICTION.

1. An indictment for assault and battery at common law, and an indictment under the statute for the same assault and battery with intent to kill, may be pending and tried at the same time, and, if the defendant be found guilty on both, the attorney for the United States may enter a nolle prosequi as to either, and pray judgment upon the other; but there cannot be judgment upon both. The pendency of another indictment against the defendant for the same offence is no ground for arresting the judgment.

[Cited in Kalloch v. Superior Court, 56 Cal. 236; People v. Hamilton, 95 Mich. 212, 54 N. W. 767; State v. Stewart (La.) 16 South. 947; U. S. v. Eldredge (Utah) 14 Pac. 44.]

2. In an indictment under the statute for assault and battery with intent to kill, it is not necessary to state the manner and extent of the assault and battery, nor the particular weapon used. It is only necessary to describe the assault and battery as at common law, with the addition of the words charging the intent to kill in the terms required by the statute. It is not necessary to charge the assault to be felonious nor malicious, nor to be with malice prepense, nor to state any other circumstance to show that, if death had ensued, it would have been murder.

[Cited in State v. Collyer (Nev.) 30 Pac. 895; State v. Finley, 6 Kan. 369.]

3. A former conviction cannot be pleaded in bar unless it has been followed by judgment.

There were two indictments against the defendant [James Herbert, a negro]. The first (No. 176) was for a simple assault and battery at common law upon one John Sybert. The other for the same assault and battery, in the same words, with this addition: "with intent him, the said John, then and there to kill," "and against the form of the statute in such case provided."

The two indictments were found on the same day, and tried on the same day, and the defendant was found guilty on both, whereupon Mr. Key, the attorney for the United States, entered a nolle prosequi, with the leave of the court, upon the indictment for simple assault and battery, and moved the court for judgment upon the other.

H. May and C. L. Jones, for defendant, moved in arrest of judgment, and for a new trial. For the motion in arrest of judgment three reasons were assigned: (1) Because the defendant is "convict of the same identical offence on another indictment found and prosecuted at the same time, and for the same identical offence, differing in no respect but in matter of mere aggravation. (2) Because the indictment is vague, uncertain, and insufficient; especially in this, that the manner and degree of the assault charged is not shown; no deadly or dangerous weapon or instrument, nor any weapon or instrument of any kind, is described, or in any manner averred or shown to have been used or exhibited in the assault, or in any manner to have accompanied it; nor is it in any manner averred or shown that killing or murder might have ensued from the assault, or how or by what means the alleged intent to kill was attempted to be carried into effect. (3) Because the indictment does not "charge the assault to have been felonious or malicious: nor in any manner avers or infers that the killing charged as intended by the prisoner would have been a felonious or malicious homicide, in any degree, if it had been perpetrated."

The reasons stated for granting a new trial: (1) Because, as to the intent to kill, the verdict was contrary to the evidence—

[1] [Reported by Hon. William Cranch, Chief Judge.]

first, in this, that there was no evidence of malice prepense, or any other matter going to constitute the offence of murder if death had ensued from the assault; second, in this, that there was no evidence of an intent to kill. (2) Because the defendant stands convict, upon another distinct indictment, for the same identical offence, and upon the same, and no other evidence, of a simple assault and battery, without the aggravation of the intent to kill; upon which conviction he now stands for judgment, which, as he has nothing to say against it, must of necessity be passed in due course. (3) The third reason, in effect, was that if the motion in arrest of judgment is not the proper mode to take advantage of the double conviction, and if a motion to quash the indictment on that ground be too late, the defendant ought to have a new trial, with leave to plead that matter in bar. (4) Because new evidence has been disclosed to the defendant since the jury was sworn, and not known to the defendant in time to obtain it at the trial.

The defendant's counsel cited Tidd, Prac. 464; Com. Dig. "Indictment, G. & N." note; 2 Starkie, 200; Starkie, Cr. Pl. 378; 6 Wheel. Abr. 33; Archb. Cr. Law, 348, 349.

CRANCH, Chief Judge. This is an indictment for assault and battery with intent to kill one John Sybert.

The defendant's counsel have moved in arrest of judgment:

(1) Because there was pending at the same time another indictment, charging it as a simple assault and battery at common law, both indictments having been found at the same time, and tried at the same time, by the same jury, who found the defendant guilty upon both, at the same time. These facts do not appear in the record of the case, in which the defendant was found guilty of a battery with intent to kill; and therefore are no ground for arresting the judgment. If, as the defendant's counsel contend, the defendant had a right, upon the general issue, to avail himself of the pendency of another indictment for the same cause of prosecution, it is to be presumed, after a general verdict against the defendant, that the jury acted upon and negatived that defence; for the court must presume that they considered every defence which the defendant could avail himself of, under that issue.

(2) The second ground alleged for arresting the judgment is, that the indictment is "vague, uncertain, and insufficient; especially in this, that the manner and degree of the assault charged is not shown. No deadly or dangerous weapon or instrument is described, or averred, or shown to have been used or exhibited in the assault," &c. "nor is it in any manner averred or shown that killing or murder might have ensued from the assault, or how, or by what means the alleged attempt to kill was attempted to be carried into effect." In the argument of the defendant's counsel, it was contended that the indictment should so far have discriminated the nature, degree, and circumstances of the assault and battery as to show the court with legal certainty that it was commensurate with the imputed intent, and was per se, if proved as laid, sufficient to ground a presumption of the intent from the act itself. The penitentiary act, upon which this indictment was framed, only requires that the offence charged should be an assault and battery with intent to kill. To describe the offence as it is described at the common law, with the addition of words charging the intent to kill, seems to be all that is necessary in an indictment upon the statute, especially as the sixteenth section of the same statute declares, that all definitions and descriptions of crimes, not provided for in the acts, should remain as heretofore. When, therefore, the statute uses the common-law terms "assault and battery," the description of that part of the offence which consists of the assault and battery must be the same as heretofore, that is, at common law; and although in the old indictments for assault and battery it was usual to say, with sticks, staves, knives, &c., yet it has been often decided that the particular instrument used need not be proved, as laid in an indictment for assault and battery at common law. We think the indictment is sufficient, under the statute, if it describe the common-law offence, with the addition of the words required by the statute. The precedent referred to in Archb. Cr. Law, 348, is an indictment at common law for an aggravated assault and battery, describing particularly the manner of beating, namely, by throwing the person down upon a brick floor, and beating and kicking him, &c.; but it cannot be contended that those circumstances might not have been given in evidence upon a common count for assault and battery. The other precedent, cited from page 349, is upon the statute of 9 Geo. IV. c. 31, § 11, which enacts that if any person shall unlawfully and maliciously attempt to drown any person, with intent to murder such person, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death. Archb. Cr. Law, Append. 76. The precedent cited states that the defendant feloniously, unlawfully, and maliciously, did cast, throw, and push the said J. N. into a certain pond there situate, wherein was a great quantity of water, and did then and there feloniously, unlawfully, and maliciously attempt the said J. N. to drown and suffocate, with intent, then and there, and thereby, feloniously, willfully, and of his malice aforethought, the said J. N. to kill and murder, against the form of the statute, &c. This precedent contains no averments not required by the statute in order to make a case under it. By the same section of the same statute, it is enacted "that if any person unlawfully and maliciously shall administer, or attempt to administer, to any per-

son, or shall cause to be taken by any person, any poison or other destructive thing, or shall unlawfully and maliciously attempt to drown, suffocate, or strangle any person, or shall unlawfully and maliciously shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person; or shall unlawfully and maliciously stab, cut, or wound any person, with intent, in any of the cases aforesaid, to murder such person, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony; and, being convicted thereof, shall suffer death as a felon." The indictment in page 349, for attempting to shoot, with intent, &c., states it to be by drawing a trigger of a certain pistol loaded with gunpowder and one leaden bullet, which pistol the defendant had and held in his right hand. The indictment in page 351, for stabbing, with intent, &c., only states that the defendant, in and upon the right side of the belly of him the said J. N., between the short ribs of him the said J. N., feloniously, unlawfully, and maliciously, did stab, cut, and wound, with intent, &c. And Archbold says: "The instrument or means by which the wound was inflicted need not be stated; and, if stated, do not confine the prosecutor to prove a wound by such means. It is not necessary that the prosecutor should be cut in a vital part, for the question is not what the wound is, but what wound was intended." The indictment in page 351, under the 12th section of the same statute, for stabbing, &c., with intent to maim, &c., is in the same form. And Archbold says the instrument need not be stated; and if stated need not be proved. The indictment in page 357, under the 25th section of the same statute, for an assault and battery with intent to commit felony, and which punishes the offence by imprisonment and hard labor not exceeding two years, or by fine and imprisonment and surety of the peace, is quite as bare of circumstances as the present. It merely states that the defendant, in the county aforesaid, in and upon one J. N., in the peace of God, &c., then and there being, unlawfully did make an assault, and him the said J. N. did then and there beat, wound, and ill-treat, with intent, &c. Add (says Archbold,) a count for a common assault and battery. From a consideration of all these forms of indictment, we are satisfied that the form of the present indictment is sufficient; and that the manner of the assault and battery need not be more circumstantially stated therein than it is.

(3) The third reason alleged for arresting the judgment is, because the indictment does not charge the assault to have been felonious or malicious; nor aver, nor infer, that the killing charged as intended by the defendant would have been a felonious or malicious homicide in any degree, if it had been perpetrated. The statute does not require that the assault should have been felonious, or malicious; nor that the homicide, if it had been perpetrated, would have been felonious or malicious. The intent to kill gives to the assault and battery its whole statutory character. It is sufficient to charge the assault and battery in the usual form, and that it was made with that intent.

The defendant by his counsel, has also moved for a new trial: (1) Because the verdict, as to the intent to kill, was contrary to evidence—first, in this, that there was no evidence of malice prepense, or other matter going to constitute the offence of murder, if death had ensued; and, secondly, in this, that there was no evidence of the intent to kill or murder.

The answer to this objection to the verdict is, that there was evidence, tending to prove the intent to kill, sufficient to be left to the jury, who had the whole subject before them; and that the issue did not require evidence of malice prepense, nor of any other matter, to show that the offence would have amounted to murder if death had ensued.

(2) The second ground urged for a new trial is, that the prisoner stands convict upon another distinct indictment for the same identical offence, and upon the same identical and no other evidence, of a simple assault and battery, without the aggravation of an intent to kill.

The answer to this is, that upon the common-law indictment for simple assault and battery, the attorney for the United States has entered a nolle prosequi, so that no judgment can be entered upon the verdict in that case; and a former conviction cannot be pleaded in bar unless it has been followed by judgment; nor can the pendency of another indictment for the same offence be pleaded in bar or abatement, though it may be a good ground for a motion to quash. 1 Chit. Cr. Law, 446, 447; Fost. Crown Law, 104; 1 Chit. Cr. Law, 299, 301, 303, 452, 454–457, 462; 2 Hale, P. C. 243, 246. All that the defendant could ask in any previous stage or these prosecutions, was, that the attorney of the United States should select which of them he would try. The defendant having pleaded to both indictments, and the trial of both, by the consent of the defendant, having been had before the same jury, and verdicts against him having been rendered upon both indictments, the attorney of the United States had the option to take judgment upon that which would "best answer the ends of public justice;" the court taking care that judgment should not be entered up on both. Swan v. Jeffreys, Fost. Crown Law, 106.

(3) The third ground urged for a new trial supposes that there may be judgments at the same time upon both indictments. This cannot now be, as a nolle prosequi is entered upon one of them. I am not certain that two separate indictments were necessary, as both are for misdemeanor. In one

the punishment is fine and imprisonment; and in the other, imprisonment and labor; and in neither is the defendant entitled to a peremptory challenge. But the grand jury having found separate indictments, they must be disposed of; and if the court should at any time be satisfied that indictments are multiplied vexatiously and unnecessarily, and with a view to oppress the defendant, the remedy must be by quashing them, or some of them. Archb. Cr. Law, 60; Young v. Rex, 3 Term R. 106; Rex v. Benfield, 2 Burrows, 984.

(4) The fourth reason assigned for a new trial is the discovery of evidence supposed to be material for the defendant, after the jury was sworn, when it was too late to be adduced in his defence. The affidavit in support of this allegation states that, if a new trial should be granted, the defendant expects to prove, by evidence not known to him in time to be adduced in his defence, that John Sybert, upon whom the assault and battery is alleged to have been made, had a dirk or knife about his person at the time of the assault, and that it was taken from him by the witness. It does not seem to us that that fact is material; for, unless the defendant could show that what he did was in self-defence, it would be no ground of defence that the person assaulted was secretly armed. It might be that he had armed himself against the apprehended attack which actually took place.

We are therefore of opinion that the motion in arrest of judgment, and for a new trial, should be overruled.

THRUSTON, Circuit Judge, absent.

The defendant was sentenced to the penitentiary for two years and a half, from the 2d of February, 1837.

Case No. 15,354a.

UNITED STATES v. HERBERT.

[2 Hayw. & H. 210.] [1]

Criminal Court, District of Columbia. July 24, 1856.

MURDER—SELF-DEFENSE—DUTY TO RETREAT—INSTRUCTIONS.

1. In a trial for homicide the court *held*: That the moment a man is bound to retreat, is that in which the danger becomes apparent; up to that time there is nothing to retreat from; he is obliged to retreat if he can safely; but if by reason of the fierceness of attack, he is prevented from moving away, the law does not require it of him; but he is excused in the same manner as if he fled. If, under these circumstances, he gives his assailant a mortal wound it is a case of justifiable homicide.

2. The court is not bound to grant an abstract instruction; that in answering a prayer the judge gives an opinion when he modifies the instruction asked for on an abstract point of law it is error.

3. The criminal court should not instruct the jury that upon the whole evidence the prisoner is entitled to an acquittal.

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

This case was first examined by Justices of the Peace Daniel Smith and James H. Birch, who concluded not to take bail, but to refer the matter to the criminal court. Thereupon the counsel for the accused [Philemon T. Herbert] procured a writ of habeas corpus, and brought him before Judge Crawford, who decided that a conviction for murder could not take place, and admitted the prisoner on bail in the sum of $10,000 to answer the charge of manslaughter. The grand jury thereafter made a presentment for murder against the prisoner.

Mr. Bradley, John B. Weller, Percy Walker, and P. Philips, for the prisoner.

Philip B. Key, U. S. Dist. Atty.

On the trial the prisoner's counsel submitted the following instructions: Instructions to the jury: "1st. If a sudden affray arose between the accused and the deceased, and afterwards several other persons interfered to assist the deceased, and by these assailants the defendant was borne down and beaten, and had reason to believe that he was in imminent danger of bodily harm, from which he could not safely escape, and while in this position fired the pistol by which the deceased was killed, it was in judgment of law a case of excusable homicide, and it is immaterial, in the absence of premeditation and malice, by whom the affray was commenced. And it is also not material that the accused might have escaped before the imminent peril came upon him, if at the time the peril came, he had reason to believe himself in imminent peril of life, or of great bodily harm, and when he fired the pistol he could not safely escape. 2nd. To have authorized Herbert to take the life of Keating, the necessity for doing so need not be actual; for if the circumstances were such as to impress his (Herbert's) mind with the reasonable belief that such necessity was impending it is sufficient. 3rd. If the jury believe, from the evidence, that at the time the pistol was discharged, Herbert was being pressed by superior numbers, and was in danger of death or of serious bodily harm, from which he could not safely escape, he was justified in taking life. 4th. If the jury entertain reasonable doubts as to any material facts necessary to make out the case for the government, they must give the benefit to the defendant."

The judge accepted them without hesitation. The jury retired after the reading of the instruction by the court. The jury could not agree, and were dismissed.

The prisoner was again tried, Mr. Wm. P. Preston, of Baltimore, assisting the district attorney in the prosecution. The case for the prosecution was opened by Mr. Key, followed by Mr. Bradley for the defence.

After the testimony was given on both sides, the prosecution moved the court to instruct the jury as follows: "1st. If from the

evidence the jury believe that on the day mentioned in the indictment, Philemon T. Herbert, the accused, armed with a pistol or pistols, entered the breakfast room of Willard's Hotel, and then and there, without provocation, made use of language and acted in a manner ordinarily indicative of a wicked, depraved and malignant spirit, and within said room, shortly after the use of said language and the doing of said acts, by the means of the pistol or pistols aforesaid, shot to death Thomas Keating, who was then and there unarmed, and in the lawful discharge of his duty, such shooting and killing is in judgment of law murder. 2nd. If from the evidence the jury believe on the day mentioned in the indictment, Philemon T. Herbert, the accused, being a guest or boarder at Willard's Hotel, entered the breakfast room of said hotel for the purpose of obtaining his breakfast; that, having in a proper and lawful manner ordered said breakfast; the servant to whom he gave the said order, declined to comply therewith, unnecessarily delayed the execution thereof, or, by insolence of manner, words or gestures, insulted or provoked said Herbert; and thereupon, under such insult or provocation suddenly, in heat of blood and under the influence of mere passion, by means of a pistol or pistols, which he casually had about his person, said Herbert shot to death a certain Thomas Keating, who then and there in the opinion of said Herbert, took part in the insult and provocation aforesaid, and by words and actions manifested a disposition to commit an assault and battery on the said Herbert, such shooting and killing is in the judgment of law, manslaughter. 3rd. If the jury believe from the evidence that the prisoner at the bar made an assault and battery upon the deceased, and the brother of the deceased, Patrick Keating, interfered to pacify the prisoner and to protect the deceased from said assault; and that the prisoner then advanced upon the said Patrick Keating with a chair and a loaded pistol, whereupon the said Patrick Keating seized the said pistol and endeavored to wrench it from the grasp of the prisoner, and that the deceased then came to the assistance of the said Patrick Keating; and that the deceased and Patrick Keating and one Gardiner, a friend of the prisoner, and the prisoner then became engaged in a conflict and struggle, and the said parties thus engaged were separated by one DeVenois, and that the said Patrick Keating fled; and that the prisoner then seized the deceased by the collar of his coat or jacket and shot him with the said pistol, which caused his death, then, in the absence of premeditation and malice, the prisoner is guilty of manslaughter. 4th. If the jury believe from the evidence that the prisoner first assaulted the deceased with a deadly weapon, and the brother of the deceased, Patrick Keating, interfered to protect the deceased, and the prisoner then advanced upon the said Patrick Keating with a deadly weapon, whereupon the said Patrick Keating seized the deadly weapon and endeavored to wrench it from the grasp of the prisoner, and that the deceased then came to the assistance of the said Patrick Keating, and that the deceased and Patrick Keating and one Gardiner and the prisoner then became engaged in a conflict and struggle, and that the prisoner then used the deadly weapon upon the person of the deceased, which took his life, then, in the absence of premeditation and malice, it is manslaughter, notwithstanding the jury may believe from the evidence the prisoner had reasonable grounds to apprehend great bodily injury. 5th. If the jury believe from the evidence that the prisoner, even if he were assaulted, could have retreated without endangering his life, or without receiving great bodily injury by so doing, and did not retreat, but pressed on the attack and took the life of the deceased, then, in the absence of premeditation and malice, he is guilty of manslaughter. 6th. If from the evidence the jury believe that on the day mentioned in the indictment, Philemon T. Herbert, the accused, being a guest or boarder at Willard's Hotel, in the room referred to in the evidence in this cause, made an assault upon Thomas Keating with a loaded pistol, and that out of said assault arose an affray, in which affray the said accused shot to death the said Thomas Keating, that then the accused is not justifiable under the law in making the plea of self-defence."

The judge's decision upon the above instructions was as follows:

"Qualifications to the 1st instruction: The instruction prayed above is abstract. It presents a naked proposition, without reference to any fact disputed in the case, or any fact sworn to on either side, except only the presence of the prisoner at Willard's Hotel, on the 8th of May last, having a pistol in his possession, and the shooting by him of Thomas Keating, which facts are not contested. It is the duty of the jury to give their verdict on the whole evidence adduced on this trial, and on that only in connection with the law as it shall be given to them by the court. The circuit court has decided uniformly that the court is not bound to grant an abstract instruction, and the same court has gone so far as to decide in a case which went from this court, that if the judge, in answering a prayer, gives an opinion when he modifies the instruction asked for on an abstract point of law, it is error. 2nd. The jury may believe the above statement of facts, and yet the defendant not be guilty of manslaughter, by reason of additional facts which the evidence, in the opinion of the jury, may have established. If so, all the facts are to be weighed together by you. The prayer sets forth not only a part of the evidence, but so small a portion of it as to have very little application to the case. It excludes all the

material facts that have been sworn to on both sides, and which are in controversy. All these you are to weigh and decide upon. The case supposed would be manslaughter, but, unless all the testimony on either side is thrown out of view, it is not this case. 3rd. The above statement of facts would make a case of manslaughter if they are believed by you from the evidence; but it embraces only a part of the evidence, and as already remarked, it is your especial province to draw your conclusions of the guilt or innocence of the accused from the entire body of testimony, and to give credit or not to any one or more of the witnesses on either side. 4th. On the statement of facts in this prayer, it is granted. But the court thinks the first statement in it is capable of misconstruction as to the nature of the assault said therein to have been made by the accused upon the deceased with a deadly weapon. Whether there was such an assault, and, if there was, what was the nature, whether the pistol was pointed at deceased and used as a deadly weapon, or whether it was used as a man might use a stick or other instrument, are questions for you to decide; and this and all other questions involved in the cause trying you will determine, not on any partial statement of facts, but upon the whole evidence. This remark in regard to your duty has been repeated, and will be again, because the district attorney has insisted that to grant the prayer of the defendant would be to exclude a part of the evidence from the consideration of the jury, and I should regret very much if such an erroneous idea should find a resting place in your minds. 5th. This instruction is granted with the remark that the time when retreat was incumbent on the accused was the moment when the danger became apparent. 2 Bl. Comm. bk. 4, p. 184. 6th. This court, and the circuit court, have both decided that the court should not instruct the jury, that upon the whole evidence the defendant is entitled to acquittal. Drayton v. U. S. [Case No. 4,074] 2 T. H. Crawford's Opinions, pp. 39, 46. To grant the instruction now asked would be more erroneous, for it rests on only a part of the testimony. The defence in this case is that the pistol was fired in self-defence. To instruct the jury that the plea of self-defence cannot be maintained on this trial, would be to take the decision of facts from the jury. The instruction is refused."

Judge CRAWFORD then gave his decision upon the instructions, which had been asked by the counsel for the defence, which instructions the judge explained as follows:

"The instructions asked by the defendant were given substantially at the last trial, with such short explanations as seemed to be calculated to aid the jury in comprehending them. They will be given again with fuller, but still brief explanation, out of respect to the counsel who have argued for and against the prayers. The jury, as has been already mentioned, should look to the whole evidence, and not to any statement of facts made by either side, short of the whole of it.

"The first instruction asked for is in these words: '1st. If a sudden affray arose between the accused and the deceased, and afterwards several other persons interfered to assist the deceased, and by these assailants the defendant was borne down and beaten, and had reason to believe that he was in imminent danger of great bodily harm, from which he could not safely escape, and while in this position fired the pistol by which the deceased was killed, it was in judgment of law a case of excusable homicide, and it is immaterial, in the absence of premeditation and malice, by whom the affray was commenced; and it is also not material that the accused might have escaped before the imminent peril came upon him, if at the time the peril came he had reason to believe himself in imminent peril of life, or of great bodily harm, and when he fired the pistol he could not safely escape.' The branch of the instruction asked, which I will first notice is, whether it is material who struck the first blow under the circumstances in evidence. In the case of sudden affray, where parties fought on equal terms, that is, at the commencement or onset of the conflict, it matters not who gave the first blow. 1 Russ. Crimes (845) 587, 588. If upon a sudden quarrel blows pass without any intention to kill or injure another materially, and in the course of the scuffle, after the parties are heated by the contest, one kills the other with deadly weapon, unless he had a previous intention or made previous preparation to use such a weapon in the course of the affray (Id. 588); that is, when the contest continues as it began, and there was no addition of force to either side or change of parties, and no danger nor reason to believe there was danger to life or serious bodily harm; or if one party should be joined by other individuals, and by his and their active co-operation there was such danger and no power to retreat, then the right of self-defence arises. Id. 661; Fost. Crown Law, 277. As in the case of manslaughter on sudden provocation, when the parties fight upon equal terms, all malice apart, it matters not who gave the first blow, so, in the case of excusable self-uefence, it seems that the first assault in a sudden affray all malice apart, will make no difference, if either party quit the combat and retreat before a mortal wound be given. 1 Russ. Crimes, 662. He must endeavor to retreat, in the language of 4 Bl. Comm. 1391; that is, he is obliged to retreat, if he can safely; but if by reason of the fierceness of the attack, or by surrounding obstacles or impediments, or by his having been held, and so prevented from moving away he could not retire from the contest and retreat with safety, the law does not require it of him, but he is excused in the same manner as if he had fled. 1 Hale, P. C. (1847) 482; Whart. C. S. 256; 1

Russ. Crimes, 661; U. S. v. Noah Green, 2 T. H. Crawford's Opinions, 179 (decided by the court at Dec. term, 1851). The moment when a man is bound to retreat is that in which the danger becomes apparent. Up to that time there is nothing to retreat from. A man may, to be sure, decline a combat when there is no existing or apparent danger, but the retreat to which the law binds him is that which is the consequence. Fost. Crown Law. Several blows were struck before the retreat, and several cases cited by counsel on both sides show this to be law. From these well established principles it results, that if you believe, from the whole evidence which you have heard on this trial, that a sudden affray arose, without malice on either side, between the deceased and the accused, and that afterwards several other persons interfered to assist the deceased, and that by them the prisoner was borne down and beaten, and had just reason to believe that his life was in danger, or that some grievous bodily harm was impending over him, from which he could not safely retreat, and that, thus situated and so circumstanced, he fired the pistol to save his own life from destruction or his person from grievous injury, it is a case of excusable homicide. If you believe from the evidence that there was an absence of all malice, it is not material who struck the first blow. The defendant was bound to retreat, if he could, before he can be excused on the ground of self-defence; but if you believe from the evidence that he had, under the circumstances mentioned above, good ground to believe that his life was in danger or that he was about to receive some grievous personal harm, and that at the time this danger was apparent and when he fired the pistol he could not safely retreat, it is not material that he might have escaped at the commencement of the affray."

The following are the remaining instructions asked for by the defence, and Judge CRAWFORD'S decision thereon:

"2nd. To have authorized Herbert to take the life of Keating, the necessity for doing so need not be actual; for if the circumstances were such as to impress his (Herbert's) mind with the reasonable belief that such necessity was impending, it is sufficient. There is, strictly speaking, no authority except the order of the law for taking a man's life, but a homicide may be excusable. If the defence of an accused party is put on the ground of the act charged, being necessary to save his own life, or his own person from great bodily harm, the question is, had he just foundation, proper reason for the belief that he was in danger; not what he thought, but whether the circumstances which surrounded him were such as to create the apprehension of said danger, in the mind of a reasonable man? And this is a question for you to determine. If circumstances did exist that would justify the apprehension of danger, then it is not necessary that the danger in point of fact existed. U. S. v. Cook (Dec. Term 1845); U. S. v. Usher (June Term 1847). See 1 Hale, P. C. (1847) 481, 482; 1 Russ. Crimes, 669.

"'3rd. If the jury believe from the evidence that at the time the pistol was discharged, Herbert was pressed by superior numbers and was in danger of death or of serious bodily harm, from which he could not safely escape. he was justified in taking life.' This is but the first prayer condensed or put into smaller compass, and if you believe from the evidence that the several facts detailed in the first prayer and in the answer to it existed as therein stated, then the response to that first prayer is an answer to this one.

"'4th. If the jury entertain reasonable doubts as to any material fact necessary to make out the case for the government, they must give the benefit to the defendant.' There are gentlemen on this jury who could themselves answer this prayer, I presume, from the instruction it asks; having been given so often, and probably to themselves as jurors on many occasions. The law is so."

After the instructions had been disposed of, Mr. Preston addressed the jury on the part of the prosecution, followed by Messrs. Ratcliffe & Walker, of the counsel for the prisoner.

After the closing argument by Mr. Key, THE COURT read the instructions submitted by the defence. The jury retired, and, after an hour's deliberation, brought in a verdict of acquittal.

Case No. 15,355.

UNITED STATES v. HERMANCE et al.

[15 Blatchf. 6.] [1]

Circuit Court, S. D. New York. July 1, 1878.[2]

INTERNAL REVENUE LAWS—TAX ON SPIRITS—WHAT IS A PAYMENT—ABSCONDING COLLECTOR—LIABILITY OF SURETIES.

A distiller of brandy from fruits, paid to a deputy collector of internal revenue, money intended as the tax on such brandy, without receiving the proper stamps required by law to be affixed to the casks containing such brandy before it could lawfully be sold. The collector converted the money to his own use, and did not enter it on his books, or report or pay it to the United States. The collector did not prepare any stamps for the distiller, or furnish any to him. The collector absconded, and an acting collector was appointed. After that, and against the protest of the sureties on the official bond of the collector, the proper stamps were issued to the distiller, by the acting collector, by direction of the commissioner of internal revenue. In a suit against such sureties, by the United States, on such bond, to recover the amount of such money: *Held*, that the payment of the money

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

[2] [Affirming Case No. 15,356.]

to the deputy collector, without receiving stamps therefor, was not a payment of the tax on the brandy; that the money did not become public money in the hands of the collector; and that the sureties were not liable for it.

[Error to the district court of the United States for the Southern district of New York.]

[This was a suit by the United States against Henry L. Hermance and others, as sureties upon the official bond of a collector of internal revenue. The case is now before the court upon a writ of error.]

Stewart L. Woodford, U. S. Dist. Atty.

Peter Cantine, for defendants in error.

WAITE, Circuit Justice. This was an action upon the official bond of John P. Curtis as collector of internal revenue for the 13th collection district of the state of New York. The collector had absconded previous to the commencement of the suit, and process was served only upon his sureties. The facts are these: Four distillers of brandy from fruit, having in their respective distilleries brandy in casks, which had been duly gauged and reported, in the form required by law, to the collector and to the internal revenue department, went to the office of the collector to pay the taxes. He being absent and there being no stamps in the office signed, they each paid the deputy collector the amount of money which was required, and left, with the understanding that they were to receive the proper stamps at some future time. Upon making the payment they took from the deputy receipts in the following form, to wit: "United States Internal Revenue, Collector's Office, 13th District, New York, July 22, 1875. Received from Hiram Atkins, five hundred thirty four $^{80}/_{100}$ dollars, for tax on 764 gallons cider brandy, at 70 cents per gallon, $534 80. J. P. Curtis, Collector, A. C. Norris, Deputy." The several payments were made July 22d, August 31st, September 15th, October 1st, and October 26th, 1875. On the 4th of November in the same year, Curtis, the collector, absconded, having converted the money thus paid to his own use, and never having entered it upon his books or reported it to the department. The distillers never received their stamps from him, and none were ever prepared for them by him. On the 9th of November the office of the collector was taken possession of by a duly authorized revenue agent, and he remained in charge until November 17th, when an acting collector was appointed. After this, against the protest of the sureties upon the bond, stamps were issued to the distillers by the acting collector, upon the direction of the commissioner of internal revenue, antedated as of November 16th, 1875. Upon this state of facts the district court gave judgment for the defendants [Case No. 15,356], and the judgment has been brought here for review by this writ of error.

The single question to be determined is, whether what was done between the distillers and the deputy collector, before the collector was suspended from office, amounted in law to a payment of the taxes upon the brandy in the possession of the distillers. If it did, the money in the hands of the collector was public money, to be accounted for and paid over only to the United States. But, until the payment of the taxes was complete, no such accountability arose.

The spirits in this case were distilled from fruit, and, therefore, under the operation of section 3255 of the Revised Statutes, resort must be had to regulations of the commissioner of internal revenue, approved by the secretary of the treasury, as well as to the acts of congress, to ascertain when the taxes could be paid and what must be done to effect a payment. Brandy distilled from fruit must be drawn into casks, each of not less capacity than ten gallons, wine measure, and must be retained at the designated place of deposit at the distillery, until the tax is paid thereon and the stamps are attached thereto. On the 25th of each month, the distiller is required to notify the collector of his district, in a particular form, of the probable number of packages that will be distilled by him during the month, and the probable number of wine gallons, with his request to have the same gauged and marked; and, on the receipt of such notice, and after the last day of the month, the collector is required to cause the brandy produced during the month to be gauged, proved and marked by a United States gauger. The gauger, upon receiving the order of the collector, must proceed at once to gauge, prove and mark each cask of such spirits that he may find in the distillery or designated place of deposit, and to cut upon the bung-stave of each cask the wine gallons, the proof and the proof gallons, and to cut or burn upon the head of each cask the name of such distiller, the district, the serial number of the cask, and the kind of spirits, and to mark thereon the date of the gauge, and the name of the gauger by whom made, placing such date and name on the head of the cask, in such way as to admit of the attaching of the tax-paid stamp between them. On completing his inspection, the gauger must immediately make report thereof in duplicate, according to a particular form, showing for whom gauged, and where, the number of casks, the serial number of each, the proof, the wine gallons and proof gallons of each, the kind of spirits and the amount of tax thereon, and sign the same, delivering one copy thereof to the distiller and transmitting one to the collector of the district. Reg. & Inst. Series 6, No. 7, p. 90. All stamps required for distilled spirits are engraved in their several kinds in book form, and are issued by the commissioner of internal revenue to collectors, upon their requisition, in such numbers as may be necessary. Each stamp has an engraved stub attached to it, with a number

corresponding with an engraved number on the stamp. The stub must not be removed from the book, and there must be entered upon it such memoranda of its corresponding stamp as may be necessary to preserve a perfect record of the use of the stamp detached. Rev. St. § 3312. On every stamp for the payment of tax on distilled spirits, there is engraved words and figures representing a decimal number of gallons, and on the stub corresponding a similar number of gallons, and between the stamp and the stub, and connecting them, are nine engraved coupons, which, beginning next to the stamp, indicate in succession the several numbers of gallons between the number named in the stamp and the decimal number next above. When a collector receives the tax on the distilled spirits contained in any cask, he must detach from the book a stamp representing the denominate quantity nearest to the quantity of proof spirits in the cask, as shown by the gauger's return, with such number of the coupons attached thereto as shall be necessary to make up the whole number of proof gallons in the cask. All unused coupons must remain attached to the stub, and no coupon is of any value when detached from the stamp. Section 3313. The books of tax-paid stamps issued to a collector are charged to his account at the full value of the tax on the number of gallons represented on the stamps and coupons contained in the book. Every collector must make monthly returns of all tax-paid stamps issued by him to be affixed to any cask or package containing distilled spirits on which the tax has been paid, and account for the tax collected. It is the duty of the collector to return to the commissioner the book of marginal stubs, as soon as the stamps are used. Section 3314. When taxes, as shown in the gauger's report, are paid upon spirits distilled from fruit, the collector is required to prepare tax-paid stamps of the proper denomination, with all the blanks filled up according to the facts appearing in the gauger's return, including the serial number of the cask to which each stamp is to be attached, which stamps must be signed by the collector, as well as by the gauger making the return, and delivered to the distillers. Reg. p. 91. This stamp must then be affixed to the cask by the distiller and cancelled. That being done, he is permitted to sell the spirits in the tax stamped packages, at the place of manufacture, (Reg. p. 92); but, until the tax is paid and the stamp is affixed, the packages cannot be removed or sold. When taxes are paid upon spirits distilled from grain, and an order is obtained for a withdrawal of the spirits from a warehouse, the collector cuts the tax-paid stamps from his book and they are affixed by the gauger to the casks, in the presence of the storekeeper, and the cask is branded in a particular manner.

From this statement it is apparent, that taxes can only be paid upon distilled spirits in casks which have been properly gauged and marked. The payment, too, must be of the tax upon the contents of each cask by itself, and for each payment a tax-paid stamp is to be issued, corresponding with the gauge and the marks of the cask to which it relates. The transaction is something more than the mere payment of a tax. In effect, it is the purchase from the collector, by the distiller, of stamps which must be affixed to the packages before the spirits they contain can be put upon the market and sold. It is of no importance that the price to be paid for the stamp is the amount of the tax upon the purchase to which it is to be affixed. The payment is of no avail to the distiller, for the purposes of trade, without the stamp. He cannot get the stamp until he pays the tax. Therefore, he pays the tax to get the stamp. The fruit distiller is permitted to take the stamp from the collector and affix it himself, and the gauger does the same thing for the grain distiller. To the distiller the stamp on the package is the essential thing. Without it his payment is of no use to him.

So long as the blank stamp remains in the book of stamps, and in the possession and under the control of the collector, it is a voucher to him, in his settlement of accounts with the government. He is charged with all stamps and coupons delivered to him and credited with such as he returns. The government has no means of knowing what his collections have been, except by taking an account of the stamps he has issued. Until then, a stamp has been, at least, prepared for issue, it would seem to be clear that the distiller might withdraw his money and leave his taxes unpaid. If this be so, the payment is not complete. So long as the distiller can control his money in the hands of the collector, it is held as bailee for him and not as public money of the United States.

The provision which requires the collector to detach the stamps from the book when he receives the tax, is part of the system of checks and balances, adopted for the security both of the government and the tax-payer. The distiller need not pay until he can obtain his stamps; and, as the issue of the stamps is the evidence upon which the government relies to show the amount for which the collector is accountable, good faith requires that payments should not be made except in the regular way.

In this case, the receipts taken from the deputy collector indicate no application of the money paid to specific casks of spirits. It is possible that the records of the office may have furnished evidence of the manner in which it was expected the distribution would be made, but none was actually made at the time, so far as the record discloses. If the payment had been made before the spirits were drawn into casks, or even before the casks were gauged, marked and re-

ported by the gauger, it could not be seriously contended that the money paid was public money in the hands of the collector. And the obvious reason is, that no application of the payment could then be made. From this it would seem to follow, that actual application was essential to the completion of any payment of taxes upon distilled spirits, and that, as the law has only provided one way in which the collector can bind the government by his application, to wit, by filling up and detaching the appropriate stamp from his book, a payment could not be complete until this was done. This is in accordance with the analogies of the law. As has been seen, the payment of a tax upon distilled spirits is, in effect if not in reality, the purchase of the stamp which is to make the payment available, and as a purchase would not be complete until the stamp had been put in a condition by the collector to be affixed to the cask, or, at least, until it had been legally designated and set apart for that purpose, it is not unreasonable to require the same things to be done before the payment shall be considered complete. The object of the payment, so far as the distiller is concerned, is to enable him to control and dispose of his property. This he cannot do until he is in a condition to attach to it the instrument which the law has made the only evidence that it may lawfully be put upon the market. He ought not to be bound by his payment, therefore, until his right to control this evidence is complete. That certainly cannot be until all has been done by the collector which is necessary to fit the evidence for use, and it has been legally set apart for that purpose. That was not done in this case before the defaulting collector was removed from his office, and it is not claimed that the sureties can be held by what was done afterwards. Judgment affirmed.

Case No. 15,356.

UNITED STATES v. HERMANCE et al.

[24 Int. Rev. Rec. 111.]

District Court, S. D. New York. 1877.[1]

INTERNAL REVENUE LAWS—PAYMENT OF TAX—ABSCONDING COLLECTOR—LIABILITY OF SURETIES.

[Placing in the hands of a collector money intended as payment of the tax on spirits, without receiving the proper stamps therefor, is not a payment of the tax so as to render the collector's sureties liable for the same in case the collector converts it to his own use; and, if the collector absconds with the money, the subsequent issuance of the proper stamps to the distiller by direction of the commissioner of internal revenue, cannot create any liability on the part of the sureties.]

This was an action against Henry L. Hermancé and others as sureties upon the official bond of John T. Curtis, collector of internal revenue for the Thirteenth collection district of New York. A distiller had paid to a deputy-collector a sum of money intended as payment of the tax on certain brandies, without receiving the stamps required by law to be affixed to the casks. The money was turned over to the collector who converted the same to his own use and absconded. Thereafter, by direction of the commissioner of internal revenue, the acting collector of the district issued to the distiller the proper stamps, against the protest of the sureties on the collector's official bond, and the question in this suit is, whether they are liable for the money in question.

R. M. Sherman, Asst. U. S. Dist. Atty.
P. Cantine, for defendants.

BLATCHFORD, District Judge. I am of opinion that the placing of the moneys in the hands of Mr. Curtis by the distillers was not the payment of the tax to the United States in such wise as to make the sureties on the bond of Mr. Curtis liable for such moneys. The payment of the tax was not complete. The receipt of the stamps by the distillers was a part of the payment of the tax. When Mr. Curtis absconded the stamps were still in the possession of the United States. They were subsequently given to the distillers by order of the commissioner of internal revenue after notice from the sureties not to do so. The United States could not, by such act, create a liability in the sureties which did not before exist. Let a verdict be entered for the defendants.

[The case was taken to the circuit court upon a writ of error to review the judgment of this court, which judgment was there affirmed. Case No. 15,355.]

[1] [Affirmed in Case No. 15,355.]

Case No. 15,357.

UNITED STATES v. HERTZ et al.

[3 Pittsb. Leg. J. 194; Whart. Prec. Ind. § 1123, note.]

Circuit Court, E. D. Pennsylvania. 1855.

VIOLATION OF NEUTRALITY LAWS — HIRING PERSONS TO ENLIST—EVIDENCE.

1. If a person, within the jurisdiction of the United States, engages another to go beyond the limits of the United States with intent to enlist in the service of any foreign prince or state, and there be an intent on both sides that, after these acts have been performed, a consideration shall be paid to the party so engaging to enlist, the hiring or retaining denounced by the second section of the act of April 20, 1818, is complete.]

[2. The intent of the person accused may be inferred both from his own acts and declarations and the acts and declarations of the person or persons whom he is alleged to have hired or engaged for the purpose specified; for where two or more persons combine to do an unlawful act, the acts of each may be given in evidence for the purpose of explaining the general transaction.]

[This was an indictment against Hertz & Perkins for an alleged violation of the second section of the act of April 20, 1818, by hiring

persons to go beyond the jurisdiction of the United States to enlist in the service of a foreign prince or state.]

KANE, District Judge (charging jury). I intended, gentlemen of the jury, when we separated, to avail myself of the leisure afforded me to put my charge in writing, but I have been prevented by controlling circumstances, from doing so, and my remarks to you, therefore, will be less closely connected perhaps, though I trust they will not be on that account less intelligible and clear. The case has involved, in its progress, a train of facts of very considerable political interest—perhaps of more general interest in that aspect of it, than in its bearing on the questions which are to be decided by your verdict. There are very few among us, probably none, who have not felt aggrieved at the tone with which the press of foreign countries, and occasionally of foreign statesmen of the day, have commented upon what they have been pleased to call the over alacrity of the American people to engage in military controversies in which they had no rightful part. Our people and our government have been accused of forgetting the obligations of neutrality, and pushing ourselves forward into the conflicts of foreign nations, instead of minding our own business as neutrals and leaving belligerents to fight out their own quarrels. For one, I confess that I felt surprised, as this case advanced, to learn that, during the very time that these accusations were fulminated against the American people by the press of England, there was, on the part of eminent British functionaries here, a series of arrangements in progress, carefully digested, and combining all sorts of people under almost all sorts of influences, to evade the laws of the United States by which our country sought to enforce its neutrality; arrangements matured, upon a careful inspection of the different sections of our statutes, ingeniously to violate their spirit and principle without incurring their penalty, and thus enlist and send away soldiers from our neutral shores to fight the battles of those who were incontinently and not over courteously admonishing us to fulfil the duties of neutrality. I allude to these circumstances, and this train of thought, gentlemen, not because it is one that should influence your action as jurors, but because I feel it my duty to guard you against its influence. The question which you have to decide is not whether there has been an effort on the part of any foreign functionary to evade the provisions of our acts of congress, which are cited in these bills of indictment; your verdict will respond to the simple question, are these two men guilty of the crime with which they are charged.

In order that my remarks may not hereafter be embarrassed by the necessity of using the plural when the singular alone is the appropriate phraseology, I will say to you, at the outset, that there is no evidence against one of these defendants. Before a jury can properly convict an individual of the commission of a crime, they must be satisfied, by clear evidence, that the crime has been committed by some one. We have no statute which affects to punish braggart garrulity; and, unless the particular offence of enlisting certain definite persons has been committed by Perkins, one of the defendants, though he may have proclaimed upon the house-tops that he has recruited armies innumerable, no jury can properly convict him of the offence he professes to have engaged in.

I pass to the consideration of the case of the defendant, Hertz. He stands indicted, sometimes jointly with another, sometimes alone, with the offence of having hired and retained certain persons to go out of the United States, for the purpose of enlisting and entering themselves as soldiers in the service of a foreign prince, state, or territory. The act of congress is in these words (I read the words material to the question, leaving out those which apply to a different state of circumstances): "If any person shall, within the territory of the United States, hire or retain any person to go beyond the limits of the United States, with the intent to be enlisted in the service of a foreign prince, he shall be deemed guilty of a high misdemeanor." The question which you have to pass upon is, did Henry Hertz hire or retain any of the persons named in these bills of indictment to go beyond the limits of the United States with the intent to be enlisted or entered in the service of a foreign state? Did he hire or retain a person? What ever he did was within the territory of the United States. The hiring or retaining does not necessarily include the payment of money on the part of him who hires or retains another. He may hire or retain a person with an agreement that he shall pay wages when the services shall have been performed. The hiring or retaining a servant is not generally by the payment of money, in the first instance, but by the promise to pay money when the services shall have been performed: and so a person may be hired or retained to go beyond the limits of the United States, with a certain intent, though he is only to receive his pay after he has gone beyond the limits of the United States with that intent. Moreover, it is not necessary that the consideration of the hiring shall be money. To give to a person a railroad ticket, that cost $4, and board and lodge him for a week is as good, as a consideration for the contract of hiring, as to pay him the money with which he could buy the railroad ticket and pay for his board himself. If there be an engagement on the one side to do the particular thing, to go beyond the limits of the United States, with the intent to enlist, and on the other side an engagement, that when the act shall have been done, a consideration shall be paid to the party performing the services or doing the work, the hiring and retaining are complete.

The meaning of the law then, is this: that if any person shall engage, hire, retain or employ another person to go outside of the United States to do that which he could not do if he remained in the United States, viz. to take part in a foreign quarrel; if he hires to go, knowing that it is his intent to enlist when he arrives out—to enlist and engage him, or carry him, or pay him for going, because it is the intent of the party to enlist; then the offence is complete within the section. Every resident of the United States has a right to go to Halifax and there to enlist in any army that he pleases; but it is not lawful for a person to engage another here to go to Halifax for that purpose. I trust I make myself sufficiently clear to the jury that they may comprehend the distinction. It is the hiring of the person to go beyond the United States, that persons having the intention to enlist when he arrives out, and that intention known to the party hiring him, and that intention being a portion of the consideration before he hires him, that defines the offence.

I believe that after making this comment upon the law, I might pass on to the fact; but it occurs to me to add, that you are not to require proof of the connexion of the defendant with each particular fact and circumstance which has been given in evidence, to show the working out of the general plan. If you believe the witnesses, the object here was to effectuate an enlistment beyond the borders of the United States, and yet escape from the provisions of this section; to do effectively and yet not seem to do. If you are satisfied; no matter what was the avowed object of the party, no matter what the pretext; if you are satisfied that Henry Hertz was here engaged in hiring and retaining men to go off to Nova Scotia, there to enlist, that being their intention, and he believing that it was so, and therefore hiring them; then, no matter what was the costume or mask which the transaction wore, he has committed the offence charged in the bill of indictment.

As to the evidence, gentlemen, you have listened to it very carefully, and it has been commented upon abundantly. I do not know that it is my duty to detain you by a single remark on it. It is all on one side. Whether it establishes the fact is for you to judge. It is the law of the land that, where two or more persons combine together to do an unlawful act, the acts of each may be given in evidence for the purpose of explaining the general transaction. You will see that otherwise it would be impossible, in a case like this, to develop its true history and character. The enlistment necessarily includes the action of different parties; the concert between them is to be inferred from their acts. The intention of the party engaged or retained to enlist, is to be gathered from his conduct and declaration here, from his conduct after he reaches the foreign country, and from the action of third persons with whom he perfects the enlistment that he may have contracted for here. You are, therefore, while looking primarily at the conduct of Hertz, to look also at the actions of others tending to the same objects; and if you judge that they were actually in concert with him, then all their acts, done in pursuance of the common purpose and plan, are to be regarded as his.

With these remarks, I leave the case in your hands.

At the conclusion of the judge's charge, the jury retired and returned in about fifteen minutes. On taking their seats, the clerk of the court, in the usual form, put the question: "Gentlemen of the jury, have you concluded upon your verdict?" To which the foreman replied, "We have."

Clerk—"How say you, guilty or not guilty?"

Foreman—"Guilty as to Henry Hertz, in the manner and form as he stands indicted on all the bills of indictment; as respects Emanuel C. Perkins, not guilty."

The jury were then discharged.

Case No. 15,358.

UNITED STATES v. HESS.

[5 Sawy. 533; 25 Int. Rev. Rec. 201, 240; 8 Reporter, 102;[1] 11 Chi. Leg. News, 320.]

Circuit Court, D. Oregon. June 5, 1879.

TAX SALE—DESCRIPTION—MISTAKE IN SALE.

1. Unless required by statute, a levy or seizure of real property for the purpose of sale to satisfy a debt or tax, may be made without going upon the premises, by making a memorandum upon the warrant of the description of the premises for the purpose of a levy and sale.

2. A deputy collector of internal revenue to whom a warrant was directed for the collection of a delinquent tax due from Joseph H., levied upon three hundred and thirty acres of land belonging to said Joseph H., when said tax became due, by entering upon said warrant a correct description of the premises by metes and bounds, but at the same time incorrectly stated therein, that they were in the occupation of John H., who lived over two miles distant from the premises, and afterwards offered the premises upon which said John H. lived for sale upon the erroneous assumption that they were the premises of Joseph H., upon which he had levied as above, and there being no bidders, declared the same purchased for the United States for the amount of the tax, interest thereon and charges. *Held*, that there was no sale of the premises levied upon as the property of Joseph H., and that the United States took nothing by the subsequent conveyance to it from the collector.

Action to recover real property.

Rufus Mallory, for plaintiff.

Benton Killin, for defendant.

DEADY, District Judge. This action is brought to recover the possession of the south half of the donation of Joseph Hess

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 8 Reporter, 102, and 25 Int. Rev. Rec. 201, contain only partial reports.]

and Mary L., his wife, situate in Yamhill county, in township 3 south, range 3 west of the Wallamet meridian, and containing three hundred and thirty acres. It was brought against John Hess, who answered that he was in possession only as a tenant of his mother, Mary L. Hess, whereupon the latter was made defendant in his place. The cause was heard by the court without the intervention of a jury. The complaint alleges that the plaintiff is the owner of the premises, and entitled to the possession of the same. The answer denies these allegations, and sets up that the defendant is the owner of the premises.

The material facts are as follows: On and before June 1, 1868, the premises belonged to Joseph Hess, who, together with his wife, Mary L., on October 31, 1868, for the expressed consideration of one thousand dollars, conveyed the same to their son Tilman C. Hess; and on December 14, 1868, for the expressed consideration of five hundred dollars, said Tilman C. and Rachel M., his wife, conveyed the same to said Mary L. On June 1, 1868, a tax was assessed by the United States against said Joseph Hess of eight hundred and sixteen dollars and sixty-seven cents, with a penalty of five per centum thereon, amounting in the aggregate to eight hundred and fifty-seven dollars and fifty-seven cents, for the occupation of a distiller, and a tax of two dollars per gallon upon three hundred and fifty gallons of distilled spirits, and payment of the amount duly demanded of said Joseph Hess prior to January 4, 1871, when a warrant was duly issued to a deputy collector of internal revenue, for the collection of said tax with interest and charges. By virtue of section 3186 of the Revised Statutes, upon the demand and non-payment of this tax, it became a lien upon all the property of Hess from the time it was due. On March 22, 1871, the deputy seized the premises and sold the same at the residence of John Hess, by declaring them purchased for the United States for the amount of said tax and interest and charges, amounting to one thousand two hundred and sixty-two dollars and sixty-six cents; and on April 20, 1872, the collector of internal revenue duly conveyed the premises to the United States. This, in brief, is the statement contained in the collector's deed concerning the seizure and sale of the premises, which is made by the law (section 3199, Rev. St.) "prima facie evidence of the facts therein stated." But upon the trial, it appeared from the testimony of the deputy collector and otherwise, that said deputy was never upon the land nor nearer to it than the residence of John Hess upon the Wallace donation, which is about two and one quarter miles from the dwelling-house on the Joseph Hess donation; that said Hess at the date of the assessment of said tax, and for some years prior thereto, lived on the Wallace donation, where he carried on a distillery, and that prior to January 4, 1871, he left the country and has remained absent ever since; that John Hess, his son, also lived on the Wallace donation near his father, at this time, and during the proceedings under the warrant, lived in the house occupied by his father prior to his departure; that the notice of the seizure and the time and place of sale were given to John Hess; that the only levy or seizure of the premises was made by correctly describing them on the warrant or other memorandum of the levy by metes and bounds, but incorrectly stating therein that they were in the occupation of John Hess, whereas they were, and for some time had been, in the possession of a third person; that this error in the description was carried into the notice of sale, and the deputy collector, supposing that the distillery was upon the Hess donation, while, in fact, it was upon the Wallace donation, actually sold the latter premises to satisfy the tax against Joseph Hess.

By section 3197 of the Revised Statutes, the sale may be made at any place within five miles of the property seized in the discretion of the officer making the same. Objection is made to this levy because the deputy collector did not go upon the land to make it, or in some way signify the fact to the occupant thereof. Under the Code of Oregon it would not be a good levy. According to its provisions a levy must be made by leaving with the occupant of the premises, or if there be no occupant, then in a conspicuous place thereon, a copy of the writ. Or. Civ. Code, §§ 147, 280. But there is nothing in the internal revenue acts making the local law in this respect applicable to seizures to enforce the collection of a tax, while in the absence of any statute to the contrary, it seems to be the general rule in the states of this Union, that a levy upon or seizure of real property for the purposes of sale, may be legally made without going upon the premises, by simply indorsing a description of the premises upon the writ, and stating that they are levied upon for the purpose thereof. Catlin v. Jackson, 8 Johns. 546; Armstrong v. Rickey [Case No. 546]. Freeman on Executions (section 280, says): "Judges frequently speak of a levy, and sometimes of a seizure, of real estate under an execution. Notwithstanding this fact, it may well be doubted whether a levy is essential to a sale; and, if essential, whether any one can confidently state the acts indispensable to its legal existence. * * * Where there are no statutory provisions governing the officer, a mere entry on the writ, or an advertisement of sale, or making a memorandum descriptive of the premises, intending it for the purpose of levy, is generally regarded as a sufficient levy." To constitute, then, the seizure authorized by section 3196 of the Revised Statutes, it seems only necessary that the officer entrusted with the execution of the warrant should indorse a

description of the premises thereon, for the purpose of a levy and sale, as required therein, and give notice thereof to the owner as provided in section 3197 of the Revised Statutes.

Whether the incorporation of an unnecessary, but erroneous and probably misleading statement in the description of the premises—as that they were in the occupation of John Hess when they were not, and were distant two miles from his residence—vitiated the levy, it is not necessary now to consider. This sale was made at the house of John Hess and upon a levy and notice of sale which described the premises as being in his occupation, and was in fact a sale of the premises then in the occupation of John Hess, and under the misapprehension that they were the premises in controversy—the south half of the Joseph Hess donation. No one attended the sale or paid any attention to it, and the consequence was that that property which was worth from three thousand dollars to five thousand dollars appears to have been purchased by the United States for less than one thousand three hundred dollars.

Upon these facts there was no valid sale of the premises in controversy, and the prima facie case made out in the deed to the plaintiff is overthrown by the evidence. There must be a finding of fact and law for the defendant that she is the owner of the premises and entitled to the possession of the same.

Case No. 15,359.

UNITED STATES v. HEWES.

[Crabbe, 307; 2 Law Rep. 329; 1 Liv. Law Mag. 545; 4 Pa. Law J. Rep. 358; 2 Am. Law J. (N. S.) 204.] [1]

District Court, E. D. Pennsylvania. Jan. 31, 1840.

CONSTRUCTION OF STATUTES—SOVEREIGN POWER—IMPRISONMENT FOR DEBT.

1. The sovereign power is not bound by general words in a statute, but only when included expressly, or by necessary implication.

[Cited in Dollar Sav. Bank v. U. S., 19 Wall. (86 U. S.) 239.]

[Cited in Hoge v. Brookover, 28 W. Va. 310.]

2. The United States and their debtors are not included in the provisions of the act of February 28, 1839 (5 Story's Laws, 2760 [5 Stat. 321]).

[Cited in Hanson v. Fowle, Case No. 6,041. Distinguished in U. S. v. Tetlow, Id. 16,456; Re Sanborn, 52 Fed. 585.]

The defendant in this case [Samuel F. Hewes] was in execution on a judgment rendered for the plaintiffs, on a debt due before the 5th July, 1838; he was discharged, by the court of common pleas of Philadelphia county, as an insolvent, under the insolvent law of the state of Pennsylvania, on the 5th of July, 1838; and petitioned this court that he might be liberated from imprisonment, under the provisions of the act of February 28, 1839.

Mr. Grinnell, for defendant.

The United States are bound by the discharge given by the court of common pleas, all the requirements of the law have been complied with, and the petitioner is exonerated from all liability. Act Assem. Pa., "relating to insolvent debtors," of June 16, 1836 (P. L. 729; Dunl. Laws Pa. 717, §§ 10, 11; Dunl. Laws Pa. 719); Com. v. Cornman, 4 Serg. & R. 2; Act Cong. Feb. 28, 1839 (5 Story's Laws, 2760 [5 Stat. 321]). The words of the act of 1839 are general, and without restriction or exception. The former acts had express exception of debts due the United States. Act Jan. 17, 1800 (1 Story's Laws, 715 [2 Stat. 4]); Act March 3, 1817 (3 Story's Laws, 1652 [3 Stat. 399]); Act March 2, 1831 (4 Story's Laws, 2236 [4 Stat. 467]). And see People v. Rossiter, 4 Cow. 143; U. S. v. Wilson, 8 Wheat. [21 U. S.] 253; U. S. v. Hoar [Case No. 15,373]; U. S. v. Fisher, 2 Cranch [6 U. S.] 358, 389.

Mr. Read, U. S. Dist. Atty.

This very question has arisen in the Southern district of New York. U. S. v. Wood [Case No. 16,755a]. The United States are excepted from all general statutes, unless either expressly named therein, or included by necessary implication. Dwar. St. 668; Chit. Prerog. 382; 1 Kent, Comm. (3d Ed.) 460, 461; U. S. v. Hoar [supra]; U. S. v. Greene [Case No. 15,258]; Com. v. Baldwin, 1 Watts, 54. The state insolvent laws require notice to be given to the creditors; but when the government are creditors, who is to be notified? The president? the secretary of the treasury? the district attorney? the comptroller? the marshal? None have authority to receive such notice. If the plaintiffs are included in the act of 1839, they must come under all the restrictions of the state law, and be treated as common creditors, having no priority or preference; and they must have an attorney in every county court in the Union, in order to guard their interests. The provisions of the act of March 3, 1797 (1 Story's Laws, 464 [1 Stat. 512]), will be wholly nugatory if the act of 1839 has the extent contended for.

Mr. Grinnell, in conclusion.

The decision of the point has been made in New York. It has been argued that, if the United States are bound by the Act of 1839, they will lose their priority; there is nothing in the Pennsylvania Act of 1836, or in the decisions under it, to sanction this argument. The United States would still be preferred creditors.

[1] [Reported by William H. Crabbe, Esq. 2 Law Rep. 329, and 1 Liv. Law Mag. 545, contain only partial reports.]

HOPKINSON, District Judge. A suit was brought by the United States, against the defendant, to the last November sessions, and a judgment rendered against him. Upon this judgment a writ of capias ad satisfaciendum was issued, the defendant arrested, and committed to prison. He has presented his petition, praying to be discharged from imprisonment, by virtue of an act of congress, passed on the 28th day of February, 1839, entitled "An act to abolish imprisonment for debt in certain cases," by which it is enacted, "that no person shall be imprisoned for debt in any state on process issuing out of a court of the United States, where, by the laws of such state, imprisonment for debt has been abolished; and where, by the laws of a state, imprisonment for debt shall be allowed, under certain conditions and restrictions, the same conditions and restrictions shall be applicable to the process issuing out of the court of the United States; and the same proceedings shall be had therein, as are adopted in the courts of such state."

When this act shall be brought into practical operation, some difficulties will occur, which will probably require a more explicit declaration of the intention of the legislature; at present we have to do with but one. The defendant has exhibited a certificate, from the court of common pleas for the city and county of Philadelphia, stating that he had presented his petition to that court for relief, as an insolvent debtor; that he had given notice to his creditors to appear and show cause, if any they had, why he should not receive the benefit of the provisions of the acts of assembly, for the relief of insolvent debtors: no cause being shown why the prayer of the petitioner should not be granted, he took the oath prescribed by law, made an assignment of all his estate, and was discharged; "and it was thereupon ordered, by the said court, that the said petitioner shall not, at any time thereafter, be liable to imprisonment, by reason of any judgment or decree, obtained for the payment of money only, or for any debt, damages, costs, sum, or sums of money, contracted, accrued, occasioned, owing, or becoming due, before the time of such assignment." The single question in this case is, whether a debtor of the United States, imprisoned by process issuing from a court of the United States, or on a judgment rendered against him by that court, can avail himself of the above discharge, to be liberated from imprisonment under the said judgment and process. In other words, are the United States, and their rights and remedies against their debtors, affected by, and included in, the provisions of the act of congress of February, 1839? This is a question of grave importance to the government of the United States, as it may affect their securities for the public revenue, and their remedies against their various and numerous agents, who are receivers of the public money. It therefore demands a very careful examination, and we should not declare, judicially, the intention of the legislature, until we are well satisfied of it.

The petitioner rests his right to a discharge on the broad and general terms of the act of congress, from which no exception is made of a debt due to the United States, but it enacts that no person shall be imprisoned for debt in any state, on process issuing out of a court of the United States, &c. The words it is said embrace a debtor of the United States, and a debt due to them. If they are to be taken in their large and literal meaning, it is certainly so. But it is contended on the part of the United States (1) that, inasmuch as the United States are not expressly named and included in the act of congress, they are, by implication of law, excluded, and that their rights, interests, and remedies, cannot be affected by general words, unless a clear intention is apparent to include them; (2) that, in this case, the intention of congress that the United States should not be included in the provisions of this statute, may be collected from all the acts of congress, in relation to their debtors, and the whole policy of the government on that subject. The first is purely a question of law, to be decided by the adjudications of courts of law, for, if it be the settled law, it must be presumed that congress knew it to be so, and had it on their minds in passing the act in question. It will then be my duty only to inquire what is the law, how has it been pronounced by competent tribunals, and to abide by what they have decided. Fortunately the question has more than once come under the consideration and judgment of our own courts, as well as of those of England. I will first refer to the English authorities.

In a late elementary work, Dwarris on the Construction of Statutes, which seems to have been compiled at least with the ordinary care of such works, it is said, "It is a rule that the king shall not be restrained of a liberty or right he had before, by the general words of an act of parliament, if the king is not named in the act." Page 668. In Rex v. Allen, 15 East, 333, the question arose on the statute of 48 Geo. III. c. 74, § 15, which gave to the sessions an appeal from a conviction by justices of the peace, and empowered the sessions to hear and finally determine the facts and merits of the case in question between the parties, and enacted that no certiorari should be allowed to set aside the decision of the sessions. It was held that this did not preclude the crown from removing the conviction, and the order of the sessions quashing the same by certiorari. This is a very strong case. No words can be more direct and clear to take away the right of removal by certiorari, from the determination of the sessions, not only by declaring that it shall be final, but by the further express declaration, that no certiorari

should be allowed; and it is the stronger as it gives a right of removal to one party which is denied to the other. In giving his opinion of this case, Grose, Justice, says: "The question was whether the act intended to take from the crown the power of removing the conviction by certiorari, for it is clear that, unless the act has plainly said so, the power of the crown is not restrained. There are no words expressly taking it away. Then was it the clear intention of the legislature so to do? For I admit that, if there was such a clear intention, the crown would be restrained. This, it is to be observed, is an excise law, passed for the better collection of the revenue, which is open to a different consideration in this respect from ordinary cases." The judge argues that if in a case affecting the revenue, it was the intention of the legislature to take the power from the crown, it would have been done by express words. Le Blanc and Bailey, Justices, concur in this opinion. A similar decision was given in Rex v. Inhabitants of County of Cumberland, 6 Term R. 194, in which the construction of the statute of Anne, c. 18, § 5, on an indictment for not repairing a bridge, was in question. There are other cases decided on the same principle; indeed it has not, as far as I know, been questioned in the courts of England. 1 Bl. Comm. 261. The king is not bound by any act of parliament, unless he be named therein by special and particular words. The most general words that can be devised (any person or persons, bodies politic or corporate, &c.), affect not him in the least, if they tend to restrain or diminish any of his rights or interests. It would be of mischievous consequence to the public. This may be called "prerogative,"—the prerogative of the crown or king. In England it is attached to the king, because he is the sovereign of the country; but it is so attached to the king as the sovereign power, wherever it may reside, and in that sense we may speak of prerogative without any repugnance to the principles of our constitution, or the spirit of our institutions. It is nothing more than giving certain necessary rights or privileges to the whole community, which are denied to individual citizens on principles of public policy and expediency or the "general welfare." Many preferences of this sort, granted to the government, are found in our statutes, and no one has thought of repudiating or branding them with any odium as "prerogatives."

Without a further reference to English authority on this subject, I shall inquire how far the same principle of exemption of the government from the general words of a statute, has been adopted or recognised by American judges. I will begin with an elementary work, but whose author has held the highest judicial stations, and whose learning and accuracy of research are held in the best estimation by every judge and lawyer of our country. In the first volume of Kent's Commentaries on American Law (3d Ed.) 460, it is said, "It is likewise a general rule, in the interpretation of statutes limiting rights and interests, not to construe them to embrace the sovereign power or government, unless the same be expressly named therein, or intimated by necessary implication." This is precisely the English rule, and no suggestion is made of a different rule here; on the contrary, the learned commentator, in addition to his English authorities, cites the opinion of Judge Story, as delivered in U. S. v. Greene [Case No. 15,258], which is fully to the point. The case there decided was that the United States may sue in the district court as endorsees of a promissory note, against the maker thereof, although the maker and payee are citizens of the same state, notwithstanding the restriction in the eleventh section of the judiciary act, which the judge says was not intended to apply to suits brought by the United States, or if so intended, was repealed by the act of 1815, c. 253. [3 Stat. 244.] Now the words of the judiciary act of 1789 [1 Stat. 73], are as general and comprehensive as possible, "No civil suit shall be brought," &c., "nor shall any district or circuit court have cognizance of any suit to recover the contents of a promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made." There is no exception of the United States, or of a suit brought by them, as assignees; yet they are not restrained by the general words of the act, which exclude every other suitor from these courts. And why did not these general words include the United States? The reason is given in the opinion of the court. The learned judge who delivered the opinion admitted that if the terms of the law are to be understood without any limitation, they clearly extend to the case before him. After stating some reasons why it should not be presumed that the act was intended to place this restriction on the United States, he says, "The fair construction of the terms, under such circumstances, is to restrain their generality; to look at the primary and leading intention of the provisions, and to restrain the words to obvious cases. Effect may thus be given to the whole language, without breaking in upon a very important national policy." What did the judge consider as the "obvious cases" intended to be provided for by that act? Cases between individual citizens, and not where the United States was a party. Does not the same reason and observation apply to our case?

What was the national policy which he thought so important, and not to be broken in upon? To give the United States the use of their own courts, and not to subject their rights and interests to state tribunals. And is not this policy found in the case before us? Did congress intend to submit the whole system and policy of the United States for the

collection and preservation of their revenue, for holding the responsibility of their agents, officers, and debtors in their own hands, to the various and ever-changing provisions and immunities of the insolvent laws of twenty-six states? That the rights and remedies of the United States should be one thing in Pennsylvania, another in New York, another in Maryland, and so on through the whole? Is there anything like a system, like uniformity, or equal justice, in such a state of things? Should we suppose, without a clear and express enactment, that congress intended to introduce such confusion and uncertainty in the powers of the government over its officers and revenue? In the case cited, the judge puts the opinion of the court on the safe and rational ground, that we are not bound to follow to the whole extent the meaning of the terms used in an act of congress; that we may restrain their generality by the circumstances of a particular case, and look to the primary and leading intention of the provisions, and give it such effect as will not break in upon an important national policy. In another part of this opinion the judge expressly recognises the rule I have stated for the construction of statutes. He says, "It is a general rule in the interpretation of legislative acts, not to construe them to embrace the sovereign power or government, unless expressly named, or included by necessary implication." He cites for this rule, with many other authorities, a case reported in 4 Mass. 522, 528,—Stoughton v. Baker. It will be observed that Chancellor Kent, in his Commentaries, adopted the language of Judge Story. We have another case decided by the same court. U. S. v. Hoar [Case No. 15,373], in which it was determined that neither the general statute of limitations, nor that of Massachusetts as to executors and administrators, binds the United States in a suit in the circuit court. Judge Story, delivering the opinion of the court, says, "It may be laid down as a safe proposition, that no statute of limitations has been held to apply to actions brought by the crown, unless there has been an express provision including it. For it is said, that, where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case the king shall not be bound unless the statute is made by express words to extend to him." After giving the reason of the rule which excepts the crown from the operation of statutes of limitation, which, he says, will be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers, he adds, "and though this is sometimes called a prerogative right, it is in fact nothing more than a reservation or exception, introduced for the public benefit, and equally applicable to all governments." He also refers to the case reported in 4 Mass. 528,—Stoughton v. Baker.

These have been the doctrines adopted and unreversed by a circuit court of the United States. The supreme court of New York has also recognised them. In People v. Rossiter, 4 Cow. 143, we have not to deal with the king and his prerogatives. The decision, as given in the syllabus of the case, is that "a discharge under the act to abolish imprisonment for debt, does not extend to a debt due to the people of this state. Nor, semble, does any insolvent or bankrupt law, unless the people are named in it." The report is very short, and the decision of the question seems not to have been attended with any doubt or difficulty. Judgment was obtained against an attorney of the court, for clerk's fees due to the plaintiff, upon which he was imprisoned under a ca. sa. after he had obtained his discharge under the act to abolish imprisonment for debt in certain cases. This is precisely the title of the act of congress in question. The counsel of the prisoner moved for his discharge, on the broad and unqualified words of the act, that "the debtor shall be exempt from imprisonment, for or by reason of any debt or debts due at the time of making the assignment." There was no exception, he said, of debts due to the people, and none should be implied. The attorney general replied, that general words did not bind the people,—they are not named; and that the rule is the same as to them, which prevails in England as to the king. By the court: "The motion must be denied. The people are not bound by an act of this kind unless they are named in it. The rule is the same as in England. The king is not bound by a bankrupt law, unless named; and the people are the king for the purposes of this rule." Will it not be singular if the United States shall be bound by an insolvent law of New York, when the state herself is not so; both depending on general words in a statute? Can she claim the benefit of a rule of construction against her debtors which is denied to the United States? The reports of the supreme court of Pennsylvania furnish a decision asserting the same principles. In Com. v. Baldwin, 1 Watts, 54, it was decided, after a careful examination, by the court, of cases in the courts of the United States, that the state is exempt from the operation of the acts for the revival of judgments, to continue the lien on real estate. There is in those acts no exception in favor of the commonwealth, and the terms are broad enough to include all and any judgments. That the United States have not heretofore been affected or barred by a discharge of their debtor under a state insolvent law, was settled by the supreme court in the case of U. S. v. Wilson, 8 Wheat. [21 U. S.] 253; and so the law now remains, unless it has been changed by the act of congress of February, 1839, now under consideration.

The principles maintained in the cases I have referred to, have not been contradicted or impeached, by any authority cited at the bar, nor by any I have found in my investi-

gation. I shall leave them to rest on the opinions of learned courts and judges in our own country, as well as in England, and supported, also, as I think, by their own strength and good reason. Putting aside the rule of construction, which excepts the sovereign power from the operation of such laws, unless expressly named, as a rule binding in courts of law, the same result may be reached by the ordinary doctrine, which refers to the intention of the legislature for the interpretation of their acts. The learned judge, to whose opinions and reasoning I always refer with confidence, says (U. S. v. Hoar [supra]): "Independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon legislative intention. Where the government is not expressly, or by necessary implication, included, it ought to be clear, from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such a construction upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary, force, to the government itself. It appears to me, therefore, to be a safe rule, founded on the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act."

There is another principle or rule in the construction of statutes, so well established by authority, and so entirely reasonable in itself, that it may be assumed to be unquestionable. It is this, that not only one part of a statute may be properly called in, to help the construction of another part, but that it will be inferred or presumed, that a number of statutes, relating to the same subject, were intended to be governed by one spirit and policy; to be consistent and harmonious in their several parts and provisions. Dwar. St. 699. The same author adds as the consequence of this intendment, that "it is an established rule of law that all acts, in pari materia, are to be taken together, as if they were one law, and they are directed to be compared, in the construction of statutes, because they are considered as framed upon one system, and having one object in view." This doctrine is affirmed by Duck v. Addington, 4 Term R. 447–450; Ex parte Drydon, 5 Term R. 417; Ailesbury v. Pattison, Doug. 30. In this last case Lord Mansfield says: "All acts in pari materia are to be taken together, as if they were one act." In Timmins v. Rowlinson, Burrows, 1607, he says, "they are to be considered as one system."

What have been the spirit and policy, the system adopted by the government of the United States, in relation to its debtors, running through all the acts of congress on that subject?

1. That the rights, interests, and remedies of the United States, shall not be impaired, or affected, by the insolvent laws of any state; that they have never allowed the courts of any state to interfere between them and their debtors, or to prescribe any terms, conditions, or restrictions, upon their rights and remedies, for recovering or securing their debts.

2. That they have never allowed even their own courts, constituted by their own authority, to discharge one of their debtors from imprisonment under a judgment and execution, at their suit. The general bankrupt act, and the law of congress for the relief of insolvent debtors, gave no such power to the commissioners in the one case, and the courts in the other.

3. That for all such questions, for all such indulgences, a tribunal was created, which was the government itself; and this power and discretion was lodged with the president, in certain cases, and with the secretary of the treasury, in certain other cases. To these high and responsible officers the whole subject was committed; the examination of the circumstances of each case was imposed upon them, and the decision upon it vested in them, upon such terms and conditions as they should think proper to exact. 1 Story's Laws, 750, § 62 [2 Stat. 36], the bankrupt act; 1 Story's Laws, 715 [2 Stat. 4], act for the relief of persons imprisoned for debt; 3 Story's Laws, 1652 ([3 Stat. 399] Act March, 1817), application to be made to the president; 1 Story's Laws, 506 ([1 Stat. 562] Act June 6, 1798), application to be made to the secretary of the treasury; 4 Story's Laws, 2236 [4 Stat. 467], appointing commissioners to report to the secretary; 3 Story's Laws, 1997, § 38 [4 Stat. 113], of the post-office act. It is true that in the bankrupt and insolvent acts there is an express exception of the United States, but we cannot presume from this that congress intended to reverse or abandon the rule of construction which would have excepted them. It was the exercise of that abundant caution, often found in statutes.

Can we believe it was the intention of congress, by the act of 1839, to abandon all this system, to change all this financial policy; to repeal the distinction heretofore made between ordinary debtors of the United States and "persons indebted as the principal in an official bond, or for public money received by him, and not paid over or accounted for, or for any fine, forfeiture, or penalty incurred by the violation of any law of the United States?" Did congress intend to give to the state courts a power over the rights and interests, over the revenue of the government, which had been denied, and is yet denied, to its own courts, which

had been carefully kept in its own hands? Are collectors of the customs, and debtors on duty bonds and their sureties, postmasters and other receivers of public moneys, to be thus discharged from the liability of their persons for such debts? Are persons imprisoned for fines, penalties, and forfeitures, to be liberated by the order of a state court, acting under a state insolvent law? Are such cases to be submitted to the judgment and discretion of every county court in six-and-twenty states, with, practically, no opportunity afforded to the United States to attend to their interests; to detect fraud, or concealed property; to oppose the discharge in any way or for any reason? It is no extravagant case to suppose that an absconding defaulter for immense sums might return with full pockets, apply to some obscure county court, in a distant state, and pass himself through the forms—for they are little more—of an insolvent law, and be afterwards secure in the enjoyment of his concealed plunder, which the searching power of the United States might have forced from him. Are these extensive and vital changes in the system and policy of the United States to be effected by general words, having no express reference to them, or to the United States? Assuredly such consequences would not have been left to a question of construction. The intention would have been declared in express and unequivocal language. What will become of the right, always claimed, of a priority or preference of payment from an insolvent estate? There is no provision for this in the insolvent laws of Pennsylvania, nor do I presume it will be found in any insolvent act. But the law of 1839 declares, that "where, by the laws of a state, imprisonment for debt shall be allowed, under certain conditions and restrictions, the same conditions and restrictions shall be applicable to the process issuing out of the courts of the United States." What the effect of these provisions will be upon the priority of the United States, I am not now called upon to say, but it would seem that, if the same conditions are to be imposed, no other or additional ones could be required of the debtor. All these difficulties, and many more, will be avoided, by adopting, in the construction of this statute, the reasoning of Judge Story already referred to, "that, in general, acts of the legislature are meant to regulate and direct the acts and rights of citizens, and in most cases the reasoning applicable to them applies with very different, and often contrary, force, to the government," and that "the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act."

Other difficulties and inconveniences will arise by extending the provisions of this act to the United States. The provisions of the insolvent laws of the different states, the conditions and restrictions they impose upon the debtor, are various and entirely different from each other. The United States then, as well as their debtors, will have no uniform rule of responsibility. There will be no harmony in the relations between the government and its debtor. The rights and remedies will be one thing in one state, another thing in another, and so throughout the whole twenty-six states. Could such confusion have been intended; such an entire destruction of everything that can be called a system,—of all pretence to one policy? Again, the act of Pennsylvania, and, I presume, every other insolvent act, requires a notice of some kind, either personal or by public advertisement, to be given to the creditors of the petitioner. To whom is this notice to be given for the United States? Who is bound or authorized to receive it for them? Is it the president, or the secretary of the treasury, who have heretofore had the superintendence of the debtors and debts of the United States; or the district attorney? I have seen no authority given to either of them to accept any such notice, or to bind the United States by appearing in pursuance of it. There are other details in the insolvent law of Pennsylvania which it will be difficult to apply to the United States. In the argument of this case the district attorney referred to the act of congress of March, 1797, by which it is enacted, that all writs of execution, upon any judgment obtained for the use of the United States, in any court of the United States, may run and shall be executed in any other state, but shall be issued from and made returnable to the court where the judgment was obtained. Must the discharge of which the debtor may avail himself against this execution, be under the insolvent law of the state in which he is arrested, or of the state in which the judgment was obtained; or will a discharge by the court of any state be sufficient for his liberation? The words of the act would seem to refer only to the laws of the state from which the process issued, but it is by no means clear what construction might be put upon it under the notion of extending it in favor of liberty.

I have given this case a careful examination, and extended the explanation of my views of it beyond what may be thought necessary, because I am so unfortunate as to differ in my construction of this act of congress, from the learned and estimable judge of the Southern district of New York. It would have been very gratifying to me, if I could have come to the same result he has, upon this question. It must, however, be remembered that the point was not argued or made a question by the district attorney, in the case decided in New York. The attention of the court was drawn to another part of the case, and the application

of the act to the debtors of the United States, although mooted, was not argued, as the district attorney had no doubt that the provisions of the act did include the United States. Certainly the opinion of this learned lawyer and respectable gentleman ought to make and does make me more diffident of my own; I am bound, however, to declare my opinion according to my own conviction of the true construction of the act of congress in question, and that is, that it does not include in its provisions the United States, or the debtors who may be imprisoned on a judgment obtained at their suit, in a court of the United States. The prayer of the petitioner is denied.

Case No. 15,360.

UNITED STATES v. HEWSON.

[Brunner, Col. Cas. 532;[1] 7 Law. Rep. 361.]

Circuit Court, D. Massachusetts. Nov., 1844.

MURDER—CHALLENGES OF JURORS—CAPITAL PUNISHMENT—SHIPPING—ENROLMENT OF VESSELS.

1. On an indictment for murder twenty peremptory challenges of jurors are allowed.

2. Conscientious scruples against finding a verdict which would lead to capital punishment are a good cause for challenge of a juror in a capital case.

3. An enrollment will be presumed to have been legally taken out unless the contrary is proven.

4. On an indictment for murder, by throwing a child overboard, the burden is on the government to prove (where such a defense is set up) that the child had not died in a fit before it was thrown overboard.

The indictment contained two counts, the first charging the prisoner [Catherine Hewson] with the murder of her child (a female infant) on board the steamer Massachusetts, on the passage between New York and Boston, on the night of July 30, by throwing it overboard; the second charging the prisoner with the murder of a child (not alleging it to have been her own).

Franklin Dexter, U. S. Dist. Atty.

Charles B. Goodrich and John P. Putnam, for the defense.

At the commencement of the trial the counsel for the prisoner claimed the right of peremptorily challenging thirty-five jurors, but the court ruled that the right was limited to twenty. The district attorney suggested that each juror before being sworn in chief should be asked whether he had any conscientious scruples as to finding a verdict of guilty in a capital case.

STORY, Circuit Justice, said this had been the practice in this court for the last twenty-five years, ever since the escape of two of the most atrocious men he ever knew in Rhode Island, through the scruples of two jurymen.

Accordingly, as each juror was called, the question proposed was asked by the district attorney. Three jurors declined being sworn from conscientious scruples, and were set aside by the court. The prisoner challenged nineteen jurors peremptorily.

Before opening for the defense the counsel for the prisoner stated the point which they should take respecting the jurisdiction of the court. It was argued that the national character of the vessel must be made out. A competent enrollment was necessary to make out the national character of the vessel. The acting secretary was not competent to take out the enrollment, as he had since continued to be secretary only for the purpose of taking out custom-house papers. The counsel referred to Hosea v. Buchanan, 16 Pet. [41 U. S.] 215. The point taken by the counsel respecting the ownership of the vessel was this. It does not appear, affirmatively, from the evidence that the individual corporators are American citizens. The corporation is one acting under an act of the state of New Jersey.

THE COURT on these points ruled against the defendant, and said that it would be presumed that the enrollment was legally taken out until the contrary was shown.

[2] [Captain Joseph Comstock. The steamer Massachusetts, in July last, was in the employ of the New Jersey Steam Navigation Company. She was plying from New York to Stonington, across the Sound. I do not remember having ever seen the prisoner at the bar, before the present time. On the evening of July 30, I was called about 12 o'clock at night, by the second mate, and told by him that there was a child missing, and that it had probably been thrown overboard. We were then nearly opposite the mouth of the Connecticut river, and off Saybrook. This was about two hours before we arrived at Stonington. I do not recollect the weather. I was then above, in the wheel-house. I went below to inquire into the facts, and was shown a woman, who, they said, had had a child, which could not be found. I do not remember the number of deck passengers. There were a considerable number; I should think not less than twenty-five. The deck passengers remain, during night, in the forward part of the main deck. They are not allowed to go aft, or on the upper deck, or in the cabins. They are obliged to remain in a space ninety feet by twenty-eight or thirty, under cover. Large doors lead to the forward part of the deck, which part is not under cover. The latter is fifty-eight feet by thirty-three, thirty-four or thirty-five. The bulkhead goes to the bows of the boat. This is taken up with freight, cattle, horses, &c., if there are any, chains, anchors, and various lines, ropes and other articles. The bulwarks

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

[From 7 Law Rep. 361.]

of the open part are four feet high. I was shown a woman sitting down, covered with a cloak. I asked her if she had had, or then had, a child. After various inquiries, to which for some moments she made no reply, she said that she had had a child, but had eat it up. I set her in a private room, near by, with a man to watch her. Some moments before we arrived at Stonington, the woman sent for me, and said she had made away with her child by throwing it into the sea. At the same time she stated that it was a poor weakly child, subject to fits, and she was a poor destitute woman, unable to take care of it. That was all that was said, except that I put her in charge of a man and woman, who seemed to have some charge of her, the woman having previously tended her child, and who said they would have her arrested on arrival at Boston or Lowell. I do not know that that woman was or was not the prisoner at the bar. I cannot identify her as any person that I have seen before. A thorough search was made for the child at the time. (By STORY, Circuit Justice.) The Sound is about nine miles wide in that place. We were five miles from one shore and four from the other, when I first received the information. The information was given very shortly after the child was missing.

[Cross-Examined. At that time I had some conversation with the passengers. I might have said that the woman was insane, out of her head, or in liquor, and probably did. I cannot say, positively, what I did say. My impression at the time was that she was out of her head. I stated other reasons that might have influenced her. I supposed she was in liquor until I examined her; but after examining her, I did not think so. She was confined nearly two hours. I confined her because many people were crowding around her, and there was great excitement manifested about the case, among those on board. My object was to protect her from harm or annoyance. It was not a bad night. I think it did not rain. I do not know who instituted this prosecution. I did not advise those people to do it, who appeared to have the care of her. I probably should, if those people had not taken her under their charge. Darwin F. Rockwell is the permanent secretary of the corporation in New Jersey, and was at that time. They have a secretary in New York. Rockwell lives in Jersey City. I think his only business relates to custom-house papers. I think he has no books or papers, except those relating to custom-house business.

[Direct Resumed. The nature of the act, as being done by a mother to her child, led me to suppose that she was in liquor or insane. I saw nothing else except her saying she had eat the child, to induce me to suppose so. I made the observation while I was talking with her. I noticed nothing else showing alienation of mind or insanity. I do not personally know the extent of Rockwell's duty.

[Captain William Comstock was then sworn, and testified as follows: I reside in New Jersey. I am agent in Providence of the New Jersey Steam Navigation Company. This boat is owned by and was built for that company.

[Cross-Examined. I am general agent at Stonington for this end of the line.

[James Simpson. I was a passenger together with Catherine Hewson, the prisoner at the bar, on the night referred to. I passed the night on the forward deck, under cover. I was a deck passenger. It was dark that night, and I could not identify her face. I saw her next morning, and the prisoner is the person. We were sitting two or three yards apart. My wife was with me. My wife sailed for England October 8. I saw a woman sitting on a trunk; she had a child; the child appeared cross. I saw her take some clothing from the child and put it into the trunk, and take some from the trunk and put it on the child. I think it was under clothing. I saw the child myself. I heard it cry. It appeared about a month or six weeks old, from the size of it. After that, she walked up and down the deck, trying to pacify the child. She had it on her lap. I could not say whether she was nursing the child or not. I had no conversation with her before or afterwards. She walked up and down for a few minutes. This was in the dead of the night. She then either went out of my presence, or I went out of her's, I don't know which. I think I went aft, towards the engine. I was walking about. I did not at that time go forward. I next saw her, about a quarter of an hour after. She still had the child. She was in about the same place as before. I think the child was peaceable then. I think we were both walking up and down for some time. She was afterwards out of my presence for some time. I heard a rumor that she had thrown her child overboard. I saw her, but did not hear her say anything to me. To others she said it was none of their business. She had not then her child with her. I did not hear any one ask her questions, nor hear her say anything to anybody. I saw the captain asking her questions, but did not hear what they said. I saw the woman in the morning, sitting on the opposite side of the steamboat to me. When the rumor went that the child was thrown overboard, I went up to her, and saw the woman. It was the same woman that I saw the next morning, after daylight. I recollect now that I was in another steamboat when I saw her next morning. I was crossing in the ferryboat in the morning. That woman that I saw in the morning is the prisoner. I do not recollect that I saw any horses on board the steamboat that night. I did not hear the woman herself say "It is none of your business."

[Cross-Examined. I rather supposed, at the time that she had the child in her lap, that she was nursing it. In the ferryboat in the

morning she was sitting by herself. I should think, from the child's crying, that it was well. It cried strong. I could see the child's face. It looked healthy enough from where I was sitting. I think the clothing taken from the trunk was a diaper.

[James Gay. I live in Boston. I belong to Harnden's Express. I was on board the steamboat Massachusetts on the night of the 30th of July last. I did not see the woman at night, I saw her the next morning. The prisoner is the same woman. I saw her on board the steamboat Massachusetts, and in the ferryboat. She was in a different car on the railroad track. I had no conversation with her. The baggage was on the forward part of the main deck. I believe there were horses on board. I would not swear positively that there were. We arrived about 2 o'clock at Stonington.

[Cross-Examined. We carry horses so frequently, that I cannot recollect positively respecting that time. I think I saw horses there, but am not positive enough to swear to it.

[Patrick Carigan. I am a Catholic. (STORY, Circuit Justice, remarked, that some four or five years ago, a witness was brought on to testify, who was a Catholic, and a Bible was sent for, which should be certified by the bishop to be a correct version, according to the doctrine of the Catholic Church. The bishop said, that an oath on a Protestant Bible was equally binding, or indeed an oath taken in any other way. He gave, however, his certificate in writing, that the copy produced was the version used in the Catholic Church, and the witness was sworn thereon. In the present case, the witness was sworn in the usual way, neither counsel making any objection.) I consider an oath administered in the usual form, equally binding with an oath upon the Bible. I was on board the steamboat Massachusetts on the same passage with the prisoner. I saw her along side of the same steamboat in New York. This was about five o'clock, the day I went on board. I don't know whether she had a child or not. She appeared to have something in her arms. I had no conversation with her then. I saw her next, some time in the night. I don't know whether she had a child with her or not. I saw her have a child in her arms, and heard the child. She had on a big cloak. The child was crying. I spoke to her before I heard the child. She asked me how far it was before we got into the cars. I told her I didn't know exactly. I asked her next why she was sitting out there alone. She was sitting outside, on the part of the deck which was not under cover, by herself. I asked her why she didn't come in. The weather was fair—cold, but not very cold. She said she wasn't cold. I neither saw nor heard the child at that time. She asked me if I was going to Boston; I told her yes; that I had lived in this country four or five years. She asked what kind of a place it was about serving girls. I told her the price was from a dollar up. I asked her if she had any friends there. She said her husband was in Boston for four or five years. I asked her in what street did he live. She named some place that I didn't know anything about. I asked what did he do. She said he worked along shore. Then I asked her how long since she left Ireland. She said she was in Ireland ten weeks ago. At this time I heard the child cry. Says I, "What! have you got a baby?" "It's none of your damn business," says she. I then moved away from her. She got mad. I saw two or three women coming towards her, and they came and asked her to go inside. A little while after, she did come in. She sat down on a trunk, pulled her cloak around her, and gave the child the breast. I saw her nurse the child. The child was crying all the time, and a woman alongside of her said she would take the child; she did so, and gave it her breast. The prisoner then took off her hat and cloak, and fixed up her hair. This woman that gave her the breast said she took hold as good as ner own child, that was five or six months old. The prisoner said, before the woman took the child, that it had fits. The people gathered round. Some said it looked sick. The woman gave her back the child, after nursing it. It began to cry again soon after. One woman said she had one which was sick, just like this one, and that it took the breast a little while before it died. The prisoner walked about with the child, and walked up among the baggage. After a while, I don't know how long, she walked out forward. She stopped out there about twenty or thirty minutes. I was then outside of the sheltered part of the deck. A parcel of us gathered up to see what she was out there for, where there were horses and such things. She had the child after she went out. We remained inside of the baggage cars, between the cars and the uncovered place, and remained there till she came back. She went out forward as far as she could go out. There were horses there. When she came from forward, a woman asked her to let her see her child. She said it was sleeping, and she did not know why every one made themselves so uneasy and sick about her child. She had her arms in the same way as when she carried the child out. She came in, and we insisted that we should see the child. She said she had given it to a woman, a friend of hers, down in the cabin. There was no woman down there. I did not see, but others went down to see. She had not the child there. They opened her cloak, and pulled her hands apart, and everything. A number of women came and inquired about the child. She was mad, and would hardly give any answer, and what she did was not very civil. Then the captain came round and asked her. She made no answer, until he had asked a good many times. The

captain asked her, did she stow it away anywhere. She made no answer. He then searched, and found nothing. He came back and shook her by the shoulder, and asked her what she had done with the child. Says she, "I eat it." He then walked away from her, and said he would have her secured. She then got up, and said the child died in a fit, and that she hove it overboard. Some one told the captain that she would throw herself overboard. She kept moving about, back and forth, as if she meant to go overboard. One of the men kept by the side of her to take care of her. This was in the night time. Some one said it was between nine and ten. One of the captain's men said it was between ten and eleven. She was then put into the cars. There was no moonshine, but there was a lantern near where she sat. I heard her tell some folks that the child was three weeks old, and tell others that it was only eleven days old.

[Cross-Examined. I was born in Ireland, in the county of Linegal. I first came to this country six years ago, nearly seven years ago. I arrived at St. John's. I have lived thirteen months at the corner of Battery and Commercial streets, Boston. I lived in Philadelphia three years. I worked in a junk store in Boston, for Mr. Phillips. I have a family. When I took passage on board the steamboat Massachusetts, I intended to go to Ireland. I did not intend to take my family, nor to stop long. I could not get a chance to go. I saw this woman walking about on the dock some time in New York. I saw no child with her. She kept her arms out with the cloak over them. I do not know how long it was after I went on board that I first saw her again. A little more than two hours I should think. I went on board a little after five. I first saw her sitting alone. I saw her a good while. I saw her all the time afterwards, till she went forward. Nothing was said about going to see what she was doing out there. We heard the child cry, when she went out, and did not hear it when she came back. Before she came back, some said she was out there for no good purpose. I do not remember whether I have now testified to more than I did before the commissioner. She offered the child her breast, but the child did not take her breast. She held the child to her breast but a few minutes. This was soon after she came in. She went out soon after the other woman gave the child the breast. I do not think she treated the child so well as I have seen my wife treat a child. I did not testify before the commissioner that she treated the child kindly. I did not use any language improper or insulting to her. I do not know who told the captain about her. I asked no person to look at the woman. I did not point out the woman to any one. In the cars, I told her she would be put in the state prison. She appeared not like other women in her manner and the use of her tongue. Since I have been in Boston, I have been doing nothing a part of the time, and a part of the time at work in a junk store. I have been in jail. I cannot tell what for. I was in the cell No. 21. I had no conversation with the prisoner there, except when she spoke over from her cell. She spoke first. She kept dancing and hollering. I told her, only once, that she would be dancing and hollering over South, before long. I told her I would do all I could against her. I did not say I would swear hell against her. I said I would do all I knowed against her, but not all I could. Her first answer when she came in from the forward part of the boat was, that the child was asleep, and that she did not know why they should be so uneasy about her child. I so stated before the commissioner. I think so, but am not certain. She told the captain that the child had fits, and died of fits. He was near enough to hear her. She got up and told him so. The man who had charge of her walked with her back and forth. I can't say how long, or how many hours. It was not one hour.

[Direct Resumed. The woman and the darkies who were in jail kept hollering to me, which made me say what I did to her at that time.

[Captain Comstock, Recalled. I directed the woman to be put into a little room, or a kind of gangway between two rooms, not more than four feet square, where there was a chair for her to sit down. This was immediately after I examined her, as I before stated. I did not know that she walked about, afterwards, at all. I directed a man to stand at the door, and keep watch of her, and let no one speak with her. I supposed my directions were complied with. I will not swear that she did not walk about.

[Derastus Clapp. I am a constable in the city of Boston. On the 30th of July last I was at the Providence depot on other business. In consequence of what was said to me there, I took the prisoner into custody. The prisoner stood near the baggage car, with others. She had a ticket for her baggage. I requested the baggage-master to take charge of her baggage, which she had pointed out to me as hers. She inquired if it would be safe. I told her it would. I then requested her to walk with me. She came with me, without replying. While going to Charles street, I said to her, "How came you to be so foolish as to throw your child overboard?" Her answer was, "It was dead, sir." I asked her how it came dead. She said it had fits. In another conversation afterwards, she said the child had spasms. I told her that it was improper to throw her child overboard if it was dead, without letting any one know it. She said that she had known others to do it; and I understood her to say, that she had known others to do it on her passage to this country, when their children were dead. I cannot give the pre-

cise words of this answer. I asked her how long she had been in this country. She said about a fortnight; and that she came in a vessel to New York; that she belonged in Ireland, in the county of Cork. She said that her husband had been from Ireland about nine months; and that he had sent for her to come to this country. I asked her where she was going. She said she was going to Mobile to find her husband. I informed her that she had come two hundred miles out of her way. I inquired of her whether the child was male or female. She said it was a female, and that it was born on the passage, about three weeks previous. She stated that she had no acquaintances or friends that she knew of in this part of the country. That is all that I recollect. My reason for asking her these questions was, that I arrested her without a warrant. She said that her husband's name was John, with the same name which she gave as her own, and that he was a laborer. I have not seen her since, till I saw her on the examination before the commissioner.

[Cross-Examined. I think three or four persons spoke to me at once to make the arrest. Several persons pointed her out to me. I think, as we went across the Common, that she said she felt weak and faint. I think she sat down on one of the benches. When she said the child had spasms, she said it had them a great deal of the time, or frequently. She made no complaint about my taking her into custody. I thought she appeared stupid or indifferent.

[Before opening for the defence, the counsel for the prisoner stated the point which they should take respecting the jurisdiction of the court. It was argued that the national character of the vessel must be made out. A competent enrolment was necessary, to make out the national character of the vessel. The acting secretary was not competent to take out the enrolment, as he had since continued to be secretary only for the purpose of taking out custom-house papers. The counsel referred to Hozey v. Buchanan, 16 Pet. 215. The point taken by the counsel respecting the ownership of the vessel was this. It does not appear, affirmatively, from the evidence, that the individual corporators are American citizens. The corporation is one acting under an act of the state of New Jersey.

[On these points THE COURT ruled against the defendant, and said that it would be presumed that the enrolment was legally taken out until the contrary was shown.

[J. P. Putnam opened for the defence, and after dwelling upon the danger of trusting to circumstantial evidence, the necessity of caution in receiving confessions as evidence against the prisoner, and the principle that the confessions, if introduced by the counsel for the prosecution, must be all taken to be true, unless contradicted by other evidence, and incompatible therewith, stated that the ground of defence would be, that the child had been previously unwell, that it died of sickness, and was by the mother committed to the waters of the Sound, and that the mother was laboring at the time under a partial aberration of mind.

[Dr. Horatio Stone. I reside in New York City. I am a physician. I saw the prisoner on the 20th of July last. I was called to see her professionally in the afternoon of that day. I went to the house, in Washington street, New York, at the house of Mr. Nixon. I found she had been delivered of a child, and, as I was told, about an hour before I arrived. I found her laboring under strong symptoms of fever, and nervous agitation; her pulse small and quick, throbbing of the temporal arteries, tongue thick and coated, tenderness, on pressure, of the abdomen, and distention of the abdomen. The symptoms were those which precede puerperal fever. The placenta had partly passed away, and a portion remained in the vagina. There was a diseased state of the uterus, and the placenta was also in a diseased state, the consequence of which would be imperfect nutrition to the child. The room was a small one, with but one small window, in which were two beds, and a quantity of clothes and baggage. She was lying on a poor apology for a bed, composed partly of her own trunk and clothing. I could obtain but little information from her. I could with difficulty obtain any reply to my questions. She was suffering much from pain. There was apparent congestion about the brain. The child appeared weak and shrivelled, much less vigorous than children usually are. I think I visited her only twice. I visited her the second time about sixteen hours after the first visit. The symptoms of the mother were nearly the same, but rather aggravated. It was stated that the dispensary physician had been spoken to, and would attend to her, and that she would be unable to pay any fee for medical attendance. The accommodations were very bad, the air very close and warm, and the room filled with the unpleasant odor of foul clothing. The people there appeared to be attending her as well as they could. Puerperal mania is a frequent attendant of puerperal fever. It usually deranges or destroys the moral sense or natural feelings. It sometimes comes on three or four days, and sometimes a fortnight after the birth of the child. It sometimes comes on suddenly. It is not uniform in its appearance or duration. It may disappear within twenty-four hours after its coming on. Some of the symptoms are like those of other kinds of mania, such as reasoning from wrong premises. Other symptoms are perversions of the moral sense and the natural feelings. A mother who had a tender heart, and an affection for her child, would, immediately after the appearance of the mania, deny the child to be hers, wish it to be dead, or perhaps try to kill it; but

on the disappearance of the symptoms, she would caress it with fondness. Such cases have come under my own practice, and are also laid down by distinguished physicians. There was some discharge from the eyes of the child. They were evidently diseased.

[Cross-Examined. Puerperal mania differs from other species of mania in being temporary and more uncertain. I think it produces a temporary congestion of the brain, but not organic disturbance. The mania tends more to disturb the moral sentiments than the intellect. It would be likely to recur after an interval of ten days. I observed no specific disease in the child, which would show a complaint inherited from the mother.

[Dr. Thomas M. Cocke. I reside in New York. I am a physician there. I am connected with the lying-in hospital. I was called last summer to see a woman at Mr. Nixon's, Washington street, New York. I went at the request of some one. I went up stairs and saw a woman lying on her back with her eyes closed. I could get no reply from her. Her eyes were closed, pulse accelerated, tongue coated. The symptoms threatened puerperal fever. The room was small, confined, littered with bedding and other articles. The child was wrapped up, and had pueral ophthalmy, a species of sore eyes peculiar to infants. I do not recollect to have seen that woman afterwards. I directed that she should be removed to the almshouse, and gave a certificate for that purpose. Such certificates may be given by any physician, and they are submitted to the commissioner of the almshouse. Puerperal mania is a very common attendant of puerperal fever. There are two forms of puerperal mania; one is temporary, and soon passes off; the other, usually, is developed two or three days after, and sometimes later. Diseased placenta would occasion a child to show the effect of imperfect nutrition. The skin would be shrivelled. Improper nutrition to infants tends to occasion convulsions.

[Cross-Examined. Puerperal mania may assume any form which other mania does; I do not think that it has any symptoms peculiar to itself. Nursing by a woman who has a child some months older, usually occasions convulsions. This is an established principle. I would not allow a woman with older milk to nurse a young child in any case where I had anything depending upon it. A child dying in convulsions does not usually make any noise.

[Abraham Nixon. I live in 152 Washington street, New York. I recognize the prisoner as a woman who was at my house last July. I called Dr. Stone to see her. I found her at a store in Washington street, near the Troy steamboat landing. A stranger called at my house, and directed me to her as a person who wanted to get boarded. I took her to my house. She remained from a week to ten days. The child was born at my house. Myself and wife, another person and his wife, and this woman occupied one room. A second doctor called afterwards. She went from my house on board the steamboat Massachusetts. The stranger who called at my house wished me to go to the store to find the woman.

[Cross-Examined. The man who came to me told me the woman came in the Troy boat. He did not tell her name. I did not know him. He said he knew me.

[Dr. O. W. Holmes. I am a physician of this city. Children a short time after birth are frequently subject to convulsions. The nine days disease received that name at the time of a general epidemic in Dublin hospital, which carried off a great number of infants. Want of air, want of care, want of cleanliness, are among the causes. Young children are more subject to the disease than older children. Experienced persons cannot tell, from the appearance of a child, as to its robustness at birth, whether it would be subject to convulsions. Inward fits is a term frequently used by uneducated or less discriminating persons. It is frequent among the Irish. The term is by them applied to different kinds of convulsions. There is a form of fits which appears to be characterized by spasms of the heart. It is sometimes followed by complete recovery, sometimes by death. Some internal malformations occasionally prove fatal to children, at the end of several days after birth. Among these are obstructions in different parts of the alimentary canal. These would not be likely to cause sudden death. Other internal malformations might, and might not be attended with convulsions. There are cases where children lie torpid, in a state resembling death. The symptoms of puerperal mania vary very much, from violence to simple wandering. This form of mania may take all the symptoms of other mania. It lasts sometimes, but rarely through life—sometimes for weeks and months. Still more rare are cases lasting for about twenty-four hours. The causes of this mania cannot be assigned with any certainty, with the exception of pregnancy. Nursing by a woman with an older child would not usually be considered dangerous. There exists a strong prejudice against it, however.

[Dr. Walter Channing. Puerperal fever arises from a great variety of causes, such as inflammation of the bowels, inflammation of the uterus, and other kinds of excitement. Dr. Channing described the symptoms and course of this fever at some length. The woman is apt to lose her interest in her child, and is absorbed in the contemplation of her own sufferings. There is then an entire absence of maternal feeling.

[Cross-Examined. I cannot say that the existence of diseased placenta in the mother, would naturally occasion convulsions in the child.

[At this stage of the cause, Mr. Dexter, upon a suggestion of STORY, Circuit Justice,

proposed to the prisoner's counsel, that the cause should be submitted to the jury without argument, upon the charge of the judge, it appearing, from the nature of the evidence adduced in behalf of the defendant, that a conviction could not probably be had. To this proposition the prisoner's counsel assented. All the witnesses on the part of the prisoner were not examined.] [2]

STORY, Circuit Justice, in his charge to the jury, adverted to the evident facts that the woman was not in her right mind, and that her answer that she had eat her child showed that her reason was not in operation for any useful purpose. He also commented upon the absence of any motive for the crime, the previous sickness, weakness, fever, and excitement of the prisoner, the probability that her mind was diseased, her situation among the deck passengers on board a steamboat in the night, poor, destitute, and friendless, the doubt whether the child was not dead before it was thrown overboard, and the burden upon the government to make out the case beyond a reasonable doubt; and intimated very decidedly that there was no ground for convicting the prisoner.

The jury, without leaving their seats, rendered a verdict of not guilty.

UNITED STATES v. The HIAWATHA. See Case No. 6,452.

Case No. 15,360a.

UNITED STATES v. HICKS.

[Nowhere reported; opinion not now accessible.]

Case No. 15,361.

UNITED STATES v. HIGHLEYMAN.

[22 Int. Rev. Rec. 138; 8 Chi. Leg. News, 244.]

District Court, W. D. Missouri. 1876.

INTERNAL REVENUE COLLECTORS — EXTORTION — SPECIAL TAX.

1. The defendant was an ex-revenue collector; the charge was extortion, and the court dwells specially upon the guilty knowledge which the officer should have, in order to warrant a conviction on the charge of extortion; that by the use of the word "knowingly," something more is meant than what is implied, in the legal presumption that every man must know the law.

2. A person who carries on business, requiring the payment of a special tax, without having paid the same, though violating the law, is not a delinquent within the meaning of the law, of whom, when he makes payment of his tax, mileage can be collected.

[This was an indictment against Samuel L. Highleyman.]

[2] [From 7 Law Rep. 361.]

J. S. Botsford, U. S. Dist. Atty., and M. T. C. Williams, Asst. U. S. Atty.

Horace B. Johnson, George G. Vest, and M. J. Leaming, for defendant.

KREKEL, District Judge (charging jury). The indictment which you are considering, is drawn under section 3169 of the United States statute, and provides that "every officer or agent appointed and acting under the authority of any revenue law of the United States * * * who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation or reward except as by law prescribed * * * shall be punished," etc. About the defendant having been a revenue officer when he collected the several amounts charged in the indictment as having been illegally collected by him, there is no dispute. The language of the law is, who knowingly demands or receives any greater sum than he is entitled to by law. By the use of the word "knowingly" something more is meant than what is implied, in the legal presumption that every man must know the law. In order to find the defendant guilty of demanding or receiving greater sums than he was entitled to under the law, you should be satisfied that he knew he was violating the law, and the fact that he demanded or received the several amounts charged in the indictment, is not of itself sufficient to sustain the indictment. You must arrive at his knowledge from the facts and circumstances, testified to in the case. The law does not authorize the collection of fines, penalties or cost, from a tax-payer, until he is delinquent. By a delinquent, is meant a tax-payer to whom notice has been given, and demand made of the tax due from him. A person who carries on business requiring the payment of a special tax, without having paid the same, though violating the law, is not a delinquent within the meaning of the law, of whom, when he makes payment of his tax, mileage can be collected. If you shall be satisfied from the evidence, that the defendant, Highleyman, while proceeding through his collection district, either by accident, or on inquiry, learned that the persons named in the indictment were doing business without having paid the special tax required by law, and he collected of them, or undertook, upon payment of the tax, to procure for them their stamps, he was not entitled by law to charge them mileage, and any amount demanded and received by him was illegal. In order to ascertain whether the defendant knew such collections to be illegal, you will carefully consider all said and done by him at the time, as well as afterwards, regarding the collections. The law requires all deputy collectors who collect under distraint warrants, to return such warrants with the amounts collected thereon, including all costs, fines and penalties, to the collector. If you shall find from the evi-

dence either that the defendant had no distraint-warrant at the time of making the collections, or that he failed to return the distraint warrant to the collector as required by law, this is evidence which may be considered by you, in arriving at the knowledge defendant had of the nature of the collection made by him. You will, however, make up your verdict from the whole evidence in the case. You are the judges of the credibility of the witnesses, and it is with you to give what weight you will, to the testimony of every witness. You must be satisfied, without a reasonable doubt of the defendant's guilt. If you have such a doubt arising upon the facts and circumstances testified to in the case, you should acquit. Your duty is to find upon each count of the indictment, guilty or not guilty, except the first, which has been dismissed.

After an absence of about two hours, the jury returned a verdict of guilty on one count, there being four in the indictment.

Case No. 15,362.

UNITED STATES v. HIGNERA.

[1 Cal. Law J. 372.]

District Court. N. D. California. Nov. 25, 1861.[1]

MEXICAN LAND GRANTS — LOCATION OF LINES — OBJECTIONS TO SURVEY.

This was a claim by Antonio Hignera and others, heirs of José Hignera, claimants for Los Tularcitos, described by boundaries; granted October 4, 1821, by P. V. de Sola to José Hignera; claim filed April 1, 1852; confirmed by the commission November 28, 1854; and appeal dismissed December 12, 1856,—containing 4,394.35 acres.

OPINION OF THE COURT. In 1821, José Hignera obtained from Governor Sola an order that he be put in possession of a tract of land which he had applied for under the name of "Los Tularcitos." Possession was accordingly given to him by Luis Peralta, whose report and description of the tract measured are found in the expediente. In 1839, Hignera petitioned Governor Alvarado for ratification of the grant made by Sola, together with an augmentation, as represented on the diseño annexed to his petition. This application was granted by the governor, but the formal title does not appear to have been issued. The decree of the board confirming the claim was founded on the order of Alvarado. In their opinion they state: "On examination we are satisfied that the decree of Alvarado must be construed to be a recognition of the right of the grantee previously existing in the premises claimed under Sola's grant as well as a grant of the augmentation solicited. Both are embraced in one description and delineated on the same map, which was presented with the petition to Alvarado, and now constitutes a part of the expediente, without giving any description to distinguish the portion of the premises claimed under Sola's decree from that solicited as an addition." The claim was accordingly confirmed to the land delineated on the diseño, oral testimony being received to explain by evidence of the actual occupation, and generally recognized boundaries of Hignera's rancho, such indications of the diseño as were uncertain or obscure.

The appeal from the decree of the board having been dismissed, a survey was made by the surveyor-general, which is now brought into court on objections filed on the part of the claimant. The only question presented relates to the location of the eastern boundary of the tract. On the part of the United States it is contended that the survey properly bounds the land by the range of hills which separate the valley of the Tularcitos and the plain to the west of it from the valley of the Calaveras, while the claimants maintain that this last-mentioned valley should be included, and the eastern line run between certain points on the sierra beyond it.

In ascertaining the true boundaries of the land conceded to Hignera, it is evident that the diseño presented by him to Alvarado is our chief, if not our only, guide. Neither his original petition to Sola, nor the order of the latter, nor the petition to Alvarado, nor the concession that followed, mention any boundaries, or even the extent of land granted. The measurement made by Peralta, under Governor Sola's order, which might have enabled us to identify the tract of which Hignera was originally put in possession, is wholly unintelligible. It merely states that he, Peralta, gave possession of the tract called "Tularcitos," to José Hignera, "designating for him on the south, 600 varas; on the north, the same; on the west, 1,400 varas; and on the east, 6,050 varas,—which ambit embraces the said tract De los Tularcitos." No beginning point is mentioned, and it is evident that lines of the lengths designated cannot be connected so as to enclose any parcel of land. We must therefore look to the diseño, which represents as well the tract originally conceded as the augmento, solicited of Alvarado, to ascertain the boundaries. Nor ought parol testimony as to the boundaries as claimed by Hignera, or as understood by his neighbors, be received to extend the tract beyond the limits designated in the diseño. On the north and south, the rancho of Los Tularcitos was bounded by lands of other proprietors; but on the east there was no colindante, and the cattle of Hignera might have roamed without molestation far beyond the boundaries of the lands really conceded. The fact, then, that rodeos were given, and even a house built in the Calaveras valley by

[1] [Affirmed in 5 Wall. (72 U. S.) 827.]

Hignera or his sons, though not without some significance, is yet far from conclusive as to the true limits of the grant. Nor should it have any weight whatever, except as explaining and making clear what may be obscure in the indications of the diseño.

The diseño represents a tract of land lying between two arroyos, which issue from a range of hills on the east; on the north is the Arroyo de Calera; on the south, that of Los Coches. On the west, the land is bounded by the Arroyo de la Penitencia. The identity of these streams is not disputed, although but one of them has its name inscribed upon it on the diseño. On the diseño are also represented the houses of Hignera and of Alvisu, the former on the Calera and the latter on the Coches; and both situated at the base of the hills, a little below the points where the streams emerge into the open plain. A short distance above the base of the hills, and about midway between the northern and southern boundaries, there is marked on the diseño the word, "Tularcitos," and a small square, inscribed "Viña"; while, still higher up, and in what is apparently intended to represent a narrow valley, a "Sausal" and a "Posa" are designated. Beyond this, in a range of hills to the east, is a solitary tree, marked "Chemisal," and along the base of the ridge the word "Calabera" is written.

It is contended by the claimants that the narrow valley represented on the diseño is the valley of the Calaveras creek; and that therefore the eastern boundary is the ridge of the main sierra beyond that stream. The only indications of the diseño which might seem to support this view, are the positions of the Tularcitos and the Viña, at the base of the first range of hills, and the word "Calaberas" on the second range. If the spot marked "Tularcitos," in green crayon, on the map of Stratton, were clearly shown to be identical with the Tularcitos of the diseño, there might be some reason to contend that the valley represented on the diseño as lying to the east of it, and beyond an intervening range of hills, must be the valley of the Calaveras. For the place marked "Tularcitos," on Stratton's map, is situated at the base of a range of hills which forms the western boundary of the Calaveras valley. The valley, therefore, represented on the diseño as lying to the eastward of those, might well be supposed to be the valley of the Calaveras, for none other exists.

I think it sufficiently established by the evidence that at the point marked "Tularcitos" on Stratton's map some houses were erected, and, perhaps, some cultivation made by Hignera. It is also shown that there exist at the place some tulares and a small lagoon. But it nevertheless appears to me plain that this place was not the one intended to be represented on the diseño. The tract delineated on the diseño is a rectangular piece of land, of which about two-thirds is plain or level land, and one-third hilly or broken. The topographical map of Stratton accurately exhibits the line where the hills begin, towards the eastern portion. It also indicates the points where the creeks issue from the hills, and the houses of Alvisu and Hignera, which still exist upon the ground. They are situated, as before remarked, on the level land, but immediately at the base of the first hills, and at or very near the points where the creeks come down into the plain.

The position of these houses, as shown on the topographical map, precisely corresponds with their position as indicated on the diseño, and it serves to identify with entire certainty the range of hills at the base of which the diseño represents them as situated. That range is, beyond doubt, the first hills which rise from the plain to the east. The "Tularcitos" of the diseño is represented as situated at a short distance to the east of the base of this range, about midway between the creeks, and very little to the eastward of a line drawn between the houses. But the point marked in green, "Tularcitos," on Stratton's map, in no respect corresponds to these indications. It is situated at a little more than one-fifth the distance between the creeks, and far to the eastward of the base of the first hills, or of a line drawn between the two houses. No inaccuracy which we can attribute to the draughtsman of the diseño will justify us in supposing that by the Tularcitos of the diseño the "Tularcitos" of Stratton's map was intended to be designated. But, near the base of the first hills, about midway between the creeks, and a little to the eastward of a line drawn between the houses, a laguna and tulares are found in all respects corresponding to the position of the "Tularcitos" of the diseño. It cannot, I think, be doubted that these latter were intended.

Reliance is also placed on the word "Calabera," as indicating the Calaveras valley. But it is impossible to regard the narrow valley or level place between the hills represented on the diseño as intended to designate the valley of the Calaveras, situated far to the eastward, and through a part of which flows the large stream called the Calaveras river. No such stream is represented on the diseño, and if the hills marked on the diseño as lying to the eastward of the small valley were intended for the sierra, which lies beyond the Calaveras valley, we must suppose a mistake as to the situation of that valley, and its extent, to have been committed, which is hardly conceivable. The whole extent of hilly land represented on the diseño, from the base of the hills at which the houses are situated to the extreme eastern portion of the map, is not quite one-half the distance from the Penitencia creek to the commencement of the hills; in other words, about two-thirds

of the tract is level land to the west, and one-third hilly land to the east.

But, if the hills of the diseño are the range of mountains beyond the Calaveras valley, the level land will constitute but little more than one-quarter of the whole tract; three-quarters of it lying to the east of the first hills and of the houses. Such a mistake is too gross to have been committed even by the draughtsman of a Mexican diseño. But it is shown in evidence that the name "Calabera" was applied to a high peak in the range of hills between the Calaveras valley and the plain, and situated directly on the eastern side of a small valley, lying between the first and second range of hills, which was undoubtedly intended to be represented on the diseño. In this valley are the remains of a willow thicket or "sausal," entirely corresponding in situation with the spot marked "Sausal" on the diseño; while, in the Calaveras valley beyond no similar thicket is found. But the most conclusive indication is the "chemisal," or lone tree, marked on the diseño, as situated on the hills to the eastward of the small valley. This tree, which is a noted and conspicuous landmark for miles around, is identified with great certainty, and its position determines beyond dispute, what range of hills was intended to be represented on the diseño.

In the map of the pueblo lands of San José, which is evidently prepared with unusual care and skill, the same tree is represented as standing on the eastern boundary line of Hignera, while behind it, and beyond the ridge on which it stands, the "Plan de las Calaberas," or plain of the Calaveras, is distinctly delineated. The indication, therefore, afforded by the position of the chemisal, appears to me conclusive. For the diseño plainly represents it as situated on the hills to the eastward of the small valley delineated upon it. It is found to the eastward of a small valley in the hills, but far to the westward of the valley of the Calaveras. The valley intended to be represented cannot, therefore, be the valley of the Calaveras.

The decree of the board confirmed the claimants to a tract of land the description of the boundaries of which were derived from the diseño, and the testimony of witnesses produced by the claimants themselves. Those boundaries are described as "beginning at the back side of the principal house on said rancho at the foot of the hill; running thence northwardly to a lone tree on the top of the sierra (known as a landmark); thence east, along the sierra to the line of the land known as the 'Rancho of José M. Alvisu,'" etc.

The courses of these lines are evidently incorrect, probably through a clerical error. For a line from the house to the tree will run in a nearly easterly direction; and a line along the sierra, from the tree to the land of Alvisu, will run in a southerly or southeasterly direction. But the location of the lines intended by the decree cannot be mistaken. The first is to be run from Hignera's house to the tree, and the second from the tree along the sierra, and at right angles to the first line, to the lands of Alvisu. A line run east from the tree would merely be the production of the first line. It would not "run along the sierra," but over it. Nor would it reach the lands of Alvisu, which lie to the south.

It is clear that the board intended to fix the boundaries precisely as they have been established in the official survey. No appeal was taken from this decree, and in approving the survey there is given to the claimants the very tract confirmed to them by the decree of the board, founded on their own testimony, and with which, at the time, they seem to have been entirely satisfied.

[NOTE. Upon rehearing, the decree confirming the official survey was affirmed. Case No. 15,363. The claimants then took an appeal to the supreme court, where the decree was finally affirmed. 5 Wall. (72 U. S.) 827.]

Case No. 15,363.

UNITED STATES v. HIGNERA.

[1 Cal. Law J. 387.]

District Court, S. D. New York. June 24, 1862.

MEXICAN LAND GRANTS—OBJECTIONS TO SURVEY—EVIDENCE.

[Claim of the heirs of Jose Hignera. On rehearing of objections to official survey.]

The official survey having been brought into court on objections filed by the claimants, the cause was at the last term heard, and a decree entered approving the survey. [Case No. 15,362.] A rehearing having been granted, the cause has been reargued and submitted for decision.

BY THE COURT. I have attentively considered all that is urged in the brief of the counsel for the claimants, but have failed to perceive any reason to doubt the correctness of my former opinion. It is urged in the brief referred to that the survey approved by the court is not in accordance with the decree of the board. The decree is as follows: "Beginning at the back side of the principal house on said rancho, standing at the foot of the hill, and running thence northwardly to a lone tree on the top of the sierra (which tree is known as a land-mark), thence east along the sierra to the line of the land known as the rancho of José Maria Alvisu, thence southerly along the west line of said Alvisu's rancho till it intersects the Arroyo de la Penitencia, thence up said arroyo to an estuary, and from this point to the place of beginning."

It is evident that, in this description, the courses of the lines have been mistaken.

From the back of the house to the lone tree the course is not north, but very nearly east; the line along the sierra is south, and the line of the rancho of Alvisu is west. The description in the decree was evidently taken from the deposition of Doña Carmen Cibrian de Bernal, who has fallen into the same error. The lone tree mentioned is obviously the tree represented on the diseño, and also on the map of the pueblo lands of San José. It is referred to by nearly all the witnesses as a noted land-mark, and is described by Mrs. Bernal as visible from Hignera's house on the plain. There can be no doubt as to the identity of this tree. It stands in a nearly due east direction from the house. It is clear that the second line was intended to be run at right angles to the first. It is described as running "east along the sierra to the line of Alvisu." But the direction of the sierra is north and south, and the rancho of Alvisu lies immediately to the south of that of Hignera. If, therefore, the second line be run "east," as the decree directs, it will not be at right angles to the first line, which terminates at the lone tree, but will be the production of it; nor will it run "along the sierra," but across it; nor can it reach the line of Alvisu. It is clear that "south" should be substituted for "east" in the description of this line. The same error occurs in the description of the third line. It is described as running "southerly along the line of Alvisu's rancho till it intersects the Arroyo de la Penitencia;" but the line of Alvisu is west from the sierra to the Penitencia. On a southerly course the Penitencia could not be reached. The true course of the line described, and which, having been settled at an early period by agreement between Hignera and Alvisu, is not disputed, is from east to west.

Correcting, then, this obvious error in the courses of the lines described in the decree, it would seem that it describes the limits of the tract intended to be confirmed with entire precision.

It is suggested in the brief of the counsel for the claimants that the lone tree known as a land-mark, mentioned in the decree of the board, is not the lone tree visible from the plain and identified by the witnesses. But there seems to be no foundation for this idea. The only lone tree spoken of by the witnesses is that on the first range of hills. It is evidently the one referred to by Mrs. Bernal as visible from Hignera's house. It is represented on the map of the pueblo lands of San José as forming the boundary mark on the northeastern corner of the extensive tract claimed by that pueblo. It is not pretended that any lone tree, known as a land-mark, is found on the range of hills beyond the Calaveras valley, nor is the survey contended for by the claimants bounded by any such tree. On the contrary, it runs to a rock called the "Piedra Azul," not mentioned in the grant, diseño, or decree. It is incontestible that the tree referred to in the decree is that spoken of by almost all the witnesses, and especially by Mrs. Bernal, on whose deposition so much reliance is placed by the counsel for the claimants.

But it is said that the board evidently intended to include the Calaveras valley in the tract, and to designate some other tree than that spoken of by the witnesses, because the northern line is described as extending to a lone tree "on the top of the sierra," and the eastern line as running thence "along the sierra,"—the term "sierra," it is said, plainly referring to the range of hills beyond the Calaveras valley. It seems to have been forgotten that Doña Carmen herself describes the lone tree in the chemisal precisely in the language of the decree, viz. As on the "top of the sierra"; and this tree, she says, was visible from the plain. Several witnesses have testified that the first range of hills was always called "cerros," and never "sierra." But a conclusive answer to this testimony is found in the fact that, in the diseño of the adjoining rancho of Alvisu, the same range of hills, with the houses of Hignera and Alvisu at its foot, is unmistakably delineated and described "Sierra Alta."

That the tree spoken of by Doña Carmen was the one situated on the first range of hills is impliedly admitted by the counsel for the claimants, for he contends that Mrs. Bernal testifies that the line ran past this tree to the sierra on the other side of the Calaveras valley. As the language of the decree is almost an exact transcript of that used by Mrs. Bernal, in her deposition, it is impossible to suppose that the board did not refer to the same tree as that mentioned by her, especially as no other lone tree, known as a land-mark, is spoken of by any of the witnesses.

It is clear, then, from the terms of the decree, that the line could not have been intended to be run past or beyond the tree in the same direction. The course of the first line is described as "north to the tree," and the second line is to be run "thence east, along the sierra, to the line of Alvisu." The direction by compass is erroneously given, as has already been explained, but the intention obviously is to draw the second line at right angles to the first. It could not have been meant to be merely the production of the first. For, in that case, it would not run along the sierra; nor could it ever reach the line of Alvisu.

I confess myself unable to perceive how, after ascertaining the lone tree mentioned in the decree of the board, the survey can be made under that decree in any other manner than by running from the tree south, along the sierra on which it is situated, to the line of Alvisu. This decree was obtained by the claimants. It has been accepted by them as final. It defines the boundaries of the tract with great precision; and it would seem un-

reasonable to permit them now, in a proceeding to ascertain the correctness of a survey under that decree, to disregard it entirely, and to establish new boundaries, by which the extent of the tract will be more than doubled.

But it is said that the deposition of Mrs. Bernal, on which the decree was evidently founded, shows that the northerly line was continued past the tree, and beyond the valley of the Calaveras. The answer already given to this suggestion would seem to be sufficient, viz. that the board clearly adopted the tree as a corner, and not as an object in the line of the northern boundary. But, on referring to the deposition of Doña Carmen, it is by no means apparent that the line described by her is that contended for by the counsel. She states that Hignera pointed out to her his boundaries. That the line run from the back of the house to the lone tree; from that tree to the other side of the Calaveras; and from beyond the Calaveras, by the rear of Alvisu's house, to the Arroyo de la Penitencia; thence to an estuary, and thence to the point of beginning. It appears that in the first range of hills is a noted peak, of a conical shape, known as the "Cerro de la Calabera," or de las Calaberas. If, from the tree the line be run, as directed in the decree, along the sierra to the line of Alvisu, it will pass not far from this peak. I think it most probable that this "Cerro de las Calaberas," and not the valley, was referred to by the witness. If she meant that the line was to continue in the same direction from the tree across the valley of Las Calaveras, to the sierra beyond, she wholly fails to indicate the eastern boundary of the tract; and yet it is evident that she meant to describe boundaries which would enclose it on all sides. "From beyond the Calaveras," she says, "the line continues down by the rear of Alvisu's house to the Penitencia." But this line is parallel, or nearly so, to the line from Hignera's house to the tree; and if the line which extended beyond the Calaveras is this latter line produced, it is evident that no eastern boundary whatever is mentioned.

It seems clear to me that the witness, like the board, intended to describe a line running from the tree to Alvisu's line; and thence along that line to the Penitencia, forming, as she says, a tract somewhat like a parallelogram. That such was her meaning is apparent from her answer to the fourth cross interrogatory. When asked to state particularly each land-mark of the boundaries forming the ranchos, she says: "From the tree I have mentioned, all along the top of the sierra;" precisely as described in the decree. She does not say: "From the tree across the sierra, on which it is situated, across the valley of the Calaveras to the sierra on the opposite side."

The report by Peralta of the judicial measurement made by him, under the order of Sola, has been referred to as showing that Hignera's possession extended across the Calaveras valley. Admitting the view taken by counsel with regard to that measurement to be correct, and that Peralta laid off a tract 1,200 varas wide, by 7,450 varas in length, it is highly improbable that the lines were run in the directions stated by him; that is, 7,450 varas from east to west, and 1,200 varas from north to south. The place to be measured was, as Peralta declares, "Los Tularcitos." The Tularcitos is a narrow valley, running nearly northwest and southeast. Its width is not far from 1,200 varas, while its length, as shown on Stratton's topographical map, is considerably more than a league. It would seem, therefore, that this must have been the place measured off by Peralta. It is in the highest degree improbable that, under the name of Tularcitos, he intended to give possession of a long and narrow tract, running nearly at right angles to the little valley known as the "Tularcitos," with no natural boundaries on any side, and running over the hills and across another valley a distance of nearly a league and a half; while its width was less than one-fourth of a league. The fact that Peralta says he measured 7,450 varas from west to east only proves that he fell into the same error as that committed by the draughtsman of Hignera's diseño, by many of the witnesses, and even by the board itself.

But, if Peralta measured from the point of beginning 1,400 varas to the northwest, and 6,050 to the southeast, we can understand the origin of the dispute between Hignera and Alvisu, and which, at the governor's suggestion, was amicably arranged by the adoption of an agreed line; whereas, if the tract of Tularcitos was measured by Peralta from west to east 7,450 varas, by only 1,200 varas in width, it could not have encroached on the limits of Alvisu.

It is unnecessary to recapitulate the various reasons presented in the former opinion of this court for the conclusion that the narrow valley represented on the diseño is not the valley of the Calaveras. The most important is the fact that the lone tree is represented as situated on the east and not on the west side of the valley,—clearly indicating the valley to be on the west of the range on which the lone tree stands.

It is strenuously urged by the counsel for the claimant that the court, in seeking to reconcile the indications of the diseño, has assumed, without proof, that the Tularcitos of the diseño is not intended to indicate the valley of that name. It was not supposed by the court that the place called "Tularcitos," which was measured off to Hignera, and where he built his houses, was any other than the long and narrow valley heretofore described. But from the representation of the diseño of a small square inscribed "Viña," near which the word "Tularcitos" is written, without any apparent attempt to indicate a

valley, it was supposed that the spot intended was probably that marked "Tularcitos" on Stratton's map, where tulares are in fact found, and which corresponds, in its relative position, with regard to the houses of Alvisu and Hignera, and other objects represented on the diseño, much more nearly to the place inscribed "Tularcitos" than does the valley to which that name belonged.

In the petition of Hignera for a ratification of the Sola grant, and for an augmento, he says that he has obtained a grant for "the place called 'Tularcitos,' and also the possession, and, wishing to procure the approbation and ratification of the same, together with the augmento, as represented in the map annexed," etc. The possession obtained by him was, as we have seen, of a tract 7,450 varas long by 1,200 wide, and this was known as the place called "Tularcitos." The augmento desired was to be on the plain towards the bay, and the map represented both tracts. It is highly improbable that he should not even have attempted to represent on his diseño the valley of Tularcitos, which had been measured off to him, and in which he resided, but contented himself with writing the word "Tularcitos" at a place where the diseño affords no indication of the existence of a valley, and which appears to be part of the hills. On the map of the lands of San José, which embraces a very large region of country, the small valley of the Tularcitos is distinctly delineated. It is hardly conceivable that its owner, who resided in it, should have wholly neglected to represent it on a diseño on which he professed to indicate the land he solicited. But it would be quite natural for him to inscribe with the name "Tularcitos" the patch of tulares which Stratton's map shows is found in nearly the exact position of the "Tularcitos" of the diseño. If this view be correct, the valley to the east of the place marked "Tularcitos" is evidently the Tularcitos valley which had been granted to Hignera, and which, in size and relative position, it represents with some accuracy,—the "chemisal," or lone tree, being found on its eastern side, and the word "Calabera," indicating the cerro of that name, also situated on its eastern side. But if this valley be intended to represent the Calaveras valley, the diseño is almost in this respect as inaccurate as it is in its representation of the Tularcitos valley, by a small square figure marked "Viña," near which the word "Tularcitos" is written.

It is said that a stream is represented on the diseño as flowing through the valley, but it seems to me that the line of the base of the hills, and not a stream, is intended to be indicated; and the brook which flows through the Calaveras valley flows through its centre, and not at the base of the hills beyond it, as the diseño represents, if the line in question be intended to indicate a brook. The diseño represents the valley as closed in by the hills towards the north. But the Calaveras valley receives towards the north the considerable stream called the "Calaveras River," of a much larger size than the brook which flows through the valley, but which is wholly omitted on the diseño; and yet, if the survey contended for by the claimant be adopted, and the Piedra Azul taken as the northeastern corner, this stream must be crossed, and a considerable portion of it included within the tract.

I shall refer but to one other consideration in support of the view I have taken. It is admitted that the augmento solicited was towards the plain. The right, if any, to the Calaveras valley, must have been derived under the first grant of Tularcitos by governor Sola. The report, or informe, of Louis Peralta, shows that the land solicited by Hignera was within the domain of the pueblo, but that it might be granted. The boundaries of the land claimed by the pueblo are distinctly delineated on the map so often referred to. They embrace the Tularcitos valley, but not that of the Calaveras. The boundary line is drawn from the lone tree south, along the crest of the first range of hills; while the "Plan de Calaveras" is represented as lying beyond it.

If, then, the Calaveras valley composed the larger portion of the Tularcitos grant, the report of Louis Peralta, by whom the possession was given, the order to Peralta to make the petition known to the authorities of the pueblo, that their objections might be heard, were all founded on error; for almost all the tract was without the limits of the pueblo. It seems far more reasonable to suppose that the governor and officers of the pueblo knew where the tract solicited by Hignera was situated, and that the place called "Tularcitos" was in fact within the limits of the pueblo. The subsequent augmento could not have been intended to enlarge the boundaries towards the east, for it is clearly proven that the extension asked for was towards the bay.

On the best consideration I have been able to give to this case, I am satisfied that the opinion heretofore delivered was correct, and that the official survey should be approved.

[The decree confirming the survey was affirmed, on appeal of claimants, by the supreme court. 5 Wall. (72 U. S.) 827.]

Case No. 15,364.

UNITED STATES v. HILL et al.

[1 Brock. 156.] [1]

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

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

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

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

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

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

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

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

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

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

MARSHALL, Circuit Justice. I shall not quash the presentment for two reasons. 1st. I am not certain, that the presentment has at this time any legal existence. I am much inclined to the opinion, that the two presentments of the same offence, which were made by the grand jury, the first on their own motion, which was informal, and the second, at the instance of the attorney for the United States, which is precisely the first presentment, corrected in point of form, are to be considered as one and the same act, and that the second is only to be considered as an amendment of the first. If this be correct, the presentment was embodied in the indictment and perished with it. I am, also, much inclined to the opinion, that the idea of a discontinuance, which was suggested at the bar, is correct. 2dly. The usage of this country has been, to pass over, unnoticed, presentments on which the attorney does not think it proper to institute proceedings. This usage is convenient, because it avoids the waste of time, which would often be consumed in the inquiry, whether the court could take jurisdiction of the offence presented. I am not disposed to disturb it, unless strong reasons should require my interposition. Without deciding whether this presentment retains any legal force, I shall not quash it.

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

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

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

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

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

It is well worthy of consideration, wheth-

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

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

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

Case No. 15,365.

UNITED STATES v. HILL.

[1 Cranch, C. C. 521.] [1]

Circuit Court, District of Columbia. Dec. Term, 1808.

COMPETENCY OF WITNESSES—SLAVES.

A slave is not a competent witness against a free-born mulatto not subject to any term of servitude by law.

[Cited in U. S. v. Gray, Case No. 15,252.]

Indictment for stealing a gold watch. The defendant [Peggy Hill] was a free-born mulatto, not subject to any term of servitude by law.

Mr. Jones, for the United States, offered Charity, a slave, as a witness against the prisoner. See U. S. v. Mullany [Case No. 15,832]. In the case of U. S. v. Terry [Id. 16,454], at June term, 1806, at Washington, and in the case of U. S. v. Shorter [Id. 16,284], at December term, 1806, a slave was admitted as a witness for free negroes.

But THE COURT (DUCKETT, Circuit Judge, absent), having more fully considered the Acts of Assembly of 1717, c. 13, and 1751, c. 14, § 4, were of opinion that a slave is not a competent witness against a free-born mulatto, not under a state of temporary servitude. It is also clear, that the slave cannot be admitted under the third section of the act of 1717. It cannot be implied, from the exclusion (in the second section) of slaves as witnesses against a white person, that they may be admitted against a free person of color; for the principles of the civil law, and of the laws of every country where slavery is tolerated, exclude them as witnesses against a free person.

Mr. Hiort, for the prisoner.

Verdict, "Not guilty."

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,366.

UNITED STATES v. HILLEGAS.

[3 Wash. C. C. 70.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1811.

OFFICIAL BONDS—INTERNAL REVENUE COLLECTORS—POWERS OF SECRETARY OF TREASURY—RELEASE OF SURETIES—GIVING TIME.

1. Debt on a bond, dated 19th of July, 1797, given by Michael Hillegas and others, to the United States, conditioned that Nichols, who had been appointed, in 1790, a collector of the internal revenue in the district of Pennsylvania, shall faithfully execute the office of collector of the internal revenue, and will account for, and pay over, what moneys he shall collect.

2. A balance became due by Nichols to the United States, and, without the knowledge of the sureties in his official bond, he gave to the United States, bonds and mortgages, to secure the payment of the same, which were approved by the proper officers of the treasury, and by which the amount due to the United States, was agreed to be paid in six, twelve, and fifteen months; one of which bonds was paid, and others were put in suit, by the district attorney of the United States.

3. The United States, in their political capacity, are a collective invisible body, and can only act by their officers, who constitutionally and legally administer the government, and by the agents duly appointed by them.

[Cited in Minturn v. U. S., 106 U. S. 444, 1 Sup. Ct. 408.]

4. The secretary of the treasury, is the head of the treasury department, having the general direction, superintendence, and management, of the revenues of the United States, and the collection thereof.

5. The rule of law is, that if a creditor, without the knowledge and consent of the surety, expressly or tacitly yielded, give time to the principal, by enlarging the credit beyond the period mentioned in the contract, the surety is discharged, both at law and in equity; and this rule is applicable, as well to bonds with collateral conditions, as to bonds for the payment of money; and whether the arrangement is intended for the benefit of the surety or not.

[Cited in Tiernan v. Woodruff, Case No. 14,028; U. S. v. Campbell, 10 Fed. 820; U. S. v. De Visser, Id. 658.]

[Cited in Bank of Steubenville v. Leavitt, 5 Ohio, 214; Braman v. Howk, 1 Blackf. 394; Burke v. Cruger, 8 Tex. 66; Cunningham v. Wrenn, 23 Ill. 65; Veazie v. Carr, 85 Mass. (3 Allen) 15; Watriss v. Pierce, 32 N. H. 577.]

This was an action of debt, on a bond executed by Nichols, Eddy, and [Michael] Hillegas, to the United States, dated 19th July, 1797, in the penalty of 15,000 dollars; with condition, reciting that Nichols had been appointed by the supervisor of the Pennsylvania district, in 1794, a collector of the internal revenue, and the obligation to be void, if Nichols has faithfully executed, and shall faithfully execute the said office, and account for, and pay over, what moneys he shall collect, &c. Upon oyer, the defendant

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

plead performance generally, to which the replication assigns as a breach, that he had collected, and had not paid over, to the supervisor, 27,345 dollars. Rejoinder, that he had paid; and issue. Second rejoinder, that Nichols being, on the 9th of June, 1798, indebted to the United States, in the sum mentioned in the replication for moneys collected, did, on that day, execute and deliver to the supervisor, at his request, but for the use of the United States, three bonds, payable in equal sums, at six, twelve, and fifteen months, to the amount of the said debt, with warrants of attorney to confess judgments, and also, a mortgage for securing the same; and that credit was extended to the said Nichols, for said balance, for the aforesaid terms of six, twelve, and fifteen months; which bonds and mortgage were given, and credit extended to said Nichols, without the knowledge or consent of the said Eddy or Hillegas, his sureties, by means whereof, the said sureties were discharged. Surrejoinder acknowledges that the said bonds and mortgage were accepted by the United States, but, that the supervisor, in taking the same, acted without the directions or knowledge of the United States; that the same were not made and delivered by Nichols, at the instance and request of the United States; and that the United States did not enlarge the time of payment; but, that the supervisor, in doing so, had acted without the knowledge or consent of the United States. To this an issue was taken.

The facts were as follows:—Nichols was, in September, 1794, appointed, by the supervisor, a collector; and in September, 1795, he was appointed, by the president, an inspector. At the time Nichols gave the bond on which this suit was brought, he was indebted to the United States upwards of 20,000 dollars, as collector, and upwards of 6000 dollars as inspector. In May, 1798, the supervisor removed Nichols from his office, as collector; and on the 28th of June, 1798, the president removed him from his office of inspector. The above bonds, with warrants of attorney and mortgage, were given to W. Miller, who is styled supervisor; who delivered over the mortgage to the district attorney, to bring suit on. A scire facias was accordingly sued out upon the mortgage, in the name of Miller, for the use of the United States, some time in 1802. Judgment was obtained, the money raised and brought into court, and was claimed by the state of Pennsylvania, by virtue of some other or prior lien, except about 2500 dollars, which was taken out by the district attorney for the United States, by permission of the court. The United States, and the state of Pennsylvania, are still contending before the supreme court of the United States, for the residue of the money. One of the bonds, for upwards of 9000 dollars, was paid by Nichols to the supervisor, about the time it became due.

A letter was read, on behalf of the defendants, from the secretary of the treasury, dated 26th of June, 1798, to Mr. Nichols, enclosing him the copy of a letter, from the supervisor to the secretary, and desiring to know, if the information contained in this letter is true. The letter enclosed was dated the 18th of June, and contained a report of the deficiency of Nichols in his two offices of inspector and collector. This letter from the supervisor, then stated, that for the purpose of securing the United States, in relation to so large a debt, he had, with the approbation of the commissioner of the revenue, obtained from him, bonds, and warrants of attorney, and a mortgage for the amount, to get which, he had judged it best to enlarge the time of payment.

The counsel appearing disposed to argue the points of law arising in the cause, as if there had been a demurrer, WASHINGTON, Circuit Justice, inquired, whether there was any agreement or understanding amongst the counsel, to warrant this? That on the issue joined, the only question was, whether these securities were taken, and the time of payment enlarged, with the knowledge and consent of the United States? If the jury should be in the affirmative, on this question, the cause was with the defendants.

The counsel both agreed, that the intention and agreement was, to consider not only the facts put in issue, but the legal inferences from them, as involved in the trial, in the same manner as if the pleadings had so presented them. The court then recommended a special verdict, or that the jury should reserve the points of law, which met the approbation of the bar.

WASHINGTON, Circuit Justice (charging jury). The only question for your determination is, whether the securities mentioned in the pleadings were taken, and the credit to Nichols enlarged, by the United States, without the knowledge or consent of the sureties? The United States, are a collective invisible body; which can act, and can be seen only in the acts of those who administer the affairs of the government, and their agents, duly appointed and empowered to act for them. This position, which is undeniable, leads us naturally to an inquiry into the character and powers of those officers, concerned in the management of the revenues of the United States, and who appear to have had any agency in this particular business. And first, the secretary of the treasury, who is declared by law to be the head of that department. His duties are: to digest plans for improving and managing the revenue, and for the support of public credit; to prepare and report estimates of the revenue, and expenditures; to superintend the collection of the revenue; to decide on the forms of keeping and stating accounts, and making returns, and to grant warrants for money to be issued from the treasury; to act in relation to

the sales of the public lands; to make reports to congress, on such matters as may be referred to him by that body, or which shall appertain to his office; and, generally, to perform all services, relative to the finances, required of him by law. He is to superintend the collection of the duties on impost and tonnage, as he shall judge best; and the different officers employed in relation to the internal revenue, are, from time to time, for the better execution of their duties and trusts, to observe and execute such directions as they shall receive from the treasury department. See Acts Cong. 2d Sept., 1789 [1 Stat. 65]; 3d March, 1791 [Id. 215]; 8th May, 1792 [Id. 279]. The commissioner of the revenue, is a member of the treasury department, particularly charged with the superintendence, under the direction of the head of that department, of the collection of the revenues of the United States, other than those arising from duties on impost and tonnage; and is to execute such other services, conformable to the constitution of that department, as shall be directed by the secretary. The supervisor has the appointment of the collectors, and other inferior officers; and the collection of the internal revenue is to be made under his management.

Thus, it appears, that the collection of the internal revenue, is committed to the management of the supervisor, subject nevertheless, to the control and superintendence of the commissioner of the revenue, who, in his turn, is under the control and superintendence of the secretary of the treasury. In this case, not only the before-mentioned revenue officers, but the law officers of the United States, were engaged in some way or other, in the transaction which is put in issue. The supervisor, or manager of the internal revenue, in relation to the collection, agreed to give Nichols six, twelve, and fifteen months' indulgence, for paying what was at that time due to the United States, in consideratain of receiving from him certain securities. The commissioner of the revenue, under whose superintendence this officer was, approved of the measure; and the secretary of the treasury, with full knowledge of all that had been done, if he did not expressly approve, he evinced no disapprobation of what the supervisor had done, and certainly did not attempt to control him. The supervisor directed a suit to be brought on the mortgage, which was done, for the use of the United States, in express terms, and the money was raised. The supervisor received upwards of 9000 dollars, part of the money secured by the mortgage; and the district attorney took out of court between two and three thousand dollars, other part of the same; and the United States, by its officers, are now contesting with the state of Pennsylvania, the right to the residue.

After all these acts of the officers of the government, all acting within their proper spheres, it is too much to deny, that they are to be imputed to the United States, and to be considered as the acts of the United States. As there is no proof given on the part of the United States, that the sureties knew of, or consented to the arrangement made with Nichols, the fact must be taken as it is stated in the defendants' rejoinder. Consequently, your verdict must be for the United States, on the first issue, and for the defendants, on the second issue; subject to the opinion of the court on the point reserved, whether the two sureties of Nichols had not been discharged, by the United States having taken the bonds and mortgages of Nichols, in which time was given for the payment of the debt, due by him to the United States.

The jury found accordingly.

Afterwards, the question reserved for the decision of the court, having been argued, THE COURT gave the following opinion:

The point reserved for the consideration of the court is, whether the act of the supervisor, in extending the time for payment of the debt due from Nichols, the principal in this bond, discharged the sureties? The principle of law, established by the cases of 1 Selw. N. P. 311, 312, 314; 2 Ves. Jr. 540; 2 Brown, Ch. 579; 2 Bos. & P. 61; 3 Bos. & P. 365,—is, that if a creditor, without the knowledge and consent of the surety, expressly or tacitly yielded, give time to the principal, by enlarging the credit beyond the period mentioned in the contract, the surety is discharged, both in equity and at law. The reason is an obvious one. The surety guaranties the performance of the particular contract, to which he is a party, and no other. If, without his consent, this contract be varied by the act of the creditor, he is not bound by the new contract; and the old contract cannot be enforced, according to the terms of it, without injustice to the principal, and a breach of the agreement made between him and the creditor. The surety, not being himself the debtor, but in relation to the obligation of his principal, has no right to prevent the creditor from indulging the principal, to any extent the creditor may please; but, as such indulgence cannot be granted at the risk of the surety, the only legal or equitable consequence, which can result from the indulgence granted to the principal, is, to discharge the surety from his engagement.

Should the surety call upon the creditor, as he undoubtedly may, to bring suit against the principal debtor as soon as the debt becomes due, and in case of refusal, to ask the aid of a court of equity to compel him; or should he even pay the creditor, with a view to sue the principal earlier than the period to which the new agreement had extended the credit;—the creditor, in the first instance, could not obey the call, nor could the surety, in the other, sue the principal without a violation of the second agreement. The inevitable consequence, therefore, must be what has been before stated.

It was contended on the part of the United States, that the rule does not apply, where the condition of the surety is improved by the extension of credit, granted in consideration of additional security for the debt. The answer to this argument is, that whether the security is bettered or not, was a consideration for the surety to decide upon; and the court has no right to inquire into, and to weigh the good or the bad which might result from the new contract. It would lead, most certainly, to a vast variety of speculation, on which no sound principle could be built. In this case, it led unfortunately to the very loss which is now endeavoured to be fixed upon the shoulders of the surety. The principle on which the rule is founded, is not that the change of the contract, is upon calculation more or less beneficial to the surety, but that the contract, the performance of which was guarantied by the surety, has been changed without his consent.

Again, it was contended that the cases cited, do not apply to bonds with collateral conditions, but to such only as are expressly for the payment of money. How there should be a distinction, between the one kind of obligation and the other, is not perceived by the court. In both, the responsibility and the rights of the surety are the same, and the principle of the rule, equally protects him in both. In the one, he guaranties the performance of certain acts, for a breach of which damages may be recovered; and in the other, the payment of a specified sum; but in neither, is he bound to guaranty any other contract, than that to which he is a party; and of course, the principle which discharges him, in case that contract is varied, in the one case, must discharge him in the other.

But, in this case, Nichols, at the time he was dismissed from the office of collector, was indebted in a specified sum to the United States, which he was then bound to pay, and for which a suit might immediately have been brought. The surety had a right to insist that a suit should be brought. But the United States, being, by an act of a public agent, disqualified from obeying such a requisition, had it been made, the surety was discharged.

Judgment for defendant.

Case No. 15,367.

UNITED STATES v. HILLIARD.

[4 Cranch, C. C. 644.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

FINES AND COSTS—SECURITY.

Security, by recognizance, may be taken for fine and costs, in Washington county.

This was a scire facias upon a recognizance, for a fine and costs recovered against one Noah Stinchcomb. General demurrer and joinder.

Mr. Dandridge, for the defendant, contended, that, by the common law, all security to relieve a man from prison, was void, and that there is no statute law to justify this recognizance.

Mr. Key, for the United States, submitted the question to the court, without argument.

CRANCH, Chief Judge. This scire facias sets out a judgment against Stinchcomb, and then says: "Whereas, a certain John Hilliard, late of said county, came personally into the said court, and undertook, for the said Noah Stinchcomb, that, if the said Noah Stinchcomb should not pay the said fine, so as aforesaid imposed upon him by the said court, and also all such costs and charges as had accrued or should accrue to the said United States, in the premises, that then he, the said John Hilliard, would do the same for him: Nevertheless, the said Noah Stinchcomb, the fine, costs, and charges aforesaid, to the said United States hath not paid or satisfied; nor hath the said John Hilliard done the same for him, according to the force, form, and effect of the promise and undertaking aforesaid, as by the suggestion of the said United States, in the said court, it hath been stated." "Wherefore," &c., "to show cause why the said United States should not have execution against the said John Hilliard for the fine," &c. There is no law that forbids a plaintiff to take a new security for his debt, from his debtor in execution. The statute of 23 Hen. VI. c. 10, making void all bonds taken for ease and favor, is applicable only to sheriffs and other officers. An undertaking in court, by matter of record, is good ground for a scire facias and execution. This kind of security for fine and costs is recognized in the Maryland act of November, 1793, c. 57, § 16, and by the forms in 2 Har. Ent. 223, 224, and 617. This being the opinion of the court, the demurrer is overruled.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,368.

UNITED STATES v. HILLIARD et al.

[3 McLean, 324.] [1]

Circuit Court, D. Ohio. Dec. Term, 1843.

ACTIONS ON OFFICIAL BONDS—EVIDENCE—TREASURY TRANSCRIPTS.

1. A treasury transcript, to be evidence, must contain the original items of the accounts or balances admitted by the defendant in his official returns.

2. The court can only revise the action of the treasury, by looking at the evidence on which the treasury acted.

3. A balance, therefore, struck by the treasury, cannot, as such, be charged, and made evidence.

[1] [Reported by Hon. John McLean, Circuit Justice.]

4. Where a person is charged by the defendant, through the agency of a third party, the evidence on which such charge was made must be stated.

[Cited in Boyd v. State, 94 Tenn. 505, 29 S. W. 901.]

[Error to the district court of the United States for the district of Ohio.]

[This was an action by the United States against Hilliard & Clark. There was judgment in the district court against the defendants. Case unreported.]

The District Attorney, for the United States.

Mr. Swayne, for defendants.

OPINION OF THE COURT. This is a writ of error from the district court. The action was brought against the defendants as sureties of D. Worly, late postmaster and agent, at Cleveland, Ohio. The bond signed by the defendant contained conditions, that "the said Worly should well and truly execute the duties of postmaster according to law and the instructions of the postmaster general, &c.; and should also do as agent all that might be required of him, and should account, in the manner directed by the postmaster general, for all monies which he might receive as agent," &c. The breach assigned was, that, as postmaster and agent, he has received thirty thousand five hundred and eighteen dollars and twenty-six cents, and also divers other sums, &c.; and has not paid over, though often requested, according to the condition of said writing obligatory, any part of said sums of money so received. On the trial, the defendants objected to so much of the statement A. offered in evidence as relates to the quarterly accounts rendered by the late postmaster, unless those accounts or certified copies were produced. Objection was also made to so much of said statement as relates to moneys received by Worly, as agent, from other postmasters, unless the original papers on which the charges were made, or certified copies, were produced. Which objections were overruled by the court, and to which decision the defendants excepted. Balances struck by the treasury department, and charged as such, are not evidence. The items of the account on which the balance was ascertained should be stated in the treasury transcript. But balances charged against himself, by a postmaster or other officer, may be charged against him. For this takes the admission of the officer solemnly made in his accounts. An appeal, in effect, is given from the treasury decisions to the courts, and the courts cannot revise these decisions unless they shall have before them the evidence on which the treasury acted. This point has often been ruled by the supreme court. Lawrence v. U. S. [Case No. 8,145]. The balances charged, in the account objected to, against Worly as postmaster, do not appear to be such as were charged by him against himself, but such as were made out by the corrections of the department. Now the ground on which these corrections were made should be stated in the transcript.

It also appears that the late postmaster is charged as agent, or sub-treasurer, with two items, monies received from postmasters, and no receipt or evidence is shown on which the charge is made. Where an officer is charged with the receipt of money which is not acknowledged by him in his returns, or was not regularly paid or advanced to him by the department in the ordinary course of its business, the evidence on which the charge was made must be stated. The receipts of Worly for these sums must be exhibited, or copies of them, if filed in the department, must be certified, or some other legal evidence must be exhibited on which to charge Worly, in order that his sureties may be made liable. On the two points above stated, the judgment of the district court must be reversed.

Case No. 15,369.

UNITED STATES v. HILLS et al.

[4 Cliff. 618; [1] 6 Reporter, 771.]

Circuit Court, D. Massachusetts. Oct. 7, 1878.

OFFICIAL BONDS — LIABILITY OF SURETIES — INTEREST, WHEN PAYABLE.

1. Sureties, if answerable at all for interest beyond the amount of the penalty of the bond given by their principal, can only be held for such an amount as accrued from their own default in unjustly withholding payment after being notified of the default of the principal.

2. When allowed, it is upon the ground that a debt which is due, and the payment of which is wrongfully delayed, should carry interest.

3. Interest from the date of the writ may be allowed, and for no greater amount, where the case is heard on an agreed statement of facts.

4. The defendants were principal and sureties on an official bond for the faithful performance by the first-named defendant of his duties as paymaster in the navy. Default was made in the performance of such duties. Suit was brought, service made, and the defendants defaulted. Subsequently they appeared, and the default was taken off. Judgment was finally rendered for the amount claimed by the United States, and with interest from the date of the writ to the date of the judgment. The surety had no notice of the default of the principal until the date of the commencement of the action. *Held*, that the judgment be affirmed.

[In error to the district court of the United States for the district of Massachusetts.]

This was an action of contract brought by the United States against [Frederick C. Hills and others] certain signers on an official bond of a paymaster in the United States navy, and conditioned for the faithful performance of his duties as such officer. The bond was for $5,000.

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission. 6 Reporter, 771, contains only a partial report.]

George P. Sanger, U. S. Atty.
Hillard, Hyde & Dickinson, for defendant.

CLIFFORD, Circuit Justice. Sureties, if answerable at all for interest beyond the amount of the penalty of the bond given by their principal, can only be held for such an amount as accrued from their own default in unjustly withholding payment after being notified of the default of the principal. Lyon v. Clark, 8 N. Y. 155; Wilde v. Clarkson, 6 Term R. 304. When allowed, it is upon the ground that a debt which is due, and the payment of which is wrongfully delayed, should carry interest. The Northumbria, L. R. 3 Adm. & Ecc. 11. Interest from the date of the writ may be allowed, and for no greater amount, where the case is heard on an agreed statement of facts. Ives v. Bank, 12 How. [53 U. S.] 164.

Sufficient appears to show that Frederick C. Hills was appointed acting assistant paymaster and clerk in the navy: that he gave an official bond in the penal sum of $5,000, conditioned that he should faithfully discharge all his duties as such officer; and that the defendant was one of his sureties in that bond. Contrary to the stipulation of the bond the principal made default, as charged in the declaration; that is, he did not faithfully discharge all his duties as such assistant paymaster and clerk. Instead of that, he failed to pay over to the United States property, money, and bonds in his hands, belonging to the United States, which it was his duty to pay over and account for, within the meaning of his said official bond. Due request to the principal is alleged, and his refusal to comply. Service was made, and the principal and surety failing to appear, they were defaulted. But they subsequently appeared, and the default was taken off. Suffice it to say, without entering into the details of the proceedings, that judgment was rendered against the principal, in favor of the United States, for the whole amount claimed by the United States, including principal, with interest from August 24, 1864, to December 31, 1877, the date of the judgment, and taxable costs. Interest as against the surety was allowed only from the date of the writ, the judgment against him being for the sum of $515 debt, and interest from the date of the writ to the date of the judgment, with costs of suit. Exceptions were duly filed by the plaintiffs to the ruling of the district court that the surety was liable for interest only from the date of the writ. Error to that effect having been duly assigned, the plaintiffs sued out a writ of error and removed the cause into this court.

Interest is only claimed by the plaintiffs from the date of the last sum received by the principal. When the accounts of the principal were adjusted by the accounting officers of the treasury does not appear; but it does sufficiently appear that no demand was ever made of the surety; nor is it pretended that he ever had any notice of the default of the principal, prior to the commencement of the suit. Authority for the rule adopted by the district court is found in the case of M'Gill v. Bank, 12 Wheat. [25 U. S.] 514, where interest was allowed only from the date of the writ. Prior to that there was no default of the surety, as he had no notice that the principal had committed any breach of the bond. Where a bond with a penalty is given for the performance of covenants, the recovery must be limited to the penalty, especially in the case of sureties. Bank of the U. S. v. Magill [Case No. 929]. Had there been any previous demand of the penalty, or any acknowledgment that the whole was due, the court intimated in that case that interest might have been recoverable from that time.

Sureties are only bound to the extent of the obligation expressed in their covenants, unless they are themselves guilty of default, or appear and make defence, in which case they become responsible for costs, and, in many cases, for interest by the way of damages for the delay of payment. The Wanata, 95 U. S. 612.

Aid may also be derived in the solution of the question from the decisions of the British courts in construing the act of parliament passed to limit the liability of ship-owners. By that act the liability of ship-owners, in the cases therein specified, was limited to the value of the ship and freight. Cases have arisen under that act where it is held that the court cannot decree against the owner for any excess of damages beyond the proceeds of the ship. The Volant, 1 W. Rob. Adm. 383. But it is settled law that defending owners, in such a case, are liable for costs even beyond the proceeds, because to that extent they are in fault. The John Dunn, Id. 160. And Lord Denman sustained the ruling of the admiralty court. Ex parte Rayne, 1 Gale & D. 377; Gale v. Laurie, 5 Barn. & C. 156.

Replevin bonds are bonds with a penalty, and where property was replevied and a bond given for a return, in case the plaintiff was defeated, the recovery of the property having been demanded and refused, a suit was brought upon the bond. Held, by the supreme court of Massachusetts, that judgment should be rendered for the penal sum of the bond, with interest from the demand. Leighton v. Brown, 98 Mass. 516; McCluskey v. Cromwell, 11 N. Y. 593. Interest, say the same court, in another case, where the suit was against the sureties of a defaulting cashier, is to be added as damages for the detention of the money, for such time as the case shows that the defendants have been in default for its nonpayment. As a general rule, say the court in that case, where a debtor is in default for not paying money in pursuance of his contract, he is liable for interest thereon from the day of his default, and when a demand is necessary to put the debtor in

default, interest is to be given only from the demand. Where interest is not stipulated for as part of the contract, it is given by way of damages for the detention of the money. If the surety becomes charged, by the default of the principal, for the amount of the penalty, or any portion of it, then it is his duty to pay the same on demand, and if he neglects or refuses, the general principle, as stated, applies, and the interest is added by way of damages for his own default, not as enlarging in any degree his liability for the misconduct of the principal. Bank v. Smith, 12 Allen, 252; Brangwin v. Perrot, 2 W. Bl. 1190. Interest may be recovered on the judgment, transit in rem judicatam, but not on the bond. McClure v. Dunkin, 1 East, 436; Hereford v. Alger, 1 Taunt. 220; Clark v. Bush, 3 Cow. 158.

Authorities of a standard character decide that the surety, as a general rule, is not liable beyond the amount of the penalty, even though the principal and interest due by the condition of the bond exceed that amount. Yet the same authorities admit he may make himself liable for interests and costs even beyond that amount, if he delays the collection of the money by litigation. Mower v. Kip, 6 Paige, 88.

Whenever a debtor, whether principal or surety, is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which he has done him by such neglect. Van Rensselaer v. Jewett, 2 N. Y. 140; Leggett v. Humphreys, 21 How. [62 U. S.] 75. Except where there is an express contract to pay interest, it is only recoverable as damages for the detention of the money which the party ought to pay. Abbott v. Wilmot, 22 Vt. 437; Evans v. Beckwith, 37 Vt. 285; Simmons v. Almy, 103 Mass. 36.

Bail-bond sureties, say the same court, are liable only for the penalty of the bond, with interest from the return of non est inventus as to the principal. 103 Mass. 398. Suppose that is so, still the attempt is made in argument to show that the United States are entitled to greater rights by virtue of the provision contained in section 26 of the judiciary act, which provides that in certain cases the court before whom the action is shall render judgment for the plaintiff, to recover so much as is due according to equity. 1 Stat. 87; Rev. St. § 961. Under that provision the judgment is not for the penalty of the bond, but for so much as is due according to equity; and the provision is, that if the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury. Neither party made any such request in this case, and the matter was properly determined by the court. But the provision has no application whatever to the question involved in the present writ of error. It is cited in argument as a new provision, but it has been in force since our judicial system was organized, and it was never heard that it was intended to enlarge the liability of a surety in such a case as that before the court. U. S. v. Curtis [Case No. 14,904], decided Mass. Dist., May term, 1876. For these reasons I am of the opinion that there is no error in the record.

Exceptions overruled, and judgment affirmed.

Case No. 15,370.

UNITED STATES v. HINMAN.

[Baldw. 292.] [1]

Circuit Court, D. New Jersey. April Term, 1831.

INDICTMENT FOR FORGERY—VARIANCE—PROOF OF SCIENTER—EVIDENCE—ACTS OF ACCOMPLICES.

1. In an indictment for forgery, if there is a variance of a letter in any word, between the paper alleged to be forged and the indictment, the paper will be received in evidence, if the variance does not make another word, or one differing in sense and grammar.

[Cited in Barnes v. People, 18 Ill. 53; People v. Phillips, 70 Cal. 66, 11 Pac. 493; Turpin v. State, 19 Ohio St. 545.]

2. If it is doubtful, the meaning will be left to the jury.

[Cited in U. S. v. Mason, Case No. 15,736.]

3. An order on the cashier of the Bank of the United States is evidence in support of an indictment for forging an order on the cashier of the corporation of the Bank of the United States.

[Cited in U. S. v. Marcus, 53 Fed. 786.]

4. The scienter may be proved by the fact of similar forged orders found in possession of the defendant, or of an accomplice in passing them.

5. If there is a concert between two or more to pass counterfeit notes, or any joint or concurrent action in passing them, the act of one is evidence against the other, and the possession of counterfeit notes by one is the possession of the other.

This was an indictment for passing a counterfeit order or check purporting to be drawn by Jno. Hulse, president of a branch Bank of the United States, on the cashier of the Bank of the United States for five dollars, payable to Sandford or order. It was proved that the order or check was counterfeit, and was passed by the defendant as true; it was also proved that a bundle containing twenty-six similar counterfeit orders or checks, was found upon one Moore, who was in company with Hinman, and between whom there was evidence of a connection in passing them. In the indictment the order was said to be signed by "Jno. Hulse," the order offered in evidence appeared to be "Jna. Hulse"; in the indictment the place was called "Fayelville," in the order it was "Fayetville." The indictment charges the order to purport to be drawn on the cashier of the corporation of the president and directors of the Bank of the United States; the order is on the cashier of the Bank of the United States. For these variances an objection was made

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

against the admission of the order in evidence. The bundle of notes was offered in evidence to show the scienter, but was objected to, because it was not proved that the defendant had passed or offered to pass any of them, and they were not found in his possession.

Mr. Wall, for the United States.

Mr. Stockton and Mr. Halstead, for defendant.

BY THE COURT. Where the addition, omission or change of a letter makes a word different in sense and grammar, as "nor" for "not" (2 Salk. 660), or a different name, as "King" for "Ring" (1 East, 180, note), or another word, the variance is fatal; but where the word is not changed, as "undertood" for "understood," the variance is not material (Cowp. 229). When an instrument is recited in the indictment as purporting to be, &c., it refers to what appears on the face of the instrument, which must correspond with the indictment (Doug. 289, 302; 1 East, 180, note); but the indictment in this case does not so set it out. Where the variance is plain, the court will decide the question by rejecting the evidence, where it is doubtful they will refer it to the jury, whose decision will be conclusive; as if an indictment lays a bank note to be signed "J. Reed," and the note produced is signed "J. Read" (4 Halst. [9 N. J. Law] 32); in which case the jury were instructed to find whether both names were the same. It is in evidence that there is a branch of the Bank of the United States at Fayetteville, North Carolina, of which John Hulse is president and J. W. Sandford cashier; and the order purports to have been drawn there. It is therefore a proper case for the jury to decide on a comparison of the order with the indictment, whether the place and the names are the same. There is no rule of law that the omission to cross a "t" or dot an "i" makes words different from their obvious intendment, the shape of the marks denoting a letter, whether it is an "o" or an "a," is a matter of fact and intention. We cannot judicially say that because the district attorney did not draw a line across the letter "T" the indictment cannot in law mean Fayetteville; or because in referring to the name of the president of the bank, he wrote "Jna." instead of "Jno.," it is not for us to measure the lines and curves of a letter, to ascertain whether it is an "a," an "o" or any other letter. If they may be reasonably taken to mean either, the jury are at liberty to adopt such as seems to them to comport with the obvious intention of the writer; and they ought to have evidence that there is a bank at Fayetteville, of which some other person than John Hulse is president, before they can decide, that the place where the order was drawn, and the person drawing it, are not as laid in the indictment. The indictment follows the words of the law, defining the offence to be, "or shall pass any false, forged or counterfeited order or check upon the said bank or corporation, or any cashier thereof." The corporation is created by law, by the name and style of the "President, Directors and Company of the Bank of the United States." 3 Story's Laws, 1550 [3 Stat. 268]. The cashier of the bank is the cashier of the corporation, and an order or check drawn on him is drawn on the corporation, or a cashier thereof. We are therefore of opinion that the indictment is well drawn ([U. S. v. Gooding] 12 Wheat. [25 U. S.] 474), and that the order ought to be received in evidence.

The admission of the bundle of notes found on Moore depends on the fact of a concert and communication between him and the defendant in passing counterfeit notes or orders; if they had made a common or concerted cause, in which each had his part to act, or they in any way acted together in pursuance of any agreement or understanding, each is answerable for the acts of the other, as fully as if done by himself. The whole conduct, acts and declarations of the one, accompanied with acts, are evidence against the other. It is not for us to decide how, for the connection between Moore and Hinman is proved; but as there has been enough of evidence given of concert and joint action as conduces to prove the fact, a prima facie case is so far made out as to make it proper to submit it to the jury. If they are satisfied that there was a concert of action for the effecting the common object of passing the counterfeit orders, their possession by Moore is in law the possession of Hinman ([U. S. v. Gooding] 12 Wheat. [25 U. S.] 468, 470); and they may infer the scienter as if they had been found on him.

Verdict, guilty.

Case No. 15,371.

UNITED STATES v. HIPKIN et al.

[2 Hall, Law J. 80.]

District Court, D. Virginia. Dec., 1808.

SHIPPING—PUBLIC REGULATIONS—ENROLLED VESSELS—AUTHORITY OF COLLECTOR TO TAKE BOND.

[It seems that the act of February 18, 1793, providing for the enrollment and licensing of vessels to be employed in the coasting trade and fisheries, and for regulating the same, gives no authority to the collector to take a bond in a penal sum conditioned that an enrolled vessel shall not proceed to a foreign port without being licensed for the cod or whale fishery, and without obtaining a permit to touch and trade at a foreign port, during such voyage, and without previously surrendering her certificate of enrollment.]

[Cited in Bank of United States v. Brent, Case No. 910; U. S. v. Brown, Id. 14,663; Jackson v. Simonton, Id. 7,147.]

This was an action of debt brought to recover the sum of 1200 dollars, the penalty of the bond given by the defendants for the enrollment of the schooner Caroline.

The declaration set out the bond and the conditions, among which was the following: "And if the said schooner Caroline shall not

proceed on a voyage to any foreign port or place without being duly licensed according to law for carrying on the cod or whale fishery, and without obtaining a permit to touch and trade at a foreign port or place during such voyage, or without previously surrendering the said certificate of enrolment to the collector of the district from which such foreign voyage shall be proposed to be made then," &c. This condition it was averred had been broken in this: "That the said schooner Caroline on the —— day of ——, 1808, proceeded on a foreign voyage, to wit: on a voyage to Antigua, which was a foreign place, without being duly licensed according to law for carrying on the cod or whale fishery, and without obtaining a permit to touch and trade at a foreign port or place during such voyage, and without previously surrendering the said certificate of enrolment to the collector of the district from which such foreign voyage was proposed to be made, viz. to the collector of the port of Norfolk and Portsmouth;" by reason whereof the said bond was forfeited and its penalty demandable. To this declaration there was a general demurrer, in which the United States having joined, the cause came on to be argued by Hay, district attorney, for the plaintiffs, and by Taylor & Tazewell, for the defendants.

For the defendants it was contended, that the condition above stated for a breach of which alone this action was brought, was 1st, a condition not authorized by the statute; 2d, a condition contrary to the express provisions of the law which permitted and required the bond; 3d, a condition hostile to the genius and spirit of all our laws upon the subject of navigation and commerce. And if so, that the condition was void, and no action could be maintained for a breach of it.

In support of these propositions it was said,

1st, That the only law, which permitted or required any bond to be given for the enrolment of a vessel, was the act of congress passed on the 18th of February, 1793, entitled, "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," 2 Laws [Folwell's Ed.] 168 [1 Stat. 305]. That this statute contained in itself no direction as to the form or contents of a bond to be given for the enrolment of a vessel, and indeed contained no direct declaration that any bond should be given at all. The second section of that law declares, that "in order for the enrolment of any ship or vessel, she shall possess the same qualifications, and the same requisites in all respects shall be complied with as are made necessary for registering ships or vessels, by the act entitled, 'An act concerning the registering and recording of ships or vessels,' and the same duties and authorities are hereby given and imposed on all officers respectively, in relation to such enrolments, and the same proceedings shall be had in similar cases touching such enrolments."

This law having directed the same requisites in all respects to be complied with, and the same proceedings to be had in the case of an enrolment, as had been required in the case of a register by the act therein referred to, although the act concerning the enrolling of vessels contained in itself no specific direction requiring a bond to be taken, or prescribing the form of such bond, yet as the act concerning the registering of vessels did make the execution of a bond a requisite to be complied with and proceeding to be had as in the case of a register; a similar requisite and proceeding was exacted in the case of an enrolment. Expunge this statute from our Code and no bond can be required of an enrolled vessel. Admit this statute and the only bond which it requires is a similar bond to that required in the case of a register.

The "act concerning the registering and recording ships or vessels," which is referred to as above, in its seventh section declares by whom, to whom, in what penalty, and with what condition a bond for obtaining a register shall be executed. See 2 Laws [Folwell's Ed.] 137 [1 Stat. 287].[1]

Compare this bond with that section, and you will discover their precise concordance until you come to the condition, which is the foundation of the present action, and which is no where to be found in the law. Nay, it would be strange indeed, if we expected to find any such condition in a bond of registry, remembering, as we must do, that the sole inducement for taking a register, is to qualify the vessel which receives it, to proceed on a foreign voyage. This condition, therefore, is not authorized by law.

4. To support the third position, viz. that such a condition was hostile to the genius

[1] By the 8th section of the act of congress, concerning the enrolling vessels, it is provided "that if any ship or vessel enrolled or licensed as aforesaid, shall proceed on a foreign voyage without first giving up her enrolment and license to the collector of the district, comprehending the port from which she is about to proceed on such a foreign voyage, and being duly registered by such collector, every such ship or vessel, together with her tackle, apparel and furniture, and the goods, wares and merchandise so imported therein, shall be liable to seizure and forfeiture." See 2 Laws [Folwell's Ed.] 174 [1 Stat. 305]. By this bond a penalty of 1200 dollars is imposed by the collector for the performance of the very same act. To support this action, then, it must be contended, either that the collector, by his penalty, has repealed that imposed by the law, or that the offending individual is subject to two penalties for the same act, one imposed by the collector, the other by the law. But as both these propositions would bestow high legislative authority on a very humble ministerial officer of the executive, it is believed that neither can be contended for, but that it must be admitted that this condition is contrary to the express provisions of the statute, which imposes another and a different punishment for this act.

and spirit of all our laws upon the subject of navigation and commerce, the defendant's counsel entered into a critical and historical examination of all these laws. The characters of the various vessels engaged in the trade of the United States were stated, and they were divided into the following classes, to wit: foreign, recorded, registered, enrolled, and licensed vessels. The privileges and duties enjoyed by, and imposed upon each of these classes of vessels, were also detailed, and supported by a reference to the various statutes imposing duties on tonnage and goods, and regulating the collection of duties. It was then argued, that congress, having distinguished these vessels as above, and having endowed them with different privileges, and imposed upon them different duties, it became necessary to establish some standard whereby the one class might always be distinguished from the other by those who were authorized to exact the performance of these duties, or permitted to grant these privileges. Hence certificates of record, registry, and enrolment were introduced as constituting the sole evidence, and fixing the standard whereby the different characters of vessels were to be ascertained. But as these documents might be missed, and others, not entitled to the privileges which followed their possession, might enjoy such privileges by obtaining the documents themselves; to guard against such frauds, bonds were required to be executed by those who first obtained such documents: the sole object of these bonds being to preserve American documents in American hands, the condition of such bonds attained this object, and none other. A reference to the seventh section of the act, before stated, 2 Laws [Folwell's Ed.] 137 [1 Stat. 287], would establish this position. There it would be found, that the only conditions annexed to a bond of register referred to the proper use of her documents, and similar proceedings were directed to be had in the case of enrolled vessels. These being the only kinds of American vessels which were capable of engaging in foreign trade, and therefore of misusing such documents, the bonds for these referred to this object only. As to licensed vessels, they being under twenty tons, and incapable of engaging in foreign trade, no misuse of their documents could be had to the detriment of the revenue; and therefore, no such bonds were exacted from them as were requested from the others. Frauds against the public revenue by smuggling, being the only mischief which such vessels were capable of committing, the condition of the execution by those concerned in a licensed vessel referred to this object, and to none other. Hence it was concluded, that the insertion of a condition, as was found in the present bond, was hostile to the spirit of all our laws upon the subject of navigation and commerce.

Having established these points, the counsel for the defendant observed, that no argument would be used to prove that such a condition not authorized by the expressed will of the legislature and hostile to the spirit of all our laws upon this subject, was void in itself. This point would be taken as granted, until it should be denied by the counsel for the United States. If the condition was void, no action could be maintained for a breach of a void condition, and therefore as the only breach assigned for the forfeiture of the bond in question was a breach of this condition, the present action could not be maintained, and the demurrer must be established.

The defendants' counsel concluded the argument by showing the absurd effects and tyrannical consequences which would result from permitting public officers to insert in bonds which they have authority to exact from individuals any condition which they thought proper, and which the law neither required nor permitted.

The argument on the part of the defendants being concluded, Hay, district attorney, said, that he should not pretend to deny the truth of the concluding argument which had been urged by the defendants, but would admit that a condition in a bond taken by a public officer, which was not authorized by the law which required the bond, was void, and that no action could be maintained for the breach of such a condition. Whether the condition in the present bond was of this description or not he would not pretend to say at present. If the laws referred to by the defendants' counsel were the only laws upon the subject, the argument which had been urged was unanswerable. But the bond in question had been taken in pursuance of instructions received by all the collectors in the United States, from the treasury department in the year 1793, shortly after the enaction of the laws which had been referred to by the counsel for the defendants. Supposing that the officer of that department was perfectly acquainted with the law, under which he was acting when these instructions were given, and indeed being convinced of this, not only from the general character of the department itself, but from an universal acquiescence in the form of the bond by every individual who had executed such a bond for 15 years past, he had not deemed it necessary to examine the form of the bond and to compare it with the law which required it upon the present occasion. He hoped the court would allow him some time not only to examine the various acts of congress upon this subject himself, but to consult with the officers of the customs, whose duty it was more particularly to attend to such matters, in order to inform himself if there were any other provision in the laws which had been cited, or any other statutes which applied to this case. The judge granted this application; and the cause was continued for several days.

Mr. Hay has stated to the court, that he had not only made every examination into the subject which he could, but had also applied to the officers of the customs for their aid in this research. It had been in vain, however; for no other laws could be found applicable to the case, but those to which the defendants' counsel had referred.

The positions for which they had contended under those laws he could not deny, and therefore with the consent of the defendants' counsel he should dismiss the cause. This was done accordingly; and at the same time several other causes which had been instituted on similar bonds, were also dismissed.

Case No. 15,372.

UNITED STATES v. HIRSCHFIELD.

[13 Blatchf. 330.] [1]

Circuit Court, S. D. New York. April 29, 1876.

ELECTIONS AND VOTERS—FRAUDULENT REGISTRATION—INDICTMENT.

An indictment under section 5512 of the Revised Statutes, for fraudulent registration, alleged, in one count, that the defendant, "having no lawful right to register, fraudulently and wilfully did register," and, in another count, "that he had no lawful right to register, as he well knew, by reason of the fact that he was then and there an alien, and had not been admitted to become a citizen of the United States." *Held*, that the indictment was bad, in not pointing out the fraud, and in omitting to state facts showing that the defendant was not entitled to register; and that the averment that the accused was an alien and had not been admitted to become a citizen of the United States, did not show that he had no right to register, or that he was not a citizen of the United States, or that he had no right to vote.

[Cited in Re Coleman, Case No. 2,980.]

[Cited in brief in Com. v. Howe (Mass.) 10 N. E. 756; People v. Neil, 91 Cal. 469, 27 Pac. 761.]

Benjamin B. Foster, Asst. U. S. Dist. Atty.

Benjamin F. Tracy, for defendant.

BENEDICT, District Judge. The accused was indicted under section 5512 of the Revised Statutes, for fraudulent registration. He was tried and convicted, and now moves in arrest of judgment. The indictment contains two counts. The first count charges, that, "at a registration of voters for an election for representative in the congress of the United States, to wit, at a registration then and there conducted for the Fifteenth election district of the Fourth assembly district of the city of New York, in the said Southern district of New York, made under the laws of the state of New York, for an election at which a representative in congress might be chosen, he, the said Wolf Hirschfield, otherwise called William J. Hirschfield, having no lawful right to register, fraudulently and wilfully did register, against the peace of the United States and their dignity, and against the form of the statute in such case made and provided." The second count differs from the first in no substantial particular except in stating that the accused "had no lawful right to register, as he well knew, by reason of the fact that he was then and there an alien, and had not been admitted to become a citizen of the United States."

This indictment is claimed, in behalf of the accused, to be insufficient to warrant a judgment thereon, for several reasons: (1) Because the averment is, simply, that the accused fraudulently registered, without stating any facts to show that a fraud was committed, or to enable the accused to know what he is charged with having done. (2) Because the election districts and assembly districts of the city of New York are not known to the law, the one being designated by the supervisors, the other by the police commissioners, and neither by any statute; wherefore, it is claimed that the registration is imperfectly described in the indictment. (3) That the indictment is also defective in omitting to state any facts showing the organization of any board, or the appointment of any officers, authorized to make a registration, and to whom application for registration could be made. (4) That the averment in the first count, that the accused had "no lawful right to register," is insufficient, because it contains no statement of facts showing that the accused had not such right, and that the averment in the second count is also insufficient, for the same reason. (5) That, inasmuch as the laws of the state permit every person to register who would be entitled to vote at the ensuing election, this indictment is defective for omitting to aver that the accused was not entitled to vote at the next election.

The first of these objections, which is applicable to both counts, is well taken. The averment that the accused fraudulently registered is insufficient, although those are the words of the statute. Something more must be stated, in order to give the accused any proper notice of the charge which he is to meet. It is impossible for the accused to determine, from this indictment, whether he is required to show, in his defence, that he was twenty-one years of age, or to show that he resided in a certain place, or to show that he bore a certain name, or to show that he was a native, or that he was a naturalized, citizen of the United States. An indictment under this statute should point out the fraud which, it is supposed, the accused committed, so that he can know what it is that he is called on to explain, and be enabled to prepare his defence. 1 Bish. Cr. Proc. § 371; Pearce v. State, 1 Sneed, 67.

The indictment is also fatally defective for omitting to state facts showing that the accused was not entitled to register. This omission, which is palpable in the first count, was sought to be cured in the second count,

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

by the averment that the accused was an alien, and had not been admitted to become a citizen of the United States. But, this averment does not show that the accused had no right to register. Some aliens who have never been admitted to become citizens are entitled to vote. Thus, by section 2172, Rev. St., it is provided, that "the children of persons who have been duly naturalized, * * * being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof." Such persons have a right to register, although they are aliens and have never taken any steps towards being admitted to become citizens. They are citizens by virtue of the statute, and are never admitted by any court, or required to take any proceedings to entitle them to the rights of citizenship. The absence of a lawful right to vote is, by the statute, made a necessary ingredient of the offence, and the necessity to aver and prove such absence of right is conceded. But, the indictment contains no fact showing the absence of such right. It is, therefore, plainly insufficient, and the judgment must be arrested for this reason.

Case No. 15,373.

UNITED STATES v. HOAR.

[2 Mason, 311.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1821.

LIMITATIONS OF ACTIONS—INAPPLICABLE TO UNITED STATES—ADMINISTRATORS—PLEADING.

1. Neither the general statute of limitations, nor the statute of limitations of Massachusetts, as to executors and administrators binds the United States in a suit in the circuit court; and, of course, neither can be pleaded in bar of such suit.

[Cited in note to U. S. v. Wilson, 8 Wheat. (21 U. S.) 256. Cited in U. S. v. Greene, Case No. 15,258; U. S. v. Hewes, Id. 15,359; Armstrong v. Morrill, 14 Wall. (81 U. S.) 145. Gibson v. Chouteau, 13 Wall. (80 U. S.) 99; U. S. v. Tetlow, Case No. 16,456; Dollar Sav. Bank v. U. S. 19 Wall. (86 U. S.) 239; U. S. v. Herron, 20 Wall. (87 U. S.) 263; U. S. v. City of Alexandria, 19 Fed. 612; U. S. v. Southern Colo. C. & T. Co., 18 Fed. 279; U. S. v. Houston, 48 Fed. 210.]

[Cited in Baxter v. State, 10 Wis. 455; Re City of Utica (Sup.) 26 N. Y. Supp. 566. Cited in brief in Re Fox, 52 N. Y. 531; Knox v. Chaloner, 42 Me. 154. Cited in Mayrhofer v. Board of Education, 89 Cal. 112, 26 Pac. 646; People v. Clark, 9 N. Y. 361; St. Charles Co. v. Powell, 22 Mo. 527; State v. Franklin Falls Co., 49 N. H. 252; State v. Kelsey, 44 N. J. Law, 44; Topsham v. Blondell, 82 Me 154, 19 Atl. 94; Trustees of Public Schools v. Trenton, 30 N. J. Eq. 684. Cited in brief in U. S. v. San Pedro & Canon Del Agua Co. (N. M.) 17 Pac. 338.]

2. A general plea of plene administravit may be good, where all the property of the intestate has been exhausted in a regular course of administration. But if exhausted in paying debts, without notice of a debt having a legal priority, that fact should be specially pleaded.

[Cited in Bassett v. Granger, 136 Mass. 177; Cumberland v. Pennell, 69 Me. 372; Thurlough v. Kendall, 62 Me. 167.]

3. In what cases a special plea of plene administravit is necessary at the common law, or under Massachusetts statutes.

[In error to the district court of the United States for the district of Massachusetts.]

This was a writ of error from the judgment of the district court. The original action was assumpsit for money had and received, brought by the United States against the defendant in error [Samuel Hoar, Jr.], as administrator of the estate of Col. John L. Tuttle, deceased. The defendant pleaded, (1) the general statute of limitations of Massachusetts (St. Feb. 13, 1787; 1786, c. 52, —substantially like the statute of 21 Jac. c. 16, § 3) to personal actions; (2) the statute of Massachusetts (St. Feb. 14, 1789; 1788, c. 66; and Feb. 14, 1792; 1791, c. 28) limiting suits against executors and administrators to four years after the acceptance of the trust; (3) plene administravit. To the two first pleas the plaintiffs demurred, and to the third plea replied, that the estate of Tuttle is fully sufficient to pay all his debts and the charges of administration. To this replication the defendant demurred; and upon joinder in demurrer to all the pleas, the district court gave a pro forma judgment for the defendant. [Case unreported.]

G. Blake, U. S. Dist. Atty.

S. Hoar, Jr., for defendant.

STORY, Circuit Justice. The only point, which has been argued here, is, whether the United States are barred of their suit by the statutes of limitations of Massachusetts above pleaded. It has not been denied, and indeed is too plain for argument, that the statutes of limitations of Massachusetts cannot proprio vigore bind or bar the suits of the national government in the national courts. If such an effect can be attributed to them, it can only be by reason of some extension of them for this purpose, by the national legislature. And it is contended, that such is the effect of the 34th section of the judiciary act of 1789, c. 20 [1 Stat. 92]. That section declares, "that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." The whole stress of the argument, therefore, turns upon the question, whether this is a case, where the laws of the state do apply. Now, I think, it may be laid down as a safe proposition, that no statute of limitations has been held to apply to actions brought by the crown, unless there has been an express provision including it. For it is said, that,

[1] [Reported by William P. Mason, Esq.]

where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case the king shall not be bound, unless the statute is made by express words to extend to him. Bac. Abr. "Prerogative," E. 5. And, accordingly, it was ruled in the Case of Magdalen College, 11 Cooke, 68, 74b, 1 Rolle, 151, that "the king has a prerogative, quod nullum tempus occurrit regi, and, therefore, the general acts of limitation, or of plenarty, shall not extend to him." And the same doctrine is maintained in the most respectable authorities. Plowd. 244, 3 Inst. 188; Bac. Abr. "Prerogative," E. 5, p. 561; Com. Dig. Pr. D 86; Temps. G. 11; Bro. St. Lim. 67. It is true, that Bracton lays down a different doctrine as to certain crown lands, for he says (Bract. lib. 2, c. 5, § 7): "Sunt etiam aliæ res quæ pertinent ad coronam, quæ non sunt ita sacræ, quin transferri possunt, sicut sunt fundi, terræ et tenementa et hujus 'modi, per quæ corona regis roboratur et in quibus currit tempus contra regem, sicut contra quamlibet privatum personam." And Staunford, citing this passage, says, this is as much as to say, that if the king had right to any such lands or tenements, and had surceased his time, so long, that it exceeded the time of limitation in a suit of right, he had lost then his right forever. Staunf. Pr. 42b. And in Britton's time the same rule prevailed, for he declared, that as to lands not held as appurtenant to the crown, the prescription in a suit of right shall run against the king, as against other people. Britton, De Droit Le Roy, c. 18, p. 29. As to lands and other things held jure coronæ, it is manifest, as well from Bracton as from Britton, that the rule governed, quod nullum tempus occurrit regi. Bract. lib. 3, c. 3, p. 103; Britton, c. 18, p. 29. But however this distinction may anciently have been, it is clear from the authorities, that the rule, excepting the crown from the operation of the statutes of limitation, has for several centuries universally prevailed; and a recent statute (9 Geo. III. c. 16) was the first that expressly limited the right to recover any estate or hereditaments. The true reason, indeed, why the law has determined, that there can be no negligence or laches imputed to the crown, and, therefore, no delay should bar its right, though sometimes asserted to be, because the king is always busied for the public good, and, therefore, has not leisure to assert his right within the times limited to subjects (1 Bl. Comm. 247), is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to all governments. We find accordingly, in our own state, the doctrine is well settled, that no laches can be imputed to the government, and against it no time runs, so as to bar its rights (Inhabitants of Stoughton v. Baker, 4 Mass. 528); so, that it is clear, that the statutes of limitations pleaded in this case would be no bar to a suit brought to enforce any right of the state in its own courts.

But, independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention. Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act.

It has not been contended in argument, that the judiciary act of 1789, in the section under consideration, meant to enlarge the construction of the statutes of Massachusetts. It is most manifest, that the terms give the same efficacy, and none other, to these statutes in the federal, that they have proprio vigore in the state, courts. And yet, unless this doctrine of enlargement can be maintained, it is difficult to perceive upon what ground the case of the defendant can be supported. The statutes of Massachusetts could not originally have contemplated suits by the United States, not because, they were in substance enacted, before the federal constitution was adopted, on which I lay no stress; but because it was not within the legitimate exercise of the powers of the state legislature. It is not to be presumed, that a state legislature mean to transcend their constitutional powers; and, therefore, however general the words may be, they are always restrained to persons and things, over which the jurisdiction of the state may be rightfully exerted. And if a construction could ever be justified, which should include the United States, at the same time, that it excluded the state, it is not to be presumed, that congress could intend to sanction an usurpation of power by a state to regulate and control the rights of the United States. In the language of the act of 1789, it would not be a case, where the laws of the state could apply. The mischiefs, too, of such a construction, would be very great. The public rights, revenue, and property would be subject to the arbitrary limitations of the states; and the limitations are so various in these states, that the government would

hold their rights by a very different tenure in each. I am of opinion, therefore, that the first and second pleas of the defendant are bad in point of law, and, that judgment ought to be for the plaintiffs.

As to the third set of pleadings, it is impossible to sustain the replication as a good answer to the plea of plene administravit, for it neither denies nor avoids the matter of that plea. If the United States meant to deny that matter, it is surprising, that the usual anl technical replication was not made; and if it meant to admit the truth and justice of that plea, the true course was to have admitted the same in terms, and prayed judgment of assets quando acciderint. But here, the replication does neither. It asserts, that there are assets of the deceased, not saying in the hands of the administrator, sufficient to pay all his debts, and yet does not take issue upon the point of plene administravit. It is a perfectly anomalous and incongruous pleading, and is bad in substance as well as in form.

The only remaining question, is, whether the plea of plene administravit generally is good in this case. It is suggested at the bar, that under the peculiar system of laws of Massachusetts, this plea, however good at common law, is not sustainable. By these laws the rights of creditors of a deceased debtor are equal, and no one has a priority over another, but all are to be paid pari passu, excepting debts to the United States, to the commonwealth, and for charges of the last sickness and funeral of the deceased, which have a priority, where the estate is insolvent. Jewett v. Jewett, 5 Mass. 275; Act Cong. March 3, 1797, c. 74, § 5; [1 Story's Laws, 465; 1 Stat. 515, c. 20]; Fisher v. Blight, 2 Cranch [6 U. S.] 358. It is supposed, therefore, that in cases of insolvency, the administrator is bound to pursue the statute provided for such cases, and can avail himself only of the special plene administravit growing out of the provisions of that statute. If the estate be in fact insolvent, the administrator cannot lawfully prefer one creditor to another in the payment of debts; and if he pays one creditor in full to the injury of the others, it will be a wasteful administration, and at his own peril. While a single creditor remains unpaid, if the assets are exhausted, the administrator is guilty of waste. Such, as I understand it, is the drift of the argument.

Now, in the first place, it does not appear to me, that upon principle any special plea of plene administravit is necessary, where the assets have been in fact paid according to the directions of the statute of insolvency; for if the assets are rightfully applied, the mode is matter of evidence and not of pleading. A special plene administravit can only be necessary, where the administrator either admits assets to a limited extent, or he sets up a right of retainer for the payment of other debts, to which they are legally appropriated, or he has paid debts of an inferior nature, without notice of the plaintiff's claim. And so is the doctrine of the common law according to the better authorities. Hickey v. Hayter, 6 Term R. 384; Toll. Ex'rs, bk. 3, c. 2, § 2, pp. 267, 282; Parker v. Atfield, Salk. 311; Toll. Ex'rs, bk. 3, c. 3, p. 298; Id. bk. 3, c. 5, p. 367; 1 Saund. 333, note 6, 334, note 8; 3 Bac. Abr. "Executors and Administrators," L. pp. 77, 82. In the next place, it seems to me, that there may be cases, where the estate may be insolvent, and yet the administrator would not be bound to procure a commission, and proceed under the statute of insolvency. If, for example, the assets were less than the privileged or priority debts, a commission of insolvency would be utterly useless to the other creditors; and surely the law would not force the administrator to nugatory acts. In such a case it seems to me, that a general plene administravit would be good, if the administrator had in fact applied the assets in discharge of such debts. If he had not so applied them, then he might specially plead these debts and no assets ultra. Other cases may be put of an analogous nature; and unless some stubborn authority could be shewn, founded in our local jurisprudence (and none such has been produced), I should not be bold enough to overrule, what I consider a most salutary doctrine of the common law. Judgments, bonds, and some other debts at the common law are privileged debts, and are entitled to a priority of payment. And yet, if the administrator have no notice either actual or constructive of such privileged debts, he will be justified in paying debts of an inferior nature, provided a reasonable time has elapsed after the decease of the intestate. Com. Dig., "Administration," C. 2; 3 Bac. Abr. "Executors and Administrators," L. p. 82, and Guillim's note; Sawyer v. Mercer, 1 Term R. 690; Toll. Ex'rs, bk. 3, c. 2, pp. 292, 293; Britton v. Batthurst, 3 Lev. 114. And in principle there cannot be any just distinction, whether such payment be voluntary or compulsive. Toll. Ex'rs, bk. 3, c. 2, p. 293. But in such case, if he be afterwards sued for such privileged debt, he cannot plead plene administravit generally, but is bound to aver, that he had fully administered before notice of such debt. Sawyer v. Mercer, 1 Term R. 690; Toll. Ex'rs, bk. 3, c. 2, p. 293. Now it is precisely in this view, that the plea of the defendant is defective. The debt of the United States is a privileged debt, and the plea should have shown, that the assets were exhausted before knowledge of this debt.. It seems to me, therefore, that the plea must be adjudged bad.

In point of fact, it is admitted at the bar, and by the pleadings, that Col. Tuttle's estate is solvent; but the administrator has, in consequence of the lapse of time, and in pursuance of the general principles of law,

distributed the surplus assets after the payment of all known debts among the heirs. Whether such a distribution, either voluntary or under a probate decree, would protect him from a suit by the United States, need not now be decided. If it would not, the United States might well have taken issue on the plene administravit; if it would, it ought to have been specially pleaded. Judgment for United States.

Case No. 15,374.

UNITED STATES v. HODGES.

[Brunner, Col. Cas. 465;[1] 2 Wheeler, Cr. Cas. 477.]

Circuit Court, D. Maryland. May Term, 1815.

CRIMINAL LAW—PROVINCE OF COURT AND JURY—TREASON—DELIVERING PRISONERS TO ENEMY.

1. It is the duty of the court when requested, to declare the law, but the jury are not bound to conform thereto, having the right to decide both the law and the facts.

[Cited in U. S. v. Taylor, 11 Fed. 473; Sparf v. U. S., 156 U. S. 163, 15 Sup. Ct. 317.]

[Cited in Territory v. Kee (N. M.) 25 Pac. 926.]

2. Delivering up prisoners and deserters to an enemy is treason, and nothing but a well-grounded fear of life will excuse the act.

[Cited in Lawson v. Miller, 44 Ala. 616.]

The facts of the case were as follows: While the British army was on the retreat from the city of Washington last summer, as they passed through ——, George county, some of the people of the town of Upper Marlborough took four stragglers, who were following the army. They were sent into the interior of the country together with a deserter. As soon as they were missed they were demanded by the British commander, under a threat that the town should be destroyed if they were not obeyed. Communications passed between the two parties, the result of which was that the men were restored to the enemy. It appeared by the testimony of John Randall and others that on Saturday after the engagement at Bladensburgh, General Bowie brought three prisoners to Queen Anne, and asked Randall to stand guard over them, which he did. During the night Mr. William Lansdale brought another. Early in the morning the prisoner [John Hodges] and his brother appeared and demanded them; they said that the British had threatened to destroy the town, unless this req ition was obeyed before twelve o'clock, etc., and that they would hold their wives and children as hostages. The witness sent for General Bowie, who at first refused to suffer them to go; upon an explanation of the threat he said it was hard, but he supposed they must be returned. They were delivered up to the prisoner, who surrendered them to the British.

Elias Glenn, for the United States.

U. S. Heath, J. E. Hall, and Wm. Pinkney, for prisoner.

[Mr. Pinkney on behalf of the prisoner, read an address from the grand jury to the president of the United States, in which the jurors expressed their respect for the motives of the prisoner, and prayed a nolle prosequi.] [2]

Mr. Glenn prayed the court to direct the jury that the mere act of delivering up prisoners or deserters is an overt act of high treason.

THE COURT said they were bound to declare the law whenever they were called upon in civil or criminal cases; in the latter, however, it was their duty to inform the jury that they were not obliged to take their direction as the law.

[2] [Mr. Pinkney. There is no law in this prayer, for it excludes that which is the essence of the offence,—intention; and if it was otherwise, the court has no right to instruct the jury, as if this were a civil case. No instance has occurred in modern times of at attempt to bind the jury in such a case by the opinion of the court. What remedy is there for the party if you err? We may appeal to a higher tribunal, it is true; but what is the consequence? The man is hanged, and your judgment is reversed. In England, did their courts interfere in this mode in the celebrated cases of Hardy, and Horne Tooke and others? No, it would not have been endured. The best security for the rights of individuals is to be found in the trial by jury. But the excellence of this institution consists in its exclusive power. The jury are here judges of law and fact, and are responsible only to God, to the prisoner, and to their own consciences. After the case is closed, you may, indeed, advise the jury, if they ask it, or, if you think proper to do so, without being asked by them. But to interrupt the progress of the trial in the way proposed would be monstrous. Suppose the court to give the direction, I shall not submit to it as the prisoner's counsel. I will, on the contrary, tell the jury that it is not law. It is my right to do so, and in a case of blood, I dare not forego the exercise of it. I trust I shall not be placed in a predicament which will thus set my duty to a man whose life is in my charge against my respect for this tribunal. I pray your honors to suffer this cause to go on in the customary and legal manner.

[Mr. Glenn observed that it was the practice every day in the criminal court, and appealed to one of the counsel for the prisoner, whose long career as a public prosecutor must have furnished innumerable instances.

[Mr. Jennings, for the prisoner, said that, being thus called upon, he was sorry he could not aid the district attorney by any such precedent. He never knew an instance,

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

[2] [From 2 Wheeler, Cr. Cas. 477.]

while he was prosecutor for the state, of praying a direction on behalf of the state, though it was frequently done by the traverser.

[Mr. Glenn then said he would not now address the jury.

[Mr. Pinckney regretted that his learned friend across the table had not seen fit to come forward in support of his case, as he wished to have delivered a brief homily on the law of treason; not, indeed, for the benefit of his client, but for the instruction of others, who appeared to stand in need of it.

[Mr. Glenn, in support of his prayer, read to the court the following authorities: 1 East, P. C. p. 70. If the joining with rebels be from fear of present death, and while the party is under actual force, such fear and compulsion will excuse him. But an apprehension, ever so well grounded, of having property wasted or destroyed, or suffering any other mischief, not endangering the person of the party, will be no excuse for joining or continuing with rebels. Id. p. 71. U. S. v. Vigol [Case No. 16,621]: This was an indictment for high treason, in levying war against the United States. Patterson, who presided in that case, said there were two points for consideration,—the facts and the intention. He stated the evidence and the design, and concluded that the combination of these facts with this design, consummated the crime of high treason in the contemplation of the constitution, and law of the United States. It may not, said the judge, be useless, on this occasion, to observe that the fear which the law recognizes as an excuse for the perpetration of an offence must proceed from an immediate and actual danger, threatening the life of the party. The apprehension of any loss of property, by waste or fire, or even an apprehension of a slight or remote injury to the person, furnish no excuse. The counsel then read Cranburn's Case, from Salk. 633. He then admitted that he must prove a certain portion of the intention, and that in the present case there were but two inquiries to be made: (1) Did he deliver up the prisoners? (2) Did he intend to do so? Both these questions must be answered affirmatively, and therefore the treason was proved, and he had no more to say upon the subject.

[Mr. Pinckney. Nothing but an utter confusion of ideas could have introduced a doubt upon the subject. The gentleman's prayer excluded all idea of criminal intention, or it relied upon the influence of criminal motive, as a necessary corollary from the naked facts charged, as the overt acts in the indictment. It might be affirmed, as a universal proposition, that criminal intention is the essence of every species of crime. All indictments commence with an assertion of corrupt motives; and in indictments for treason, the overt acts laid are to show the manner in which the wicked intention is carried into execution. In the speeches of Lord Erskine, to whom the world is so largely indebted for a correct knowledge of the principles of civil liberty and the law of treason, you will find him perpetually contending, and contending with effect, that, although the crown had proved the facts charged, it had not shown the evil design, the corrupt purpose, without which the facts are nothing. The counsel then referred to and read part of Mr. Erskine's remarks in the Case of Lord George Gordon [21 How. State Tr. 485]. In that case it was proved that the prisoner incited the acts which produced the consequences complained of, yet he was acquitted, because he was not the enemy of the king, nor the friend of any man who was his enemy. Take the case of a man who, in time of war, is charged with the defence of an important fortress or castle, which he surrenders to an incompetent force. What more effectual means could he have adopted to aid the enemy than the delivery of this fortress? The books will tell you, that if he was bribed to this desertion of his duty, if he did it with a view to benefit the enemy, he is guilty of treason. But if pusillanimity was the cause, or if it arose from a false calculation of his own means, or the force of the enemy, he is not a traitor. You may banish him with ignominy from the ranks which he has disgraced, or try him by martial law as a coward or a fool; but he has committed no treason. Suppose a powerful force to invade the country, to which resistance is hopeless. They levy contributions. They do not proclaim that they will hang me if I neglect to comply with this order, but they threaten plunder and desolation. I know they have the power to execute that threat, and I comply accordingly. Now the paying of money, or the furnishing of provisions, is an assistance. It is, "giving aid and comfort" much more effectually than the delivery of a few prisoners or a deserter. Yet no man will call this treason, because there is no evidence of hostility to the interests of the country. The authorities say it is not treason. In Stone's Case, 1 East, P. C. 79, the indictment charged, as an overt act of adherence to the enemy, that the prisoner conspired, with others, to collect intelligence within England and Ireland, of the disposition of the king's subjects, in case of an invasion of either country, and to communicate such intelligence to the enemy. The tendency of parts of the correspondence, which was given in evidence, was to advise the enemy against an invasion of England, by representing the improbability of its being attended with any success, from the general disposition of the people. Now it was scarcely possible that such a correspondence could have been opened and maintained with other then corrupt motives. Yet the counsel were allowed to argue that the letters were transmitted with a good intent, in order to avert the danger of so great a calamity as an invasion. And the court said,

the jury were to judge, from all the circumstances, whether the intelligence had been sent with that view. My client is charged, as Stone was charged, with being an adherent; and, like him, is entitled to be sheltered by his motives from the imputation of treason. The district attorney confounds the indictment which you are now trying with an indictment for levying war. I admit that it has been decided that, if a man becomes an integral part of the enemy's force, and acts with it, he necessarily levies war, and is guilty of treason, unless it appears that he did so pro terrore mortis. The law will suffer no other exculpation of such conduct. It will excuse it upon no other motive. But will the gentleman refer us to some authority which declares that if a man, without joining the enemy, so as to levy war, does, upon virtuous or even pardonable inducements (having no reference to the promotion of the enemy's views), that which happens, or is calculated, to be advantageous to the enemy, he is therefore a traitor? What is an adherent? Can he be any thing less than a willing partisan, a corrupt auxiliary of the enemy? Such, at least, is the natural and ordinary import of the word; and you cannot strain it beyond that import by the refinements of comments of construction, to the prejudice of the accused, without reviving the ferocious and appalling doctrine of constructive treason, which once made England bleed at every pore, and stained the palace and the cottage with judicial murder. The protecting spirit of the constitution, and of the statute which acts upon it, as well as humanity and justice, would be outraged by such a course. Unlike the conduct of Stone, the conduct of Hodges presents nothing ambiguous to the most zealous scrutiny. His honourable feelings and intentions are acknowledged by all. He was urged by the solicitation of those whom he respected. He was led by a generous sympathy for the situation of one who is deservedly dear to all who know him. He was actuated by an apprehension, by no means unreasonable, for the quiet and safety of the affrighted women and helpless children of the neighborhood, and for the security of the persons and property of the whole district. The treason of adherence cannot be committed by one whose heart is warm with all the honourable feelings of the man and the patriot. "Overt acts undoubtedly do discover the man's intentions; but I conceive they are not to be considered merely as evidence, but as the means made use of to effect the purposes of the heart." Fost. Crown Law, 203. This is the master key which lets you into the whole secret of this title of the criminal law. Sir Walter Tyrrel, who in shooting at a deer, killed the king, could not be convicted of treason. The killing was per infortunium. So, where a person non compos slays another designedly, still he is innocent, because there is no malignity in his heart. So in every homicide, it is felonious, justifiable or excusable, according to the purpose with which the act was perpetrated. It is murder where it is done through malice; manslaughter, if without malice; where it is done through misfortune, or in self-defence, it is excusable; and it is justifiable when done in advancement of public justice, in obedience to the laws. If the heart be uncontaminated by corrupt intentions, the man is innocent, for it is motive that qualifies actions. As it will be with God, so it is with the man. The latent intention of the heart must be searched. Look at the locus in quo,—the scene where the plot of this treason is laid. A hostile force, but the day before, had traversed the country in all the pride of victory. The jus belli was lord of the ascendant. The army, if such a force may deserve the name, which had been relied upon for the defence of the capitol, had been broken up and dissipated to every quarter of the compass. The country was menaced by an enemy, with whom, to adopt the language of Cæsar, it was easier to do than to say. If I were addressing the jury, I might appeal to their love of country. I might remind them that they are administering law for posterity as well as for us. But I am addressing a tribunal where these considerations have their full weight, and I expect with confidence that the court will vindicate the doctrines which I have had the honour to advance.

[(After considerable delay, occasioned by the examination of the authorities, the court proceeded to pronounce an opinion.)] [2]

Before DUVAL, Circuit Justice, and HOUSTON, District Judge.

DUVAL, Circuit Justice. The court would have been better satisfied if the whole case had been gone through in the usual way; but as the district attorney has prayed an opinion on the law, the court will give their opinion.

First. Hodges is accused of adhering to the enemy, and the overt act laid consists in the delivery of certain prisoners, and I am of opinion that the overt act laid in the indictment and proved by the witness is high treason against the United States.

Second. When the act itself amounts to treason it involves the intention, and such was the character of this act. No threat of destruction of property will excuse or justify such an act; nothing but a threat of life, and that likely to be put into execution.

Third. The jury are not bound to conform to this opinion, because they have a right in all criminal cases to decide on the law and the facts.

HOUSTON, District Judge, said he did not entirely agree with the chief justice in any except the last remark.

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[2] [From 2 Wheeler, Cr. Cas. 477.]

[2] [Mr. Pinckney then rose again, and addressed the jury: The opinion which the chief justice has just delivered is not, and I thank God for it, the law of the land. If you have the slightest doubt on the subject, I will undertake to remove it, to show you that the cases have been misconceived, and that the conclusions drawn from them are erroneous. No man can feel for the learned judge who has just given you his instruction, a reverence and affection more sincere than I do. But reverence and affection for him shall not stand in the way of the great duty which I owe to a fellow citizen who relies on me to shield his innocence from the charge of guilt, and his life from an attainder for treason. I had hoped that, since his motives were admitted, on all hands, to be entitled to praise, since the grand jury had associated with their indictment a certificate of the purity of his views, and a solemn recommendation that the prosecution should be abandoned, he would at least have been left by the district attorney, and the court, to obtain from you, as he could, a deliverance from the danger that encompassed him. In that hope I have been disappointed. As if the salvation of the state depended upon the conviction of this unfortunate man, whose situation, one would think, an inquisitor might deplore, the district attorney has gone out of his way to bring down vengeance upon him; and one of the court has told you that he is a traitor, and that you ought to find him so. In a case where justice might be expected to be softened into clemency, and even to connive at acquittal, where every generous sentiment must take part with the accused, and law might be thought to fear the reproach of tyranny, if it should succeed in crushing him,—in such a case, the established order of trial is deserted, a pernicious novelty is introduced, the court is called upon to mix itself in your deliberations, to mutilate the defence of the prisoner's counsel, to harden your consciences against the solicitations of an enlightened mercy, and to sacrifice the prisoner to gloomy and exterminating principles, which would render the noble and beneficent system of law, for which we are distinguished, a hideous spectacle of cruelty and oppression. For the sake of the country to which I belong, as well as of my client, I will not only protest before you against these principles, but will examine and speak of them with freedom, restrained only by the decorum which this place requires.

[After several introductory observations, Mr. Pinkney proceeded thus:

[In my argument to the court, I showed that if it be done treacherously, it is treason; but that if the commander act from any motive not corrupt, no indictment can touch him. If the fort be as impregnable as Gibraltar, and be garrisoned with 50,000 men, and it is surrendered to a force of half that number, from motives of fear, the commander cannot be punished as a traitor. What can be more strong to show that upon an indictment for adherence, the law looks into the heart, and adapts its penalties accordingly? Has that authority been answered? In the Case of Stone, which was parallel with the point, the court said expressly, if the heart be pure, it matters not how incorrect the conduct. So the counsel argued, and Stone was acquitted. Has any answer been given to that authority? Has any been even attempted? This indictment charges Hodges with having done certain things wickedly, maliciously, and traitorously. Must not the United States prove what they allege? When the law allows even words to be given in evidence, as explanatory of intention, to exculpate, it admits that exculpation may be made out by proof of innocent motives; that overt acts alone do not furnish a criterion; that concomitant facts, illustrative of the state of the heart, must not be neglected. A military force levies contributions. If you pay them, for the purpose of saving the country from further mischief, although there be no fear or danger of death, the law says this is not treason. By the doctrine of the chief justice, however, it is treason, and consequently his doctrine is unsound. On this occasion, the enemy were in complete power in the district where the transactions occurred which are complained of in the indictment. They were unawed by the thing which we called an army, for it had fled in every direction. They were omnipotent. The law of war prevailed, and every other law was silent. The domestic code was suspended. They menaced pillage and conflagration; and, after they had wantonly destroyed edifices which all civilized warfare had hitherto respected, was it to be believed that they would spare a petty village, which had renewed hostilities, before the seal of its capitulation was dry? There was menace; power to execute; probability, nay, certainty, that it would be executed. How, then, can you find a wicked and traitorous motive in the breast of my client? There is not only the absence of any wicked motive, but there is the visible presence of those which are laudable,—an attachment to Dr. Beanes, anxiety for the defenceless people about him, a desire to preserve the country from the afflictions which hung over it. In conduct so characterized, so produced, we discover the operations of an excellent heart, upon a mind which virtuous inducements could betray into error; but what way we can distort it into treason, I have not yet been able distinctly to learn. The conduct is in itself treasonable, says the chief justice. It necessarily imports the wicked intention charged by the indictment. The construction makes it treason, because it aids and comforts the enemy. These are strong and comprehensive positions; but they have

[2] [From 2 Wheeler, Cr. Cas. 477.]

not been proved, and they cannot be proved until we relapse into the gulf of constructive treason, from which our ancestors in another country have long since escaped.

[Gracious God! In the nineteenth century, to talk of constructive treason! Is it possible that in this favoured land, this last asylum of liberty, blest with all that can render a nation happy at home and respected abroad, this should be law? No. I stand up as a man to rescue my country from this reproach. I say there is no colour for this slander upon our jurisprudence. Had I thought otherwise I should have asked for mercy, not for law. I would have sent my client to the feet of the president, not have brought him, with bold defiance, to confront his accusers, and demand your verdict. He could have had a nolle prosequi. I confirmed him in his resolution not to ask it, by telling him that he was safe without it. Under these circumstances I may claim some respect for my opinion. My opportunities for forming a judgment upon this subject, I am compelled to say, by the strange turn which this cause has taken, are superior to those of the chief justice. I say nothing of the knowledge which long study and extensive practice enabled me to bring to the consideration of the case. I rely upon this. My opinion has not been hastily formed, since the commencement of the trial. It is the result of a deliberate examination of all the authorities, of a thorough investigation of the law of treason in all its forms, made at leisure, and under a deep sense of a fearful responsibility of my client. It depended upon me whether he should submit himself to your justice, or use with the chief magistrate the intercession of the grand jury, which could not have failed to have been successful. You are charged with his life and honour, because I assured him that the law was a pledge for the security of both. I declared to him that I would stake my own life upon the safety of his, and I declare to you now that you have as much power to shed the blood of the advocate as to harm the client whom he defends. If the mere naked fact of delivery constitute the crime of treason, why not hang the man who goes under a flag of truce to return or exchange prisoners? According to the doctrine of the chief justice, this man is equally guilty with him who stands at the bar, if you are forbidden to examine his mind, but are commanded by the law to look only to his acts. I ask you to consider this, in the spirit of Stone's Case. That doctrine, I pledge myself, goes through every nerve and artery of the law. If the doctrine of the chief justice be the law of the land, every man concerned in the deeds of blood that were acted during our recent war was a murderer. Our gallant soldiers who had repulsed the hostile step whenever it trod upon our shores, our gallant tars who unfurled our flag and acquired for us a name and rank upon the ocean which will not soon be obliterated,—these are all liable to be arraigned at this bar. These men have carried dismay and death into the ranks of the foe. Blood calls for blood. You dare not inquire into the causes which produced the circumstances, which attended the motives, which prompted the deeds of carnage. The act, you are told by the chief justice, and such is the reasoning of the attorney general, involves the intent.

[Gentlemen! so solemnly, so deeply, so religiously do I feel impressed with this principle, that I know not how to leave the case with you, although at the present moment it strikes my mind in so clear a light that I know not how to make it more clear. Gentlemen! this desolating doctrine would sweep us from the face of the earth. Even when we deserved to be crowned with laurels, we should be stretched on a gibbet. I tremble for my children, for my country, when I reflect upon the consequences of these detestable tenets which reduce indiscretion and wickedness to the same level. Which of you is there that in some unguarded moment may not, with honest motives, be imprudent? Which of you can hope to pass through life without the imputation of crime, if your motives may be separated from your conduct, and guilt may be fastened upon your actions, although the heart be innocent? If this damnable prosecution should prevail, it would be the duty of the district attorney instantly to arraign Gen. Bowie, one of the witnesses in this case, than whom a purer patriot never lived. Nay, half Prince George's county would come within its baleful influence. Yet such is the law the chief justice recommends to you. His associate does not concur with him. In this conflict of opinion I should be entitled to your verdict, but I rest the case upon more exalted grounds. I call upon you as honourable men, as you are just, as you value your liberties, as you prize your constitution, to say, and to say it promptly, that my client is not guilty.

[The jury, without hesitating a moment, rendered a verdict of not guilty.] [2]

Case No. 15,375.

UNITED STATES v. HODGKIN.

[1 Cranch, C. C. 510.] [1]

Circuit Court, District of Columbia. Nov. Term, 1808.

RECOGNIZANCES—MISDEMEANORS.

Upon a recognizance for the appearance of the defendant in a case of misdemeanor, he is bound to appear on the first day of the term.

Mr. E. J. Lee contended that the recognizance, returnable to this term, cannot be forfeited at this term, as the traverser has the whole term to appear in. The return-day of

[2] [From 2 Wheeler, Cr. Cas. 477.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

all writs is the day after the last day of the session.

THE COURT (DUCKETT, Circuit Judge, absent) said the traverser is bound to appear at the court, which is the first day of the term, and the whole term is but one day in law.

Case No. 15,376.

UNITED STATES v. HODSON et al.

[14 Int. Rev. Rec. 100.]

Circuit Court, W. D. Wisconsin. Sept., 1871.

INTERNAL REVENUE—SUPERVISORY POWER OF ASSESSOR—NATURE OF AUTHORITY.

Sections 14, 20, Act June 30, 1864 [13 Stat. 226, 229], as amended by the act of July 13, 1866 [14 Stat. 98], clothe assessors of internal revenue with supervisory power over, and authorize them to investigate all accounts, lists, or returns made or required to be made to him by any and all classes of persons liable to pay taxes upon any property, trade, or business; they authorize him to increase the amount of the assessment in all cases of fraud or omission, and to assess upon every party the amount of tax for which he is liable. This authority is in its nature judicial instead of ministerial.

[Cited in U. S. v. Black, Case No. 14,600; U. S. v. Millinger, 7 Fed. 189.]

In equity.

H. L. Palmer, for plaintiff.

A. Hyatt Smith, John Winans, and George B. Smith, for defendants.

Before DAVIS, Circuit Justice, and HOPKINS, District Judge.

HOPKINS, District Judge. This is a suit in equity brought under the authority of the 106th section of the act of July 20, 1868 (15 Stat. 167), to subject the real estate of the principal defendant, William Hodson, to the payment of a tax assessed upon him as a distiller by the assessor of the Second district of this state to the amount of $98,407.50. This assessment was made under the authority conferred upon the assessor by sections 14 and 20 of the act of June 30, 1864, as amended by the act of July 14, 1866 (14 Stat. 101, 103). It was made on the 10th day of October, 1867, and on the 14th of October Hodson appealed from it to the commissioner of internal revenue, and on the 19th of January, 1868, the commissioner affirmed it. It was made because of fraudulent and false returns of Hodson as distiller for spirits manufactured and not reported to the assessor, and for spirits sold by him upon which the tax to that amount had not been paid, in fraud of the provisions of the law. The defendant was duly notified and summoned before the assessor, and appeared and was examined on oath, and testimony was taken before the assessor and a full examination had of the case as provided by law, and after such hearing said assessment was made, and was afterwards affirmed on appeal as before stated. The assessor on the 11th day of October, 1867, delivered the assessment to the collector of the district to collect. The collector on the same day notified the defendant thereof, and on the 30th of November his deputy, under proper warrant, levied upon certain real estate of the defendant and advertised it for sale. On the 19th of December, 1867, the defendant commenced suit in equity in the United States circuit court for the district of Wisconsin against the collector and his deputy, to set aside the assessment, and obtained injunction restraining the sale. Suit was dismissed in November, 1868. This suit was commenced in February, 1869. The proceedings of the assessor in making the assessment conformed substantially with the requirements of the act. But the defendants claim that the sections above mentioned, under which the assessor acted, are not applicable to distillers, and that he had no jurisdiction in the premises, and that the assessment is therefore absolutely void. If that is so, the bill must be dismissed, for it is only in cases "where it is lawful and has become necessary to seize and sell real estate to satisfy the tax" that a suit of this character can be sustained. We cannot yield our assent to the defendants' view of the act. Upon a careful examination of the provisions of those sections, we think they confer jurisdiction upon assessors in such cases. The claim of defendants' counsel that section 14 relates to "annual lists" only, cannot be sustained. The section, after providing fully for "annual lists," further states, "or if any person without notice shall not deliver a monthly or other list or return at the time required by law, or if any person shall deliver or disclose to any assessor or assistant assessor any list, statement, or return which in the opinion of the assessor is false or fraudulent, or contains any understatement or undervaluation," etc., the assessor may proceed to hear and decide the case in the manner provided therein, "and from the best information which he can obtain, including that derived from the evidence," make "such list or return of the property, and all articles or objects liable to tax, owned or possessed or under the care or management of such person, and assess the tax thereon." The section further provides that the tax thus assessed "shall be collected by the assessor the same as other taxes," and the "list or return so made and subscribed by such assessor or assistant assessor shall be taken and reputed as good and sufficient for all legal purposes." Section 20 rather extends the power of assessors in case of omission in making any list, and authorizes them to assess in case of "omission, understatement or undervaluation, or false or fraudulent statement contained in any return or returns made by any person or parties liable to tax, and to fix the amount the party may be liable for above the amount stated in any return, and certify it to the collector." It also makes applicable all provisions of law for the ascertainment

thereof. The authority of the assessor to make assessment in such cases has been sustained in U. S. v. Six Fermenting Tubs [Case No. 16,296]; In re Lippman [Id. 8,382]. These provisions, in our opinion, confer upon the assessor authority to investigate all accounts, lists, or returns made or required to be made to him by any and all classes of persons liable to pay taxes upon any property, trade, or business. They clothe him with supervisory power over such accounts or returns, and authorize him to increase the amount of the assessment in all cases of fraud or omission, and to assess upon every party the amount of tax for which he is liable under the law. The law fixes the tax, and the revenue officer is simply the instrument or machinery provided for carrying it into effect. The authority confided to him by the sections above named is in its nature judicial instead of ministerial. This law should receive a liberal construction. Revenue laws are not penal or to be considered as penal, but rather as remedial laws. Taylor v. U. S., 3 How. [44 U. S.] 210; Cliquot's Champagne, 3 Wall. [70 U. S.] 145.

Distillers by section 57 of the act of June 30, 1864 (13 Stat. 243), are required tri-monthly to render to the assessor of the district sworn accounts of the "number of gallons of spirits distilled, and also the number of gallons sold or removed for sale or consumption," and we cannot see any reason for exempting those returns or accounts from the operation of the provisions of sections 14 and 20 before mentioned. The reasons, on the contrary, for allowing assessors to exercise such authority over distillers' accounts, we deem far more cogent than for allowing such authority over many other cases; for either the amount of the tax imposed or the nature of the business has shown that fraudulent accounts in that business have been far more frequent and of much greater magnitude than in any other. Hence the importance of authorizing assessors to revise those accounts and assess the proper tax thereon. Again, section 14 of the act of March 2, 1867, confers upon the assessor the right (14 Stat. 480) to assess upon a distiller the tax upon spirits removed other than to a bonded warehouse, and to certify it to the collector for collection. It declares that "that provision shall not exclude any other remedy or proceedings provided by law." An examination of the acts satisfies us that it was the intention of congress to make very stringent the remedy for enforcing the law applicable especially to distillers, and that by the terms used they have undoubtedly done so.

Having come to the conclusion that the assessor had jurisdiction to make the assessment, and that he proceeded therein according to law, the question arises as to what effect is to be given to his decision by the courts. Section 19 of the act of July 13, 1866, as amended by the act of March 2, 1867 (14 Stat. 457), provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," which in effect makes the assessment conclusive for the purpose of collecting the tax. If no court is authorized to interfere to prevent its collection, it must as a legal sequence be final for that purpose. But the section impliedly provides that a suit may be brought to recover a tax wrongfully collected or illegally assessed after an appeal to the commissioner of internal revenue from the decision of the assessor imposing the tax, provided the suit shall be commenced within six months from the decision or the passage of the act; or if the decision be delayed more than six months from the date of the appeal, then within twelve months from the appeal. That is the only mode provided by law for correcting or testing the legality of the assessment, and the decision of the assessor fixing the amount of the tax, when brought under consideration in any other way, is conclusive. This we think is settled by the adjudicated cases (Nichols v. U. S., 7 Wall. [74 U. S.] 122, 129; Baltimore v. Baltimore R. R., 10 Wall. [77 U. S.] 552), in the last of which the court uses the following language: "These laws not only provide for the manner of collecting the revenue, but also furnish a mode of redress to the party who has suffered injury by their administration." And in the case of Nichols v. U. S., supra, which arose under the general revenue laws, but involving a like question, the court says "that the allowing a suit at all was an act of beneficence on the part of the government. It had confided to the secretary of the treasury the power of deciding in the first instance upon the amount of duties demandable, so it could have made him the final arbiter in all disputes concerning the same." In the case of U. S. v. Wright, 11 Wall. [78 U. S.] 648, the supreme court, speaking of a decision of the postmaster-general upon the question of an allowance refused by him, state the rule as follows: "Congress constituted him the sole judge, and it is not competent for a court or jury to revise his decision, nor is it re-examinable anywhere else, as there is no provision in the law for it." "It may be safely laid down as a general rule," says Judge Story, "that when a particular authority is confided to a public officer, to be exercised by him in his discretion upon an examination of facts of which he is made the judge, his decision upon the facts is, in the absence of any controlling provision of law, absolutely conclusive as to the existence of those facts." Allen v. Blunt [Case No. 217]. This case falls clearly within the principle and doctrine of those cases. The internal revenue act, however, provides a remedy as before stated, but it prescribes the conditions precedent in order to obtain it, and the party wishing to avail himself of that remedy must comply with those terms. It is well settled that an action of assumpsit for money had and received against the col-

lector to recover back the money illegally assessed and paid under protest, is the appropriate and proper remedy under that section. Assessor v. Osborne, 9 Wall. [76 U. S.] 567. And we think it equally clear, upon principle and authority, that, before a party can question the validity of an assessment (the assessor having jurisdiction), he must first pay the tax, and then bring his suit within a year against the collector to recover it back. Insurance Co. v. Ritchie, 5 Wall. [72 U. S.] 541; Philadelphia v. Collector, Id. 731; Nichols v. U. S., 7 Wall. [74 U. S.] 129; Assessor v. Osborne, 9 Wall. [76 U. S.] 567; [Baltimore v. Baltimore R. R.] 10 Wall. [77 U. S.] 552. The defendant Hodson did not pay the tax nor commence a suit within a year, as we have held was necessary; so we hold for the purpose of this suit that this assessment is conclusive, and that the court in this action is not permitted to look into the facts for the purpose of determining whether the assessor decided properly in making it or not. Hodson has waived the privilege of questioning the assessment by omitting to comply with the conditions upon which such right was granted to him, and he must now pay it, or his property must be applied to the payment thereof in the manner provided by law.

Before proceeding with the main branch of the case, we will notice a point of practice raised by defendants' counsel upon the effect of the answers. The complainant in his bill waived an answer under oath, but the defendants notwithstanding put in sworn answers, and insist that they are to have the same benefit therefor as if the oath was not waived. We concur with them in that view. There is no rule of this court allowing a complainant to waive an answer under oath, and without a rule conferring that authority, the complainant cannot do it. It is a long established right and advantage secured to defendants in chancery proceedings. "The rule of courts of equity being that when a defendant in express terms negatives the allegation in the bill, and the evidence of one person only affirms what has been so negatived, then the court will neither make a decree nor send it to a trial at law." 2 Daniell, Ch. Prac. p. 983; Story, Eq. Jur. § 1528. Under that rule the answer must be overcome by more than one witness, but one witness and corroborating circumstances are sufficient. Clark v. Riemsdyck, 9 Cranch [13 U. S.] 160; Hart v. Ten Eyck, 2 Johns. Ch. 92; 1 Greenl. Ev. § 260. It often gives a defendant a very important and not unfrequently decisive advantage; and the plaintiff, without a standing rule or an order of the court expressly authorizing it, cannot deprive him of it. The only effect of waiving it would be to estop the plaintiff from insisting upon a sworn answer. He can waive his rights, but not the defendant's. Cocks v. Izard, 4 Am. Law T. 72; Story, Eq. Pl. § 875a. But it would seem that since the statute allowing parties to be witnesses, this rule has lost much of its practical effect. For, as in this case, for instance, we have held that the defendants in their own testimony contradict their sworn answers; and it will not be contended, we think, that they have a right to insist that the plaintiff must contradict their answers by another witness besides themselves. It would be too absurd to entertain for a moment that the rule was so inflexible that defendant's answer must prevail unless contradicted by one witness besides his own testimony given in the case. We think that when a defendant in his testimony contradicts his answer, and shows that it is not true, the plaintiff need not call other witnesses to the same effect. The court could not regard such testimony as having the effect of an admission on the trial of the falsity of the answer, and grant the relief upon the defendant's testimony alone as given upon the trial. The defendant would have no right to insist that his own testimony alone should not be taken as true unless sustained by another witness or corroborating circumstances. So that according to the view we have taken of the party's testimony in the case, this question is not of much moment to either side; but if the old rule is to apply to the testimony of the party the same as to any other witness, we think the answers in this case are contradicted and disproved by more than one witness in every instance where we have found against defendants. The assessor had placed this assessment in the hands of the collector, and he was proceeding to collect it, and was authorized "to seize and sell real estate," so that the state of things existed which authorized this suit to ascertain whether the delinquent had any real estate properly subject to the payment of this tax.

Having disposed of these preliminary questions, we will now proceed to examine the evidence and dispose of the case upon its merits. The section of the act under which the bill is filed authorizes the enforcement of "the lien of the tax upon real estate of the delinquent, or to subject any real estate owned by any delinquent, or in which he has any title or interest, to the payment of the tax," and provides that "all persons having liens upon the real estate sought to be subjected to the payment of any tax or claiming any ownership or interest therein shall be made parties to such proceeding." It then authorizes the court "to adjudicate all questions involved therein, and to pass upon and finally determine the merits of claims to and liens upon the real estate in question." So that it becomes the duty of the court to ascertain from the evidence the title and ownership of the real estate described in the bill, and to determine what, if any, interest the principal defendant Hodson had therein, and to decree the sale of such portions as we may find belonged to him and apply the proceeds to the payment of this tax. The first piece

of real estate described in the bill is that which stands in the name of Sarah Ann Ferguson, a daughter of Wm. Hodson, and which we will designate here for convenience as the property on Milwaukee street. This property was bought and paid for by William Hodson, and the title taken in the name of Sarah Ferguson, his daughter, without her knowledge, after he had incurred the liability for this tax. She had no means with which to pay for the same. The allegation in the answer that it was paid for by her money is wholly unsupported by her evidence or the evidence of her father. The agreement which they attempted to establish to show a consideration paid by her is too preposterous to be accredited by any court. He probably intended to give her this property, but he could not do so while owing this tax, or to avoid the payment of it. We therefore hold that this property belongs in equity to the defendant William Hodson, and that Sarah Ann Ferguson holds the same in trust without any interest therein whatever, and that the same is subject to this tax, and should be sold and applied to the payment thereof. The property described in the bill, and which was conveyed to the defendant William Tibbetts by deed of date of May 20, 1867, and which we will designate herein for convenience as the "Turtleville Farm," we think is in equity the property of William Hodson, and that the deed given to William Tibbetts of the date aforesaid by William Hodson was without consideration, and was given to and received by said Tibbetts in order to defraud the government out of this tax and prevent its being reached or applied to the payment thereof; that the same is subject to the payment of said tax, and that the said Tibbetts has no beneficial interest therein as against the plaintiff in this suit. The answers of Hodson and Tibbetts allege that the farm was sold to Tibbetts in September, 1866, by contract, he agreeing to pay for it $4,500 in money, pay a dower interest of Mrs. Lewis, and to give Hodson the use of the farm for the three ensuing years, Hodson paying taxes; that he paid down on execution of contract $2,500, and agreed to pay $1,000 in one month and the balance in May, 1867, when deed was to be executed to him, all of which it is stated he paid. Tibbetts was a workman for Hodson in his distillery at Shopiere from September, 1864, to May, 1865, at the very time these frauds were perpetrated by Hodson upon the law, and which he must have known. Hodson and Tibbetts were both sworn on behalf of complainant. Their story is so extravagant and unnatural as to evidence its own falsity. Tibbetts says he had been engaged for several years before going to work for Hodson in the produce business at Fond du Lac, doing $200,000 annually; that his warehouse was burnt in the summer of 1864, which was of but small value, being insured for only $150. He says he was thrown out of business by that circumstance, and then went to work for Hodson in his distillery for $50 per month. He swears that when he was burnt out he had in his safe at his house at Fond du Lac $15,000 in currency, that he removed the safe with the money in it to Shopiere when he went to work for Hodson, and kept it there in his own house during the time he worked for him. He tells this story to account for his having money to pay for the farm. It is so strange and unusual that we cannot believe it. Its inherent improbabilities are enough to refute it. The idea that a man doing $200,000 worth of business annually should be broken up by the destruction of a warehouse of the value of $200 or $300, when he had $15,000 in cash in his safe that he could employ to go on again, beggars credulity; and that he should on account of being thus broken up go to work at so small a salary and not invest his money, the interest upon which would have been more than twice as much as his salary, is so contrary to the common course of men that we could not without strong corroborating circumstances believe it. And, instead of being supported in his statements, he is contradicted in one very material fact, that is, the fact of his having a safe at all. The preponderance of evidence is that he did not have a safe. The man from whom he swears he bought it, swears that he never sold him one, and further that he was familiar with his business and never saw or knew that he had one, and, what is very strange, no one ever saw it at Shopiere. The circumstances all tend to show that this story about his means was a sheer fabrication, and this circumstance that he swore to to render the story probable was as groundless and visionary as the story itself. The bankers of Fond du Lac never understood that he possessed any such means. He had no reputation of possessing it, and his bank account was altogether too insignificant to warrant any one in believing that he was the possessor of any such amount of money. There are other remarkable and unusual features about the transaction, as that the sale was made at Fond du Lac when Hodson and his wife were there on a visit, and although the deed bears date on the 20th of May, 1867, it was not recorded until November 9, 1868, the date and record being the same as some other deeds that we shall have occasion to refer to often; that the price at which Hodson pretended to sell it was far below its real value; that when he went to Fond du Lac he had but very little means, and his income returns given in evidence negative the idea that he had made any such amount as he claimed to have after going there. Again, by the state statute every tax-payer is required to list his personal property for taxation, stating the particular kind, and, if he has money, the amount, to which he is required to make oath. He made such returns annually from 1861 to 1866 inclusive. They were as follows: 1861,

$275; 1862, $130; 1863, $400; 1864, $340; 1865, nothing; and in 1866, $50; which shows that if he had any such amount of money as he now attempts to make out he had, he must have sworn falsely in making such returns. The circumstances attending the transaction, as detailed by both Tibbetts and Hodson, are such as to throw discredit upon the whole matter and force us to believe that the sale was merely colorable, and made out for the purpose of defrauding the government out of the tax. It is not necessary to pursue this transaction further. We entertain no doubt of its mala fides.

Hodson first took the title to a part of the property in the name of his daughter Maria, but she did not pay anything for it; he paid for it with his own money, and she never had any interest in it or means with which to purchase it. And the piece of three and one-half acres that was deeded to her by him, as he swears, in exchange for her deed to him of the farm, was without consideration and was void, and is subject to the payment of the tax above mentioned. One-half of the property described in the complaint, upon which the grist mill, distillery, etc., are situated, consisting of about twenty-three acres, and which we for convenience designate herein as the "Turtleville Mill Property," confessedly belongs to William Hodson, although the deed was not on record when this suit was commenced, but it is admitted that John R. had conveyed an undivided half of what he owned to William, and that he was the owner thereof at the commencement of the suit. That is subject, of course, to the payment of this tax. The other half was conveyed by John to his stepmother, Sarah Hodson. The case shows that John obtained the title to the most of this property as early as 1853, and has continued to hold it in his own name to the time of conveying it to his father and mother, as before stated. Although he says the deed to his mother was in consideration of natural love and affection, still we think it is good. If he owned the property he had a right to give it away. The government had no claim against him, and has not now. This deed conveyed a good title to her as against everybody but his creditors. It is alleged that he held the title in trust for the benefit of his father; that he took the title first in 1853 to defraud his father's creditors; but we do not feel it our duty to go back to 1853 to inquire into the consideration of that transaction in order to defeat the title of Mr. Hodson, but shall regard John as owner up to the time he conveyed to his father and mother, and that the moiety conveyed to his mother is her individual property, and not subject to the payment of this tax, and that the interest of William Hodson therein be sold under the decree in this case, —whether that is more than an undivided half we are not certain. From the exhibits it would seem that some portions of it were conveyed by other parties to William Hodson, which in preparing the decree must be examined and settled.

We now come to the consideration of the property standing in the name of Charles W. Hodson. The property known as the "Excelsior Mill Property," and 500 inches of water attached, we think is not subject to this tax. That property was bought of other parties by Charles in his own name, in September, 1861, and he became responsible for the payment of the consideration, and, even if he took a part of the funds realized from the sale of the spirits upon which the tax had not been paid, that would not give William Hodson any title or claim to the property. He would have a claim against him for the money thus used, but would not have any lien upon the premises purchased with it. Whether he did use the money of William for that purpose, we express no opinion, as it is immaterial in this case, for if he did the property could not be reached in this suit.

But as to the property deeded William Hodson by Spensely on the 5th day of September, 1866, therein designated as the "Barstow Property," and which was by deed bearing date May 20th, 1867, conveyed by William to him, a different question is presented. If that deed was given without consideration, and to avoid the payment of this tax, it was void; and the title in equity remained in William so far as this plaintiff is concerned, and can be reached in this case. This involves a consideration of the testimony of the transactions between Charles and his father, and a particular examination of Charles's business affairs for some time before and after the transaction. They allege in their answers that Charles loaned to his father when he bought that property $3,000 to pay for it, and that his father in May, 1867, for the purpose of securing the payment of it, deeded the property to Charles.

We must pass upon this case upon the theory that William Hodson during the years 1865, 1866, had received or ought to have received about the amount of this tax from the sale of spirits illegally disposed of; that he was violating the revenue laws during that time, and that his sons John and Charles must have been cognizant of it, and co-operated with him in the matter. This being so, it would seem improbable that he should have wanted to borrow this money of Charles at that time, and the testimony fails to satisfy us that he did borrow it of Charles, or that Charles had it to loan of his own means. The spirits were shipped by Charles, who had a warehouse at Janesville, to John at Chicago, and sold by John and the funds returned to somebody, but the evidence does not disclose expressly to whom, but we think by a fair consideration of the testimony, we are warranted in holding that they came back to Charles. We think the condition of his bank account, unexplained, shows uncontrovertibly that such was the case. Notwithstanding

Charles shipped all of the spirits, he did not keep any account of the shipments or receipts, and although John sold them he did not keep any account of the sales; neither of them kept any account with their father in reference to these matters, and both swear that they are unable to tell the quantity shipped or sold, or the amount received therefor. Such conduct we cannot reconcile with any honest business, or any business honestly conducted. We think this business was purposely transacted in that way by the parties, in order to conceal all evidence of the amount of spirits sold, and that both John and Charles were parties to and aided and assisted their father in violating the revenue law. We are well satisfied that a large amount of the proceeds of that illegal traffic went into the bank account of Charles, and that the money which he used in paying for the "Barstow property," and buying the $5,000 mortgage upon the "Turtleville mill property," was money received by him from the sale of his father's spirits, and that he used his father's money for those purposes and not his own. Therefore we hold that the "Barstow property" belongs to William Hodson and not to Charles, and that the deed to Charles from his father of the date of May 20, 1867, is void as against the complainant in this case, and that the $5,000 mortgage upon the "Turtleville mill property," which was assigned to Charles in January, 1866, was purchased with the means of William Hodson and not of Charles, and that it is paid and should be cancelled, and that Charles must cancel or discharge the same of record.

These conclusions we think are inevitable from Charles's returns of taxable property to the assessor for several years before and after that time, his income returns during the same period, and his bank accounts for the same time. His list of personal property which he returned amounted in 1861 to $620; 1862, $560; 1863, $245; 1864, $200; 1865, $1,130; 1866, $1,830; 1867, $2,330; in 1869, $2,400, in none of which does he list any mortgages or credits. We are unwilling to believe that if he had been the owner in fact of that $5,000 mortgage in 1866, 1867, and 1869, that he would not have included it, as he swore that each list contained a true list of all his personal property liable to taxation, which was false for the last three years if he owned that mortgage. His income returns for the same period do not show that he was making money in his business sufficient to have those amounts to loan or invest in that way. He returned an income for the year 1862 of $83; 1865, gross amount, $2,321, net, $86; 1866, gross, $4,000, net, $3,000; 1869, gross, $1,000, net, nothing. These returns neutralize his testimony as to the extent of his means derived from his business, and show that in that respect it is not reliable, and satisfying us that he was not in the receipt of funds from his own business to loan his father therefrom $3,000 in September, 1866, or to buy the $5,000 mortgage in January, 1866, especially as it appears that in the year 1865 he paid balance of purchase on this mill, $5,000, and for the extra water $2,000. His testimony is that he loaned, during the year 1866 in the purchase of the $5,000 mortgage and to his father on the purchase of the "Barstow property" $8,000, and invested permanently in his own business, the year before $7,000, all of which he swears he took from his own business. These sworn returns negative that testimony effectually. An inspection of his bank account during those years furnishes the most convincing evidence to our minds of the correctness of our conclusion as to the source from which he received the money to use for such purposes. It appears from the bank accounts that there was a very extraordinary increase in his deposits during the years 1865 and 1866, and a great decrease in his discounts, and what is very remarkable the increase in his deposit account does not differ much from the amount his father ought to have received from the quantity of spirits which he sold without the payment of the taxes. In 1863 his bank account shows his deposits were $67,821 90, his discounts $40,462 10; 1864, deposits, $67,679 24, discounts $23,500; in 1865, deposits, $107,061 43, discounts $15,576; and in 1866, deposits $158,384 17, discounts $13,900. From what source did he receive the increased amount of money which he deposited in the years 1865 and 1866? (the two years during which those spirits were sold). If he could why did he not give some reason or explanation for such increase of his deposit account during those years? He did not attempt to explain this matter. We have a right to hold, in the absence of any account or evidence showing to the contrary, or showing what he did with the additional amount of money thus deposited, which he could have shown by the production of his checks, that the additional amount was the proceeds of the illegal sales of spirits belonging to his father. As the testimony now stands, the increase in his deposit account and decrease in his discounts can only be explained or accounted for upon the theory that he kept his father's money received from sales of spirits in his own name in the bank. The deed of the "Barstow property" to Charles, like the deed to Tibbetts, bears date on the 20th of May, 1867, and, like that, was not recorded until the 9th of November, 1868; both were dated on the same day and both were recorded on the same day, and were given, we entertain no doubt, to enable the defendant to defraud the plaintiff out of this tax, and that both Charles and Tibbetts, when they received them, knew the object and intent for which they were given.

This disposes of all the property mentioned in the pleadings. We have not attempted to describe the property: the counsel on drafting the decree will see that the property is properly described in it. The complainant's solicitor will prepare drafts of decree in accordance with this opinion against the defend-

ants William Hodson, Charles W. Hodson, William Tibbetts, Sarah Ann Ferguson, and —— Ferguson, her husband, and Maria Hodson, with costs to complainant to be taxed, and the bill as to John R. Hodson, Sarah Hodson, Bates, and Allen, is dismissed. The counsel will give notice of the settling the terms of the decree before a judge of the court to the defendant's solicitors. The decree will direct that the property be sold by one of the masters of the court at auction to the highest bidder upon notice of six weeks published in the Wisconsin Journal, Janesville Gazette, and Beloit Journal, once in each week, and that on the confirmation of the sale that the master execute deed ordered to the purchaser thereof, and that the defendants and all persons claiming under or any of them surrender the possession to such purchasers.

DAVIS, Circuit Justice. I concur in this opinion and decree to be prepared.

Case No. 15,377.

UNITED STATES v. HOLLAND (two cases).

[3 Cranch, C. C. 254.] [1]

Circuit Court, District of Columbia. Dec. Term, 1827.

LARCENY — JOINT AND SEVERAL INDICTMENTS — EVIDENCE.

If two be separately indicted for the same theft, and one be convicted, it is necessary for the United States, upon the trial of the other, to prove that it was a joint theft, and that both were present at the act of taking the goods; but it is not necessary to charge in the indictment that the theft was joint; they may be indicted jointly or severally, as both are principals; if there be a doubt as to one whether he were present, he must be acquitted upon an indictment charging him as principal.

Negroes Margarett Holland and her daughter, Louisa Holland, were indicted separately for the same theft. Neither of the indictments mentioned the participation of the other in the crime. The jury first found Margarett, the mother, guilty. Afterwards, upon the trial of Louisa, Mr. Wallach, for the prisoner, prayed the court to instruct the jury that they could not find her guilty, unless they should be satisfied, by the evidence, that it was a joint theft, and that both were present at the act of taking the goods.

THE COURT (nem. con.) gave the instruction as prayed. It was then suggested by the prisoner's counsel, that she could not be convicted upon this indictment, because it did not charge her with jointly stealing the goods; the other prisoner, Margarett, having been convicted of the same theft.

But THE COURT (nem. con.) inclined to think, and so decided, that it was not necessary to charge in the indictment that the theft was joint, as neither of them was more or less guilty because they were together. Both were principals. 1 Chit. Cr. Law, 260 (214), 267 (220), 271 (223); 2 Hale, P. C. 173, 174.

The jury found Louisa, also, guilty.

There seemed to be some doubt whether Margarett was actually present at the taking of the goods; and the court granted her a new trial, upon which Mr. Key, for the United States, entered a nolle prosequi. The other prisoner, Louisa, was sentenced to be whipped fifteen stripes, and to pay a fine of $1, and costs.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,378.

UNITED STATES v. HOLLAND.

[2 N. Y. Leg. Obs. 55.]

Circuit Court, S. D. New York. 1843.

GRAND LARCENY ON THE HIGH SEAS — TAKING SHIP'S PROVISIONS—QUESTION FOR JURY—VERDICT.

1. Where a prisoner was indicted for a larceny on shipboard on the high seas, on a voyage from the port of Liverpool to the port of New-York, for taking the ship's provisions, and disposing of them to the steerage passengers:—It was *held*, that the indictment was sustainable under the act of congress passed April 30, 1790, § 16 [1 Stat. 116].

2. Although the steward of the vessel had charge of the provisions for the voyage, yet when he acted in the capacity of cook and steward for the vessel, and disposed of the provisions to the steerage passengers, it was a question of fact for the jury to determine whether the taking of the property originally was felonious.

3. When the jury found the prisoner guilty, under the act of congress above mentioned, they should assess in the verdict for the value of the property taken.

The prisoner was indicted by the grand jury of the Southern district of New-York for a grand larceny committed on board of the American ship Mary Howard, on the high seas, on a voyage from Liverpool to the port of New-York. The indictment was founded upon the act of congress passed April 30, 1790 (section 16), which, among other things, declares: "That if any person upon the high seas, shall take and carry away with an intent to steal or purloin the personal goods of another, such person so offending, his counsellors, aiders and abettors, knowing of, and privy to the offences aforesaid, shall, on conviction, be fined not exceeding the four-fold value of the property so sold, embezzled or purloined, the one moiety to be paid to the owner of the goods, and the other moiety to the informer and prosecutor, and be publicly whipped not exceeding thirty-nine stripes." The whipping has been abolished by a subsequent act of congress. The indictment alleged that the prisoner on said voyage on board of said vessel, did take and carry away with intent to purloin and steal the same, fifty pounds of meat and fifty pounds of bread, the personal property of the owners of said vessel.

The prisoner, upon being arraigned, pleaded not guilty.

On the trial the principal witness introduced on the part of the United States was Samuel Ware, the master of the vessel, on said voyage. He testified that the vessel was an American vessel, and that the prisoner was the cook of the vessel for the voyage; that the prisoner shipped at New-York, went the voyage to Liverpool and returned on the homeward voyage to New-York; that his vessel on the homeward voyage brought out something near 200 steerage passengers, who occupied the steerage of the ship; that his crew were some 12 or 14 in number; that on the homeward voyage, the prisoner's duty was to cook the provisions for the crew and officers of the vessel; that he might cook also for the steerage passengers at the galley, they finding their own provisions; that he took pay for cooking, but that it was against the rules of the ship, strictly speaking, for the cook to do any other cooking than what was required for the officers and crew; that it was somewhat of a privilege or perquisite for the cook to do any cooking for the steerage passengers; that in no case was it the privilege or right of the cook to supply any of the passengers with provisions of any kind; that steerage passengers furnished themselves with their own food and provisions for the voyage; that these were the terms upon which all of the steerage passengers were taken on board of vessels, carrying steerage passengers across the Atlantic; that he knew of no exception; it was the general usage of trade. The witness also testified that in the first place the steward of the ship dealt out the provisions every day to the cook, to prepare them for the crew and officers of the vessel by cooking, and that he had no right to take any other provisions than such as were designated by the steward. It also appeared that the prisoner acted both as steward and cook, during a considerable portion of the homeward voyage; that on the outward voyage to Liverpool, no steerage passengers were carried out; that a certain number of pounds of meat and bread were dealt out to the cook daily, which were abundantly sufficient for the crew and officers of the vessel; that they had the same number of officers and crew coming home to New-York that they had when the vessel was on the outward voyage to Liverpool; that on the outward voyage the crew were satisfied with their provisions; they had abundance; that on the homeward voyage, the crew were continually complaining that the food was short in quantity, while the witness found that full two barrels more of beef were exhausted in the same time on the homeward voyage than when she was on the outward voyage; that the bread was also continually running short, and the witness found that his beef and bread became almost exhausted before he got in, when he had put up a very large supply for the voyage. The witness, to a question put to him, stated that he never had seen the cook give any provisions to the steerage passengers, but he was satisfied that it had been done, as some of the hands had complained to him that such was the case, and the witness stated that he had no doubt he had lost from $50 to $100 worth on the voyage, and perhaps more. He had charged the cook with purloining the provisions, but got no satisfactory answer. It was proved by several witnesses, that they had seen the prisoner take the bread of the ship and sell it to the steerage passengers. They had also seen him boil meat for the officers and crew of the vessel, and that pieces of it had been sent below by the prisoner. On one occasion they saw the prisoner, while cooking for the ship, take a piece of meat out of the pot at the galley and wrap it up in a cloth and give it to a person who came on deck for it, and then it was carried below among the steerage passengers. Other acts of the prisoner were proved, such as that he had taken money from the steerage passengers for provisions; indeed there could be but little doubt but that the prisoner had purloined or disposed of more or less of the ship's provisions from the galley to the steerage passengers of the voyage. How much, it did not distinctly appear. The prisoner introduced no evidence direct for his defence; but he endeavored to show by cross-examination of the witnesses against him, that he had a privilege of cooking on the voyage for the steerage passengers, and that it was known to the master and officers of the vessel.

The case being closed, the prisoner's counsel submitted to the court the following propositions, and asked the court to instruct the jury that under the evidence as it appeared, the prisoner could not be convicted of the offence charged in the indictment:

(1) That the prisoner being both cook and steward of the vessel on the homeward voyage, he had the custody of the provisions of the vessel, and therefore he could not be convicted of a larceny as charged in the indictment; that to make out the crime of larceny, it must appear that there was an intent of stealing the property when it first came to the hands of the offender, and at the very time of his first receiving it. 3 Chit. Com. Law, p. 920; 3 Inst. 107. The case was similar, said the learned counsel, to that of a man intending to go a distant journey, hiring a horse fairly and bona fide for that purpose, and evidences the truth of such intention by actually proceeding on the way, but afterwards rides off with the horse. That no theft would be committed because the felonious design was imagined subsequent to the delivery, which was obtained without fraud or design. 1 Hale, P. C. 504; 1 Hawk. P. C. c. 33, § 2; 2 East, P. C. 694. In the present case the property had

been delivered to the prisoner upon trust, and although he had converted it, such conversion did not amount to larceny. Archb. Cr. Pl. 186.

The learned counsel also urged that the present case was properly one of embezzlement, and not of larceny, under the act; and as the prisoner had been indicted for one offence, and if found guilty, had been shown to have committed another offence not named in the indictment in the act of congress, he ought to be acquitted. The act was technical, and used the terms of taking and carrying away; whereas an embezzlement was properly neither, but was only a species of larceny, applicable to cases of servants coming into possession of property by virtue of their employment, and afterwards converting the same to their own use. 2 Rev. St. N. Y. p. 678, § 59.

The district attorney, contra, submitted that there had evidently been a series of depredations by the prisoner upon the property that belonged to the owner, and that every successive depredation might be used as an argument against the prisoner, that he had taken the property, or some portion of it, with a felonious intention. The intent might reasonably be inferred as to the excess of the provisions used by the cook over and above what was necessary on the voyage; the difference between the outer voyage and the homeward voyage in the quantity of the provisions was very great, and upon this difference in quantity it was that the jury ought to infer a felonious intention; the learned counsel requested the court to charge the jury, that the prisoner was guilty of the offence charged in the indictment, if they believed the testimony brought against him.

BETTS, District Judge (charging jury). 1. That in order to constitute a larceny there must be a taking of the goods either actual or constructive; that an actual taking of the goods was where the owner retained possession and the goods were taken against his will, or without his consent; that where there is a constructive taking the owner may in fact deliver the goods to another, but in law he is deemed to retain possession of them; that a taking from the constructive possession of the owner in the present case was sufficient, and it became a mere question of fact for the jury to determine, whether the goods had been obtained by the prisoner with a felonious intent; that if they believed the prisoner had intended to make away with the provisions of the vessel when he received them for cooking, that in such a case it was larceny for all the goods he had disposed of; that if the jury believed that he had taken possession of the provisions in the first instance fairly and without a felonious intent, they ought to acquit the prisoner under the indictment; and if they found him guilty, they were to assess the value of the property taken. Whereupon the jury retired, and came into court, and said they found the prisoner guilty in name and form charged in the indictment, and they assessed the value of the property taken to $10.

The prisoner was brought up for sentence; the court imposed a fine of $40 upon the prisoner, who was to stand committed until the sum was paid, not exceeding a term of six months' imprisonment in the county jail.

Case No. 15,379.

UNITED STATES v. HOLLEY.

[14 Int. Rev. Rec. 87.]

District Court, S. D. New York. Aug. 29, 1871.

EMBEZZLEMENT BY COLLECTOR OF CUSTOMS.

[This was an indictment against] Samuel J. Holley, a prominent politician, grain merchant, and collector of customs for the district of Buffalo, from April 9, 1869, to March 27, 1870, who had been indicted at the last January term of the United States district court, under an act of congress approved August 6, 1846, section 16, for embezzling $387.82 from the government while collector of the port. Through political influence the case was not called at the March or May term. At the June term the district-attorney obtained a new indictment, upon which Holley was arraigned on Monday and pleaded not guilty.

The government examined about ten witnesses, and offered as testimony a certified transcript from the treasury records to show the amount of money alleged to have been embezzled had not been received from the collector at the treasury department. The defence was that the money alleged to be embezzled was not public money, and that the money, which was fees, did not belong to the government and that the government did not require a return to be made of fees. The cashier in the custom-house under Holley testified that he had charge of all moneys received and disbursed, and that Collector Holley never received any money but his salary, which was paid in treasury warrants. At four o'clock the case was given to the jury. After being out nearly half an hour they returned with a verdict of guilty. Sentence was postponed.

Case No. 15,380.

UNITED STATES v. HOLLINSBERRY.

[3 Cranch, C. C. 645.] [1]

Circuit Court, District of Columbia. Nov. Term, 1829.

INDICTMENT—ASSAULT AND BATTERY—PROSECUTOR'S NAME.

The court will, on motion, quash an indictment for assault and battery, in Alexandria, if

[1] [Reported by Hon. William Cranch, Chief Judge.]

the name of a prosecutor be not written at the foot thereof, although the accused shall have been recognized to appear at the court to answer for the offence.

[Cited in U. S. v. Helriggle, Case No. 15,344; U. S. v. Shackeltord, Id. 16,261.]

Indictment [against John Hollinsberry] for assault and battery upon Robert Walker. No prosecutor's name was written upon the indictment.

Mr. Taylor, for the defendant, moved the court to quash the indictment for that reason, which was done (MORSELL, Circuit Judge, absent), upon the authority of U. S. v. Helriggle [Case No. 15,344], at November term, 1827, and U. S. v. Shackelford [Id. 16,261], at April term, 1828, although the defendant had been recognized by a justice of the peace to appear at this term to answer for the offence.

Mr. Swann, for the United States, then offered the witnesses to be examined by the court, and prayed the court to order an indictment to be sent up to the grand jury. THE COURT examined them, but refused to order an indictment.

Mr. Swann objected to the cross-examination of the witnesses by the defendant; but THE COURT overruled the objection.

NOTE. See, also, U. S. v. B. Dulany, [Case No. 14,999], Dec. term, 1808; U. S. v. Sandford [Id. 16,221], 14th July, 1806; Virginia v. Leap [Id. 16,964], April, 1801; U. S. v. Jameson [Id. 15,466], Jan., 1802; U. S. v. Singleton [Id. 16,293], June, 1805; U. S. v. Carr [Id. 14,729], Nov., 1823; U. S. v. Willis [Id. 16,728], Nov., 1808.

Case No. 15,381.

UNITED STATES v. HOLLY.

[3 Cranch, C. C. 656.][1]

Circuit Court, District of Columbia. Dec. Term, 1829.

GAMING LAWS—NUISANCE.

The authority given to the corporation of Washington, by their charter of 1804, is "to restrain or prohibit." "all kinds of gaming." The by-law of the 16th of August, 1809, prohibiting the setting up or keeping any faro-table, &c. within the city of Washington; and a conviction under that by-law, are no bar to an indictment against the same person for a nuisance at common law by keeping a common gambling house at the same time.

[Cited in Town of Van Buren v. Wells, 14 S. W. 40.]

Indictment at common law for keeping a common gaming house, and procuring divers idle and evil disposed persons to frequent and come to play together at a certain unlawful game called faro, for divers large and excessive sums of money; to the great damage and common nuisance of the good citizens of the United States, to the evil example, &c.

Verdict guilty, subject to the opinion of the court upon the fact that the defendant has been convicted and fined, by a justice of the peace, under the by-law of the corporation of Washington, of the 16th of August, 1809, for keeping a faro-table in the same place, and for the same time, whether such conviction is a bar to this prosecution. By that by-law it was enacted, that "no E O, A B C, L S D, faro, rolly-bolly, shuffle-board, equality-table, or other device to be used with cards, balls, dice, coin or money, except billiard-tables, for the purpose of playing, or gaming for money, or any thing in lieu thereof, shall be set up or kept in any part of this city, under the penalty of $20, for every day or less time," &c. "to be recovered of the person so setting up or keeping the same, before a single magistrate, one half whereof shall go to the informer, and the other for the use of the city council."

Among the powers given to the corporation by the act of congress (2 Stat. 254) of the 24th of February, 1804, was the power "to restrain or prohibit," "all kinds of gaming."

Mr. Swann, for the United States, cited and relied upon U. S. v. Wells [Case No. 16,661], in this court, at December term, 1811.

Mr. Jones and Mr. Coxe, for the defendant contended, that the power given to the corporation by the charter, to restrain or prohibit all kinds of gaming, was exclusive, as to the city of Washington, and superseded the common law upon that subject. The case of U. S. v. Wells [supra], is not applicable. It was an indictment under Act Assem. Md. 1797, c. 110, for keeping a faro-bank in a house occupied by a tavern-keeper, in Georgetown. The power given to the corporation of Georgetown by the charter was, "to restrain or prohibit gambling;" "and to pass all laws, not inconsistent with the laws of the United States, which may be necessary," &c. The defendant, Wells, had been fined by a justice of the peace, under the by-law of March 7, 1806, for "gaming" at a faro-bank kept by himself; which act of gaming was at the tavern in which the faro-bank was kept by the defendant, in violation of Act Md. 1797, c. 110, and was one of the acts of gaming given in evidence at the trial of the indictment. The power of the corporation of Georgetown can not be exercised so as to repeal or supersede the general law of the land; and such was the opinion of the court, who said that the payment of the fine under the by-law did not prevent the operation of the general law of 1797, c. 110. But the power of the corporation of Washington is unlimited. The subject of gaming is entirely given up to their cognizance, and the by-law covers the whole common-law offence. A by-law enacted under the charter is equivalent, as respects the city, to an act of congress; upon paying the penalty a man may commit the offence. A conviction, upon the statute, for forging a note of the Bank of the United States, is a bar to a prosecution at common law for forging the same note. Piracy is an offence

[1] [Reported by Hon. William Cranch, Chief Judge.]

against the law of nations, and punishable by any nation: a conviction in America is a bar to a subsequent conviction in England. So in cases of concurrent jurisdiction, the court which first has possession of the cause has exclusive cognizance of it. U. S. v. Pirates, 5 Wheat. [18 U. S.] 197; Smith v. McIver, 9 Wheat. [22 U. S.] 535; The Robert Fulton [Case No. 11,890]; U. S. v. Bevans, 3 Wheat. [16 U. S.] 339. By its charter the corporation of Washington has "full power and authority to prohibit all kinds of gaming." If they have acted upon the subject, and omitted to prohibit, they have sanctioned what they have not prohibited. Having assumed to legislate upon the subject, the power has become exclusive. Gibbons v. Ogden, 9 Wheat. [22 U. S.] 17. McLearn's Case, in this court at December term, 1809 (not reported), was an indictment under the Maryland law of 1798, c. 113, for keeping a billiard-table without a license. By the charter of the city of Washington of May 3, 1802 (2 Stat. 195), the corporation had power "to restrain or prohibit gambling," and to "prevent and remove nuisances," and "to provide for licensing and regulating auctions, retailers of liquors, hackney-carriages," &c. And by the amended charter of February 24, 1804 (Id. 254), they had power "to restrain or prohibit" "all kinds of gaming." On the 25th of May, 1803, the corporation passed a by-law requiring licenses to be taken out for certain objects, and among others, for keeping a billiard-table for gain, upon paying therefor the sum of $50. This court was of opinion that the charter of Washington repealed so much of the law of Maryland of 1798, c. 113, as required a license for the keeping of a billiard-table in the city to be taken out from the clerk's office. The court had before given a similar opinion in regard to retailers of spirituous liquors, &c.

Mr. Swann, for the United States, submitted the case, without argument, upon the following authorities: Hawk. P. C. bk. 1, c. 75, § 6; 1 Mod. 76; 2 Keb. 846; 3 Keb. 464; 5 Mod. 142; 1 Vent. 168; 3 Burrows, 1233; 1 Russell, 433.

CHANCH, Chief Judge (nem. con.). This is an indictment at common law for a nuisance in keeping a common gambling house. Verdict guilty; subject to the opinion of the court upon the question whether a conviction before a justice of the peace, under a by-law of the corporation of (Burch's Dig. 95) August 16, 1809, for keeping a faro-table, and judgment for the penalty of twenty dollars per diem, is a bar to this prosecution; it being admitted that the conviction and judgment before the justice of the peace cover the whole time for which he is charged in the present indictment for keeping the disorderly house. The indictment charges that the defendant, "on the 15th of January, 1829, and on divers days and times between that day and the day of taking this inquisition, with force and arms, unlawfully did keep and maintain a certain common gaming house; and in the said common gaming house, for hire and gain, on the said 15th day of January, in the year aforesaid, and on the said other times and days, then and there unlawfully and wilfully did cause and procure divers idle and evil-disposed persons to frequent and come, to play together at a certain unlawful game called faro; and in the said common gaming house, on the said 15th day of January in the year aforesaid, and on the said other days and times, there unlawfully and wilfully did permit and suffer the said idle and evil disposed persons to be and remain playing and gaming at the said unlawful game called faro, for divers large and excessive sums of money, to the great damage and common nuisance of the good citizens of the United States, to the evil example of all others in like cases offending, against the peace and government of the United States." The by-law of the corporation of August 16, 1809, entitled "An act to suppress gaming," enacts:

"Section 1. That after the passage of this act, no E O, A B C, L S D, faro," &c., "or other device to be used with cards," &c., "for the purpose of playing or gaming for money," "shall be set up or kept in any part of this city, under the penalty of twenty dollars for every day or less time that such faro," &c., "shall be so kept and maintained;' to be recovered of the person so setting up or keeping the same, before any single magistrate, one half whereof shall go to the informer, and the other for the use of the city council."

"Sec. 2. That if any person shall permit any faro," &c., to be "set up, kept, or played in his house," &c., "he shall incur the penalty of twenty dollars for every day or less time that the same is so 'kept up and maintained,' to be recovered," &c., as in the first section.

There is no statement of the facts of this case, but I understand that the defendant has been sentenced by the justice of the peace to pay a fine of twenty dollars per diem for keeping and maintaining a faro-table in the house of Dr. Smethers, for the whole time proved upon the present indictment.

It is contended, by the counsel of the defendant, that the common law as to the nuisance of a common gaming house is repealed, in regard to the city of Washington, by the powers given to the corporation, "to prevent and remove nuisances;" "to restrain and prohibit" "all kinds of gaming;" "to cause" "all such as keep public gaming tables or gaming houses to give security for their good behavior," "and to indemnify the city against any charge for their support;" "to pass all laws which shall be deemed necessary and proper for carrying into execution the powers vested by that act, in the said corporation or its officers;" and "to impose and appropriate

fines, penalties, and forfeitures for the breach of their laws or ordinances." It is supposed that these provisions cover the whole common-law offence of nuisance arising from the keeping of a public gaming house; and transfer to the corporation of Washington the whole legislative jurisdiction over the subject; and that as the corporation has legislated in part upon the matter, the common-law offence is abrogated; inasmuch as by legislating in part the corporation has signified its will that every thing should be permitted which they have not expressly forbidden. Such I understand to be the argument, and it seems to be the only argument which can bear an appearance of plausibility; for the by-law does not cover the whole ground of the common-law offence. It only punishes the setting up or keeping a faro-table, &c., or permitting it to be set up, kept, or played. But the common-law offence does not consist in the setting up or keeping a faro-table or other device for the purpose of playing or gaming for money; but in its being kept and used as a public or common gaming house.

The by-law punishes the act of setting up the table—the common law punishes the act of permitting it to be used as a common gaming house. It is this and this only that makes it a common nuisance, and, as such, punishable by fine and imprisonment at common law. The offence created by the by-law, therefore, is not a complete substitute for the common-law offence. It cannot be supposed that congress, by giving the corporation of Washington power "to restrain and prohibit all kinds of gaming," intended to abrogate the common-law offence before the corporation should have actually legislated upon the subject and provided a substitute. No motive for such an intention can be imagined. It is not in the power of congress to delegate to the corporation an exclusive right of legislation upon this subject. Its by-laws must be subject to the control of congress at all times; and it would be natural to conclude that the grant of a vicarious power to legislate upon a subject, would not, until that power is executed, be a repeal of all pre-existent laws upon that subject, any more than it would if the whole power of legislation had been still retained in the hands of congress. And even, admitting that congress could delegate the whole power of legislation, and should delegate it, yet such delegation would not, of itself, repeal all the existing laws. They would still remain in force until altered or repealed by the delegated authority. If, therefore, we admit that the power given to the corporation, "to prevent and remove nuisances," authorizes the corporation to define and punish the offence of keeping and maintaining a common gaming house in such a manner as to be a common nuisance, as defined by the common law; yet the corporation not having done so, the common law remains unaltered; and the fact that the defendant has been punished under the by-law, for setting up and keeping a faro-table, is no bar to his conviction of the offence of keeping and maintaining a common gaming house in such a manner as to be a common nuisance.

In the case of U. S. v. Wells [Case No. 16,661], at June term, 1812, the indictment was for keeping a faro-table, in a house occupied by a tavern-keeper, contrary to Act Md. 1797, c. 110. The defence was that he, as keeper of the faro-table, had been fined twenty dollars under the by-law of Georgetown of March 7, 1806, for "an offence of gaming" at the table. It was there also urged that the act of congress to amend the charter of Georgetown, passed March 3, 1805 [2 Stat. 332], giving to the corporation the power "to restrain or prohibit gambling," to impose "and appropriate fines, penalties, and forfeitures, for breach of their ordinances," and "to pass all laws, not inconsistent with the laws of the United States, which may be necessary to give effect and operation to all the powers vested in the said corporation," and the by-law of March 7, 1806, by which the corporation executed the power given them to restrain or prohibit gambling, operated as a repeal of Act Md. 1797, c. 110. But the court in that case was of opinion that the act of Maryland was not repealed; and ordered judgment to be entered for the penalty of £50. The offence under the act of Maryland was the setting up and maintaining a faro table, or other device for the purpose of gaming for money, in a dwelling-house occupied by a tavern-keeper. The offence under the by-law was the setting up, keeping, or maintaining a public gaming house, or public gaming table, or other device for common gaming; and the by-law gave a penalty of twenty dollars for every offence of gaming at the table, to be paid by the keeper, whether it were or were not kept in a house occupied by a tavern keeper. That case was stronger in favor of the defendant than this; for there the by-law covered the whole offence described in the act of Maryland. The court, however, thought that the penalty of the by-law was cumulative, and intended to be in addition to that imposed by the Maryland law.

The case of licenses for taverns, retailers of spirituous liquors, and billiard tables, is different from this, which is an offence at common law. There the offence was a mere malum prohibitum; a penalty for not paying a tax and taking a license from a particular authority. When the tax was given to the corporation, as well as the means to enforce its payment, the whole subject was transferred to the corporation as a matter of revenue. But a common nuisance is a malum in se, or it would not be a common-law offence; and a delegation of power to legislate upon the subject cannot be construed into an intention to repeal the common law; for even a providing a new punish-

ment for a common-law offence has never been held to prevent a conviction upon an indictment for the offence at common law, without express words to that effect; much less would that effect be produced by a delegation of power to legislate upon the subject.

We are, therefore, of opinion, that the offence is still indictable at common law, and that judgment should be rendered for the United States upon the verdict.

Judgment for the United States, for a fine of $200.

See U. S. v. Ismenard [Case No. 15,450]; Docker's Case [Id. 3,946], December, 1805; McLearn's Case, December, 1809 (not reported); Wells' Case [supra], December, 1811; and U. S. v. Dixon [Case No. 14,969], December, 1813.

Case No. 15,382.

UNITED STATES v. HOLMES.

[1 Cliff. 98.] [1]

Circuit Court, D. Maine. Sept. Term, 1858.

EVIDENCE—IMPEACHMENT OF WITNESSES—CRIMINAL LAW—INSANITY AS DEFENCE—ACTS AND DECLARATIONS—EXPERT TESTIMONY.

1. Testimony in chief, of any kind, tending merely to support the credit of the witness, is not to be heard except in reply to some matter previously given in evidence by the opposite party to impeach it.

2. Evidence to confirm a witness, by proving that he has given the same account out of court, is not admissible, even although it has been proved, in order to contradict him, that he has given a different account.

3. Testimony merely rebutting is inadmissible, in anticipation of the matters to be contradicted or explained.

4. Where evidence of acts, conduct, and declarations of the accused, at various periods of his life, is introduced in defence, to prove his insanity at the time of the commission of a crime, the prosecution, in rebuttal, is not limited to an explanation or denial of the particular acts, conduct, or declarations so put in evidence in behalf of the prisoner, but may offer evidence of other acts, conduct, or declarations of the accused to show that he was sane within the same period.

[Cited in Green v. State, 59 Ark. 246, 27 S. W. 6.]

5. It is not necessary, in order to enable the proof of such other acts, conduct, and declarations to be regarded as rebutting testimony, that the prosecution should show the accused to be of sound mind at the time to which they refer.

6. The defence being insanity, the evidence of such acts, etc., is not an attack upon the character of the prisoner before he has put his character in issue, but is rebutting testimony, admitted in order that the jury may compare the prisoner's conduct on different occasions together, and thus judge understandingly upon the question in controversy.

7. Testimony legal in form, pertinent to the issue, and received without objection, cannot afterwards be stricken out by the court, merely because the foundation for its admission, by preliminary inquiry, has not been made.

8. Where the expression of an opinion of a witness not qualified to speak as an expert is so interwoven with the res gestæ as to be inseparable therefrom, and was therefore rehearsed by the witness in his account of the circumstances of a homicide, *held*, that the statement that such expression was made was legal testimony, and as such was as much the subject of contradiction as any other competent testimony, and may be rebutted by proof of an inconsistent statement out of court.

9. It is not necessary, in order to impart a rebutting character to testimony, that the contradiction should be complete and entire, but it is sufficient if it has a tendency to contradict or disprove the opposite statement.

10. Although a person when committing a crime be laboring under partial insanity, if he still understands the nature and character of the act, and its consequences, and has knowledge that it is wrong and criminal, and mental power enough to apply that knowledge to his own case, and to know if he did the act he would do wrong and deserve punishment, such partial insanity is not sufficient to exempt him from criminal responsibility.

[Cited in State v. Lawrence, 57 Me. 581, 585; State v. Lewis, 20 Neb. 333, 22 Pac. 248.]

11. Such is the law of this court and in many of the best-considered decisions in the state courts.

12. Review of the authorities upon the question.

13. Wherever partial insanity is set up as an excuse for crime, if it appears that the mind of the accused is merely weakened and clouded, but is not incapable of remembering, reasoning, and judging between right and wrong in respect to his particular act, to admit in such a case that he was impelled to the commission of the act by an uncontrollable impulse would be to disregard the test of responsibility which the law establishes.

[Cited in State v. Harrison, 36 W. Va. 746, 15 S. E. 988, 989.]

This was an indictment [against John A. Holmes] for murder upon the high seas, and came before the court upon a motion for new trial. The grounds of the motion are sufficiently set forth in the opinion. It appeared from the testimony, that on the 12th of May, 1857, the American ship Therese, of which the accused was master, sailed from New York to Valparaiso, thence to Callao, thence to the Chincha Islands, and then back to Callao, at which place and time George W. Chadwick, the person alleged to have been murdered, shipped as a mariner on board the vessel for the homeward voyage to Hampton Roads. After the ship got this side of Cape Horn, and before the time of the homicide, a difficulty had arisen between the accused and Chadwick, in consequence of the latter having omitted to sing, while hauling at the lee brace, as sailors are accustomed to do, and the accused beat, maltreated, and threatened him in violent and profane language. Afterwards, meeting Chadwick on deck, the master adverted to this omission as a neglect of duty, and repeated his threats in still more violent terms. Some time subsequent to this occurrence, Chadwick was at the wheel, and the witnesses testified they heard the accused speaking to him from the cabin, and inquiring how the vessel was heading. The question was correctly answered, but the customary "sir" was omitted.

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

Upon this the accused immediately called out again, "How is that you say?" and the answer was given the same as before. In a few minutes, the accused came up from the cabin with a belaying-pin in his hand, and began beating the sailor, Chadwick, with it, upon his head. The blows were continued after the sailor was prostrated on the deck, and until he regained his feet and started to run forward; he was soon brought back by the second mate, acting under the master's order, and the beating renewed, until he was covered with his own blood. He was then stripped, washed,—his clothes thrown overboard,—and triced up in the main rigging. The accused then took a strand of yarn, knotted it, and ordered the men to flog the sailor thus triced up, and the order was obeyed for some twenty minutes. After several times reproving the men for not striking hard enough, and inflicting several blows himself, the master doubled and knotted a piece of ratlin stuff, and ordered this to be used in place of the yarn. Groans and cries several times escaped from the lips of the sufferer, but were in every instance silenced by the belaying-pin in the hands of the master. After a brief interval, during which the beaten man was carried to and brought back from the forecastle, he was again beaten with the belaying-pin, again triced up in the rigging, and a second time flogged with the ratlin. On this second occasion, as the sailor, Chadwick, cried for mercy, the accused answered, "If you don't stop your noise, I'll kill you on the spot"; and thereupon renewed the blows with the belaying-pin upon his head, neck, and side, until he sank down, supported only by his hands, which were tied to the rigging. He was then taken down and laid on the deck, where unsuccessful efforts at resuscitation and bleeding, showed that he was dead. When it was found that life was extinct, the accused remained standing for a few moments in silence on the deck, and then, with his mates, retired to the cabin. They remained in the cabin about twenty minutes, when the mate came on deck, called all hands aft, told them that he now had charge of the ship, and that the captain was crazy. It was not denied, on the part of the accused, that the sailor, George W. Chadwick, came to his death by violence and by the hands of the accused; but the defence was placed solely upon the ground, that at the time the homicide was committed, the prisoner was so far insane as not to be criminally responsible for the act. Upon this question witnesses were introduced and examined, both by the defence and the prosecution, and acts, conduct, and declarations of the prisoner at different periods and under different circumstances, throughout nearly his whole life to the time of the arrest, were offered in evidence. Acts and declarations, and the constitution of the prisoner when quite young, were detailed and described in the testimony, as well as his conduct upon voyages remotely and immediately preceding the one during which the homicide was committed. The jury returned a verdict of guilty. The motion for a new trial was based upon certain alleged incorrect rulings of the court in the course of the trial, and upon alleged misdirections in matters of law in the final instructions given to the jury.

G. F. Shepley, U. S. Dist. Atty., for the prosecution.

G. Evans and P. Barnes, for the defence.

CLIFFORD, Circuit Justice. Motions for new trials in the federal courts are not always exhibited to the court for verification before they are filed. Usually they are prepared by the party objecting to the verdict, within the time prescribed by the twenty-sixth rule, and not unfrequently are filed with the clerk of the court without any examination by the opposite side, where they sometimes remain upon the files until the argument, without any revision whatever. Drawn from the minutes of the counsel or from recollection, it not unfrequently happens that they require some correction in order that they may accord with the actual rulings and instructions of the court at the trial. No inconvenience results from the practice, as the whole subject is one entirely within the control of the court, whose undoubted province it is to revise such motions if any error has intervened, either at the time of the argument or when its opinion is finally delivered. U. S. v. Gibert [Case No. 15,204].

Two classes of complaints are embraced in the motion, each containing several distinct objections to the action of the court. One class has respect solely to the rulings of the court in admitting or rejecting evidence in the course of the trial. Another and a distinct class has respect to the instructions given to the jury when the case was finally submitted to their determination. Those appertaining to the rulings of the court in admitting and rejecting evidence will first be considered, for the reasons that they were made in the progress of the trial, and that the weight of such objections cannot be satisfactorily determined without some reference to the circumstances of the case under which the evidence was offered. In considering this class of objections, therefore, it becomes necessary to recur to the proceedings in the trial, and somewhat to the evidence, as it was developed at the trial, in order that the exact circumstances under which each particular ruling was made may be fully and clearly understood.

According to the record, the indictment was filed in court on the 25th of September, 1858. It alleges to the effect that the prisoner, on the 22d of January, 1858, upon the high seas, out of the jurisdiction of any particular state, and within the admiralty and

maritime jurisdiction of the United States and of this court, in and on board a certain American vessel called the Therese, in and upon one George W. Chadwick, piratically, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the prisoner with a certain instrument called a belaying-pin, in and upon the head, neck, back, and left side of him, the said George W. Chadwick, then and there on the high seas, in the vessel aforesaid, did strike, giving to him, the said George W. Chadwick, then and there, several mortal wounds, blows, and bruises, to wit: one mortal wound on the head of him, the said George W. Chadwick, of the length of three inches and of the depth of one inch; one mortal bruise and wound on the neck of him, the said George W. Chadwick, of the length of three inches and of the depth of one inch; one mortal bruise on the back of him, the said George W. Chadwick, of the length of six inches and of the depth of one inch; one mortal bruise on the left side of him, the said George W. Chadwick, of the length of four inches and of the breadth of two inches, of which mortal wounds and bruises the said George W. Chadwick then and there instantly died. It contains two counts, and in each there is the usual conclusion, charging that the prisoner, piratically, feloniously, wilfully, and of his malice aforethought, him, the said George W. Chadwick, in manner and form aforesaid, did kill and murder.

He was arraigned on the 28th of September, 1858, and pleaded that he was not guilty. His trial was commenced on the 5th of October following, pursuant to an assignment previously made at the request of his counsel. No objection is made to any of the proceedings at the trial, except what are contained in the motion under consideration. In opening the case, the district attorney confined his remarks to the discussion of the principles of law applicable to the charge made in the indictment, and to a brief statement of the evidence to be introduced to prove it. He called some seven or eight witnesses in the opening to prove the necessary allegations, to show the jurisdiction of the court, the act of killing, as laid in the indictment, and all the material elements of the crime.

(At this point the court recapitulated the testimony which substantially appears in the foregoing statement.)

Such is the substance of the testimony produced by the government in the opening, so far as respects the jurisdiction of the court, the fact of homicide, and all the material elements of the crime charged in the indictment. Many other facts and circumstances material to the question, whether the prisoner was sane or insane when the act was committed, were elicited in the cross-examination, which it is unnecessary to reproduce in this investigation.

The testimony of the witnesses for the defence varied in several important particulars from the narration previously given by the government witnesses. Many new facts were also stated, which had more or less bearing upon the question of sanity or insanity presented by the defence. That remark is more particularly applicable to the testimony of the second mate, who was examined as to all the circumstances attending the homicide, as well as to those which followed, and in many particulars his statements differed widely from the statements of the seamen previously examined; but as those discrepancies and contradictions do not give rise to any legal question, they will not be specified. One part of his testimony, however, is material in this investigation, and that part only will be particularly stated. Speaking of the efforts to resuscitate the deceased while he lay on the deck, and before the prisoner retired from the scene, the witness says he went to the cabin to get some hartshorn, thinking that hartshorn would revive the deceased if he had any life in him; and as he went, he says, he looked into the mate's room, and said to him, "For God's sake come on deck, for I believe the captain is crazy, and is going to kill us all." This statement of the witness was made in the examination in chief, and was given as a part of the circumstances which took place while the prisoner was standing over the dead body, and before the mate came on deck, as stated by the government witnesses. Both of those witnesses were fully examined as to the acts, conduct, and declarations of the prisoner throughout the voyage, both before and after the homicide, up to the time the ship arrived at Pernambuco, and while she remained in that port. It appeared from their testimony, as well as from the testimony of the master of the ship Andalusia, who was also examined as a witness for the defence, that the prisoner was sick at the Chincha Islands, in consequence of an injury he received in the head while on shore; and the latter gave a particular description of the injury, and a minute statement of his acts, conduct, and declarations during his sickness. His acts, conduct, and declarations immediately after the homicide, and during the five days that elapsed before the ship arrived at Pernambuco, were also very fully narrated by the second mate, in whose charge the prisoner remained ever after he retired to the cabin on the day the homicide was committed, until he arrived in New York in the bark Emperador, about the middle of March following.

Many other witnesses were also called, and examined as to his prior and subsequent acts, conduct, and declarations when not at sea, covering nearly the whole period of his life, from early youth to the time of his arrest. The brother-in-law of the prisoner, Joseph A. Cargill, was examined upon this point, and testified to certain attacks of pain in the head which the prisoner had suf-

fered on a voyage previous to the one during which the homicide was committed, and to his violent conduct and language during those attacks. Near the close of his examination in chief, after the witness had stated the time of his return and his arrival at the house of his father in Newcastle, in this state, he was asked by the counsel for the prisoner whether he mentioned these occurrences during the voyage to any of his family or to any of the family of the prisoner. That question was objected to by the district attorney, and ruled out by the court, upon the ground that the inquiry was irrelevant to the issue, and that it was incompetent for the prisoner to fortify his own witness by declarations made out of court, and not under oath. This ruling presents the first question to be determined at the present time. In the motion as filed in the case, it is numbered five in the list of causes assigned for a new trial; but it is in fact the first cause of complaint when considered in the order of events as they occurred at the trial. As before remarked, the question was asked in the examination in chief, and, of course, before the witness was cross-examined. No principle in the law of evidence is better settled than the one enunciated in the rule, that testimony in chief of any kind, tending merely to support the credit of the witness, is not to be heard except in reply to some matter previously given in evidence by the opposite party to impeach it. Jackson v. Etz, 5 Cow. 320; 2 Cow. & H. notes, 776. When this question was asked and excluded, nothing had been given in evidence by the other side to impeach the credit of the witness, and it was for that reason that it was ruled out as incompetent and immaterial. Tested by the circumstances under which the testimony was offered, it is clear it could have had no tendency to prove the issue, and in fact and truth could have had no other effect except to fortify the credit of the witness. Evidence to confirm a witness, by proving that he has given the same account out of court, is not admissible, even although it has been proved, in order to contradict him, that he has given a different account. Rex v. Parker, 3 Doug. 242; Robb v. Hackley, 23 Wend. 55; Ware v. Ware, 8 Greenl. 55; 1 Greenl. Ev. 469.

It was suggested at the argument that the testimony called for by the question was offered, not to fortify the credit of the witness, but to prevent any misconstruction of his conduct arising out of the circumstance that the prisoner married his sister shortly after his return from that voyage. Admit the fact to be as stated, and it is not perceived that it changes the aspect of the question in any degree, as the difficulty still remains in all its force, that at the time the question was asked and ruled out there was nothing in the case to which the answer, whether given in the affirmative or negative, would apply as rebutting evidence. At that time the question whether the witness objected to the marriage of his sister had not been asked, and certainly it cannot be maintained that testimony merely rebutting is admissible in anticipation of the matters to be contradicted or explained. Such a rule would be a very inconvenient one, and finds no support either in the decided cases or in the practice of the federal courts. But suppose the answer, had it been admitted, would have been accompanied by the statement, as assumed by the counsel, that he did object to the marriage of his sister, or that he did not. Still the testimony would not have been admissible, for the plain reason that it would not have afforded any explanation of his conduct in the particular under consideration, except so far as it disclosed, either directly or indirectly, his opinion as to the sanity or insanity of the prisoner at the time the occurrences took place. Testimony in general is limited to matters of fact within the knowledge of the witness, and it is only when the subject-matter of the controversy is such as to require peculiar experience, study, or skill to understand it, that persons professionally acquainted with the trade, science, or practice are permitted to give their opinions, showing conclusively that two prerequisites are essential to the admissibility of such testimony: first, that the inquiry be one appertaining to a matter of trade, skill, or science; and secondly, that the witness called be one qualified to speak upon the subject. Tested by this rule, it is clear that the opinion of this witness was not admissible, as he was in no proper sense qualified to speak upon the subject of diseases of the mind. 1 Greenl. Ev. § 440. In every point of view, therefore, we are satisfied that this ruling was correct, and that it affords no ground whatever for a new trial.

Inquiries were made of this witness, in his examination in chief, not only as to the acts, conduct, and declarations of the prisoner during the attacks, but on other occasions throughout the voyage. It appeared from his testimony that the prisoner also had an attack of sickness while the ship lay at Acapulco, in the republic of Mexico, and particular inquiry was made of him as to the acts, conduct, and declarations of the prisoner during that attack. Among the incidents of this occasion, the witness says he saw the prisoner carried from the cabin up the companion-way to the deck by the mate, carpenter, steward, and cook, and that afterward he saw them holding him on the deck. At one time, he says the prisoner got away from them, and made an attempt to jump over the rail of the vessel, when they caught him and brought him back to the house of the ship. All these particulars, and many others of a kindred character during the voyage, were stated by the witness in his examination in chief. He was then cross-examined by the district attorney. In the course of the cross-examination, he was asked whether any diffi-

culty occurred during the voyage between the prisoner and the mate. That question was objected to by the counsel for the prisoner, and was admitted by the court. Considered in the order of events as they occurred at the trial, this ruling constitutes the second cause of complaint. In answer to this question, the witness stated that he had heard the prisoner and the then mate have loud talk, but could not state the conversation or what it was about. Corresponding questions were then put to the witness, in answer to which he stated that the then mate left the ship at Acapulco, after she had been there about two weeks, and that he was succeeded by another, who went to Callao, and there left the ship. Some difficulty took place between him and the prisoner about bending the topsail. A third was then appointed, who was discharged shortly afterward on account of his intemperate habits. At the Chincha Islands a fourth was appointed, who continued to fill the place until the ship arrived at Hampton Roads, when he ran away. Difficulty occurred between the prisoner and the mate last appointed on two occasions. One during the passage, and the other the night before he left the ship. Various acts, conduct, and declarations of the prisoner, during those difficulties, were stated by the witness in answer to the questions propounded by the district attorney. It is insisted by the counsel for the prisoner that the question objected to should have been ruled out, and that all the testimony of this witness, so far as respects the acts, conduct, and declarations of the prisoner during these difficulties, was improperly admitted. (1) They contend that the effect of the rulings was to allow the government to establish the offence charged against the prisoner, by proving that he had committed other acts of violence of a like kind. (2) In the second place, they insist that the rulings authorized an illegal attack upon the character of the prisoner, when, in fact and in truth, he had offered no evidence putting his character in issue. (3) And lastly, they contend that the evidence was a surprise upon the prisoner, who could not be expected to come to trial on the charge in the indictment, prepared to defend his whole life.

All the answer that need be given to the first proposition is, to state that the theory of fact on which it is based is not correct, and to refer to what has already appeared in verification of the statement. It is a mistake to suppose that the evidence in question, or any part of it, was admitted, or even offered as having any bearing whatever upon the question whether the prisoner was the guilty agent who committed the act of homicide charged in the indictment. His agency in that behalf had been admitted by his counsel in the opening of his defence, and was no longer a matter in question at the trial. In the opening of the defence his counsel stated, in effect, that they did not controvert the fact that the deceased came to his death by violence, or that the violence was committed by the hands of the prisoner; but insisted, as before stated, that the prisoner was so far insane at the time he committed the homicide that he was not criminally responsible for the act. Much of the time occupied in the trial was spent on this new issue, very properly raised by his counsel at the opening of the defence. It was upon this ground that the trial proceeded; and after the defence was opened, it was to this point that the efforts of counsel on both sides were directed.

On the part of the prisoner, many witnesses had been called and examined, and his acts, conduct, and declarations, not only throughout this voyage, but throughout his whole life, from early youth to the time of his arrest, had been introduced into the case. His counsel, in offering his acts, conduct, and declarations, called the attention of the witnesses to such occurrences and incidents in his life and conduct as they supposed were material to support the defence set up by the prisoner. That examination extended to his mental, moral, and physical condition at many and different periods of his life, both before and after the homicide was committed. Some of the witnesses referred to particular sicknesses and incidents in the life of the prisoner, and all were allowed to state his acts, conduct, and declarations at the particular times and in respect to the particular transactions to which their attention was directed by the examining counsel. Evidence tending to show hereditary insanity in his family had also been introduced; and, in fact and truth, the counsel had claimed and exercised the right to examine the witnesses so called upon all such occurrences, acts, and declarations in the life and conduct of the prisoner as tended to show that he was insane, or that there was any tendency, either in his mental or physical condition, to that state of mind. They accordingly selected, as was very properly admitted at the argument, the dark spots in his life, or those most peculiar and least in accordance with the ordinary conduct of men, as best suited to support the defence set up by the prisoner in this case. All of the testimony objected to, and now under consideration, was admitted in reply to that which had previously been introduced by the prisoner to support that ground of defence.

One of the suggestions at the trial in support of the objection was, that the government, in attempting to rebut the testimony offered by the prisoner on this point, should have been limited to the explanation or denial of the particular transactions, acts, conduct, and declarations introduced by the prisoner to make out his defence. That rule would be a very convenient one if it were the sole purpose of the law to acquit the guilty by establishing this ground of defence upon a partial view of the facts; but so

long as it continues to be the purpose of the law, and of those who administer it, to ascertain the truth, the limitation suggested by the counsel for the prisoner, cannot be sustained. Most men in the course of their lives, in times of excitement produced by disease or otherwise, do many strange or peculiar acts, and oftentimes give utterance to eccentric or unusual language; and it is obvious if a person accused of crime may select and offer in evidence all the dark spots of his life, or every peculiar and unusual act and declaration, and be allowed to exclude all the rest, that many guilty offenders must escape, and justice often be defeated, because the means of ascertaining the truth are excluded from the jury. Persons accused of crime have a right to set up this defence, and when proved according to the rules of law, to the satisfaction of the jury, upon a view of all the facts, it is a legal and just defence. Beyond doubt the precise question to be tried in all such cases is, whether the accused was insane at the very time he committed the act, and to that point all the evidence must tend. Great difficulties surround the inquiry, and it is for that reason that the rules of law allow a wide range of testimony in the investigation. Proof of hereditary insanity is therefore admissible as affording some ground of presumption that the alleged diseased state of mind may have descended through those from whom the accused derived his existence. Reg. v. Tucket, 1 Cox, Cr. Cas. 103; Reg. v. Oxford, 9 Car. & P. 525.

Evidence of acts, conduct, and declarations, both before and after the time of committing the act, tending to show an insane state of mind are also admissible, as having some bearing upon the exact point in controversy. Lake v. People, 1 Parker, Cr. R. 556; Peaslee v. Robbins, 3 Metc. (Mass.) 164; Grant v. Thompson, 4 Conn. 203; 1 Ben. & H. Lead. Cas. 104. On the trial of this indictment that rule was observed, and every proper latitude was allowed to the counsel to show the acts, conduct, and declarations of the prisoner, both before and after the homicide was committed; and it is but just to say that the right was exercised to its fullest extent. Whenever that right is exercised in behalf of the accused, it follows, as a necessary consequence of the rule conferring the right, and as a material and essential part of the rule itself, that the government may offer evidence of other acts, conduct, and declarations of the accused within the same period to show that he was sane, and to rebut the evidence introduced for the defence. To that extent, at least, the rule of law is clear and undeniable, and to that extent only was it allowed in this case under the ruling of the court. Another suggestion of the counsel for the prisoner, however, deserves to be considered before leaving this branch of the case. They contend, that proof of other acts, conduct, and declarations, though within the period of time covered by the inquiry in behalf of the accused, cannot be regarded as rebutting testimony, unless it be first shown that the accused, at the time to which the inquiries for the government refer, was of sound mind and memory. To admit the proposition as stated would be to exclude the evidence in all cases; as the question of sanity or insanity is for the jury, and their opinion cannot be taken during the progress of the trial. All the cases herein cited to the point show that such evidence, tending to prove an insane state of mind, is admissible for the prisoner; and by the same rule of law, and for the same reasons, evidence tending to show that he was sane within the period opened for examination is admissible for the government to rebut the evidence previously introduced for the accused. For these reasons we are of the opinion that the proposition cannot be sustained.

Enough has already been said in this case to show that the second objection to the admissibility of the evidence under consideration cannot be maintained. Like the preceding proposition, its great and controlling error consists in the theory of fact on which it is based, as will presently more fully appear. Beyond question, every person accused of crime is presumed to be innocent until he is proved to be guilty; and no circumstance at the trial, except evidence of his good character previously introduced by the accused himself, can justify the court in allowing the government to introduce evidence to show that his character is bad. Such evidence is never admitted until the accused has first put his character in issue, or, in other words, has laid the foundation for its introduction by offering evidence to show that he is of good character; and then the counter-proof is properly admitted as rebutting testimony. These principles are elementary, and perfectly familiar to any one at all acquainted with the criminal law; and they are principles of very great moment to the accused, and as such ought always to be respected, strictly observed and enforced, and constantly applied. No such testimony was admitted in this case, and, what is more, none such was offered by the government. All the evidence under consideration appertained to the acts, conduct, and declarations of the prisoner in his intercourse, as master of the vessel, with those under his command, and was admitted as rebutting testimony, in order that the jury might have the appropriate means legitimately before them of comparing the prisoner with himself, and thus be enabled understandingly to determine the question in controversy, whether the prisoner was sane or insane at the time he committed the act of homicide charged in the indictment. Unless it be assumed that evidence pertinent to the issue, and essential to the inquiry,

may constitute an attack upon the character of one on trial, there is no foundation to support the argument, that the testimony under consideration should be viewed in that light; always bearing in mind that the subject-matter of the inquiry, to which the testimony is applied, was not whether the prisoner committed the act of homicide, but whether he was sane or insane at the time it was committed. Failure to discriminate in this behalf lies at the foundation of a large portion of the error plainly discoverable in the argument for the prisoner.

Two or three observations as to the third proposition will be sufficient, as it was much less relied on at the argument upon the motion for new trial than in the discussion which took place at the bar when the objection was made. Surprise may often arise out of the offer of evidence strictly competent, and yet that circumstance has never been considered as affecting the question of its admissibility. Embarrassments of that sort, which are more or less incident to every trial, are usually remedied by motion to the court for a postponement of the trial to a future day in the term, or for a continuance. Such motions are addressed to the discretion of the court, and, whether granted or refused, are not the proper subjects of exception or error. It is not, however, in that sense that the objection in this case is urged, as no such motion was made, and of course there can be no complaint that it was not granted. In this case the objection is pressed rather as an argument to show that the evidence was not admissible, and as that point has already been considered and determined, further discussion of the subject is unnecessary.

Additional testimony was then introduced. Experts were called and examined upon the subject of insanity, and they were allowed to give their opinions in answer to such hypothetical questions pertinent to the case on trial, as the counsel thought proper to propound. Rebutting testimony was then introduced by the government. One Joshua R. Trevet was called and examined. In answer to preliminary inquiries, he stated that he resided in Wiscasset, in this state; that he was acquainted with the prisoner, and sailed with him in the year 1855 in the ship Ontario, which was commanded by the prisoner during the voyage. He also testified that a man by the name of Furlong was a seaman on board the ship. At that stage of the examination he was asked by the district attorney to state what occurred during this voyage between the prisoner and that seaman. To that question the counsel for the prisoner objected; but the court ruled that it was admissible, and the witness answered, giving a very full account of certain difficulties that occurred in August, 1855, on the morning after he arrived at Trapani, in Italy. All the acts, conduct, and declarations of the prisoner during this occurrence were fully stated by the witness. Much discussion took place at the trial upon the objection made by the prisoner's counsel, but the testimony was ruled to be admissible, upon the same ground and for the same reasons previously given, when the objection was made to the question propounded to his brother-in-law in the cross-examination respecting the events of the succeeding voyage. Both rulings present the same question and involve the same legal considerations; and we are satisfied they were correct, for the reasons already given, which need not be repeated. When a person accused of crime relies upon his prior and subsequent acts, conduct, and declarations to show that he was insane at the time he committed the act charged against him, and actually offers them in evidence to establish that defence, we entertain no doubt that it is competent for the government to introduce other acts, conduct, and declarations of the accused, within the same period, to rebut that presumption, and to show that he was sane. Were it otherwise, it is not perceived how this class of legal investigations can be satisfactorily conducted, as jurors, if the proposition assumed by the counsel for the prisoner be correct, must always be compelled in cases like the present to decide the question of sanity or insanity upon a partial view of the facts, and may often be deprived of the means of ascertaining the truth. Courts of justice have established the principle that such evidence is admissible for the accused, whenever he sees fit to offer it, and so long as that rule continues in force it must of necessity be competent for the government to introduce countervailing proof.

One other objection only remains to be considered, in connection with the rulings of the court at the trial. That question arises out of the testimony of Daniel Randal, who was called and examined by the government. He stated that he had a conversation with the second mate on the day before the witness went before the grand jury; that he asked him in his shop, whether he thought the prisoner was crazy when the affair occurred on board the Therese, and that the second mate replied that the prisoner was no more crazy than he was. This testimony was admitted without objection, and the witness, after the examination was closed, passed off the stand. Another witness was then called, and upon being examined upon the same subject without objection, gave a similar answer. After his examination had been completed and he had left the stand, a third witness was called by the government, and the question asked to the effect whether he had heard the mate say anything upon that subject. This last question was seasonably objected to by the counsel for the prisoner, and was ruled out by the court upon the ground and for the reason that the mate, in his examination in chief, had not

testified to anything connected with the circumstances of the homicide before the prisoner left the deck, which the testimony offered was suited either to rebut or explain. Whereupon the counsel for the prisoner moved the court to strike out the testimony introduced to contradict the second mate, upon the ground that it was not admissible, and had been improperly received. That motion the court refused to grant; and the refusal of the court in that behalf constitutes the basis of the fifth, sixth, and seventh causes assigned for a new trial.

Two objections were taken by the counsel at the argument to the ruling of the court, in refusing to strike out the testimony. They contend, in the first place, that the testimony had been improperly received, because the foundation for its admission had not been laid in the cross-examination of the second mate. When the second mate was cross-examined, the district attorney did not inquire of him whether he had ever made such a statement to either of the witnesses. That objection goes to the right of making the inquiry, and not to the competency of the testimony; and if the objection had been seasonably made, the question could not have been put. But it was not made until the question was put and answered without objection, and therefore the testimony was legally in the case, if it was competent and relevant to the issue. As a general rule it is not to be expected that the court will interfere mero motu to exclude testimony, otherwise competent, merely because the preliminary inquiry has not been made, unless the question is objected to on that ground by the other side; and if not objected to, and the testimony is received, it is not then competent for the court to strike it out if it is legal in form and pertinent to the issue. In the state courts the rule, that the preliminary inquiry in such cases must first be made, is never enforced, and if testimony is admitted without objection on that ground, in the federal courts, it would not be competent for the court afterward to strike it out merely on that account.

More importance is attached to the second objection, and it deserves to be more carefully considered. In the second place, it is insisted that the testimony of these witnesses was not admissible, because it had no tendency to contradict or rebut any statement made by the second mate. This denial makes it again necessary to refer to his testimony, in order that the exact state of the case may be seen and understood. In relating the circumstances attending the homicide, he testified that he looked into the mate's room and said to him, "For God's sake, come on deck, for I believe the captain is crazy, and is going to kill us all." This statement had been given by the second mate, in his examination in chief, as a part of the res gestæ, and as such was clearly admissible, as substantive testimony. Neither its admissibility nor its importance to the prisoner can be denied. As a general rule, the opinions of witnesses not qualified to speak as experts are not admissible, but it will sometimes happen, as in this case, that their opinions are so connected with the res gestæ, and so interwoven therewith, that they inseparably become a part thereof, and in such cases they are legal testimony, as much as any other part of the transaction; and whenever that is the case, they become as much the subject of contradiction as any other legal and competent testimony, and may be rebutted or explained in the same way. Decided cases have established the rule that, whenever the circumstances of the case are such as to allow evidence of opinions to be received, the opposite party, after laying the foundation, may call other witnesses and prove, for the purpose of contradicting the witness whose opinion has been introduced, that he has expressed an inconsistent opinion out of court. 1 Greenl. Ev. § 449, and cases cited. That principle is applicable to this case, notwithstanding the preliminary inquiry had been omitted in the cross-examination of the second mate, as the questions to the witnesses called to rebut his testimony were allowed to be put, and the testimony in question was received without objection. For all purposes connected with the defence of the prisoner, on the ground assumed by the counsel, the opinion of the second made had been given in evidence in his examination in chief, and none the less effectually, because it had been recited by him among the circumstances attending the act of homicide. That opinion being thus in the case, it was certainly a proper subject of contradiction; so that the only remaining question on this branch of the case is, whether the evidence in question was of a rebutting character. Rebutting evidence is that which is given by a party in a cause to explain, repel, contradict, or disprove the facts given in evidence by the other side. Directness, in the technical sense, is not essential to give the evidence that character, nor is it necessary that the contradiction should be complete and entire, in order to admit the opposing testimony. Circumstances may be offered to rebut the most positive statement, and it is only necessary that the testimony offered should have a tendency to explain, repel, counteract, or disprove the opposite statement, in order to render it admissible. Its weight and sufficiency, as in other cases, are for the consideration of the jury. Applying these principles to the matter in question, it is so obvious that the testimony under consideration had a tendency to rebut the prior statement of the second mate, that further discussion of the question is, we think, unnecessary.

All of the questions presented in the causes assigned for a new trial, so far as respects

the rulings of the court, having been determined, we will now proceed to the consideration of those arising out of the instructions of the court to the jury. Periodical mania was the form of mental disease set up in this case, and relied on in the defence to excuse the prisoner from the charge against him in the indictment. It was agreed by the experts that the evidence in the case tending to show that the disease was occasioned by any delusion was very slight. One of them testified that the indications of delusion in this case were very few, and added that he was not sure that the prisoner labored under any delusion. Another testified, that he did not see any indications of delusion, regarding delusion in its strictest sense. Such of the instructions only as are material to questions raised by the motion for new trial will be reproduced. In effect, the jury were told, that if they came to the conclusion that the government had not made out the whole charge, as laid in the indictment, beyond a reasonable doubt, it would be their duty to find that the prisoner was not guilty. On the contrary, if they found from the evidence that the whole charge was proved beyond a reasonable doubt, provided the prisoner, at the time he committed the homicide, was in a state of mind to be criminally responsible for his acts, that then they would turn their attention to the principal ground of defence, and in that view of the case they were instructed that, in legal contemplation, every person on trial under a criminal charge was presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, unless the contrary was proved to the satisfaction of the jury; and that to establish a defence on the ground of insanity, it must be clearly proved to the satisfaction of the jury, that the party accused, at the time of committing the act, was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing wrong. They were also instructed that a person was not to be excused from responsibility if he had, at the time he committed the act, capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he was then doing, a knowledge and consciousness that the act he was then doing was wrong and criminal, and would subject him to punishment; that in order to be responsible he must have sufficient power of memory to recollect the relation in which he stands to others and others stand to him, and that the act he was doing was contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty. In the same connection, immediately following, the jury were also instructed, that although the person was laboring under partial insanity, if he still understood the nature and character of the act and its consequences, and had a knowledge that it was wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and to know that if he did the act he would do wrong and deserve punishment, such partial insanity was not sufficient to exempt him from criminal responsibility. This last instruction, upon the subject of partial insanity, is the one to which exception is taken in the eighth cause assigned for a new trial. Upon this subject two things are certain: first, that the instructions are drawn in strict accordance with the settled law in this court; and, secondly, that the law of this court is the same as the law of England, and in those states in this country whose judicial decisions are entitled to the most respect. Reference is made, in support of the first remark, to the case of U. S. v. McGlue [Case No. 15,679], decided by Mr. Justice Curtis in 1851. In that case, the learned judge said that the law supplied a test by which the jury is to ascertain whether the accused be so far insane as to be irresponsible. That test is the capacity to distinguish between right and wrong as to the particular act with which the accused is charged. If he understands the nature of his act, if he knows his act is criminal, and that if he does it he will do wrong and deserve punishment, then, in the judgment of the law, he has a criminal intent, and is not so far insane as to be exempt from criminal responsibility. On the other hand, if he is under such delusion as not to understand the nature of his act, or if he has not sufficient memory and reason and judgment to know that he is doing wrong, or not sufficient conscience to discern that his act is criminal and deserving punishment, then he is not responsible. Some of the cases will now be referred to which substantiate the second remark. They are as follows: Case of McNaghten, 10 Clark & F. 210, and 1 Car. & K. 130; Reg. v. Oxford, 9 Car. & P. 525; Rex v. Offord, 5 Car & P. 168; 1 Russ. Crimes (Ed. 1853) 13; Rosc. Cr. Ev. 953.

Suggestions were made at the argument, that the rule in the state courts of this country is different. Our examination of the subject has brought us to a different conclusion. To the extent that our researches have been prosecuted, we find that the great majority of the well-considered cases decided in the law tribunals of the states conform in principle, and in some instances in the exact language employed, to the rule laid down in the first case cited from the English reports. As examples, we refer to the case of Freeman v. People, 4 Denio, 28, and to the case of Com. v. Rogers, 7 Metc. (Mass.) 501. In the former case, Beardsley, J., speaking for the whole court, said, where insanity is interposed as a defence to an indictment for an alleged crime, the inquiry is always brought down to the single question of a capacity to distinguish between right and wrong at the time when the act was done. In such cases, the jury should be instructed that it must be

clearly proved that, at the time of committing the act, the party was laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. Shaw, C. J., in the latter case said, in the very language employed in this instruction, that, although a person accused of crime may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences, if he has a knowledge that it is wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong, and receive punishment, such partial insanity is not sufficient to exempt him from responsibility for criminal acts. Many other cases of like import might be added to the list of citations, but we think it unnecessary, as those already given are sufficient to demonstrate the proposition, that the English and American rules, in the particular under consideration, are the same. This question is concisely but satisfactorily considered by Mr. Wharton, in his valuable treatise upon the Criminal Law, wherein he remarks to the effect that the courts of this country have not hesitated to apply the rule, that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing wrong; and it is very doubtful whether our language affords the means of stating the proposition in a more satisfactory manner. Those who may desire to examine the cases more fully will find them collected by that learned author under the title appropriately designated as the one where the accused is incapable of distinguishing right from wrong, in reference to the particular act. Whart. Cr. Law, § 16, notes b, c, d.

All of the well-considered cases since 1843, in both countries, are founded upon the doctrine laid down by the fourteen judges, in the opinion delivered in the house of lords at that time. In the debate upon the question, Lord Brougham said, if the perpetrator knew what he was doing,—if he had taken the precaution to accomplish his purpose,—if he knew, at the time of doing the desperate act, that it was forbidden by the law, that was his test of sanity, and he cared not what judge had given another test, he should go to his grave in the belief that it was the real, sound, and consistent test. 1 Ben. & H. Lead. Cas. 94; Reg. v. Vaughan, 1 Cox, Cr. Cas. 80; Reg. v. Layton, 4 Cox, Cr. Cas. 149; Reg. v. Barton, 3 Cox, Cr. Cas. 275. This last case is more particularly applicable to another branch of the present inquiry, arising out of the complaint, that the court omitted to instruct the jury in accordance with the views presented in the opening of the defence, and as enforced in the closing argument. In that case, the defence set up was, that the prisoner had committed the crime under an irresistible impulse. Parke, Baron, told the jury that there was but one question for their consideration, and that was, whether, at the time the prisoner inflicted the wounds that caused the death, he was in a state of mind to be made responsible for the crime. That would depend upon the question whether he, at the time, knew the nature and character of the deed he was committing, and if so, whether he knew he was doing wrong in so acting. In the course of his remarks to the jury he expressed his decided concurrence in the view of the question previously taken by Baron Rolfe, that the excuse of an irresistible impulse, coexisting with the full possession of the reasoning powers, if allowed to be a sufficient defence, might be urged in justification of every crime known to the law; for every man might be said, and truly, not to commit any crime except under the influence of some irresistible impulse. That distinguished judge then went on to say, that something more than this was necessary to justify an acquittal on the ground of insanity, and it would therefore be for the jury to say whether, taking into consideration all that the surgeon had said, which was entitled to great weight, the impulse under which the prisoner had committed this deed was one which altogether deprived him of knowledge that he was doing wrong. Reg. v. Stokes, 3 Car. & K. 185; Reg. v. Allnut, and Reg. v. Pate, 1 Ben. & H. Lead. Cas. 95, 96. Other cases to the same effect might be cited, but we think it unnecessary, as it was admitted at the argument that the two first named are regarded as sound law in the courts of the country where the decisions were made. Such undoubtedly is the fact, and in our view of the matter there is nothing in the opinion of the court in the case of Com. v. Rogers inconsistent with that state of the law. On the contrary, we think it is to the same effect, when the different paragraphs of the opinion are carefully compared with each other. In the first place, the learned judge lays down the doctrine that a person accused of crime is not to be excused from responsibility, if he had capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he was then doing, which is the rule, as before remarked, in all the well-considered cases upon the subject. He then stated the rule by which the jury were to be governed in case they found from the evidence that the accused was laboring under partial insanity.

That rule, it will be observed, is in the exact language of the instruction in this case, and was adopted by this court at the trial, for the reason that it was believed to be correct, and we are still of the same opinion. It does not authorize a jury to convict a person accused of crime, if laboring under partial in-

sanity, unless they find, from the evidence, that the accused, at the time he committed the act, still understood the nature and character of the act he was doing; that he still had a knowledge that the act was wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and to know that if he did the act he would do wrong and deserve punishment; and we hold, that when a man has capacity and reason sufficient to understand the nature and character of his act and its consequences, and knows that it is wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and deserve punishment, he is so far sane as to be responsible for his criminal acts; and on that state of facts, and when all those things concur,—which was the state of the case supposed in the instruction,—the law assumes that he has the power to refrain from doing the act, and does not acknowledge the doctrine that he may be impelled to commit it by any uncontrollable or irresistible impulse. Every person, on trial, under a criminal charge, is presumed to be sane and to possess a sufficient degree of reason to be responsible for his criminal acts, unless, as before remarked, the contrary is proved to the satisfaction of the jury; and whenever partial insanity is set up as an excuse for crime, the question, whether the degree of insanity is sufficient to constitute a valid defence, is for the consideration of the jury, whose province it is to determine the question, in view of all the evidence in the case; and if it appears from the evidence that the mind of the accused is merely clouded and weakened, but is not incapable of remembering, reasoning, and judging between right and wrong, in respect to his own particular act, that he still understands the nature and character of the act and its consequences and has a knowledge that it is wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and deserve punishment, then the law, on that state of facts, properly regards the accused as a moral agent responsible for his criminal acts and punishable for the crime charged against him; and to admit, in such a case, that the defence may be successfully set up that he was impelled to the commission of the act charged by any uncontrollable or irresistible impulse would be to overlook and disregard the test or criterion of responsibility for criminal acts which the law itself establishes in such a case, and to allow that defence to be urged in justification of every crime known to the law. For these reasons we are of the opinion that the instruction was correct, and that no further instruction in the case upon this subject was necessary.

A few remarks in relation to the twelfth cause assigned for a new trial will be sufficient to show that it is entirely without merit. It assumes that the court, in effect, instructed the jury that they could not acquit the prisoner on the ground of insanity, unless it appeared that his reason and mental powers were, at the time of the act, either so deficient that he had no will, no conscience or controlling mental power, or, that through the overwhelming violence of mental disease, his intellectual powers were for the time obliterated. Such portions of the charge as are supposed to be referred to in the motion for a new trial will furnish the most satisfactory answer to this ground of complaint. Upon this subject, the jury were told, in the first place, that insane delusion may and sometimes does exist to so high a degree that the person under its influence has neither intelligence nor capacity to have a criminal intent, but that such extreme cases were easily distinguishable from the examples of partial insanity, where the mind of the person is merely clouded and weakened, but is not incapable of remembering, reasoning, and judging, at the time, between right and wrong, in respect to his own particular acts. Another remark of the court in this connection was to the effect that extreme cases of insane delusion had doubtless occurred, where the reason and mental powers of the person were for the time wholly obliterated, so that he had no will, no conscience or controlling mental power, and consequently could not be regarded, in legal contemplation, as a moral agent, and that such persons would not be responsible for criminal acts. They were also told, upon the same subject, that if the testimony of the experts was correct, that form of insanity could not be successfully set up by the prisoner, as they appeared to negative that theory of his defence; but still, it was for them to determine whether there was any sufficient evidence in the case to support that view of the defence. Towards the close of the charge these propositions, together with some others of like importance, were re-stated to the jury in a more distinct form, in order to guard their minds against the danger of any mistake. They were then told, that if they found that the prisoner did not know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong, then he was clearly entitled to an acquittal.

With the same view they were also told, that a person was not criminally responsible if, at the time he committed the act, he had not sufficient capacity and reason to know whether his act was right or wrong, or, to speak more accurately, to know that the act he was doing was wrong and criminal, and would subject him to punishment; and also, that he was not responsible, if the act was actually done under a fixed insane delusion that certain facts existed which were wholly imaginary, but which, if true, would have constituted a good defence; and finally, that he was not responsible if he had not intelligence and capacity enough to have a criminal in-

tent, or if his reason and mental powers were, at that time, either so deficient that he had no will, no conscience, or controlling mental power, or, if through the overwhelming violence of mental disease, his intellectual power was for the time obliterated. Comment upon this part of the charge is unnecessary. It gives its own construction, and, as we think, affords a demonstration that the theory assumed in the motion for a new trial is erroneous.

All of the questions have been attentively considered, and, after full deliberation, we have come to the conclusion that it is our duty to overrule the motion; and there must be judgment on the verdict.

Case No. 15,383.

UNITED STATES v. HOLMES.

[1 Wall. Jr. 1.] [1]

Circuit Court, E. D. Pennsylvania. April 22, 1842.

CONDUCT OF TRIAL—ADMISSION OF PERSONS WITHIN BAR—HOMICIDE BY SEAMEN—SHIPWRECK—ABANDONMENT OF PASSENGERS.

1. Although this court is deprived, by the act of March 2, 1831, of the power to punish, as for a contempt of court, the publication during trial, of testimony in a case, yet having power to regulate the admission of persons, and the character of proceedings within its own bar, the court can exclude from within the bar any person coming there to report testimony during the trial.

[Cited in U. S. v. Anon., 21 Fed. 768.]

2. Seamen have no right, even in cases of extreme peril to their own lives, to sacrifice the lives of passengers, for the sake of preserving their own. On the contrary, being common carriers, and so paid to protect and carry the passengers, the seamen, beyond the number necessary to navigate the boat, in no circumstances can claim exemption from the common lot of the passengers.

3. In the case here reported, the relative obligations of seamen and passengers, in the event of shipwreck or maritime disaster, are examined and stated.

4. The indictment charged that the prisoner did commit manslaughter on the high seas (1) by casting F. A. from a vessel belonging, etc., whose name was unknown; (2) by casting him from the long-boat of the ship W. B., belonging, etc. The indictment is sufficiently certain.

The American ship William Brown, left Liverpool on the 13th of March, 1841, bound for Philadelphia, in the United States. She had on board (besides a heavy cargo) 17 of a crew, and 65 passengers, Scotch and Irish emigrants. About 10 o'clock on the night of the 19th of April, when distant 250 miles southeast of Cape Race, Newfoundland, the vessel struck an iceberg, and began to fill so rapidly that it was evident she must soon go down. The long-boat and jolly-boat were cleared away and lowered. The captain, the second mate, 7 of the crew, and 1 passenger got into the jolly-boat. The first mate, 8 seamen, of whom the prisoner was one (these 9 being the entire remainder of the crew), and 32 passengers, in all 41 persons, got indiscriminately into the long-boat.[2] The remainder of the passengers, 31 persons, were obliged to remain on board the ship. In an hour and a half from the time when the ship struck, she went down, carrying with her every person who had not escaped to one or the other of the small boats. Thirty-one passengers thus perished.[3] On the following morning (Tuesday) the captain, being about to part company with the long-boat, gave its crew several directions, and, among other counsel, advised them to obey all the orders of the mate, as they would obey his, the captain's. This the crew promised that they would do. The long-boat was believed to be in general good condition; but she had not been in the water since leaving Liverpool, now thirty-five days; and as soon as she was launched, began to leak. She continued to leak the whole time; but the passengers had buckets, and tins, and, by bailing, were able to reduce the water, so as to make her hold her own. The plug was about an inch and a half in diameter. It came out more than once, and finally, got lost; but its place was supplied by different expedients.

It appeared by the depositions of the captain, and of the second mate,[4] (the latter of whom had followed the sea twenty-one years; the former being, likewise, well-experienced), that on Tuesday morning when the two boats parted company, the long-boat and all on board were in great jeopardy. The gunwale was within from 5 to 12 inches of the water. "From the experience" which they had had, they thought "the long-boat was too unmanageable to be saved." If she had been what, in marine phrase, is called a "leaky boat," she must have gone down. Even without a leak she would not have supported one-half her company, had there been "a moderate blow." "She would have swamped very quickly.' The people were half naked, and were "all crowded up together like sheep in a pen." "A very little irregularity in the stowage would have capsized the long-boat." "If she had struck any piece of ice she would inevitably have gone down. There was great

[1] [Reported by John William Wallace, Esq.]

[2] The first mate and some of the crew of the long-boat were originally in the jolly-boat with the captain; but the mate, understanding navigation, was transferred, with a chart, quadrant, and compass, to the long-boat; and some of the crew were exchanged. The long-boat was 22½ feet long, 6 feet in the beam, and from 2½ to 3 feet deep.

[3] One passenger had died after leaving Liverpool, and before the catastrophe of the 19th.

[4] The captain and second mate, with the other persons in the jolly-boat, after having been out at sea six days, were picked up by a French fishing lugger. They afterwards came to Philadelphia, where, by consent of the United States, the depositions of the captain and mate were taken, and the testimony was now read in evidence.

peril of ice for any boat." (Captain's and second mate's depositions.) Without going into more detail, the evidence of both these officers went to show that, loaded as the long-boat was on Tuesday morning, the chances of living were much against her. But the captain thought, that even if lightened to the extent to which she afterwards was, "it would have been impossible to row her to land; and that the chances of her being picked up, were ninety-nine to one against her." It appeared, further, that on Monday night, when the passengers on the ship (then settling towards her head and clearly going down) were shrieking, and calling on the captain to take them off on his boat, the mate on the long-boat said to them: "Poor souls! you're only going down a short time before we do." And, further, that on the following morning, before the boats parted company, the mate, in the long-boat, told the captain, in the jolly-boat, that the long-boat was unmanageable, and, that unless the captain would take some of the long-boat's passengers, it would be necessary to cast lots and throw some overboard. "I know what you mean," or, as stated by one witness, "I know what you'll have to do," said the captain. "Don't speak of that now. Let it be the last resort." There was little or no wind at this time, but pieces of ice were floating about.

Notwithstanding all this, the long-boat, loaded as she is above described to have been, did survive throughout the night of Monday, the day of Tuesday, and until 10 o'clock of Tuesday night,—full twenty-four hours after the ship struck the iceberg. The crew rowed, turn about, at intervals, and the passengers bailed. On Tuesday morning, after the long-boat and jolly-boat parted, it began to rain, and continued to rain throughout the day and night of Tuesday. At night the wind began to freshen, the sea grew heavier, and once, or oftener, the waves splashed over the boat's bow so as to wet, all over, the passengers who were seated there. Pieces of ice were still floating around, and, during the day, icebergs had been seen. About 10 o'clock of Tuesday night, the prisoner and the rest of the crew began to throw over some of the passengers, and did not cease until they had thrown over 14 male passengers. These, with the exception of two married men and a small boy, constituted all the male passengers aboard. Not one of the crew was cast over. One of them, the cook, was a negro.

It was among the facts of this case that, during these solemn and distressful hours, scarce a remark appeared to have been made in regard to what was going to be done, nor, while it was being done, as to the necessity for doing it. None of the crew of the long-boat were present at the trial, to testify, and, with the exception of one small boy, all the witnesses from the long-boat were women,—mostly quite young. It is probable that, by Tuesday night (the weather being cold, the persons on the boat partially naked, and the rain falling heavily), the witnesses had become considerably overpowered by exhaustion and cold, having been 24 hours in the boat. None of them spoke in a manner entirely explicit and satisfactory in regard to the most important point, viz. the degree and imminence of the jeopardy at 10 o'clock on Tuesday night, when the throwing over began. As has been stated, few words were spoken. It appeared, only, that, about 10 o'clock of Tuesday night, it being then dark, the rain falling rather heavily, the sea somewhat freshening, and the boat having considerable water in it, the mate, who had been bailing for some time, gave it up, exclaiming: "This work won't do. Help me, God. Men, go to work." Some of the passengers cried out, about the same time: "The boat is sinking. The plug's out. God have mercy on our poor souls." Holmes and the crew did not proceed upon this order; and after a little while, the mate exclaimed again: "Men, you must go to work, or we shall all perish." They then went to work; and, as has been already stated, threw out, before they ended, 14 male passengers, and also 2 women.[5] The mate directed the crew "not to part man and wife, and not to throw over any women." There was no other principle of selection. There was no evidence of combination among the crew. No lots were cast, nor had the passengers, at any time, been either informed or consulted as to what was now done. Holmes was one of the persons who assisted in throwing the passengers over. The first man thrown over was one Riley, whom Holmes and the others told to stand up, which he did. They then threw him over, and afterwards Duffy, who, in vain, besought them to spare him, for the sake of his wife and children, who were on shore. They then seized a third man, but, his wife being aboard, he was spared. Coming to Charles Conlin, the man exclaimed: "Holmes, dear, sure you won't put me out?" "Yes, Charley," said Holmes, "you must go, too." And so he was thrown over. Next was Francis Askin, for the manslaughter of whom the prisoner was indicted. When laid hold of, he offered Holmes five sovereigns to spare his life till morning, "when," said he, "if God don't send us some help, we'll draw lots, and if the lot falls on me, I'll go over like a man." Holmes said, "I don't want your money, Frank," and put him overboard.

[5] It was a matter of doubt whether these women (two sisters of Frank Askin, an Irish youth, spoken of further on) had been thrown over, or whether their sacrifice was an act of self-devotion and affection to their brother. When Holmes seized him, his sisters entreated for his life, and said that if he was thrown over they wished to be thrown over too; that "they wished to die the death of their brother." "Give me only a dress to put around me," said one of the sisters, after her brother had been thrown out, "and I care not now to live longer."

When one McAvoy was seized, he asked for five minutes to say his prayers, and, at the interposition of a negro, the cook, was allowed time to say them before he was cast overboard. It appeared, also, that when Askin was put out, he had struggled violently, yet the boat had not sunk. Two men, very stiff with cold, who had hidden themselves, were thrown over after daylight on Wednesday morning, when, clearly, there was no necessity for it.[6] On Wednesday morning, while yet in the boat, some of the witnesses had told the crew that they (i. e. the crew) should be made to die the death they had given to the others. The boat had provisions for six or seven days, close allowance; that is to say, 75 pounds of bread, 6 gallons of water, 8 or 10 pounds of meat, and a small bag of oatmeal. The mate had a chart, quadrant and compass. The weather was cold, and the passengers, being half clothed, much benumbed. On Wednesday morning the weather cleared, and early in the morning the long-boat was picked up by the ship "Crescent." All the persons who had not been thrown overboard were thus saved.

On the other hand the character of the prisoner stood forth, in many points, in manly and interesting relief. A Finn by birth, he had followed the sea from youth, and his frame and countenance would have made an artist's model for decision and strength. He had been the last man of the crew to leave the sinking ship. His efforts to save the passengers, at the time the ship struck, had been conspicuous, and, but that they were in discharge of duty, would have been called self-forgetful and most generous.[7] As a sailor, his captain and the second mate testified that he had ever been obedient to orders, faithful to his duty, and efficient in the performance of it,—"remarkably so," said the second mate. "He was kind and obliging in every respect," said the captain, "to the passengers, to his shipmates, and to everybody. Never heard one speak against him. He was always obedient to officers. I never had a better man on board ship. He was a first-rate man." (Captain's deposition.) While on the long-boat, in order to protect the women, he had parted with all his clothes, except his shirt and pantaloons; and his conduct and language to the women were kind. After Askin had been thrown out, some one asked if any more were to be thrown over. "No," said Holmes, "no more shall be thrown over. If any more are lost, we will all be lost together." Of both passengers and crew, he finally became the only one whose energies and whose hopes did not sink into prostration. He was the first to descry the vessel which took them up, and by his exertions the ship was made to see, and, finally, to save, them.[8]

The prisoner was indicted under the act of April 30, 1790, "for the punishment of cer-

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[6] The exact condition of these two men did not appear. Some of the witnesses thought that they were too much frozen to recover. Others swore differently.

[7] On board the long-boat, a widowed mother, a Scotswoman, and her three daughters had escaped; but, just as the boat was about veering astern, and when there was great danger of being drawn into the vortex of the sinking ship, it was discovered that one of the family, a sick sister, had been left behind in the ship. Her mother was calling, "Isabel, Isabel, come, come!" But the girl was too sick to hear or to mind. Holmes, hearing the mother's cry, climbed up the ship's side (at great peril of his life, as was testified), ran astern, and, hoisting the sick girl upon his shoulders, swung himself and her over, by the tackle, by one arm, into the long-boat below. "O, mother, I am coming, I am coming!" responded the girl, as Holmes was lowering himself and her along the ship's side. On the trial, Holmes' counsel, after describing, with effect, the earlier circumstances of the catastrophe, thus opened his defence: "But hark, gentlemen! On that dreadful night, the crew and half the passengers having taken to the boats, the agonized voice of a mother is heard, even beyond the tumult and the outcry, calling for the preservation of her daughter, who, in the consternation of the moment, had been forgotten, and remained on board the fated ship. In an instant you see an athletic sailor passing hand over hand, by means of a slender rope, until he regains the vessel. Behold him now on the quarter-deck, with one arm entwined around a sickly and half naked girl, in the depth of the night, surrounded by icebergs and the ocean, while, with the other, he swings himself and his almost lifeless burthen from the stern of the sinking ship into the boat below, and restores the child at once to the open arms and yearning heart of her mother. Yet, today, gentlemen, there, before you, sits that selfsame heroic sailor, arraigned upon the charge of having voluntarily and feloniously deprived a fellow creature of his life: and that, gentlemen, is the charge which you are summoned here to determine."

[8] "The passengers, on Wednesday morning," said one of the witnesses, "looked very distressed; and Holmes told them to keep their hearts up." "The mate," said another witness, "asked the men what he should do. Holmes said we ought not to steer for Newfoundland, as we would never reach it, but to go south, as it would be warmer, and we might meet a vessel. The mate said he would do as Holmes wanted. He would give up all to Holmes. * * * I saw Holmes with a quilt. He tried to raise it to make a sail, but the wind was too strong. He then stood up and said that he saw the mast of a vessel, and afterwards got to work to raise a shawl on the end of an oar." In fact, as appeared by other parts of the testimony, Holmes' long-trained, labouring eye descried the Crescent's main-mast, in the distance, several minutes before it was at all visible to anybody on board: and, while most of the boat's assemblage lay yet exhausted or despairing, he had raised the signal of distress. His coolness and deep knowledge of sea life were not less manifested now, than his physical superiority had been before. The great distance of the Crescent rendered it almost impossible that Holmes' signal should be seen. The second mate of the vessel happened, however, to be aloft, watching for ice; and as soon as the ship, responding to the signal, put about, the voice of exultant joy and gratitude burst forth from the wretched assemblage on the long-boat. Some were crawling up the side of the boat to see the approaching vessel, and others, who had seemed congealed, now stood erect; "Lie down," said Holmes, "every soul of you, and be still." "If they make so many of us on board, they will steer off another way and pretend they have not seen us."

tain crimes against the United States" (1 Story's Laws, 83 [1 Stat. 115]), an act which ordains (section 12) that if any seaman, &c., shall commit manslaughter upon the high seas, &c., on conviction, he shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars. The indictment charged that Holmes—First, with force, &c., "unlawfully and feloniously" did make an assault, &c., and cast and throw Askin from a vessel, belonging, &c., whose name was unknown, into the high seas, by means of which, &c., Askin, in and with the waters thereof then and there was suffocated and drowned; second, in the same way, on board the long-boat of the ship William Brown, belonging, &c., did make an assault, &c., and cast, &c. The trial of the prisoner came on upon the 13th of April, 1842, a few days before the anniversary of the calamitous events referred to. The case was replete with incidents of deep romance, and of pathetic interest. These, not being connected with the law of the case, of course do not appear in this report; but they had become known, in a general way, to the public, before the trial; and on the day assigned for the trial, at the opening of the court, several stenographers connected with the newspaper press appeared within the bar, ready to report the evidence for their expectant readers.

BALDWIN, Circuit Justice, on taking his seat, now said: "By an act of congress, passed some years since,[9] the court has no longer the power to punish, as for contempt, the publication of testimony pending a trial before us. We have, however, the power to regulate the admissions of persons and the character of proceedings within our own bar; and, as the court perceives several persons apparently connected with the daily press, whose object, we presume, is to report the proceedings and evidence in this case, as it advances, the court takes occasion to state that no person will be allowed to come within the bar of the court for the purpose of reporting, except on condition of suspending all publication till after the trial is concluded. On compliance with this condition, and not otherwise, the court will direct that a convenient place be afforded to the reporters of the press."

The reporters expressed their acquiescence in this order of the court, and the most respectful silence, on the part of the press, prevailed during the whole trial.

The prosecution was conducted by Mr. Wm. M. Meredith, U. S. Dist. Atty., Mr. Dallas, and O. Hopkinson; the defence by David Paul Brown, Mr. Hazlehurst, and Mr. Armstrong.

Mr. Dallas. The prisoner is charged with "unlawful homicide," as distinguished from that sort which is malicious. His defence is that the homicide was necessary to self-preservation. First, then, we ask: Was the homicide thus necessary? That is to say, was the danger instant, overwhelming, leaving no choice of means, no moment for deliberation? For, unless the danger were of this sort, the prisoner, under any admission, had no right, without notice or consultation, or lot, to sacrifice the lives of 16 fellow beings. Peril, even extreme peril, is not enough to justify a sacrifice such as this was. Nor would even the certainty of death be enough, if death were yet prospective. It must be instant. The law regards every man's life as of equal value. It regards it, likewise, as of sacred value. Nor may any man take away his brother's life, but where the sacrifice is indispensable to save his own. (Mr. Dallas then examined the evidence, and contended that the danger was not so extreme as is requisite to justify homicide.) But it will be answered, that death being certain, there was no obligation to wait until the moment of death had arrived. Admitting, then, the fact that death was certain, and that the safety of some persons was to be promoted by an early sacrifice of the others, what law, we ask, gives a crew, in such a case, to be the arbiters of life and death, settling, for themselves, both the time and the extent of the necessity? No. We protest against giving to seamen the power thus to make jettison of human beings, as of so much cargo; of allowing sailors, for their own safety, to throw overboard, whenever they may like, whomsoever they may choose. If the mate and seamen believed that the ultimate safety of a portion was to be advanced by the sacrifice of another portion, it was the clear duty of that officer, and of the seamen, to give full notice to all on board. Common settlement would, then, have fixed the principle of sacrifice, and, the mode of selection involving all, a sacrifice of any would have been resorted to only in dire extremity. Thus far, the argument admits that, at sea. sailor and passenger stand upon the same base, and in equal relations. But we take, third, stronger ground. The seaman, we hold, is bound, beyond the passenger, to encounter the perils of the sea. To the last extremity, to death itself, must he protect the passenger. It is his duty. It is on account of these risks that he is paid. It is because the sailor is expected to expose himself to every danger, that, beyond all mankind, by every law, his wages are se-

[9] Act March 2, 1831 (4 Story's Laws U. S. 2256), by which it is enacted "that the power of the several courts of the United States to issue attachments and inflict summary punishments for contempt of court, shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts, in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree or command of the said courts."

cured to him It is for this exposure that the seamen's claims are a "sacred lien," and "that if only a single nail of the ship is left, they are entitled to it." 3 Kent, Comm. 197, and in note. Exposure, risk, hardship, death, are the sailor's vocation,—the seaman's daily bread. He must perform whatever belongs to his duty. To this effect speaks Lord Bacon, when he says "that the law imposeth it upon every subject that he prefer the urgent service of his prince and country before the safety of his life." His lordship goes on to say that, "if a man be commanded to bring ordnance or munition to relieve any of the king's towns that are distressed, then he cannot, for any danger of tempest, justify the throwing of them overboard; for there it holdeth which was spoken by the Roman when he alleged the same necessity of weather to hold him from embarking: 'Necesse est et ut eam; non ut vivam.'" 13 Bacon's Works, by Montagu (Lond. 1831) p. 161.[10] No other doctrine than this one can be adopted. Promulgate as law that the prisoner is guiltless, and our marine will be disgraced in the eyes of civilized nations. The thousand ships which now traverse the ocean in safety will be consigned to the absolute power of their crews, and, worse than the dangers of the sea, will be added such as come from the violence of men more reckless than any upon earth.

Mr. Armstrong opened the defence, and was followed by Mr. Brown.

We protest against the prisoner being made a victim to the reputation of the marine law of the country. It cannot be, God forbid that it should ever be, that the sacrifice of innocence shall be the price at which the name and honour of American jurisprudence is to be preserved in this country, or in foreign lands. The malediction of an unrighteous sentence will rest more heavily on the law, than on the prisoner. This court (it would be indecent to think otherwise) will administer the law, "uncaring consequences." But this case should be tried in a long-boat, sunk down to its very gunwale with 41 half naked, starved, and shivering wretches,—the boat leaking from below, filling from above, a hundred leagues from land, at midnight, surrounded by ice, unmanageable from its load, and subject to certain destruction from the change of the most changeful of the elements, the winds and the waves. To these superadd the horrours of famine and the recklessness of despair, madness, and all the prospects, past utterance, of this unutterable condition. Fairly to sit in judgment on the prisoner, we should, then, be actually translated to his situation. It was a conjuncture which no fancy can image. Terrour had assumed the throne of reason, and passion had become judgment. Are the United States to come here, now, a year after the events, when it is impossible to estimate the elements which combined to make the risk, or to say to what extent the jeopardy was imminent? Are they, with square, rule and compass, deliberately to measure this boat, in this room, to weigh these passengers, call in philosophers, discuss specific gravities, calculate by the tables of a life insurance company the chances of life, and because they, these judges, find that, by their calculation, this unfortunate boat's crew might have had the thousandth part of one poor chance of escape, to condemn this prisoner to chains and a dungeon, for what he did in the terrour and darkness of that dark and terrible night. Such a mode of testing men's acts and motives is monstrous. We contend, therefore, that what is honestly and reasonably believed to be certain death will justify self-defence to the degree requisite for excuse. According to Dr. Rutherford (Inst. Nat. Law, bk. 1, c. 16, § 5): "This law,"—i. e. the law of nature,—"cannot be supposed to oblige a man to expose his life to such dangers as may be guarded against, and to wait till the danger is just coming upon him, before it allows him to secure himself." In other words, he need not wait till the certainty of the danger has been proved, past doubt, by its result. Yet this is the doctrine of the prosecution. They ask us to wait until the boat has sunk. We may, then, make an effort to prevent her from sinking. They tell us to wait till all are drowned. We may, then, make endeavours to save a part. They command us to stand still till we are all lost past possibility of redemption, and then we may rescue as many as can be saved. Where the danger is instantaneous, the mind is too much disturbed, says Rutherford, in a passage hereafter cited, to deliberate upon the method of providing for one's own safety, with the least hurt to an aggressor. The same author then proceeds: "I see not, therefore, any want of benevolence which can be

[10] The navy and army chronicles of England record many examples of Bacon's noble thought: "The duties of life are more than life." And certainly, in whatever circumstances witnessed, such testimonials will prove a vindication of all that counsel here asserted. But most of these heroic examples (some of which were cited in the argument) have been on the part of officers, in England especially, men of high associations, and often highly educated. And we are ready to resolve much into the instinct of discipline, and much, perhaps, into the incentive of ambition, seeking the bubble reputation. An example more impressive than any of these, as it was that of a common sailor, occurred in our country, on Lake Erie, in the destruction of the steamboat Erie by fire, on the afternoon of the 9th of August, 1841. As soon as it was discovered that the flames could not be controlled, the captain ordered the helmsman to make for land, then within sight. The man accordingly turned the vessel. The fire having taken near midships, quickly reached the binnacle. Yet the man kept his post, and his hand was on the wheel. The wreathing flames ere long enclosed him, and when every soul had left the ship, his form was still to be seen amidst the flames, his clothes dropping from him, standing like a man of steel, and in performance of his duty, steering the flaming vessel to a headland.

reasonably charged upon a man in these circumstances, if he takes the most obvious way of preserving himself, though perhaps some other method might have been found out, which would have preserved him as effectually, and have produced less hurt to the aggressor, if he had been calm enough, and had been allowed time enough to deliberate about it." Rutherf. Inst. Nat. Law, bk. 1, c. 16, § 5. Nor is this the language of approved text writers alone. The doctrine has the solemnity of judicial establishment. In Grainger v. State, 5 Yerg. 459, the supreme court of Tennessee deliberately adjudge, that "if a man, though in no great danger of serious bodily harm, through fear, alarm, or cowardice, kill another under the impression that great bodily injury is about to be inflicted on him, it is neither manslaughter nor murder, but self-defence." "It is a different thing," say the supreme court of the United States, in The Mariana Flora, 11 Wheat. [24 U. S.] 51, "to sit in judgment upon this case, after full legal investigations, aided by the regular evidence of all parties, and to draw conclusions at sea, with very imperfect means of ascertaining facts and principles which ought to direct the judgment." The decision in the case just cited, carried out this principle into practice, as the case of The Louis, 2 Dod. 264, decided by Sir William Scott, had done before. The counsel cited Lord Bacon, likewise (Works, by Montagu, vol. 13, Lond. 1831, p. 160), and 4 Bl. Comm. p. 186. But the prospect of sinking was not imaginary. It was well founded. It is not to be supposed that Holmes, who, from infancy, had been a child of the ocean, was causelessly alarmed; and, there being no pretence of animosity, but the contrary, we must infer that the peril was extreme. As regards the two men cast over on Wednesday, the presumption is that they were either frozen, or freezing to death. There being, at this time, no prospect of relief, the act is deprived of its barbarity. The evidence is that the two men were "very stiff with cold." Besides, this indictment is in regard to Askin alone. There is no evidence of inhumanity on Tuesday night, when this throwing over began; though it is possible enough, that, having proceeded so far in the work of horrour, the feelings of the crew became, at last, so disordered as to become unnatural. (The learned counsel then examined the evidence, in order to shew the extremity of the danger.)

Counsel say that lots are the law of the ocean. Lots, in cases of famine, where means of subsistence are wanting for all the crew, is what the history of maritime disaster records; but who has ever told of casting lots at midnight, in a sinking boat, in the midst of darkness, of rain, of terrour, and of confusion? To cast lots when all are going down, but to decide who shall be spared, to cast lots when the question is, whether any can be saved, is a plan easy to suggest, rather difficult to put in practice. The danger was instantaneous, a case, says Rutherford (Inst. Nat. Law, bk. 1, c. 16, § 5), when "the mind is too much disturbed to deliberate," and where, if it were "more calm," there is no time for deliberation. The sailors adopted the only principle of selection which was possible in an emergency like theirs,—a principle more humane than lots. Man and wife were not torn asunder, and the women were all preserved. Lots would have rendered impossible this clear dictate of humanity. But again: The crew either were in their ordinary and original state of subordination to their officers, or they were in a state of nature. If in the former state, they are excusable in law, for having obeyed the order of the mate,—an order twice imperatively given. Independent of the mate's general authority in the captain's absence, the captain had pointedly directed the crew to obey all the mate's orders as they would his, the captain's; and the crew had promised to do so. It imports not to declare that a crew is not bound to obey an unlawful order, for to say that this order was unlawful is to postulate what remains to be proved. Who is to judge of the unlawfulness? The circumstances were peculiar. The occasion was emergent, without precedent, or parallel. The lawfulness of the order is the very question which we are disputing; a question about which this whole community has been agitated, and is still divided; the discussion of which crowds this room with auditors past former example; a question which this court, with all its resources, is now engaged in considering, as such a question demands to be considered, most deliberately, most anxiously, most cautiously. It is no part of a sailor's duty to moralize and to speculate, in such a moment as this was, upon the orders of his superiour officers. The commander of a ship, like the commander of an army, "gives desperate commands. He requires instantaneous obedience." The sailor, like the soldier, obeys by instinct. In the memorable, immortal words of Carnot, when he surrendered Antwerp in obedience to a command which his pride, his patriotism, and his views of policy all combined to oppose: "The armed force is essentially obedient. It acts, but never deliberates." This greatest man of the French Revolution did here but define, with the precision of the algebraist, what he conceived with the comprehension of a statesman; and his answer was justification with every soldier in Europe. How far the principle was felt by this crew, let witness the case of this very mate, and of some of these very sailors, who, by the captain's order, left the jolly-boat, which had but 10 persons, for the long-boat, with more than four times that number. See ante, p. 360, note 2. They all regarded this as going into the jaws of death. Yet not a murmur. It is a well-known fact that in no marine on the ocean is obedience to orders so habitual and so implicit as in our own. The prisoner had been always distinguished

by obedience. Whether the mate, if on trial here, would be found innocent, is a question which we need not decide. That question is a different one from the guilt or innocence of the prisoner, and one more difficult. But if the whole company were reduced to a state of nature, then the sailors were bound to no duty, not mutual, to the passengers. The contract of the shipping articles had become dissolved by an unforeseen and overwhelming necessity. The sailor was no longer a sailor, but a drowning man. Having fairly done his duty to the last extremity, he was not to lose the rights of a human being, because he wore a roundabout instead of a frock coat. We do not seek authorities for such doctrine. The instinct of these men's hearts is our authority,—the best authority. Whoever opposes it must be wrong, for he opposes human nature. All the contemplated conditions, all the contemplated possibilities of the voyage, were ended. The parties, sailor and passenger, were in a new state. All persons on board the vessel became equal. All became their own lawgivers; for artificial distinctions cease to prevail when men are reduced to the equality of nature. Every man on board had a right to make law with his own right hand, and the law which did prevail on that awful night having been the law of necessity, and the law of nature too, it is the law which will be upheld by this court, to the liberation of this prisoner.

On the 22d of April, the same day, Mr. Meredith, district attorney, replied, speaking principally to the evidence.

BALDWIN, Circuit Justice, charging jury, alluded to the touching character of the case; and, after stating to the jury what was the offence laid in the indictment, his honour explained, with particularity, the distinction between murder and manslaughter. He said that malice was of the essence of murder, while want of criminal intention was consistent with the nature of manslaughter. He impressed strongly upon the jury, that the mere absence of malice did not render homicide excusable; that the act might be unlawful, as well as the union of the act and intention, in which union consisted the crime of murder. After giving several familiar instances of manslaughter, to explain that, although homicide was committed, there was yet an absence of bad motive, his honour proceeded with his charge nearly as follows:

In such cases the law neither excuses the act nor permits it to be justified as innocent; but, although inflicting some punishment, she yet looks with a benignant eye, through the thing done, to the mind and to the heart; and when, on a view of all the circumstances connected with the act, no evil spirit is discerned, her humanity forbids the exaction of life for life. But though, said the court, cases of this kind are viewed with tenderness, and punished in mercy, we must yet bear in mind that man, in taking away the life of a fellow being, assumes an awful responsibility to God, and to society; and that the administrators of public justice do themselves assume that responsibility if, when called on to pass judicially upon the act, they yield to the indulgence of misapplied humanity. It is one thing to give a favourable interpretation to evidence in order to mitigate an offence. It is a different thing, when we are asked, not to extenuate, but to justify, the act. In the former case, as I have said, our decision may in some degree be swayed by feelings of humanity; while, in the latter, it is the law of necessity alone which can disarm the vindicatory justice of the country. Where, indeed, a case does arise, embraced by this "law of necessity," the penal laws pass over such case in silence; for law is made to meet but the ordinary exigencies of life. But the case does not become "a case of necessity," unless all ordinary means of self preservation have been exhausted. The peril must be instant, overwhelming, leaving no alternative but to lose our own life, or to take the life of another person. An illustration of this principle occurs in the ordinary case of self-defense against lawless violence, aiming at the destruction of life, or designing to inflict grievous injury to the person; and within this range may fall the taking of life under other circumstances where the act is indispensably requisite to self-existence. For example, suppose that two persons who owe no duty to one another that is not mutual, should, by accident, not attributable to either, be placed in a situation where both cannot survive. Neither is bound to save the other's life by sacrificing his own, nor would either commit a crime in saving his own life in a struggle for the only means of safety. Of this description of cases are those which have been cited to you by counsel, from writers on natural law,—cases which we rather leave to your imagination than attempt minutely to describe. And I again state that when this great "law of necessity" does apply, and is not improperly exercised, the taking of life is devested of unlawfulness.

But in applying this law, we must look, not only to the jeopardy in which the parties are, but also to the relations in which they stand. The slayer must be under no obligation to make his own safety secondary to the safety of others. A familiar application of this principle presents itself in the obligations which rest upon the owners of stages, steamboats, and other vehicles of transportation. In consideration of the payment of fare, the owners of the vehicle are bound to transport the passengers to the place of contemplated destination. Having, in all emergencies, the conduct of the journey, and the control of the passengers, the owners rest under every obligation for care, skill, and general capacity; and if, from defect of any of these requisites, grievous injury is done

to the passenger, the persons employed are liable. The passenger owes no duty but submission. He is under no obligation to protect and keep the conductor in safety, nor is the passenger bound to labour, except in cases of emergency, where his services are required by unanticipated and uncommon danger. Such, said the court, is the relation which exists on shipboard. The passenger stands in a position different from that of the officers and seamen. It is the sailor who must encounter the hardships and perils of the voyage. Nor can this relation be changed when the ship is lost by tempest or other danger of the sea, and all on board have betaken themselves, for safety, to the small boats; for imminence of danger can not absolve from duty. The sailor is bound, as before, to undergo whatever hazard is necessary to preserve the boat and the passengers. Should the emergency become so extreme as to call for the sacrifice of life, there can be no reason why the law does not still remain the same. The passenger, not being bound either to labour or to incur the risk of life, cannot be bound to sacrifice his existence to preserve the sailor's. The captain, indeed, and a sufficient number of seamen to navigate the boat, must be preserved; for, except these abide in the ship, all will perish. But if there be more seamen than are necessary to manage the boat, the supernumerary sailors have no right, for their safety, to sacrifice the passengers. The sailors and passengers, in fact, cannot be regarded as in equal positions. The sailor (to use the language of a distinguished writer) owes more benevolence to another than to himself. He is bound to set a greater value on the life of others than on his own. And while we admit that sailor and sailor may lawfully struggle with each other for the plank which can save but one, we think that, if the passenger is on the plank, even "the law of necessity" justifies not the sailor who takes it from him. This rule may be deemed a harsh one towards the sailor, who may have thus far done his duty, but when the danger is so extreme, that the only hope is in sacrificing either a sailor or a passenger, any alternative is hard; and would it not be the hardest of any to sacrifice a passenger in order to save a supernumerary sailor?

But, in addition, if the source of the danger have been obvious, and destruction ascertained to be certainly about to arrive, though at a future time, there should be consultation, and some mode of selection fixed; by which those in equal relations may have equal chance for their life. By what mode, then, should selection be made? The question is not without difficulty; nor do we know of any rule prescribed, either by statute or by common law, or even by speculative writers on the law of nature. In fact, no rule of general application can be prescribed for contingencies which are wholly unforeseen. There is, however, one condition of extremity for which all writers have prescribed the same rule. When the ship is in no danger of sinking, but all sustenance is exhausted, and a sacrifice of one person is necessary to appease the hunger of others, the selection is by lot. This mode is resorted to as the fairest mode, and, in some sort, as an appeal to God, for selection of the victim. This manner, obviously, was regarded by the mate, in parting with the captain, as the one which it was proper to adopt, in case the long-boat could not live with all who were on board on Tuesday morning. The same manner, as would appear from the response given to the mate, had already suggested itself to the captain. For ourselves, we can conceive of no mode so consonant both to humanity and to justice; and the occasion, we think, must be peculiar which will dispense with its exercise. If, indeed, the peril be instant and overwhelming, leaving no chance of means, and no moment for deliberation, then, of course, there is no power to consult, to cast lots, or in any such way to decide; but even where the final disaster is thus sudden, if it have been foreseen as certainly about to arrive, if no new cause of danger have arisen to bring on the closing catastrophe, if time have existed to cast lots, and to select the victims, then, as we have said, sortition should be adopted. In no other than this or some like way are those having equal rights put upon an equal footing, and in no other way is it possible to guard against partiality and oppression, violence and conflict. What scene, indeed, more horrible, can imagination draw than a struggle between sailor and sailor, passenger and passenger, or, it may be, a mixed affray, in which, promiscuously, all destroy one another? This, too, in circumstances which have allowed time to decide, with justice, whose life should be calmly surrendered.

When the selection has been made by lots, the victim yields of course to his fate, or, if he resist, force may be employed to coerce submission. Whether or not "a case of necessity" has arisen, or whether the law under which death has been inflicted have been so exercised as to hold the executioner harmless, cannot depend on his own opinion; for no man may pass upon his own conduct when it concerns the rights, and especially, when it affects the lives, of others. We have already stated to you that, by the law of the land, homicide is sometimes justifiable; and the law defines the occasions in which it is so. The transaction must, therefore, be justified to the law; and the person accused rests under obligation to satisfy those who judicially scrutinize his case that it really transcended ordinary rules. In fact, any other principle would be followed by pernicious results, and, moreover, would not be practicable in application. Opinion or belief may be assumed, whether it exist or not; and if this mere opinion of the sailors will justify them in making a sacrifice of the passengers, of course,

the mere opinion of the passengers would, in turn, justify these in making a sacrifice of the sailors. The passengers may have confidence in their own capacity to manage and preserve the boat, or the effort of either sailors or passengers to save the boat, may be clearly unavailing; and what, then, in a struggle against force and numbers, becomes of the safety of the seamen? Hard as is a seaman's life, would it not become yet more perilous if the passengers, who may outnumber them tenfold, should be allowed to judge when the dangers of the sea will justify a sacrifice of life? We are, therefore, satisfied, that, in requiring proof, which shall be satisfactory to you, of the existence of the necessity, we are fixing the rule which is, not merely the only one which is practicable, but, moreover, the only one which will secure the safety of the sailors themselves.

The court said, briefly, that the principles which had been laid down by them, as applicable to the crew, applied to the mate likewise, and that his order (on which much stress had been laid), if an unlawful order, would be no justification to the seamen, for that even seamen are not justified, in law, by obedience to commands which are unlawful. The court added that the case was one which involved questions of gravest consideration, and, as the facts, in some sort, were without precedent, that the court preferred to state the law, in the shape of such general principles as would comprehend the case, under any view which the jury might take of the evidence.

After a few remarks upon the evidence, the case was given to the jury, who, about 16 hours afterwards, and after having once returned to the bar, unable to agree, with some difficulty, found a verdict of guilty. The prisoner was, however, recommended to the mercy of the court. On the same day a rule was obtained to show cause why judgment should not be arrested and a new trial granted. The following ground was relied on for a new trial: Because the court, instead of telling the jury that, in a state of imminent and deadly peril, all men are reduced to a state of nature, and that there is, then, no distinction between the rights of sailor and passenger, adopted a contrary doctrine, and charged the jury accordingly.

Mr. Brown subsequently showed cause. He insisted largely upon the existence of the state of nature, as distinguished from the social state, and contended that to this state of nature the persons in the long-boat had become reduced on Tuesday night, at 10 o'clock, when Askin was thrown overboard. He iterated, illustrated, and enforced the argument contained in the closing part of the defence. For the arrest of judgment he argued that the indictment was defective in not stating the name of the boat on which the homicide was alleged to have been committed; that the counts in this respect wanted certainty. The United States did not reply.

THE COURT held the application for some days under advisement, and, at a subsequent day, discharged the rule. They said that, during the trial (aware that no similar case was recorded in juridical annals), they had given to the subject studious and deliberate consideration, and they had paid like regard to what was now urged, but that, notwithstanding all that had been said (and the arguments, it was admitted, were powerful), no error had been perceived by the court in its instructions to the jury. It is true, said the court, as is known by every one, that we do find in the text writers, and sometimes in judicial opinions, the phrases, "the law of nature," "the principles of natural right," and other expressions of a like signification; but, as applied to civilized men, nothing more can be meant by those expressions than that there are certain great and fundamental principles of justice which, in the constitution of nature, lie at the foundation and make part of all civil law, independently of express adoption or enactment. And to give to the expressions any other signification, to claim them as shewing an independent code, and one contrariant to those settled principles, which, however modified, make a part of civil law in all Christian nations, would be to make the writers who use the expressions law down as rules of action, principles which, in their nature, admit of no practical ascertainment or application. The law of nature forms part of the municipal law; and, in a proper case (as of self-defence), homicide is justifiable, not because the municipal law is subverted by the law of nature, but because no rule of the municipal law makes homicide, in such cases, criminal. It is, said the court, the municipal or civil law, as thus comprehensive, as founded in moral and social justice,—the law of the land, in short, as existing and administered amongst us and all enlightened nations,—that regulates the social duties of men, the duties of man towards his neighbour, everywhere. Everywhere are civilized men under its protection; everywhere, subject to its authority. It is part of the universal law. We cannot escape it in a case where it is applicable; and if, for the decision of any question, the proper rule is to be found in the municipal law, no code can be referred to as annulling its authority. Varying however, or however modified, the laws of all civilized nations, and, indeed, the very nature of the social constitution, place sailors and passengers in different relations. And, without stopping to speculate upon overnice questions not before us, or to involve ourselves in the labyrinth of ethical subtleties, we may safely say that the sailor's duty is the protection of the persons intrusted to his care, not their sacrifice,—a duty we must again declare our opinion, that rests on him in every emergency of his calling, and from which it would be senseless, indeed, to ab-

solve him exactly at those times when the obligation is most needed.

Respecting the form of the counts, the court said that the locality of the offence was sufficiently expressed, and that, in a case so peculiar, it was impossible to express the place with more precision.

When the prisoner was brought up for sentence, the learned judge said to him, that many circumstances in the affair were of a character to commend him to regard, yet, that the case was one in which some punishment was demanded; that it was in the power of the court to inflict the penalty of an imprisonment for a term of three years, and a fine of $1,000, but, in view of all the circumstances, and especially as the prisoner had been already confined in gaol several months, that the court would make the punishment more lenient. The convict was then sentenced to undergo an imprisonment in the Eastern Penitentiary of Pennsylvania, (solitary confinement) at hard labour, for the term of six months, and to pay a fine of $20.

NOTE. Considerable sympathy having been excited in favour of Holmes, by the popular press, an effort was made by several persons, and particularly by the Seamen's Friend Society, to obtain a pardon from the executive. President Tyler refused, however, to grant any pardon, in consequence of the court's not uniting in the application. The penalty was subsequently remitted.

Case No. 15,384.

UNITED STATES v. HOLTSCLAW.

[1 Brunner, Col. Cas. 31;[1] 2 Hawy. N. C. 379.]

Circuit Court, D. North Carolina. 1805.

EXPERT EVIDENCE — PROOF OF HANDWRITING — BANK BILLS.

The signatures of the president and cashier of a bank may be proved by persons who never saw them write, but whose business has made them conversant with bank bills; and the judgment of persons well acquainted with bank notes is sufficient to determine whether a note be genuine or forged.

At law.

PER CURIAM. The objection made by Mr. Seawell that no one shall speak as to the handwriting of the president and cashier of the bank, but one who has seen them write, or has been in the habit of receiving letters from them in a course of correspondence, is not a sound one. These signatures are known to the public, and persons who have been in the habit of distinguishing the genuine from the counterfeit signature, and conversant in dealings for bank bills, are as well qualified to determine of their genuineness, as persons who in private correspondence have received letters from the person whose handwriting is in question. Moreover, it is determined by the skillful whether a bill be genuine, not only by the signature, but also by the face of the bill, and by the exact conformity of the devices which are used for the detection of counterfeits, to those in true bills. We are of opinion that the judgment of persons well acquainted with bank paper is sufficient evidence to determine whether the one in question be genuine or otherwise.

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

Case No. 15,385.

UNITED STATES v. HOOD.

[2 Cranch, C. C. 133.][1]

Circuit Court, District of Columbia. April Term, 1817.

GAMING—VIOLATION OF MUNICIPAL ORDINANCE—COMMON LAW OFFENCE.

A conviction of the offence of keeping a faro-bank, contrary to a by-law of the corporation of Alexandria, is no bar to an indictment at common law for keeping a disorderly house, supported by the same evidence.

Indictment [against Robin Hood], at common law, for keeping a disorderly house. The evidence was that he kept a faro-bank in a room at McLaughlin's Tavern. It also appeared that he had been convicted and fined, by the mayor of Alexandria, under a by-law of the corporation, for keeping the faro-bank.

R. J. Taylor, for defendant, contended that that conviction was a bar to the present prosecution.

But THE COURT (THRUSTON, Circuit Judge, absent) decided that it was no bar. He offended against two laws. The by-law could not repeal the general law of the land. It is not the same offence.

Case No. 15,386.

UNITED STATES v. HOOE et al.

[1 Cranch, C. C. 116.][1]

Circuit Court, District of Columbia. March Term, 1803.[2]

WRIT OF ERROR—AMENDMENT OF RECORD—POWER OF COURT BELOW.

After a writ of error has been served and returned to the supreme court, the record is no longer before the court below and cannot be amended, although at an adjourned session of the same term, it appear that the writ of error has been dismissed in the court above at the request of the party praying an amendment.

Motion by Mr. Mason, for the United States to amend the record by adding a statement of the case, according to the requisitions of the 19th section of the judiciary act of September 24th, 1789 (1 Stat. 83). It was a suit in equity which, since the last term, had been carried up by writ of error to the supreme court of the United States, and dismissed on the motion of the attorney of the United States, because not accompanied by a statement of the facts upon which

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Affirmed in 3 Cranch (7 U. S.) 73.]

the decree was founded. This being an adjourned session of November term, 1802, the term in which the decree was rendered, it was contended that the decree was still in the power of the court.

Mr. Swann and Mr. Lee, contra. The record is completely out of this court; the cause is no longer here. This court cannot amend a record, which, in contemplation of law, is not before the court.

THE COURT refused to make the statement of facts, because they conceived the whole cause and record were completely out of their power by the writ of error.

CRANCH, Circuit Judge, contra, because if a statement of facts now made, can avail the United States, let them have the benefit of it, if not it can do no harm.

Mr. Mason, then prayed an appeal, and cited the judiciary act of 1789, § 22 (1 Stat. 84), showing that a decree in equity could not be appealed from under that law, the only remedy being a writ of error; and the act of 13th of February, 1801, § 33 (2 Stat. 98), giving an appeal; and the act of 3d of March, 1803, § 2 (2 Stat. 244), containing the same provision as that in the act of 1801, excepting that the act of 1803, expressly applies to decree then already rendered.

Upon that appeal the cause was again carried up to the supreme court, where the decree was affirmed. See U. S. v. Hooe, 3 Cranch [7 U. S.] 73, 78.

Case No. 15,387.

UNITED STATES v. HOOK et al.

[14 Pittsb. Leg. J 361: 3 Pittsb. Rep. 54.]

District Court, W. D. Pennsylvania. May, 1867.

VIOLATIONS OF INTERNAL REVENUE LAWS — CONDEMNATION OF PROPERTY—RIGHTS OF INFORMER.

On a sale of property condemned as forfeited for violation of the United States internal revenue laws, the informer, under the forty-first section of the act of 1864 [13 Stat. 223], is entitled to claim one-half of the proceeds, the same as in case of penalties.

Libel of information in a cause of forfeiture.

R. B. Carnaham, U. S. Dist. Atty.
Wyley & Buchanan, for informer.

McCANDLESS, District Judge. On the 7th of April, 1866, the collector of the 24th collection district seized the distillery of Hook & Wise, situated in Greene county, together with seventy-two barrels of whiskey, and all the implements of manufacture, for a violation of the laws regulating the internal revenue of the United States. The district attorney, on the 27th of the same month, filed his libel in this court for a forfeiture; and the respondents failing to answer, or even to appear in obedience to the monition, the court, on the 23d July, pronounced sentence of condemnation, and ordered a sale of the forfeited property. Only a part of the proceeds of sale, amounting to about $6,000, have been realized by the marshal, and none as yet, paid into court. This is owing to an outside claimant of part of the whiskey, who is in correspondence with the commissioner of internal revenue.

At this stage of the proceedings, J. W. Scott presents his petition to this court, asking to be declared, in the judgment of the court, the informer,—in the language of the 4th section of the act of 1864, being "the first to inform of the cause, matter or thing whereby such fine, penalty or forfeiture was incurred," and claiming to be entitled as such to a moiety of the forfeiture. It is objected that this distribution of the proceeds is applicable to penalties, and not to forfeitures. But the act makes no discrimination, placing them in the same category; and although one is a fixed sum, readily divisible, and the other a condemnation or appropriation of the offending chattel in specie, yet the act of the government, by its execution, reduces it to money, and renders it susceptible of similar divisions.

It is claimed by the district attorney that there is no informer on the record, and that, the decree of condemnation having been entered without reference to such a party, he is barred from participation in the proceeds of the forfeited property. It must be remembered that these proceedings are in accordance with the practice of courts of admiralty. They are in rem, and the sentence of condemnation must precede any inquiry as to distribution. The suit is instituted in the name of the United States; and as Mr. Justice Washington says, in Sawyer v. Steele [Case No. 12,406], it is not necessary that the informer should accompany the communication which he makes by an assertion of his claim to a share of the forfeiture, or that he should make the seizure, or concern himself with the prosecution by causing its institution, or providing testimony to support it. With all these things he has nothing to do. He may be even ignorant, at the time he gives the information, that he has any claim to assert it. It is sufficient for him to show that the information which he gave caused the prosecution and recovery. By the seizure consequent upon his information, he acquired an inchoate right to moiety of the proceeds, which is consummated on the rendition of the decree,—[The Samuel] 1 Wheat. [14 U. S.] 17; and that although his name nowhere appears upon the record, his position is passive until the fund is ready for distribution; and then, if he satisfies the court that he was "the first to inform of the cause, matter, or thing whereby the forfeiture was incurred," it is the duty of the court, by their judgment, to award to him his moiety, and direct the residue to be paid into the treasury of the United States. The moiety here will be between three and four thousand dollars; but as Judge Washington

says, in the case referred to, "it is no argument to say that this is an unreasonable allowance." The legislature has thought proper to make it, and our duty is to execute its will. The large amount which will accrue in this case to the informer is just what congress designed, to stimulate somebody to detect the enormous frauds practiced upon the revenue, particularly in the manufacture and sale of whiskey. Whether the information is given from motives of gain or public policy, the government is indifferent, so that the culprit is arrested in his criminal career, and stripped of his ill-gotten treasure. The ample sum given is to excite vigilance, and to secure the integrity of the informer by such reward as would place him above any temptation which the offenders could offer him. To deduct the tax of two dollars per gallon from the proceeds of sale, and then allow him one-half of the residue, would be no reward at all. He would deem it a mockery upon public justice, and no one would be willing to incur the odium which sometimes attaches to public informers if such was the bounty of the government. It would be giving him the moiety of something incapable of division,—of nothing; for in most cases of forfeiture, the proceeds of sale would not cover the tax and costs. A sale of the forfeited chattel does not exempt the party from the payment of the tax. He is still liable, although his title to the very property which was the subject of taxation, has been divested.

It only remains to notice the objection caused by the delay in making this application. This is sufficiently accounted for in the proofs. The informer mistook his remedy. At the suggestion of the collector he applied to the department at Washington, and after some delay, was referred to this court, to which the adjudication properly belonged. He is in time. The money has not yet been brought into the registry of the court, and it is subject to our control until it passes into the treasury of the United States.

From the testimony before us, the judgment of the court is that J. W. Scott was the first to inform of the cause, matter or thing whereby his penalty and forfeiture was incurred; and the amount thereof, deducting costs, is directed to be divided equally, one moiety to be paid to the collector of the twenty-fourth district for the use of the United States, and the other moiety to the said J. W. Scott. Decree accordingly.

Case No. 15,387a.

UNITED STATES v. HOPKINS.

[38 Niles, Reg. 256.]

Circuit Court, D. Georgia. May, 1830.

CRIMINAL LAW — FEDERAL JURISDICTION — FORTS AND ARSENALS.

[Under the Georgia statute ceding jurisdiction to the United States only in places purchased by them "for forts or fortifications," with the proviso that "forts and fortifications be erected thereon," the federal courts have no jurisdiction to punish a crime committed upon lands purchased and used for the purposes of an arsenal only.]

The case had its origin in the duel which occurred near Augusta some time since, and terminated in the death of Mr. Nixon. The people of Augusta made application to the governor of this state to demand the offenders. The governor submitted the affidavits to the attorney general, and the attorney general returned them with the answer, that the offence had been committed in a place within the jurisdiction of the United States, and must be prosecuted in their courts. They were accordingly transmitted to the district attorney of the United States, who accordingly preferred bills against the principals and seconds for murder, and also severally against the seconds, for a misdemeanor under the laws of the state, which, as to offences, are made of force in the places ceded to the United States. A motion was now submitted for bench warrants to issue into Carolina, against the parties indicted, and the court took time to look into the acts of the United States and Georgia, to determine whether the United States possessed jurisdiction over the place where the offence was committed. The place was the old arsenal near Augusta, but the act of Georgia then in force cedes jurisdiction only in places purchased by the United States for "forts or fortifications," and with the proviso that "forts and fortifications be erected thereon." This was purchased for an arsenal, and nothing but the buildings appropriate for an arsenal were erected thereon.

THE COURT (JOHNSON, Circuit Justice) were therefore clearly of opinion that the cession of Georgia did not extend to it, and accordingly refused the bench warrant, ordering United States' prosecution to be entered, nol. pros. and the papers to be remitted to the executive of Georgia.

Case No. 15,388.

UNITED STATES v. HOPPE.

[Hoff. Dec. 4.]

District Court, N. D. California. Sept. 8, 1859.

MEXICAN LAND GRANTS—FINALITY OF DECREES—OBJECTIONS TO SURVEY.

[Where objections are filed to a survey, had under a decree of this court establishing the authenticity of a claim,—decrees of that character having been declared by the supreme court in U. S. v. Fossatt, 21 How. (62 U. S.) 450, not to be, in the strict sense, "final decrees,"—it is the duty of the court to pass upon, and, if necessary, to remove by interpretation, any ambiguities or repugnancies which may exist in such decree: but the decree must be considered as finally determining that, as between the claimant and the United States, the claim is valid.]

[This was a claim by the heirs of Jacob D. Hoppe for Ulistac, one-half square league in Santa Clara county. Granted May 19, 1845, by Pio Pico to Marcelo Pio and Cristoval.

Claim filed March 19, 1852, by Jacob D. Hoppe. Confirmed by the commission May 8, 1855, and by the district court March 2, 1857 (case unreported). Now heard on objections to survey.]

HOFFMAN, District Judge. The surveyor having delivered to this court a certified copy of the survey and plat made by him, objections thereto have been filed on the part of the United States. A motion is now made to strike from the records those objections, on the ground that the survey is in conformity with the decree, and that the correctness of the decree confirming the claim cannot now be impeached on the part of the United States. It is contended that, of the land included within the general boundaries mentioned in the decree, a part of a tract of 1,000 varas had, before the date of the grant in the case at bar, been conceded to one Barcelia Bernal; that the claimant neither before the board, nor in this court, pretended that this tract should be included within the land granted to him; that he so stated in his petition to the board, and so represented in the original diseño, which accompanied his petition to the governor. It is also urged by the United States that they are prepared to show that the land embraced within the external boundaries is, if the 1,000 varas tract be excluded, of the extent mentioned in the grant, viz. one-half a square league, while, if that tract be included, the quantity of land confirmed to the claimant will exceed by the whole extent of the tract so included, the extent to which the grant is limited. It is not a little embarrassing to attempt to determine the precise force which should be attributed to those decrees of this court preliminary to a survey, which, until the recent decision in the case of U. S. v. Fossatt, 21 How. [62 U. S.] 450, had been supposed to be its final decrees. That those decrees are final in a certain and limited sense is clear; for an appeal from them has been entertained by, and will still lie to, the supreme court. But the decision referred to instructs us that this practice is a "relaxation of the rules of proceedings," and that the decrees so appealed from, and revised by the supreme court, were not final decrees under the judiciary act of 1789 [1 Stat. 73], or in the ordinary sense of the term. The reasons for this departure from ordinary rules are to be found, say the court, in the peculiar nature of the controversy, and the character of the parties which rendered inappropriate the "strict rules of proceeding that experience has suggested to secure a speedy and exact administration of justice between suitors of a different character." U. S. v. Fossatt, 21 How. [62 U. S.] 450, 451.

If then the decree of this court ascertaining the authenticity of the claim be not a final, but merely an interlocutory decree, it might be argued that it is still open to revision and correction by the court. But the consequences of such an assumption of power would be in the highest degree important; for, under color of reforming the survey, the whole merit of every claim finally passed upon by the court, and the controversy as to which was supposed to be settled, might be reopened, to the great delay and vexation of suitors. It is unnecessary, however, now precisely to determine how far the decrees of this court, which by the supreme court seem to be pronounced not final (though appealable), are none the less conclusive; so that all questions, whether of boundary, extent, or any other nature, are res adjudicata. It is at least clear that in this proceeding, with respect to surveys, whether it be regarded as supplementary to the final decree already rendered, or preliminary to the final decree to be hereafter rendered, the court must pass upon, and, if necessary, remove by interpretation, any ambiguities or repugnancies which may exist in the decree by which the authenticity of the claim was established. In the decree of the board in the case at bar, the land confirmed is designated by specific boundaries—but it is added that those boundaries contain half a league, viz: the quantity mentioned in the grant. If then it appears that the land included within the boundaries exceeds that amount, a question as to the construction of the decree will arise which should properly be resolved by the court. Is the decree to be construed as meaning that all the land within the boundaries should be confirmed, without regard to the limitation of quantity contained in the grant and expressed in the decree? Or is the decree to be taken as meaning that the quantity of land mentioned, if found within the boundaries, shall be confirmed and the excess reserved? On this question it seems to me that either party has a right to be heard; whatever force or finality be assigned to the decree already rendered; and it should be passed upon by the court after hearing such evidence as to the extent of the land within the boundaries, and circumstances of the case may be admissible and proper to assist it in arriving at a proper construction of the decree, and a precise determination of the rights growing out of it.

I shall therefore deny the motion to strike out the exceptions; leaving, however, to the claimant, the right to urge at the hearing, and after the testimony shall have been taken, all the objections to such testimony, and every consideration in favor of his interpretation of the decree and of its absolute finality, as to which he may be advised. It may be observed, however, that with respect to the third exception, I have not been able to perceive how the matters therein set up can be inquired into in this stage of the proceeding. If the decree rendered have any finality whatsoever, it must be considered as finally determining that, as between the United States and himself, the claim of the claimant is valid. To allow a third party to attempt now to show that the title to the rancho is not, nor ever at any "time was,

in him," is to reopen the whole controversy, and to invite a renewal of the litigation in all these cases on every point already adjudged and determined. If the title be in some person other than the confirmee, his rights can be asserted in the ordinary tribunals; and if a proper case be made, the issuance of the patent to the confirmee may be enjoined until the determination of the controversy.

At no stage of the cause has this court or the board felt itself authorized to enter into and determine mere questions of private right, or to allow the intervention in the suit of rival claimants under the original grantee. It has considered that its duty was confined to determining whether the land was public land or private, and whether there existed in the original grantee or his representatives such a right of property as the United States were bound to respect. But as between various persons claiming to hold the rights of the grantee, it did not attempt to decide, and contented itself with merely exacting that the claimant should derive a prima facie and apparently regular deraignment of title from the original grantee.

It might probably have been permitted to the United States, in any case, to show that the claimant had no title whatever; and in such case, and in cases where his title was doubtful, the decree might have been in favor of the legal representatives of the grantee, whoever they might be found to be. But when no such proof has been offered nor question raised, where the confirmation has been made to the claimant, the correctness of the decree acquiesced in by the United States, and all that remains to be done is to designate by a survey to be approved by the court, the land confirmed, I do not see how the United States can be heard to own, or be permitted to prove, that the claimant has not, and never had, any title derived from the original grantee. As this point was not touched upon at the hearing of the motion, it may be inexpedient now finally to dispose of it. It will be sufficient to deny generally the motion to strike out all the exceptions, and to order that the United States have leave to take proofs in support of the first two, but that no proofs be taken in support of the third, unless hereafter so ordered by the court, on motion of the United States, with notice thereof to the claimant's attorney.

Case No. 15,389.

UNITED STATES v. HORN.

[5 Blatchf. 102.] [1]

Circuit Court, S. D. New York. Nov. 10, 1862.

CRIMINAL LAW—NEW TRIAL—IRREGULARITIES OF JURY—COMPETENCY OF WITNESSES—ACCOMPLICES.

1. A jury, on the trial of an indictment, after they had retired to consider their verdict, were, at their request, furnished by the officer in charge of them, with several directories of the city of New York. This fact was made known to the court before the verdict, which was one of conviction, was rendered, and they were then recalled and directed by the court to wholly disregard, in coming to a result, any information they might have obtained from the books, and it did not appear that the irregularity operated in any way to the disadvantage of the prisoner: *Held*, that such irregularity was not sufficient ground for granting a new trial.

2. Where an accomplice with the defendant in an indictment, is examined as a witness for the prosecution, his wife, not being an accomplice herself, is a competent witness to prove any independent facts not sworn to by her husband, and not forming any part of his acts, although those facts fasten a guilty knowledge on the defendant.

This was an indictment [against Albert Horn] for fitting out and sending away a vessel, with intent that she should be employed in the slave trade. At the trial, the defendant was found guilty, and he now moved for a new trial.

E. Delafield Smith, U. S. Dist. Atty.

James T. Brady, for defendant.

SHIPMAN, District Judge. It is alleged, in support of this motion, that, after the case was submitted to the jury and they had retired to their room, they applied to the officer in charge of them to furnish them with several directories of the city of New York, and that the officer complied with this request; and it is alleged that this irregularity is sufficient to avoid the verdict and entitle the prisoner to a new trial. We have already stated that this was a highly improper act of the officer. For it he has received the pointed censure of the court. But nothing appears before us to show that this irregularity operated, in any way, to the disadvantage of the prisoner. Without determining the general question, how far affidavits of jurors can be read for the purpose of disturbing their verdict, or whether they can be read at all for that purpose, we do not think the one offered presents any facts calling for the court to set aside this verdict, especially in view of the fact that the circumstance of the books having gone to the jury was made known to the court before they had come into court with their verdict, and that they were then recalled and directed by the court to retire to their room and banish from their minds any information they might have obtained from the books, and to wholly disregard any such information, in coming to whatever result they might reach.

The second ground upon which the motion for a new trial rests, is founded upon alleged error in the charge to the jury, touching the weight to be given to the testimony of Mrs. Crawford, the wife of one of the witnesses for the government. Crawford, the husband, was confessedly an accomplice, and the jury were instructed that it was not safe to convict upon the uncorroborated testimony of accomplices alone. The defendant contend-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

ed, upon the authority of the case of Rex v. Neal, 7 Car. & P. 168, that the wife's testimony was not competent in law to confirm the statements of her husband. The court charged the jury on this point as follows: "Mrs. Crawford is not, upon the evidence before us, an accomplice, and, so far as she testifies to facts not testified to by her husband, her statements must rest upon her personal credibility, subject to any inconsistency in, or contradiction of, her story. Although she cannot, in law, as the wife of an accomplice, corroborate and strengthen his particular statements, she is a competent witness, if believed by the jury, to prove any independent facts not sworn to by her husband, and not forming any part of his acts, although those facts, if believed by the jury, fasten a guilty knowledge on the defendant." We think the rule here laid down is sufficiently favorable to the defendant. Whether we should, upon full deliberation, affirm the doctrine laid down in the case of Rex v. Neal, we are not prepared to say. But, assuming it, for the purpose of this case, to be correct, we have no hesitation in affirming the particular instructions that were given to the jury in the present case, in connection with that doctrine.

The motion is overruled, upon both grounds.

UNITED STATES v. The HORNET. See Case No. 6,705.

Case No. 15,390.

UNITED STATES v. HORNIBROOK.

[2 Dill. 229.] [1]

Circuit Court, E. D. Arkansas. 1871.

LOTTERIES—REVENUE LAWS.

Mr. Whipple, U. S. Atty.

Howard, Gallagher, Newton & Hempstead, for defendant.

Before DILLON, Circuit Judge, and CALDWELL, District Judge.

PER CURIAM. The game popularly known as "keno" is not a "lottery," within the meaning of internal revenue laws.

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

Case No. 15,391.

UNITED STATES v. HORRELL.

[Hoff. Land Cas. 78.] [1]

District Court, N. D. California. Dec. Term, 1855.

MEXICAN LAND GRANTS.

No reason perceived for refusing a confirmation.

Claim for two leagues of land in Sonoma county, confirmed by the board, and appealed by the United States. [This was a claim by Johnson Horrell and others for the Rancho Rincon de Musalacon two square leagues in Mendocino and Sonoma counties. Granted May 2, 1846, by Pio Pico to Francisco Berreyesa. Claim filed February 11, 1853. Confirmed by the commission December 12, 1854.]

S. W. Inge, U. S. Atty.

R. W. Morrison, for appellee.

HOFFMAN, District Judge. The claimants in this case have produced the original grant made by Governor Pio Pico to Francisco Berreyesa, on the second of May, 1846. The expediente is in the archives of the former government, and contains, in addition to the usual documents, the record of the approval of the concession by the departmental assembly on the third of June, 1846. No doubt is suggested as to the genuineness of any of these documents. The grantee appears within the year prescribed by the grant to have entered into the possession of his land, and to have resided in a wooden house built by him upon it. He also placed upon it cattle, and commenced its cultivation. There is no difficulty in identifying and locating the land by means of the description in the grant and the map to which it refers, and which is contained in the expediente. The commissioners in their opinion on this case observe "that although the title was executed but a short time before the American occupation, it appears to have been made in good faith and with due regard to the requirements of the law." This court perceives no ground for differing from the commissioners in this view of the case. The decision of the board must therefore be affirmed, and a decree entered accordingly.

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

Case No. 15,392.

UNITED STATES v. HORTON.

District Court, D. Alabama. Dec. 20, 1867.

CIVIL RIGHTS—BANISHMENT OF NEGROES.

[It is a violation of the civil rights bill of 1866 (14 Stat. 27) to inflict upon a negro the punishment of banishment from the state.]

[Cited in 1 Brightly's Dig. 150, to the point above stated. Nowhere reported; opinion not now accessible. Decided by Busteed, District Judge.]

Case No. 15,393.

UNITED STATES v. HORTON.

[2 Dill. 94;[1] 18 Int. Rev. Rec. 31, 63; 5 Chi. Leg. News, 471; 21 Pittsb. Leg. J. 17; 5 Leg. Gaz. 255.]

Circuit Court, E. D. Missouri. March, 1873.

TAKING BAIL—POWER OF UNITED STATES COMMISSIONER.

1. A United States commissioner, as respects the taking of bail, has the same power as a state magistrate and no greater.

[Cited in U. S. v. Eldredge, 71 Cal. 565, 13 Pac. 679.]

2. The statute of Missouri provides that a magistrate may adjourn the examination of a prisoner for a period not exceeding ten days at one time. At the request of a prisoner charged with violating the revenue law, a commissioner adjourned the examination for nineteen days, and took bail for his appearance at the end of that time The bail having been forfeited: *Held*, on a suit against the sureties, that the commissioner's order for the appearance of the accused after an interval of nineteen days was directly contrary to law, and that the recognizance for such appearance was invalid, and that the consent of the accused could not confer jurisdiction or power to make the order, nor does it estop him or his sureties to set up the invalidity of the recognizance.

[Cited in U. S. v. George, Case No. 15,199; U. S. v. Evans, 2 Fed. 151; U. S. v. Insley, 54 Fed. 223; U. S. v. Keiver, 56 Fed. 425, 4 C. C. A. 296; Hallett v. U. S., 63 Fed. 822; U. S. v. Hudson, 65 Fed. 73; Re Acker, 66 Fed. 294; U. S. v. Ewing, 140 U. S. 144, 11 Sup. Ct. 743; Re Dana, 68 Fed. 893.]

[Cited in Re Mantz, 19 D. C. 598; State v. Swope, 72 Mo. 404.]

One Horton was arrested for a violation of the internal revenue laws, and taken before Chamberlin, a commissioner of the United States for this district, for examination, on the 30th day of May, 1872. The accused asked for a postponement, and the commissioner adjourned the proceedings until the 19th of June following, and required the defendant to enter into a recognizance, with sureties, for his appearance before the commissioner at the adjourned time, and it was under this order that the recognizance in suit was executed. Horton failed to appear, and his default was duly entered. This suit is on the recognizance. The sureties defend. The district court held the recognizance to be valid, and judgment was rendered against the sureties, who bring the same and the bill of exceptions, by writ of error, to this court. The constitution of this state provides that all persons shall be bailable, except for capital offenses. The statute of the state enacts that "a magistrate may adjourn an examination of a prisoner pending before himself, from time to time, as occasion requires, not exceeding ten days at a time, * * * and for the purpose of enabling the prisoner to procure the attendance of witnesses, or for other good and sufficient cause shown by the prisoner, said magistrate shall allow such an adjournment on the motion of the prisoner." 2 Wag. St. 1075, § 88. The act of congress of 24th September, 1789, § 33 [1 Stat. 91], provides that "for any crime or offense against the United States, the offender may by * * * any justice of the peace of any of the United States where he may be found, agreeably to the usual mode of process against offenders in such state, * * * be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offense." By the act of 23d August, 1842, § 1 [5 Stat. 516], it is provided that United States commissioners "shall and may exercise all the powers that any justice of the peace * * * of any of the United States may now exercise in respect to offenders, by arresting, imprisoning, or bailing the same under the act of 1789."

Wm. Patrick, U. S. Dist. Atty.

Fletcher & Reynolds, for defendant.

DILLON, Circuit Judge. The record shows that the principal cognizor was charged with an offense against the laws of the United States, and was arrested and taken before a commissioner for this district, who, upon his application, continued the time for the examination and hearing of the charge for the period of nineteen days, and thereupon ordered him to find bail in the sum of $500 to appear before the commissioner at his office on the day to which the adjournment was thus made.

The recognizance in suit was given in pursuance of this order. The principal failed to appear at the time and place to which the hearing was adjourned, and his default was entered by the commissioner.

The substantial question presented for determination is whether the recognizance taken under these circumstances is binding upon the cognizors. It is settled that bonds of this character are valid only when taken in pursuance of law and the order of a competent court or officer. U. S. v. Goldstein's Sureties [Case No. 15,226]; U. S. v. Rundlett [Id. 16,208]. Whatever authority the commissioner has in respect to the arresting, imprisoning, or bailing of criminal offenders is conferred by statute, and must be exercised by him pursuant to its requirements. Congress has not seen fit to prescribe a uniform mode of its own in respect to preliminary proceedings against persons accused of a violation of its criminal enactments, but in the 33d section

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

of the judiciary act, it provided that the procedure in such cases should be "agreeably to the usual mode of process against offenders in such state," that is, in the state in which the offenders may be arrested and the proceedings had. To this section we must resort to ascertain the powers of commissioners in respect to the arrest, imprisonment, and bail of offenders against the laws of the United States. The meaning of this section was very carefully considered by Mr. Justice Curtis, in U. S. v. Rundlett, supra. This learned judge there says: "My opinion is that it was the intention of congress by these words, 'agreeably to the usual mode of process against offenders in such state,' to assimilate all proceedings for holding accused persons to answer before a court of the United States to proceedings had for similar purposes by the laws of the state where the proceedings should take place; and, as a necessary consequence, that the commissioners have power to order a recognizance to be given to appear before them in those states where justices of the peace, or other examining magistrates, acting under the laws of the state, have such power. The prisoner is not only to be arrested and imprisoned, but bailed, agreeably to the usual mode of process in the state."

As the legislation now stands, a commissioner, as respects taking bail, has the same power as state magistrates and no greater. On this principle it has been recently held by Judge Woodruff, that in New York, where state magistrates have no power to take recognizances to appear before them at a subsequent day, United States commissioners have no such authority, and a bond conditioned for the appearance of the accused before the commissioner on a future day to which the proceeding was adjourned, was void. U. S. v. Case [Case No. 14,742], affirming the judgment of the district court. On the other hand, in those states where magistrates have by statute the power of adjournment, there a United States commissioner may let to bail pending the proceedings against the accused. U. S. v. Rundlett, supra.

By the statute of Missouri, "a magistrate may adjourn an examination of a prisoner pending before him, from time to time, as occasion requires, not exceeding ten days at one time." Wag. St. p. 1075, § 88. In this case the commissioner adjourned the examination for nineteen days, and ordered the accused to find bail to appear before him at that time. This was an order not only without authority of law, but contrary to law. He could not lawfully require the accused to find bail in pursuance of it; and a bond executed to avoid being imprisoned for the nineteen days, when the statute limits the period to ten days, is without any binding obligation. It is immaterial that in this instance the accused asked for the continuance. His consent could not confer jurisdiction or power to make the order; nor does it estop him or his sureties to set up the invalidity of the recognizance executed to comply with it. Reversed.

NOTE. As to the power of justices of the peace to adjourn examination and take a bond pending a continuance, see Potter v. Kingsbury, 4 Day, 98, 1809. This case affirmed the power, "but the court," says Woodruff, J., in U. S. v. Case [Case No. 14,742], "refer the power solely to statute." The only statute referred to by the court is one in these words: "No man shall be imprisoned if he will give sufficient security, bail, or mainprize, for his appearance," etc. The case treats the justice as a court of inquiry, with the incidental power to adjourn for the purpose of enabling the public or the prisoner to obtain witnesses. But compare U. S. v. Case, supra, with which it seems difficult to reconcile it. As to the limited powers and jurisdiction of justices of the peace in Missouri: State v. Metzger, 26 Mo. 65; Williams v. Bower, Id. 601.

Case No. 15,394.

UNITED STATES v. HOSMER et al.

[17 Int. Rev. Rec. 38; 7 Chi. Leg. News, 116.] [1]

Circuit Court, N. D. Ohio. Jan. Term, 1873.

INTERNAL REVENUE—DISTILLER'S BOND—LIABILITY OF SURETIES—RELEASE.

[1. Failure of an assessor to obtain the written consent of the mortgagee of premises about to be used as a distillery, to such use, and a stipulation that the lien of the United States for taxes should have priority over the mortgage, before accepting the distiller's bond, is no ground of defence to the sureties thereon; for a government security cannot be imperiled or destroyed by the laches of its officers or agents.]

[2. The liability of the sureties is not released by the fact that the collector permitted the distiller to remove from the bonded warehouse a quantity of spirits, sufficient to pay all the taxes due, without first requiring payment thereof.]

George Willey, U. S. Atty.

Homer Goodwin and J. M. Lemmon, for defendants.

SHERMAN, District Judge. This is an action to recover damages for the breach of a distillery bond given by Theodore Hosmer as principal, and George Stahl and Gottleib Hart as sureties, to the United States. The bond is in the sum of $5,000 and is framed under the 7th section of the internal revenue act of July 20, 1868 [15 Stat. 127]. This section provides that every distiller before commencing business shall give a bond with at least two sureties to be approved by the assessor of his district conditioned that the principal shall faithfully comply with all the provisions of the law, "that he will not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distillery apparatus to be encumbered by mortgage, judgment or other lien during the time in which he shall carry on said business. The next section of the same act provides among other things that no bond of a distiller shall be approved unless he is the owner in fee, unencumbered by mortgage,

[1] [1 Chi. Leg. News, 116, contains only a partial report.]

etc., of the lot on which the distillery is situated, or unless he files with the assessor, in connection with the notice prescribed in section 6, the written consent of the judgment creditor, or other lien holder, expressly stipulating that the lien of the United States for taxes and penalties shall have priority over such judgment or other encumbrance. The declaration in this case assigns the non-payment of taxes on 6,000 gallons of spirits distilled by Hosmer, as a breach of the bond. The sureties have filed an answer containing three defences, to the second and third of which the plaintiff has demurred. In the second defence the defendants allege that prior to the execution of said bond by Hosmer and themselves, Hosmer executed a mortgage in favor of one Dempsey, in the sum of $2,681. That at the time the bond was executed and delivered to plaintiff this mortgage was a subsisting encumbrance upon the distillery premises. That the assessor of that district did not require of Hosmer nor did Hosmer at any time file with the assessor the written consent of Dempsey, the mortgagee, that the premises might be used for the purpose of distilling spirits, and stipulating that the lien of the United States for taxes and penalties should have priority over said mortgage, and in case of the forfeiture of the premises that the title of the same should vest in the United States, discharged of said mortgage, but that the assessor approved the bond without such written consent and stipulation filed. That by reason of the non-payment of taxes upon spirits distilled by Hosmer the collector distrained the premises and sold the same, paying said mortgage out of the proceeds of the sale, and but for this mortgage the proceeds would have fully satisfied the claim of the United States.

These facts being admitted by the demurrer of the plaintiff, the question arises, what effect upon the liability of the bondsmen does this unlawful action of the assessor in approving the bond before all the requirements of the statute were fulfilled have? The point raised is not a new one, it already having been decided by the United States district court for the Eastern district of Pennsylvania, afterwards affirmed by the circuit court of the same district in a late case presenting precisely the same facts. Osborne v. U. S. [Case No. 10,599]. It was there held that these facts were not sufficient to bar the right of the plaintiff to recover on the bond; that a government security could not be imperilled or destroyed by the laches of one of its officers or agents. U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720; U. S. v. Van Zandt, 11 Wheat. [24 U. S.] 184; Dox v. Postmaster General, 1 Pet. [26 U. S.] 317. The demurrer to the second count of defendant's answer is therefore sustained.

The demurrer to the third count of the answer raises substantially the same question under a different state of facts. The defendants alleged that all the taxes due plaintiff from Hosmer were assessed on spirits distilled by Hosmer, and were a first lien on said spirits; that the spirits were deposited in plaintiff's bonded warehouse and under the sole control of plaintiff's officers; that the collector permitted Hosmer to remove from the bonded warehouse 5,000 gallons, and more than sufficient to pay all the taxes chargeable thereon, without first requiring payment of these taxes from Hosmer. It is sufficient to say that these allegations do not constitute a valid defence to the action. This count of the answer of the defendants simply sets up the laches of an officer of the plaintiff, but laches cannot discharge a government security. This principle was early established by the supreme court of the United States in U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720, already referred to. In the case Justice Story says: "The general principle is that laches is not imputable to the government, and this maxim . . . . is founded upon a great public policy. . . . The utmost vigilance would not save the public from the most serious losses if the doctrine of laches can be applied to its transactions. It would, in effect, work a repeal of all its securities." The same doctrine was reasserted in U. S. v. Van Zandt, 11 Wheat. [24 U. S.] 184. And again in Dox v. Postmaster General, 1 Pet. [26 U. S.] 317, where the above cases are reviewed and sustained.

But it was urged by the defendants in the argument, that the plaintiff having had in its sole possession and custody these spirits, the property of Hosmer, with a first and paramount lien on them, and afterwards voluntarily released them, the sureties upon the bond are discharged. This might be true if the lien on these spirits could be construed to be an original collateral security. But the right of the government to take this property in satisfaction of the taxes due on it—that is to say, the lien of the government accrued at a time subsequent to the execution and delivery of the bond. The plaintiff had no lien on these spirits until the taxes became due, and the taxes did not become due until long after the bond was given. This lien can therefore in no sense be regarded as collateral to the bond. There is a broad distinction between securities in hand when the bond is taken, i. e. collaterals, and securities that subsequently come into the possession of the obligee. In the former case, a voluntary release of the collateral security would discharge the surety. In the latter case it would have no effect upon the surety's liability. Furthermore, we are of the opinion that the lien which the law gives in this and similar cases upon the property of the distiller, is merely incidental to the bond required of him, and is in no sense a collateral security, which must be retained at the hazard of releasing the sureties.

Demurrer to both defences of defendants' answer sustained.

Case No. 15,395.

UNITED STATES v. HOSSACK.

[Nowhere reported; opinion not now accessible.]

Case No. 15,396.

UNITED STATES v. HOUGHTON.

[14 Int. Rev. Rec. 126.]

District Court, D. Massachusetts. Oct. 10, 1871.

REVENUE LAWS — STAMP DUTIES — SELLING UNSTAMPED ARTICLES—INDICTMENTS.

1. This case brings up for decision the questions growing out of the indictments found against apothecaries for selling and exposing for sale certain articles mentioned in Schedule C of the act of June, 1864 [13 Stat. 223]. *Held*, that section 169 of this act, as re-enacted by the statute of 1866 [14 Stat. 98], refers to section 167, since there is nothing else it can refer to, and keeps it operative, so that it is not repealed by the re-enactment of section 165 in its application to persons who sell but do not manufacture, even if it be repealed as to manufacturers, which is not decided.

2. Selling and exposing for sale are treated as different things throughout the statute, and congress has omitted to say that persons who are not manufacturers shall be liable to penalties except in respect to selling without stamps; it is *held*, therefore, that the only counts of the indictment which can be sustained, are those which charge actual sales. As the counts which charge sales are within the statute, and all good, the demurrer is overruled.

[This was an indictment against S. S. Houghton for selling, or exposing for sale, unstamped articles, in violation of the revenue laws. Opinion on demurrer.]

D. H. Mason, F. W. Hurd, and E. P. Nettleton, for the United States.

Hillard, Hyde & Dickinson, for defendant.

LOWELL, District Judge. A large number of indictments has been found against apothecaries for selling and exposing for sale certain articles mentioned in Schedule C of the act of 30 June, 1864 (13 Stat. 301); and the questions presented by the demurrer in this case arise in all the cases, and have been ably and thoroughly argued. Some of the points can only be understood by a constant reference to the very language of the several statutes, which must necessarily be a little tedious. Section 165 of the act of 1864 imposed a penalty of $10 since raised to $50, on any one who should make, prepare and sell, or remove for consumption and sale, any of the things on which a stamp duty was imposed by Schedule C, without affixing thereto a stamp denoting the duty. Section 167 imposed a penalty of $100 on every manufacturer of the same articles who should sell, send out or deliver any such article before the duty thereon should have been fully paid by affixing the proper stamp, or who should hide, etc., any such article to evade the duty chargeable thereon. Section 169 was, that any person who should offer for sale any of these articles should be deemed the manufacturer, and (be) subject to all the duties, liabilities, and penalties imposed by law in regard to the sale of domestic articles without the use of the proper stamps denoting the duty. The act of March 3, 1865 (13 Stat. 482), adds "expose for sale," to "sell" in section 167. The statute of 13 July, 1866 (14 Stat. 144), re-enacts sections 165 and 169 with some amendments, and says nothing about section 167. This indictment is founded on sections 169 and 167 taken together. The first point taken is that section 167 is repealed by implication by the re-enactment of section 165, so far as selling is concerned; because this section imposes a penalty of only $50 on a manufacturer who sells without affixing the stamp, and section 167 of the act of 1864 imposes $100 for substantially the same offence. I have exercised my ingenuity in vain to discover any difference between the two sections as applied to sales by an actual manufacturer. It does seem to me that under them he is liable to a different punishment for the same offence. There are some offences in each section which are not in the other, but the maker of any of these articles who sells it without affixing the stamp is to pay $50 by the one section and $100 by the other. How it is possible to say, with the district attorney, that one is a non-feasance and the other a mal-feasance, I cannot see, because the supposed acts are precisely similar, and the same evidence would prove either offence. These difficulties are equally found in the act of 1864, where both sections were enacted together, and even as far back as sections 107 and 109 of the act of July 1, 1862 (12 Stat. 478, 479). I at first thought that they might be reconciled by construing the words in section 167 "to evade the duty," etc., as qualifying the whole section, which would make, or might make, the very difference between a careless omission and a wilful default; but I am satisfied that those words do not apply to the first clause. The section is, that any person who shall sell, etc., before the duty shall have been fully paid, or who shall hide, etc., the article to evade the duty, shall be liable, etc. The argument of the attorney here is very forcible, that the latter acts are equivocal, and need to be characterized by an intent, while the former are in themselves a breach of the law. Besides, the context refers these words more fairly to the last clause or member of the sentence. It reads, who shall sell, etc., before the duty is paid, —or who shall hide, etc., to evade the duty, and not who shall do two kinds of acts with intent to evade duties. The duties are actually evaded in the one class of cases; and in the other certain acts otherwise proper are qualified by an illegal intent. It seems to me, therefore, that sections 165 and 167 are to some extent inconsistent, and it may be that one or the other is repealed or is invalid, so far as the inconsistency exists; but there is none such in the case of persons not actual manufacturers, because section 165

applies only to those who make and sell, and section 167 construed with section 169 applies to all quasi manufacturers as well, who sell but do not make. Section 169 is without meaning and void unless it refers to section 167, because it imposes on all sellers in respect to selling the same liabilities as if they were manufacturers; but manufacturers are not liable for mere selling by section 165. I hold, therefore, that section 169, as re-enacted by the statute of 1866, refers to section 167, since there is nothing else that it can refer to, and keeps it operative, so that it is not repealed by the re-enactment of section 165 in its application to persons who sell but do not manufacture, even if it be repealed as to manufacturers, which I do not decide. One other very important point, which was not taken by the defendant, but was suggested to me at the argument, is this: Section 169, in all the statutes in which it appears, including the last (14 Stat. 144), makes persons who sell, etc., quasi manufacturers and subject to the duties, liabilities, and penalties imposed by law in regard to the sale of domestic articles without the use of the stamps, etc. It does not say in terms that they shall be liable for exposing for sale, nor for hiding, etc.; nor for removing for consumption or sale, nor for taking off stamps which have once been affixed. The history of the omission is plain enough. It arose from the fact that exposing for sale formed no part of section 167 until it was inserted by the statutes of 1865; and when it was inserted, section 169 was not changed to correspond with the amendment. Now, then, it is clear that in 1864 selling in section 169 meant selling and nothing more, and I do not see how it can mean selling and exposing for sale, any more than it can include all the other acts for which manufacturers are liable. Selling and exposing for sale are treated as different things throughout the statute, and congress has omitted to say that persons who are not manufacturers shall be liable to penalties excepting in respect to selling without stamps. It would be an unreasonable stretch of language to say, under these circumstances and with this history before us, that the words, when re-enacted, created offences which did not exist before, and which are not within the fair scope of the words themselves. I hold, therefore, that the only counts of this indictment which can be sustained are those which charge actual sales. The objections to these counts will be briefly considered: (1) That it is not distinctly and affirmatively alleged that the article is subject to a stamp duty. I think that this is sufficiently shown by the charge that it was an article mentioned in Schedule C of the act of congress, etc. (2) That the defendant is not called a manufacturer. He is described as a person who did offer and expose for sale, which makes him liable to the penalty. The word manufacturer might perhaps have been used, but it would have been equivocal, while the indictment follows the language of the act, namely, that one who offers for sale shall be liable to the duties, etc., in regard to selling, which are imposed by the law. The statute, indeed, says that he shall be deemed a manufacturer, but his status is ascertained by the fact that he is one who offers and exposes those articles for sale, so that when he actually sells without a stamp he has incurred the penalty. (3) That Schedule C should be referred to with the addition of "as amended." This would be so if the article sold came within the amendment; but it does not, and although the article is within the schedule as amended it is also within the original schedule, which has never been repealed or re-enacted; for the act of 1866 contains no schedule. (4) That the indictment does not allege that the articles were either imported or of foreign or domestic manufacture. The argument is, that if there are any articles in Schedule C that are mere natural products of the United States, section 169 would not apply to them. None such were pointed out, and I am not aware that there are any such; and the language is not intended to restrict the operation of the section, but rather to extend it, and means, I suppose, simply whether the articles are foreign or domestic, the law assuming that they are all manufactures. (6) That the counts for selling are bad for duplicity because they charge both an offering for sale and a selling. This is a misapprehension. There is no charge in those counts of offering for sale before affixing the stamps; the offering is only laid to show that the defendant is within section 169, and then the sale without stamps is charged as the criminal act.

Though this is hardly a criminal offence, it has been decided in the circuit court, with my concurrence, that an indictment will lie. U. S. v. Abbot [Case No. 14,416]. As the counts which charge sales are within the statute, and all good, the demurrer must be overruled. Order accordingly.

Case No. 15,397.

UNITED STATES v. HOUSE AND LOT NO. 3 ABATTOIR PLACE.

[The case reported under above title in 8 Reporter, 391, and 25 Int. Rev. Rec. 319, is the same as Case No. 15,166.]

Case No. 15,398.

UNITED STATES v. HOUSTON.

[4 Cranch, C. C. 261.] [1]

Circuit Court, District of Columbia. Nov. Term, 1832.

ASSAULT AND BATTERY ON MEMBER OF CONGRESS—PLEA IN BAR—PRIOR SENTENCE.

A conviction and sentence of an individual, not a member of congress, by the house of represen-

[1] [Reported by Hon. William Cranch, Chief Judge.]

tatives of the United States, for a breach of privilege by assault and battery upon a member of the house, for, or on account of words by him spoken in the house of representatives, in debate, are not a bar to a criminal prosecution by indictment for the assault and battery.

CRANCH, Chief Judge (nem. con.) This is an indictment for an assault and battery committed by the defendant [Samuel Houston] upon William Stanbery, a member of the house of representatives of the United States, from the state of Ohio. The defendant has submitted his case to the court upon the evidence stated on the journal of the house of representatives of the United States, admitting the fact of the assault and battery, under the circumstances stated in that evidence; and relying upon the plea that he has been heretofore convicted and punished for the same offence, by the house of representatives. The whole case is submitted to the court without argument. The material facts, as they appear, in the evidence submitted, are substantially these: Mr. Stanbery, a member of the house of representatives of the United States, from the state of Ohio, on the 31st of March, last, in debate, in the house, made use of this language: "The superintendent of the Cumberland road is not the only officer who had been suffered to continue in office after proof of his transgressions had reached the president. Was the late secretary of war removed in consequence of his attempt fraudulently to give to Governor Houston the contract for Indian rations? I derive my knowledge of this transaction not from the columns of the Telegraph. The whole affair was known to me at the time it took place. The editor of the Telegraph gives himself too much credit for defeating this attempted fraud. I understood that it was in consequence of the remonstrances of the delegate from Arkansas that the contract was not completed. There is one fact, however, for which I am indebted to the Telegraph; and that is that the president had full knowledge of the business, and that it did not meet with his disapprobation." The speech was, at the request of one of the editors of the National Intelligencer, prepared by Mr. Stanbery for the press, and published in that gazette on the 2d of April. There does not, however, appear to be any evidence that the fact that it was thus prepared for the press by Mr. Stanbery was known to the defendant at the time of the assault and battery mentioned in the indictment. On the 4th of April, the defendant sent to Mr. Stanbery by Mr. Cave Johnson, a member of the house, the following letter:

"Washington City, April 3, 1832. Sir: I have seen some remarks in the National Intelligencer of the 2d instant in which you are represented to have said: 'Was the late secretary of war removed in consequence of his attempt fraudulently to give to Governor Houston the contract for Indian rations?' The object of this note is to ascertain whether my name was used by you in debate, and, if so, whether your remarks have been correctly quoted? As the remarks were inserted in anticipation of their regular place, I hope you will find it convenient to reply without delay. I am your most obedient servant, Samuel Houston.

"Hon. William Stanbery, M. C."

On the 5th of April, Mr. Creighton, of Ohio, at the request of Mr. Stanbery, (having previously ascertained that Mr. Johnson was acquainted with the contents of the letter which he had delivered to Mr. Stanbery,) delivered to Mr. Johnson the following letter:

"Hall of Representatives, April 4, 1832. Sir: I received this morning, by your hands, a note signed Samuel Houston, quoting from the National Intelligencer of the 2d instant, a remark made by me in the house. The object is to ascertain whether Mr. Houston's name was used by me in debate, and whether my remarks were correctly quoted. I cannot recognize the right of Mr. Houston to make this request. Very respectfully yours, &c., William Stanbery.

"The Hon. Cave Johnson."

This letter was delivered by Mr. Johnson to the defendant in the lobby of the house, behind the speaker's chair. The defendant was much excited by reading it; used very harsh epithets in regard to Mr. Stanbery; became extremely violent, and said he would whip him before he left the house. This language he used two or three times; and upon Mr. Johnson's arguing with him that it would be a contempt, he replied that "he would right the wrong wherever it was given, even were it in the court of Heaven." But finally desired Mr. Johnson to say to Mr. Stanbery, that he would consider what would be the proper course for him thereafter to pursue.

It appears from the evidence that each party provided himself with a pair of pistols, and a dirk. Indeed it is stated that the defendant always went armed in that manner, and that he declared he would whip Mr. Stanbery wherever he could catch him. It also appears that Mr. Stanbery expected an attack immediately after the delivery of his letter to Mr. Johnson. Several days, however, having intervened without an attack, it seems that Mr. Stanbery was somewhat off his guard, when the attack was made, being armed only with a single pistol. The defendant had no weapon but a walking-cane; which is not otherwise described in the evidence than as being of young hickory. Thus armed, the parties met on the Pennsylvania avenue, not far from Mr. Stanbery's lodgings, (but on the opposite side,) about half a mile from the capitol, on the 13th of April, about eight o'clock in a moonlight evening. Although it seems probable, from the evidence, that the defendant was desirous of an opportunity to attack Mr. Stanbery, yet the meeting, at that time, seems to have been accidental, and not expected by either party. It

appears, however, that the defendant, having given the cane to Mr. Shaw, got it back for the purpose, as he said, of chastising Mr. Stanbery. The fact of his having the cane with him, at the time, seems to justify the inference that he had a previous intention to make the attack if he should meet him. While the defendant was standing on the foot pavement, Mr. Stanbery crossed the avenue, and as he stepped up on the pavement, the defendant asked if that was Mr. Stanbery; to which he replied very politely, (and bowing at the same time,) "yes sir;" "then," said the defendant, "you are the damned rascal," and struck him with a stick which he held in his hand. Mr. Stanbery threw up his hands over his head, and staggered back. His hat fell off. The defendant continued to follow him up, and to strike him. After receiving several severe blows, Mr. Stanbery turned, apparently to go away. The defendant sprung upon him in the rear, (Mr. Stanbery's arms hanging down, apparently defenceless,) seized him and attempted to throw him, but was not able to do so. Whether Mr. Stanbery extricated himself, or the defendant thrust him from him, the witness was not able to determine; but, as he passed him, the defendant struck him and gave him a trip. Mr. Stanbery fell, and the defendant continued to beat him while lying on the ground. In this situation Mr. Stanbery drew his pistol from his pocket, and attempted to shoot the defendant but the pistol did not go off. The defendant wrested it from the hand of Mr. Stanbery, and continued beating him until he ceased to speak, and laid so still, that the witness thought he was badly hurt, or perhaps killed. The witness was then about to tell the defendant to desist, but, without being spoken to, he quit, of his own accord. Mr. Stanbery then rose. Some altercation passed between them. Mr. Stanbery asked him why he attempted to assassinate him in the night. To which the defendant replied, that he had not attempted to assassinate him, but had chastised him for having traduced his reputation; and to an observation by some other person, he answered that if he had offended the law he would answer for what he had done. The defendant gave Mr. Stanbery a great many blows; and the stick, which did not appear, by the sound of the first blows, to be split, did appear, by the sound of the subsequent blows to have been split during the beating. Mr. Stanbery received several violent blows on his head; one bone in his left hand was fractured; and his left arm was much bruised. He also received a severe blow on the right arm, at the elbow, and another on the back of his right hand. On the day after this transaction, Mr. Stanbery addressed a letter to the speaker of the house, saying that he was waylaid and beaten by the defendant, for words spoken in debate; confined to his bed, and unable to discharge his duties in the house. To this letter was appended Mr. Stanbery's affidavit, verifying the facts.

The defendant, having been arrested by the order of the house, the following interrogatories were propounded to him: (1) Do you admit or deny that you assaulted and beat the said Stanbery, as he has represented in the letter which has been read, a copy of which has been delivered to you, by the order of the house? (2) Do you admit or deny that the same assault and beating were done for or on account of words spoken by said Stanbery, in the house of representatives, in debate?

1. To the first he answered, as follows: The accused denies that he assaulted and beat the said Stanbery, as he has represented in the letter which he has read. He admits that he felt great indignation on reading in the National Intelligencer, remarks there stated to have been made on the floor of the house of representatives, by the said Stanbery, imputing to the accused, by name, a gross offence, of which he knows himself to be innocent, and the dissemination of which, throughout the country, by such publication, was evidently calculated to affect his honor and character. Under these circumstances, the accused was induced to require of the said Stanbery, in a respectful note, whether the report of what he had said was truly set forth in the said paper; to which inquiry, thus made, said Stanbery refused to give any answer, in a manner still further to injure the accused. The accused admits that he was greatly excited by those provocations, and that, under the influence of feelings thus excited, he did, on accidentally meeting the said Stanbery assault and beat him, the accused being then unarmed with any other weapon than a common walk-cane, and believing the said Stanbery to be, as he, in fact, was, armed with pistols. That the meeting took place several hours after the adjournment of congress, about 8 o'clock in the evening, on the Pennsylvania avenue, and nearly half a mile from the capitol, and on the opposite side of the avenue from where Mr. Stanbery's boarding-house is situated; and, at the time of this occurrence, he was neither seeking for, nor expecting, the said Stanbery. The accused denies that he intended to commit, or that he believed he was committing, any contempt towards the house of representatives, or any breach of its privileges, or of the privilege of any of its members. He denies that the act complained of constitutes any such contempt or breach of privilege. and is prepared to justify his conduct, so far, at least, as the rights and privileges of this house, and its members, are concerned, by proof.

2. To the second, he answered: "I consider the answer already rendered to the first interrogatory, as embracing an answer to the second." After examining witnesses, and hearing the argument of the accused, by his counsel, the house of representatives, on the 11th of May: "Resolved, that Samuel Houston has been guilty of a contempt and violation of the privileges of this house." "Resolved,

that Samuel Houston be brought to the bar of the house, on Monday next, at 12 o'clock, and be there reprimanded by the speaker, for the contempt and violation of the privileges of the house, of which he has been guilty, and that he be then discharged from the custody of the sergeant-at-arms."

On Monday, the 14th of May, when the accused was brought to the bar of the house, to hear his sentence, and receive his reprimand from the speaker, he had leave to present the following paper, which was ordered to be entered upon the journal of the house: "The accused, now at the bar of the house, asks leave respectfully to state, that he understands he is now brought here to receive a reprimand from the speaker, in execution of the sentence pronounced upon him. Were he to submit, in silence, to such a sentence, it might imply that he recognized the authority of the house to impose it. He cannot consent that it shall be thus implied. He considers it a mode of punishment unknown to our laws, and, if not prohibited by the constitution, as an 'unusual punishment,' yet, inconsistent with the spirit of our institutions, and unfit to be inflicted upon a free citizen. He thinks proper to add, in making this declaration, that he has been unwilling further to trouble the house; and, although he believes the whole proceedings against him, as well as the sentence he now objects to, unwarranted by the constitution of his country, yet circumstances may exist to justify or excuse a citizen in determining, (as he has done on this occasion,) to suffer in silent patience, whatever the house may think proper to enforce." The speaker then proceeded to execute the sentence of the house, by reprimanding the accused; in doing which, he stated the offence to be "a violation of the rights and privileges of the house of representatives, in having offered personal violence to one of its members, for words spoken in debate." The accused was then conducted from the bar of the house, and discharged from the custody of the sergeant-at-arms.

The first question which arises, in this case, is, whether this conviction and judgment of the house of representatives are a bar to the present prosecution for an assault and battery. Upon the plea of autrefois acquit, or autrefois convict, it must appear that the crime for which the defendant was first prosecuted, and of which he was convicted or acquitted, was the same for which he is now prosecuted. 1 Chit. Cr. Law, 453. And the criterion of identity of crimes, is, whether the facts charged in one indictment would have been sufficient to justify a conviction and judgment upon the other, by the court in which the first conviction was had. For, although the facts charged in the second indictment constitute a part of the matter necessary to support the first, yet, if the facts averred in the second indictment are sufficient, of themselves, to constitute a crime, and the first court has not jurisdiction of the crime thus charged in the second indictment, neither a conviction nor an acquittal upon the first indictment will be a bar to the second. It is true, that, upon an indictment for murder, a general acquittal or conviction is a bar to a subsequent indictment for manslaughter, upon the same killing. So, an acquittal or conviction, upon an indictment for petit treason, is a bar to a subsequent indictment for murder. So, upon an indictment of grand larceny, a general acquittal or conviction is a bar to a subsequent indictment for petit larceny, for the same taking. But the reason, in all those cases, is, that the defendant may, upon the first indictment, be found guilty of, and punished by that court for, the offence charged in the second. And the reason why he may be so found guilty and punished by that court, upon the first indictment is, that the nature of the offence is the same, and the only difference is in the degree of punishment, the court having jurisdiction of both. But, in the present case, the house of representatives, upon this charge of violating the privileges of the house, could not, if they had found the accused not guilty of the breach of privilege, have proceeded to find him guilty of a simple assault and battery, and to punish him for that offence. It had no jurisdiction of the offence charged in the present indictment. It has not assumed any such jurisdiction. It has professed to act only in vindication of its own privileges; and, although the assault and battery were given in evidence, as a part of the facts to establish the charge of a breach of privilege, it did not constitute the offence for which he was tried.

It is unnecessary, in this view of the case, for this court to give an opinion whether the house had jurisdiction, as far as they claimed and exercised it. For, if, as the accused contended, up to the last moment of his trial, the house of representatives had not that jurisdiction, it is clear that their sentence is no bar to the present prosecution; and, if they had that jurisdiction, it does not at all interfere with the jurisdiction of this court, upon the charge of a simple assault and battery, without the allegation of any fact to justify the jurisdiction exercised by the house. The opinion, thus expressed by this court, upon this part of the case, is corroborated by that of the late Chief Justice Parsons, of Massachusetts, in the case of Coffin v. Coffin, 4 Mass. 34, 35. That was an action of slander. The defendant pleaded his privilege, as a member of the house of representatives of Massachusetts, alleging that the words were spoken in deliberation in the house. The chief justice, in considering the objection of the danger of conflicting jurisdictions, said: "I consider the house of representatives, not only as an integral part of the legislature, and as an essential part of the two houses in convention, but also as a court, having final and conclusive cognizance of all matters within its jurisdiction, for the purposes for which it

was vested with jurisdiction." "As to contempts, the house proceeds against the offender, to punish the contempt. Courts of law proceed to punish offences against the state, and to redress private wrongs." "The same act may be a contempt against the house, an offence against the state, and an injury to an individual; and, in all these respects, proceedings may be had against the offender." See, also, Starkie, Sland. & L. 162. "Let me illustrate the subject by supposing a case or two. A member is assaulted in the town in which the house is in session, and is cruelly beaten for words spoken in the house, in the execution of his duty. The house may proceed against the assailant for a contempt; and cannot the member prosecute him at law for damages? And may not the grand jury indict him for a breach of the peace? And neither can the proceedings of a court of law control the proceedings of the house; nor can the proceedings of the house control the courts of law. The judgments of each court, whatever may be the result, can be executed without any interference. Suppose a public officer indicted for extortion, and, upon trial, acquitted at law, cannot he afterwards be convicted by the senate on an impeachment? Both judgments may be executed without interference. The power of the senate is censorial, and exercised to preserve purity in office."

Upon the whole, this court is of opinion that the conviction and judgment of the house of representatives, upon the charge of a violation of its privileges, is not a bar to the present prosecution for the assault and battery. The defendant having submitted to the court, under the act of Maryland, 1793 (chapter 57, § 19), has thereby so far admitted the offence charged, as to render himself liable to the costs of prosecution. The courts of Maryland, as well as this court, have always considered such a submission as amounting to a plea of "guilty," and that nothing remained for the court to do, but to declare the punishment; and, in order to guide the court, in its discretion, in cases where the punishment is discretionary, the court will, in general, examine the witnesses. Instead of doing this, in the present case, we have been referred to the evidence taken on the trial in the house of representatives. We have examined that evidence, and in making up our judgment as to the sentence we shall pronounce, we have thrown out of view whatever relates to the violation of the privileges of the house. We cannot, however, forget the station in life which has been heretofore occupied by each of the parties; the one a representative in congress, and the other late governor of one of these United States. To such stations we look for examples, not only of good order and submission to the laws, but of that self-control and government of the passions which are necessary to the peace of society. The tone given to society, by the example of such men, is highly important, whether for good or for ill. If such men can indulge their passions with impunity, how much more excusable are the ignorant and the uneducated. The law, it is true, looks in mercy upon the infirmity of human nature; but it is only in those cases where the excitement is sudden, and the act follows the provocation, before reason and conscience have time to interfere. But when the passions have had time to cool, and the party has had leisure to consult his judgment and his conscience, and he still entertains a cool and deliberate purpose of revenge, that revenge is no longer entitled to the name of human infirmity; but, in law, takes the name of malice prepense; that malice which converts manslaughter into murder, whatever may have been the original provocation. That the defendant coolly and deliberately meditated the kind of revenge that he took, cannot be doubted from the evidence, nor that the battery was very severe. It is possible that some part of the severity of the beating may have been the consequence of a belief of the defendant, that the party assaulted was armed with deadly weapons, and that it was necessary on the part of the defendant, to be sudden and severe in his attack, to prevent the other from using those weapons. And when the defendant, in fact, found that the other not only had a deadly weapon, but attempted to use it with effect, a new and sudden excitement might have been created, which, with the increased belief that the party assaulted had another deadly weapon, might have led the defendant to inflict a more severe battery than he, at first, contemplated; and may account for some part of the severity, without attributing it to the original malice. Although the original provocation can be no justification of this breach of the peace, yet it ought to be taken into consideration in deciding upon the punishment. We have no means of knowing, judicially, whether the charge supposed to be insinuated in the speech, be true or false. Fraud is not to be presumed; and every man is supposed to be innocent, until proved to be guilty. The charge, if not true, could not fail to wound the feelings of an innocent man. If the battery had taken place immediately upon the first provocation, this consideration would have been of more avail. But, as it is, it has been allowed all the weight which it ought to have.

Upon the whole, then, considering the situation of the parties, their high standing in society, the original provocation, the deliberate revenge, the great outrage upon the public peace, the severity of the battery, and the mitigating circumstances before mentioned, the sentence of the court is, that the defendant, Samuel Houston, pay a fine of five hundred dollars, and the costs of this prosecution.

Case No. 15,399.

UNITED STATES v. HOWARD.

[See Case No. 3,393.]

Case No. 15,400.

UNITED STATES v. HOWARD.

[7 Biss. 56.] [1]

Circuit Court, E. D. Wisconsin. May, 1875.

INDICTMENT FOR UNLAWFULLY WITHHOLDING PENSION—REV. ST. § 5485—AGENCY—WHAT CONSTITUTES.

1. In order to convict under this section [Rev. St. § 5485], it must be shown by the evidence: 1st. That the person from whom it is alleged that the whole or any part of a pension is wrongfully withheld is a pensioner of the United States. 2d. That the amount alleged to be wrongfully withheld is the whole or part of a pension or claim allowed and due such pensioner or claimant. 3d. That the person charged with the wrongful withholding was an agent or attorney of the pensioner, instrumental in prosecuting the pensioner's claim for pension, or if not an agent or attorney, was a person through whose instrumentality the claim was prosecuted. 4th. That the whole or part of the pension claim allowed and due such pensioner or claimant, was wrongfully withheld from the pensioner or claimant, by such agent or attorney, or other person instrumental in prosecuting the claim for pension.

2. The mere fact that a banker or other person agrees to collect a check paid to a pensioner by a pension agent, does not thereby make him an agent for the prosecution of the claim for the pension, but only an ordinary agent for the collection of the check, and if the pensioner accepts a certificate of deposit, in lieu of the check of a pension agent, the ordinary relation of debtor and creditor is created.

Levi Hubbell, for the United States.

W. B. Felker, for defendant.

DYER, District Judge (charging jury). It is provided by statute of the United States that "any agent or attorney or any other person instrumental in prosecuting any claim for pension * * * who shall wrongfully withhold from a pensioner or claimant, the whole or any part of the pension or claim allowed, and due, such pensioner or claimant shall be deemed guilty of a high misdemeanor." Rev. St. U. S. § 5485.

The indictment in this case is based upon this provision, and charges that on the 1st day of February, 1874, the defendant, Asaph H. Howard, was the agent of Mary F. Tucker, who was a pensioner of the United States, and entitled to receive from the United States a pension of $518.80; that the defendant undertook to be instrumental for said Mary F. Tucker in prosecuting her claim for said pension and collecting the same for her, and did prosecute her claim and collect and receive said pension for her; and thereupon wrongfully withheld said pension from her; and still so wrongfully withholds the same.

The gist of the offense made punishable by this statute, so far as I have brought the statute to your attention, lies in the wrongful withholding from a pensioner or claimant of the whole or any part of a pension or claim allowed and due such pensioner or claimant, by an agent or attorney, or any other person instrumental in prosecuting a claim for such pension.

To obtain a conviction under this statute, it must be shown: 1st. That the person from whom it is alleged that the whole or any part of a pension is wrongfully withheld; is a pensioner of the United States. 2d. That the amount alleged to be wrongfully withheld is the whole or part of a pension or claim allowed and due such pensioner or claimant. 3d. That the person charged with the wrongful withholding was an agent or attorney of the pensioner, instrumental in prosecuting the pensioner's claim for pension, or if not an agent or attorney, was a person through whose instrumentality the claim was prosecuted. 4th. That the whole or part of the pension or claim allowed and due such pensioner or claimant, was wrongfully withheld from the pensioner or claimant, by such agent or attorney, or other person instrumental in prosecuting the claim for pension.

It is claimed on the part of the prosecution, that the defendant Howard was the agent of the pensioner Mary F. Tucker, and as such agent undertook to be instrumental for the pensioner in prosecuting her claim for this pension and collecting the same; and did prosecute the claim and collected and received the pension and has wrongfully withheld it.

It is however claimed on the part of the defendant that Mrs. Tucker had received from the United States pension agent, a check for the amount due her, namely, $518.80 and placed the check in the hands of defendant, taking from him in lieu thereof a certificate of deposit for the amount, less $18.80, paid to her by him at the time, and that the certificate of deposit was accepted by Mrs. Tucker in place of the check and as representing the proceeds of the check deposited in defendant's bank. If you find from the evidence, that Mrs. Tucker exchanged the check on the Milwaukee bank which she had received from the pension agent, for a certificate of deposit, and took from the defendant such certificate, knowing it was a certificate of deposit, and accepting it as a substitute for the check, thereby intending as a depositor to rely upon the personal responsibility of the defendant or his bank, and so did not constitute him her agent for the prosecution of a claim for pension and for the collection of the same, there can be no conviction, because in that case the essential element of criminal intent would be wanting. If in the transaction Mrs. Tucker made herself the voluntary depositor of this check with defendant, and knowingly accepted an obligation to repay to her the amount of it, intending to trust to the credit of defendant or his bank and to look to him or the bank

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

as the depository of her money, and not as an agent or person prosecuting her claim for pension and collecting it, then there was created the ordinary relation of debtor and creditor, and a criminal prosecution under this statute cannot be sustained.

The jury, after deliberation upon the case, requested further instructions, and were instructed as follows:

An agent is a person authorized by another person known as a principal, to transact his principal's business, or to do one or more special things for his principal. To constitute an agency in this case on the part of the defendant, it must be made to appear from the evidence, that the defendant was authorized and empowered by Mary F. Tucker to prosecute her claim for pension; and in order to convict the defendant upon this indictment it must be shown beyond reasonable doubt, that the defendant, while acting as such agent in the prosecution of her claim, has wrongfully withheld from the pensioner the whole or part of this pension. If you find and believe, from all the evidence in this case, that Mrs. Mary F. Tucker, did ask the defendant to take from her and collect the money on the check which has been exhibited here in court, and if the defendant did take the check from her and agree to collect it for her, he thereby became her agent for the collection of the check. But the mere fact that he might thereby become her agent for the collection of the check, did not constitute him her agent for the prosecution of her claim for a pension. If, therefore, you find from the evidence that the defendant was merely the agent of Mary F. Tucker for the collection of the check which she had received from the United States pension agent, and was not her agent for the prosecution of her claim for a pension, there can be no conviction upon this indictment.

Verdict, not guilty.

Case No. 15,401.

UNITED STATES v. HOWARD.

[11 Int. Rev. Rec. 119.]

District Court, W. D. Missouri. 1870.

INTERNAL REVENUE—DISTILLER'S TAX—WHO ARE DISTILLERS.

[It is not only the person or persons who carry on the actual work of manufacturing distilled spirits, but all persons having an interest in the business, or directly aiding in the production of spirits, for their use or benefit, who are considered distillers under the internal revenue law, and amenable to its provisions.]

[This was an indictment against Francis C. Howard for an alleged violation of internal revenue laws.]

THE COURT charged the jury:

The defendant, Francis C. Howard, in the first count of the indictment is charged with being, on the 15th day of January, 1869, a distiller, having his place of business in Christian county, in the Western district of Missouri; and that, as such distiller, he had failed to pay the special tax required under the revenue law. It is not pretended that he paid the tax, or that he intended to pay it, but it is denied that he had anything whatever to do with the distillery under consideration, by which he became liable to a tax or a prosecution. The United States charges the defendant with being a distiller and with having failed to comply with the law applicable to that business. Under the indictment it is the duty of the government to satisfy your minds that the charges made are true. It is not necessary, for the purpose of this case, to define what a distiller is, for under the evidence there can be no question as to there being a distillery carried on, and consequently there must have been one or more distillers. It is not only the person or persons who carry on the actual work of manufacturing distilled spirits, but all persons having an interest in the business of distilling, or directly aiding the production of spirits for their use or benefit, who are considered distillers under the law, and are subject to and amenable to its provisions. It is not necessary that the time should be proven as alleged in the indictment. If the offence has been committed (say for the purposes of this case) within one year prior to the finding of the indictment, the law is satisfied. The allegation that the offence, if any, was committed in Christian county, is satisfied by showing that it was in the Western district of Missouri.

It has already been said that more than one person may be connected with the same distillery so as to bring them within the provisions of the law. The mere fact that a party knows that the revenue law is violated, is not sufficient to make him amenable to its penal provisions. However derelict as a good citizen a man may be who stands by and sees the revenue law violated, yet that of itself is not sufficient to bring him within its penal provisions, though it may be a link in the chain of evidence leading to the establishment of his guilt. In order to find the defendant Howard guilty, he must have had some interest in the distillery over which the controversy is had. If, for instance, he had an interest in the mill situate near this distillery, and the carrying on of the distillery would bring direct benefit to the mill in the way of toll, and you shall, in addition thereto, find that he had an interest in the land on which the distillery was erected, so as to give him control of it, he consenting to the erection of the distillery, and also find that he knew the revenue laws were violated by the carrying on of the distillery—these facts, when found, may be considered by you as tending to establish such an interest in the distillery as will bring him under the definition of a distiller.

The evidence as to the manner in which the business of the distillery was carried on, the connection the partner of the defendant had with it and the mill, the manner in which illicitly distilled spirits were carried from the still-house to the mill, the barrel and keg in which it was put, what the defendant himself said about the matter, his keeping hogs upon the offal of the mill and distillery, are all circumstances carefully to be weighed by you in arriving at the conclusion of the guilt or innocence of the defendant. You are the exclusive judges of the facts and of the credibility of the witnesses. From the conduct of the latter in court, from the relation in which they stand to this case, from their means of knowledge, and from the testimony they gave, you must arrive at the weight you will attach to their evidence. It has already been said that the government must affirmatively show that the law has been violated. Your mind must be satisfied—that is, put beyond that state of uncertainty in which it hesitates in coming to any conclusion. If, upon considering all the facts and circumstances of the case, your minds remain in doubt and uncertainty, you are to acquit. If you acquit on the first count, you will, as a matter of course, on all others. If you find for the government, you may so find on one or more of the counts.

The jury found a verdict of guilty. A motion for new trial was filed by defendant, and is now pending.

Case No. 15,402.

UNITED STATES v. HOWARD (two cases).

[1 Sawy. 507;[1] 13 Int. Rev. Rec. 118.]

District Court, D. Oregon. March 13, 1871.

INDICTMENT FOR VIOLATION OF INTERNAL REVENUE LAWS—RETAILING LIQUORS AND TOBACCO—BILLIARD ROOMS.

1. An indictment which charges a defendant with carrying on the business of a retail liquor dealer without payment of a special tax at a certain place, continuously between certain dates, is sufficient without stating the means or circumstances by which he became such retail dealer.

[Cited in U. S. v. Page, Case No. 15,988.]

2. All persons who deal in tobacco are not liable to pay a special tax, and therefore an indictment which charges that a person was a dealer in tobacco without paying the special tax, is not sufficient, but the indictment should also show that he was such a dealer as is required to pay such tax.

3. A person for the time being in the possession and control of a billiard table, in a place or building open to the public, is prima facie the proprietor of a billiard room, and liable to pay the special tax therefor, even if the general property and ultimate control of the table or place, or either of them, be in some one else.

4. An allegation, that a party carried on the business of keeping a billiard table in a particular building, although unskillful pleading, is equivalent to an allegation that he kept a billiard room and was the proprietor thereof.

[These were two indictments against G. B. Howard.]

John C. Cartwright, for plaintiff.

Erasmus D. Shattuck and Richard Williams, for defendant.

DEADY, District Judge. On March 9, 1871, the grand jury of this district found two indictments against the defendant. One of them contains one count and the other two, and they will be considered as one indictment with three counts. The first count charges that the defendant, at Corvallis, Oregon, on May 1, 1870, and continuously thenceforth to February 14, 1871, "did exercise and carry on the business of a retail liquor dealer without having paid the special tax" therefor, as required by law.

The second one charges, that the defendant, at the place, and continuously between the dates aforesaid, "did exercise and carry on the business of a dealer in tobacco without having paid the special tax" therefor; and the third one charges, that the defendant, at the place, and continuously between the dates aforesaid, did "exercise and carry on the business and occupation of keeping and running a billiard table, open to the public and for the use and accommodation of the public aforesaid, in a building on Second street, without having paid the special tax" therefor.

The defendant demurs to the indictments because: (1) Of a misnomer as to his Christian name therein; (2) the facts stated do not constitute an offense; and, (3) the acts constituting the offense are not stated therein.

Misnomer cannot be taken advantage of by demurrer. For aught that appears G. B. Howard is the true name of the defendant. If not, he must so allege by a plea in abatement, and at the same time state what his name is. This is the course of proceeding at common law. Under the Code the matter is simplified and no objection can be taken to an indictment on the ground that the defendant is not truly named therein. Code Or. 458. If he is misnamed he must correct the mistake when called upon to plead. So far as appears the second and third causes of demurrer are substantially the same. The difference between is merely a verbal one.

In support of this cause of demurrer it is maintained by counsel for defendant, that it is not sufficient to allege that the accused was engaged in the business of a tobacco dealer or retail liquor dealer, but that the indictment should also state how or the means whereby he became such dealer. That a special tax is not required of all dealers in tobacco, and that, therefore, it is necessary to allege in the indictment, not only that the defendant was a dealer in tobacco, but that he was such a dealer or a dealer un-

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

der such circumstances as required the payment by him of a special tax. That it does not appear from the third count that the defendant was proprietor of a billiard-room, or that he even kept a billiard-room, but only a table.

The provisions of the statutes bearing upon the question are substantially these: Section 73 of the act of June 30, 1864 (13 Stat. 248), under which the indictments are found provides that: "Any person who shall exercise, or carry on any trade, business or profession, or do any act hereinafter mentioned, for the exercising, carrying on or doing of which a special tax is provided by law, without payment thereof, as in that behalf required, shall, for every such offense * * * be subject to a fine or penalty of not less than ten nor more than five hundred dollars. And if such person shall be a manufacturer of tobacco, snuff or cigars, or a wholesale or retail dealer in liquors, he shall be further liable to imprisonment for a term not less than sixty days and not exceeding two years."

By section 44 of the act of July 20, 1868 (15 Stat. 1848), the punishment for retailing liquor without payment of the special tax, was changed to a fine of not less than $500 and imprisonment not less than six months nor more than two years. By section 59 of the same act (15 Stat. 150) a special tax of $25 was imposed upon retail dealers in liquors and $100 upon wholesale dealers. This latter section also defines a retail liquor dealer to be one who sells or offers for sale spirits, wine or malt liquors of any kind, and whose annual sales, including those of all other merchandise, do not exceed $25,000. By act of March 10, 1869 (16 Stat. 42), this definition was amended so as to make any one "who sells or offers for sale" spirits, etc., "in less quantities than five gallons at the same time," a retail liquor dealer, without regard to the amount of his annual sales.

Ordinarily, an indictment should not only contain a certain description of the crime of which the defendant is thereby accused, but also of those necessary circumstances by which it is constituted, so as to identify the accusation. But to this general rule there are some exceptions. In the case of barretry, or being a common scold, or keeping a bawdy-house, where the crime consists of a repetition of frequent acts, it is sufficient to charge the defendant in general as a common barrator, etc. Bouv. Dict. verb. "Indictment"; 4 Bac. Abr. 310, 312.

Now, the first count in this indictment charges the defendant, in the language of the statute, with carrying on the business of a retail liquor dealer at a certain place and between certain dates. The circumstances which constitute him such a dealer between May 1, 1870, and February 14, 1871, may be various and oft repeated, but their essential character is necessarily implied in this description of the offense. One dealer may sell spirits, another wine, and another beer; the first may sell by the drink, the second by the bottle, and the third by the gallon, but these are mere accidental differences, and in no wise affect the essential and legal character of the transactions. The material circumstance is the sale, or offer to sell, of either kind of liquor in any quantity less than five gallons at the same time. The identity of the act is sufficiently established by the circumstances of time and place. Indeed, it is probable that the distinction between wholesale and retail dealers is only made in the statute for the purpose of graduating the special tax according to the business of the dealer, and that it need not be noticed in an indictment. Be this as it may, there are no circumstances under which any one can sell, or offer to sell, distilled spirits, wine or malt liquors, in less quantities than five gallons at once, without thereby becoming a retail dealer in liquor, and liable to the payment of the special tax in that behalf provided. In this respect, I think the indictment is sufficient.

The charge of being a dealer in tobacco without payment of the special tax, as stated in the second count, is not a certain description of any crime known to the law, for, as I read the statute upon the subject, it is not every one who deals in tobacco that is required to pay such special tax. For instance, neither a person whose annual sales of tobacco amount to only $100 or less, unless such person is also a "general retail dealer, liquor dealer, or keeper of a hotel, inn, tavern or eating house;" nor one who deals in leaf tobacco of his own production or that of his tenant, received for rent; nor one who sells tobacco of his own manufacture, is liable to a dealer's special tax.

"An indictment charging a man with nuisance, in respect of a fact which, lawful in itself, as the erecting of an inn, etc., and only becomes unlawful from particular circumstances, is insufficient, unless it set forth some circumstances that make it unlawful." 4 Bac. Abr. 311. So here, the indictment should state the particular circumstances necessary to make the defendant, being a dealer in tobacco, liable to pay the dealers' tax. As it is, for all that appears, he may or may not have been such a dealer, and therefore it is uncertain whether he committed a crime or not by the commission of the act charged. The demurrer to this count must be sustained.

The words of a statute need not be followed in describing an offense, but it is sufficient if an indictment contain terms or expressions of substantially equivalent import. It is also to be remembered, that these acts are parts of a revenue system and that this provision is remedial in its nature—intended to aid in the collection of a tax—and therefore not to be strictly construed, but otherwise. In my judgment, any person who ap-

pears to be, or for the time being is, in the possession and control of a place or building where a billiard table is kept for public use, is prima facie the proprietor of a billiard-room and liable to pay this special tax; and this is so, although the general property and ultimate control of the place and table, or either of them, may be in some one else.

In this view of the matter, I think the language of the indictment, although unskillful, is sufficient. An allegation that the defendant "carried on the business and occupation of keeping and running a billiard table" in a particular building is equivalent to an allegation that he carried on the business, etc., of keeping a billiard room, and that he was, for the time being, the proprietor thereof.

Case No. 15,403.

UNITED STATES v. HOWARD.

[3 Sumn. 12.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1837.

INDICTMENT—SURPLUSAGE—VARIANCE—MISNOMER.

1. Mere surplusage will not vitiate an indictment, and need not be established in proof.

[Cited in Com. v. Brailey, 134 Mass. 529; Com. v. Keefe, 7 Gray, 336; Hammons v. State (Tex. App.) 16 S. W. 100.]

2. But no allegation, whether it be necessary or unnecessary, more or less particular, which is descriptive of the identity of what is legally essential to the charge in the indictment, can be rejected as surplusage.

[Cited in U. S. v. Foye, Case No. 15,157; U. S. v. Thomas, Id. 16,473.]

[Cited in brief in State v. Robinson, 39 Me. 152; Cited in Com. v. Wellington, 7 Allen, 302; Com. v. Gavin, 121 Mass. 55; Com. v. Hartwell, 128 Mass. 419.]

3. A variance between the indictment and the evidence is not material, provided the substance of the matter be found.

4. In case of misnomer, a variance is fatal only where there is a misnomer of a party whose existence is essential to the offence charged in the indictment.

5. In an indictment under the act of congress of 1825, c. 276, §§ 22, 5 [3 Story's Laws, 1999; 4 Stat. 115, c. 65], the ownership of the vessel was alleged to be in William Nye and others, instead of Willaid Nye and others. *Held*, that an allegation of the particular ownership is unnecessary and immaterial, and that the misnomer above mentioned is of no consequence; it being sufficient to allege that the owners are citizens of the United States.

[Cited in State v. Kaler, 56 Me. 94.]

Indictment alleging that the defendant [Isaac T. Howard], on the 10th of May, 1837, "in and on board a certain ship of the said United States, called the Mount Vernon, then lying within the jurisdiction of a foreign state or sovereign court, in the Roads of St. Helena, and out of the jurisdiction of any particular state of the said United States, the said ship then and there belonging to David R. Greene, Dennis Wood, William Nye, and Clement P. Covell, citizens of the said United States, with force and arms, with a dangerous weapon, did commit an assault upon one William B. Stanton, then and there belonging to the company of the said ship, and him, the said William B. Stanton, did grievously wound, the said Howard then and there belonging to the company of the said ship, to the great damage, &c. against the peace, &c., and contrary to the form of the statute, &c." Plea, not guilty. At the trial before the district judge, (Judge Davis,) the mate of the ship testified that the name of one of the owners of the ship was Willard Nye, and not William Nye, as stated in the indictment. And it was mentioned by S. D. Parker, (the counsel for the defendant,) that the true reading of the ship's register, (a copy of which was produced, and in evidence,) corresponded with the mate's testimony in that particular, and that the variance was fatal. The district judge instructed the jury that the asserted variance, if it should be sustained by the evidence, should be considered by the jury as immaterial, and should be disregarded by the jury; and that the legal effect of the variance would be open for the consideration of the court. The jury found the defendant guilty.

Parker now moved for a new trial, upon the ground of the misdirection, and cited 1 Chit. Cr. Law, 293, 296; Archb. Cr. Law, 11, 117–119; 1 Leach, 351; 2 Leach, 290; Id. 390; 1 H. Bl. 49; 1 Camp. 494; 1 East, 415.

Mills, Dist. Atty., cited on the other side, 2 Russ. Crimes, (2d London Ed.) 705, &c.; Pye's Case, Russ. & R. 9, note; s. c., 2 East, P. C. pp. 785, 786, c. 16, § 168.

STORY, Circuit Justice. The present indictment is founded on the act of 1825, c. 276, §§ 22, 5 [3 Story's Laws, 1999; 4 Stat. 115, c. 65], the 22d section describing the offence, and the 5th conferring jurisdiction on the court to try it. The language of the 5th section is as follows: "That if any offence shall be committed on board of any ship or vessel belonging to any citizen or citizens of the United States, while lying in a port or place within the jurisdiction of any foreign state or sovereign, by any person belonging to the company of the ship, &c., on any other person belonging to the company of the said ship, &c., the same offence shall be cognizable and punishable by the proper circuit court of the United States, &c., as if the said offence had been committed on board of the said ship or vessel on the high seas," &c. It is apparent, therefore, that the objection of variance in this case does not apply to any words descriptive of the offence charged in the indictment, but solely to the words which state the jurisdiction. It is as clear, that it is wholly immaterial who are the particular owners of the ship on board of which the offence is committed, provided only that the ship is owned by citizens of the

[1] [Reported by Charles Sumner, Esq.]

United States. Now it is not disputed that the Mount Vernon is a ship of the United States, and is wholly owned by American citizens. The question then is, whether, as the names of the owners are specially set forth (although it was wholly unnecessary) in this indictment, the variance in the name of Willard Nye, one of those owners, is fatal.

It will not be found easy to reconcile all the cases upon the subject of variance, either in civil or in criminal causes. In the latter the authorities are not always in harmony, even where the same circumstances have occurred. There are, however, some principles which will guide us in arriving at a correct conclusion; and as these principles will be found well laid down by Mr. Russell, in his work on Crimes and Misdemeanors, (pages 704–718, c. 4, § 3), with illustrative examples, I shall state them from his work, because I find them confirmed by the authorities cited by him. Two questions generally arise. The first is, what allegations must be proved, and what may be disregarded in evidence. The second is, what is sufficient proof of allegations, which cannot be disregarded in evidence. The former includes the consideration of what constitutes mere surplusage, in an indictment; the latter what properly constitutes variance. Mere surplusage will not vitiate an indictment, and need not be established in proof. The material parts which constitute the offence charged must be stated in the indictment, and they must be proved in evidence. But allegations not essential to such a purpose, which might be entirely omitted without affecting the charge against the defendant, and without detriment to the indictment, are considered as mere surplusage, and may be disregarded in evidence. But no allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment can ever be rejected as surplusage. The former proposition may be illustrated by cases which have actually passed in judgment. Thus, where the prisoner was charged with robbery near the highway, and the evidence proved the robbery in a house, it was held immaterial; for it was equally a robbery ousted of clergy, whether committed near the highway or elsewhere. See Summer's Case, 2 East, P. C. p. 785, c. 16, § 168; Rex v. Wardle, Russ. & R. 9; 2 Russ. Crimes, 705. So in Pye's Case, Russ. & R. 9, note; s. c., 2 East, P. C. pp. 785, 786, c. 16, § 168, where the robbery was charged with being committed in the dwelling of A. W. The proof was that the robbery was committed in a house, but it did not appear who was the occupier of it; it was held immaterial. So, upon an indictment under the statute 8 & 9 Wm. III. c. 6, § 1, for having a die, made of iron and steel, in possession, it was held that, as it was immaterial as to the offence, of what the die was made, proof of a die either of iron or steel, or both, would satisfy the charge. Rex v. Oxford, Russ. & R. 382; Rex v. Phillips, Russ. & R. 369; 2 Russ. Crimes, 705. So an indictment for stealing so much lead "belonging to the Rev. G. C. W., and then and there fixed to a certain building called Hernden Church"; it was held that it should have been charged only as affixed to the church, and that therefore the allegation that it belonged to G. C. W. ought to be rejected as surplusage. Rex v. Hickman, 2 East, P. C. p. 593, c. 16, § 31. See, also, Rex v. Holt, 5 Term R. 446; s. c., 2 Leach, 593 (676). On the other hand, if a man should be charged with stealing a black horse, the allegation of color, although unnecessary, yet being descriptive of that which is material, could not be rejected as surplusage. 2 Russ. Crimes, 706. So upon an indictment for stealing live tame turkeys, the description of live could not be rejected as surplusage, and proof of stealing dead turkeys would not support the indictment. That was so held in Rex v. Edwards, Russ. & R. 497. Indeed, in such cases, an acquittal or conviction on one indictment would be no bar to another, for the identity could not be averred of the described animal.

In regard to the other question, what is sufficient proof of allegation, which cannot be disregarded as evidence, or, in other words, what constitutes a material variance in proof from the charge in the indictment, the general rule is that a variance between the indictment and the evidence is not material, provided the substance of the matter be found. Hence it is, that even in capital offences it is not necessary to prove more than the substance of the averment in the indictment. Thus, for example, in an indictment for murder, if it appear that the party was killed by a different weapon from that described in the indictment, it will still maintain the indictment; as, for example, if the wound or killing be alleged to be by a sword, and it be proved to be by an axe or staff; or is alleged to be by a wooden staff, and it be proved to be with a stone. For in all these cases the substance is the same, the wounding or killing with a weapon. So, if the indictment be of a death by one sort of poisoning, and it turns out in the evidence to be by another sort of poisoning, the difference is not material; for in each of these cases the mode of the death is substantially the same, viz. by poisoning. But, if the indictment charge a death by poisoning, it will not be supported by the proof of a death entirely different, as by shooting, starving, or strangling. This doctrine is clearly laid down by Mr. Russell, in his work on Crimes (2 Russ. Crimes, 701–712), and by Mr. East, in his work on Crown Law (1 East, P. C. p. 341, c. 5, § 107). Indeed Mackalley's Case in 9 Coke, 62, 66, where the indictment specially charged the murder of a sergeant at mace, in London upon an arrest, and supposed that the sheriff made a precept to the

sergeant for the arrest; and upon the evidence it appeared that there was no such precept, but that the sergeant made the arrest ex officio, at the plaintiff's request, upon the entry of the plaint according to the custom of the city; the proof was held sufficient; for the substance of the matter was, whether the defendant killed an officer in the lawful execution of legal process. S. C. 1 East, P. C. p. 345, c. 5, § 115; 2 Russ. Crimes, 711. So, in general, if the indictment charge the offence to be committed in a particular place within the county, it is not necessary to prove that it was committed in that place, or aver that there is such a place in the county; but only to prove that it was committed within the county. See 2 Russ. Crimes, 716, 717. In such a case, the place is immaterial, provided it be within the county; and it constitutes no part of the description of the offence. So, where an offence was alleged to be committed on the 20th of July, in the fourth year of the reign of King George the Fourth (although in fact tried in 1820, in the second year of the reign of George the Fourth), the judges rejected the words "fourth year of," as surplusage, and read the indictment as if it stood "on the 20th of July, in the reign of King George the Fourth"; and held the conviction right. Rex v. Gill, Russ. & R. 431, 432.

In regard to cases of misnomer, it will be found, that, in all the cases where the variance has been held fatal, it was a misnomer of a party whose existence was essential to the offence charged in the indictment; as, for example, in cases of theft, where the property is charged as that of A. B., and it turns out, in proof, to be of A. C.; or in cases of robbery, where the person robbed is alleged to be A. B., and it turns out on proof to be C. B. See 2 Russ. Crimes, 707, 714, 715.

Now, if we apply the principles here stated to the present case, it seems to me clear that the variance is not fatal. In the first place, the variance, as has been already stated, does not occur in the description of the offence. It occurs only in the clause which confers, or is supposed to confer, jurisdiction over the offence. Now that jurisdiction equally exists (as has been already stated), whoever are the owners of the ship, provided she belongs to citizens of the United States. The allegation of the particular ownership was wholly unnecessary; and is wholly immaterial. The words in the indictment allege the offence to be committed "in and on board a ship of the United States, called the Mount Vernon." Now under our laws, these words, "a ship of the United States," have a technical meaning; for the ship registry act (Act 1792, c. 45 [1 Story's Laws, 268; 1 Stat. 287, c. 1]),—and this was a registered ship—declares, that no ships, except those which are registered according to that act, shall be denominated and deemed ships or vessels of the United States, entitled to the benefits and privileges appertaining to such ships or vessels; and it proceeds to prescribe, that no ships or vessels, except those which are wholly belonging to citizens, shall be registered. Indirectly (though not as it should properly do), the indictment does contain an allegation of the American character of this ship, so as to found the jurisdiction. And if it had stopped here, a nice question might have arisen, how far such an allegation not stating in the terms of the act of 1825, c. 276, § 5 [3 Story's Laws, 1999; 4 Stat. 115, c. 65], that the offence was committed on board of a ship or vessel belonging to any citizen or citizens of the United States, but stating it in the manner above-cited, would have been sufficient to found the jurisdiction, or to sustain the indictment. But the indictment goes on to allege, "the ship then and there belonging" to certain persons (naming them), "citizens of the said United States." Now the substance of this allegation is, that all the owners of the ship are citizens; and this is strictly true, and was established in evidence. The misnomer is not in any part material to the jurisdiction, and the charge in its substance was proved so far as it bore on the question of jurisdiction. I think the names of the owners may be either rejected as surplusage; or the variance as to the proof was as to a fact purely immaterial. Pye's Case, Russ. & R. 9, note; 2 East, P. C. 785, 786; and Mackalley's Case, 9 Coke, 62, 66,—are far stronger cases of variance. And the variances upon indictments for murder, as to the weapon or other means used to effect the crime, are far more striking, as to a dispensation with exact proofs of circumstances alleged in the indictment.

Upon the whole, my opinion is, that the motion for a new trial ought to be overruled.

The district judge concurs in this opinion; and, therefore, let the motion be overruled. New trial denied.

Case No. 15,404.

UNITED STATES v. HOWARD et al.

[3 Wash. C. C. 340.] [1]

Circuit Court, D. Pennsylvania. April Term, 1818.

PIRACY—CONSTRUCTION OF STATUTE—CONFEDERATING WITH PIRATES—EVIDENCE.

1. Indictment for confederacy with pirates, knowing them to be guilty as such.

2. The crimes of piracy mentioned in the 8th section of the act for the punishment of certain crimes, passed April 30, 1790 [1 Stat. 112], are such as are committed by citizens of the United States, or on board of vessels of the United States; and therefore, the 10th and 11th sections, as to accessaries, refer to the acts of piracy mentioned in the 8th section.

[Cited in U. S. v. Kessler, Case No. 15,528.]

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

3. A confederacy by citizens on land, or on board of an American vessel, with sea robbers, or pirates, by the laws of nations; or the yielding up of a vessel by a citizen to such pirates, is within the provisions of the 8th section of the act of congress.

4. An endeavour by a mariner to corrupt the master of the vessel, and to induce him to go over to such pirates, is within the provisions of the 8th section of the law.

5. To establish the crime of confederacy, there must be some proof of criminal intentions in the person charged.

6. The language of the 12th section of the law implies compact and association with the pirates, as well in relation to the past, as to the future.

7. Any intercourse with them, which is calculated to promote their views, is within the provisions of the law.

Indictment for consulting, combining, confederating, and corresponding, with certain pirates and robbers on the seas, the defendants [Howard and Beebee], knowing them to be guilty of piracy and robbery.

The material facts in the cause, as acknowledged by the defendants, (for there was no other testimony given to support the indictment,) was, that on the 10th of July, 1817, the defendants, being branch pilots, belonging to the Delaware bay and river, spoke a small black schooner at sea, about twenty miles south of the Capes of Delaware, bound, as she said, from New-Orleans to New-York. The defendants asked the persons on board, if they would accept of some fresh fish, which they consented to do, and gave the defendants, in return, some gin. This was stated by other witnesses to be a common occurrence, when ships from sea are met with by pilot boats, and is considered as a mere interchange of civilities. Whilst the defendants were alongside of the schooner, the apparent commander of her offered them 5000 dollars, to land them and their effects somewhere on the Delaware, which the defendants refused, considering the conduct and appearance of those persons to be suspicious, and fearing, that by acceding to their proposal, they might incur the risk of a forfeiture of their boat, and expose themselves to a prosecution, which might deprive them of their liberty. The defendants then determined to seek a harbour within the Bay of Delaware, on account of the weather, which was threatening; and taking that course, the black schooner set all her sails, and followed the track of the pilot boat. The defendants had been previously requested to send a pilot on board the schooner, which they declined doing; but they permitted her to follow them in, around the point of Cape May, where both vessels came to anchor. The defendants then went on board the schooner, and demanded the usual pilotage to which they were entitled, where the pilot serves as a guide to a vessel into the bay, which was refused; but the commander of the schooner offered the defendants sixty dollars for their skiff, to enable him to land his crew and cargo. This was refused by the defendants, who, having unfavourable suspicions of the persons on board of the schooner, determined to have nothing to do with them. Those persons then declared, that they would take the skiff by force, which they accomplished; and they conveyed themselves, five trunks, and a bag of specie, to a small fishing vessel lying at some distance from them, which they had previously ascertained would receive them and their baggage on board, and convey them up the Delaware. Before the departure of those men from the schooner, they talked of scuttling and sinking her, with such of the cargo as remained on board, after the five trunks were sent off. But, upon the representations of the defendants, that it would be a pity thus to destroy the property, and that it would be better to give it to them, they abandoned it altogether, leaving the vessel and remaining cargo in the defendants' possession. The defendants immediately set sail with the pilot boat and schooner for Lewistown, where they arrived on the 11th, and immediately disclosed all the above facts to the revenue officer at that port, and stated their claim, which they afterwards prosecuted, to the vessel and cargo as derelict, or for salvage.

It was contended, by the district attorney, that the word "pirate," in that part of the 12th section of the act of congress, for punishing certain crimes against the United States (vol. 2, Last Ed. 94), on which this indictment was framed, ought to be construed to mean any "sea robber," according to the definition of a pirate by the law of nations, and ought not to be confined to pirates and robbers, as described by the 8th section of the above act of congress; and that the evidence was sufficiently strong, to justify the jury in presuming, that the persons on board the black schooner were guilty of acts of piracy under the law of nations; and that the defendants knew, or had such reasons for suspecting them of having been guilty of this crime, as should have prevented them from having any correspondence with them. He contended, lastly, that any kind of corespondence or intercourse with pirates, known by the person accused to be such, amounts to a correspondence within the intent and meaning of the law; and that the various acts of the defendants, in relation to the alleged pirates, clearly amounted to such correspondence.

The following books were referred to, to show who are pirates by the law of nations: Bynk. (Dup. Ed.) p. 127, c. 17; 2 Azuni, Mar. Law, 350, pt. 2, c. 5, art. 3, § 3; 1 Emerig. pp. 533–539, c. 12, § 28; Vatt. Law Nat. bk. 1, c. 19, § 233; 4 Bl. Comm. 71, 72; 3 Chit. Cr. Law, 1127; 2 Valin, Comm. bk. 3, pp. 235–238, tit. 9, arts. 3, 4; The Federalist, No. 42; [Thirty Hogsheads of Sugar v. Boyle] 9 Cranch. [13 U. S.] 198; U. S. v. Jones [Case No. 15,494], in this court,—to prove that the common or civil law, from which a technical expression is taken, may be referred to, to expound it. He also cited U. S. v. Tully [Id.

16,545]; U. S. v. Ross [Id. 16,196]; U. S. v. Hayward [Id. 15,336].

Charles J. Ingersoll, U. S. Dist. Atty.
Condy & Read, for defendants.

The construction of the 12th section of the law, given by the district attorney, was controverted by the counsel for the defendants, who insisted, that the words "such piracies," referred to such as are declared to be so by the 8th section, and these are decided, in Palmer's Case [3 Wheat. (16 U. S.) 610], to be confined to robbery, and other acts of piracy committed on board of an American vessel. That the word "correspond," in the 12th section, should be construed by its associates, "combine" and "confederate," to mean an agreement to join with the pirate in some piratical act: and that the clause is altogether prospective. They insisted, that there was an absence of all evidence, to prove that the alleged pirates had committed acts of piracy or robbery—if they had, that the defendants did not know it, nor did they in any manner confederate or correspond with them, within the meaning and intention of the law. Cases cited, 2 East, P. C. 796, 797; 8 Mod. 74; 4 Bl. Comm. 72.

WASHINGTON, Circuit Justice (charging jury). The issue which you are to try is, whether the defendants are guilty of having combined, confederated, and consulted with pirates or robbers, knowing them to be guilty of any piracy or robbery. Your inquiries will consequently embrace the three following particulars:—1st. Had the alleged pirates been guilty of any act of piracy or robbery, at the time when the correspondence with them by the defendants is charged to have taken place?—2d. If so guilty, did the defendants know that fact?—3d. Did the defendants, having this knowledge, consult, correspond, combine, or confederate with the alleged pirates?—Unless you are perfectly satisfied, from the evidence upon each and all of these points, you ought to acquit the defendants.

The first inquiry involves the construction of the 12th section of the law under which the defendants are indicted; and the question is, whether the piracies and robberies intended by that section, are such as are declared to be so by the 8th section of the same law, or such as are defined and punished by the law of nations?

The opinion which has been entertained by some persons, that the courts of the United States might take cognizance of robberies and other piracies committed on the high seas, by non-commissioned sea rovers and others, contrary to the general law of nations, has never received the countenance of any of the courts of the United States.

A much more doubtful question, however, arose upon the construction of the act of congress, as to this offence, which was finally settled by the supreme court, in Palmer's Case [3 Wheat. (16 U. S.) 610]. This was, whether robbery on the high seas, committed on board of a foreign vessel, amounted to piracy, within the true intent and meaning of the 8th section, and was cognizable by the courts of the United States? The general and unqualified expressions of that section most undoubtedly covered such a case; and yet it seemed difficult to believe, that the legislature could have intended to make many of the acts of piracy defined by that section, cognizable in an American court. It was, upon the whole, decided, that a robbery, committed by any person on the high seas, on board of a ship belonging exclusively to a foreign state, or to the subjects thereof, or upon the person of a subject of a foreign state, in a vessel belonging exclusively to subjects of a foreign state, is not piracy, within the true intent and meaning of the 8th section of that law. Although the offence of robbery is the only one stated in this decision; that being the only offence referred to in the question which was adjourned to the supreme court; yet there can be no doubt but that all the other acts of piracy, enumerated in that section, are included within the same principle. The 10th and 11th sections of the law, embrace the cases of accessaries before and after the fact; and, consequently, the offences of these persons must partake of the nature of the principal offences, independent of the word "aforesaid," which clearly refers to the piracies enumerated in the 8th section. We then come to the 12th section, upon one clause of which this indictment is founded. This section introduces a new set of offences, amounting only to misdemeanors, although they are declared to amount to piracy and felony, by the statute of Geo. I. c. 24, from which this section was obviously borrowed. Many of these offences are the offences of principals; others, and particularly that for which these defendants are indicted, more nearly resemble those of accessaries. The argument is, that, as confederating with pirates is necessarily accessorial to the principal offence, and as the accessaries, under the 10th and 11th sections, can be guilty of no offence but such as is made so by the 8th section, the words "such piracies," &c., in the 12th section, must find their antecedent in the same section. It is very true, that these words have no proper antecedent in the 12th section, and yet we think, that to refer them to the piracies stated in a remote section, with which the 12th section, is in no manner connected, and which embraces a different set of offences, would be inconsistent with the obvious intention of the legislature, as well as with correct grammatical construction. The 10th and 11th sections, as before observed, refer to the 8th, not only by express words of reference, but because the offences mentioned in them are declared to be those of accessaries, before and after the fact; and they are, therefore, strictly within the rule accessorius seq-

uitur, &c. But these reasons do not apply to the clause of the 12th section under consideration. The word "such" is not synonymous with "aforesaid," and has no necessary reference to the piracies defined by the 8th section of this act. The decision in Palmer's Case, does not require such a construction;—if it did, we should not hesitate to give it. That case decides, that the act of piracy must be committed on board of an American vessel; and, upon that principle, we are clear, that confederacy with pirates, on board of a foreign ship, would not be an offence within the 12th section. But in this case, the pilot boat is an American vessel, and the persons on board were citizens of the United States. The pirate, with whom the confederacy and correspondence takes place, may, in our opinion, be any sea robber or pirate, according to the general law of nations. Suppose, for instance, the captain of an American vessel were to yield up his vessel to such a pirate; could it be contended, that it would not be within the meaning, as it most unquestionably is within the words, of the 8th section of the law? Upon the same ground, it appears to us, that, if a mariner endeavours to corrupt the master of an American vessel to go over to, or to confederate with pirates or sea robbers, whoever they may be, or to trade with them, or furnishing them with ammunition, &c.; or confederating or corresponding with them; are all offences within the words, as well as within the intent and meaning of the 12th section of this law; the word "such" intending to relate, (though very inaccurately,) to pirates and robbers before mentioned.

The question of fact, which you have to decide under this head, is, whether the men on board the schooner were pirates or robbers, according to the definition which we have just given of these words? Of this fact there is no positive proof; and what ground is there for presuming it? They offered the enormous sum of $5000 to be put on shore with five trunks.—They afterwards made an extravagant offer for the defendants' skiff for the same purpose. In short, their whole conduct was mysterious, and highly suspicious. The defendants themselves thought so. It was such as might free any person from the charge of uncharitableness, who should believe that they had committed, or intended to commit, some crime. But, is the conclusion a necessary one, that that crime was piracy or robbery? We have not the slightest information as to the history of these men at any time,—who they were—of what nation; —nor do we know the national character of their vessel; although the evidence, so far as it goes, would lead to the conclusion that she was Spanish. They might have acquired the property which they were so anxious to preserve, as well by robbery on land, by capture from Spanish subjects on the high seas, under a commission from the revolutionary government of South America, (which would not amount to acts of piracy,) as by unauthorized robbery on the high seas. The master of this vessel may have run away with the cargo committed to his care, to transport from one place to another, which would be no offence within the 8th section of the act of congress, if the vessel was foreign, nor within the general law. Or, he may merely have intended a breach of the revenue laws of the United States, by smuggling his cargo on shore. Now, if the conduct of these men was equally consistent, whether they had committed any one of the above offences, as the offence of piracy, it would be carrying the doctrine of presumption to an alarming extent, for the jury to fix upon any particular crime, as that which those persons must have committed; and they ought to be perfectly satisfied, from the evidence, that the crime which these men had committed, (if, indeed, you are satisfied that they had committed any,) was the precise one of piracy or robbery, before they can convict them.

If these men were pirates and robbers, then the next inquiry for the jury to make is, 2. Whether the defendants knew that fact, at the time the alleged correspondence took place. Of this fact there is no proof. The defendants have never acknowledged that they knew, or that they even suspected, that these men were pirates; and this prosecution is supported altogether upon their own confessions. They stated, that they considered those persons as being very suspicious characters, which they might well do, without their opinions pointing at any particular crime. The refusal of the defendants to accept the tempting offer of 5000 dollars, to land them with their trunks, and the reason assigned that they might not only expose themselves to prosecution and imprisonment, but to a forfeiture of their vessel;—their prompt information to the officer of the customs, of every circumstance that had occurred; and their claim of the schooner and cargo as derelict, or for salvage, together with the irreproachable character which they are proved to have borne, present a case from which the jury may safely infer, that the defendants rather suspected those persons of an intention to smuggle, than that they had committed the crime charged against them by this prosecution. At all events, the jury ought to be well satisfied, that the defendants knew that these persons had been guilty of piracy.

The third inquiry for the jury, in case they should be against the defendants upon the first two points, is, whether they corresponded, &c., with those men? The court is inclined to think, that the different expressions used in the clause of the 12th section, on which this indictment is founded, mean nearly the same thing. They imply compact and association with the pirates, as well in relation to the past, as to future acts. Any intercourse with them, however inefficient or remote, which had a reference to the offence with which they are chargeable, and which

had a tendency, or was intended, in any manner, to promote their views, is, in the opinion of the court, an offence under this section. There must be something of criminal intention, in the person who confederates and corresponds with the pirates. The correspondence may be perfectly innocent;—it may be for the purpose of bringing the guilty persons to punishment;—or to dissuade them from a further prosecution of their guilty practices. To convict the defendants, something like a criminal participation must be shown. To exemplify these principles, we think, that if the schooner had followed the pilot boat into Delaware Bay, without any agreement or understanding between the parties, expressed, or implied;—and if the owner of the schooner choosing voluntarily to abandon the schooner and the remainder of her cargo, the defendants had possessed themselves of the property, and proceeded against it for salvage; the defendants would have been exempt from any charge of correspondence, combination, confederacy, or consulting. But they agreed, that the schooner might follow the pilot boat as a guide, and they ratified this agreement by demanding pilotage. They also asked of the alleged pirates, a donation of the vessel and the remainder of the cargo on board, which was acceded to. If the jury are satisfied, that the owners of the schooner and cargo were pirates, and that the defendants knew the fact, we should be of opinion, that these acts would amount to a correspondence and confederacy, within the true intent and meaning of the 12th section of the law under consideration.

The jury found the defendants not guilty.

UNITED STATES (HOWARD v.). See Case No. 6,763.

Case No. 15,404a.

UNITED STATES v. HOWE.

[12 Cent. Law J. 193.] [1]

District Court, W. D. Arkansas. 1881.

WITNESSES—MEDICAL EXPERTS—RIGHT TO FEES.

[A physician cannot lawfully be compelled, even in criminal cases, to testify as an expert to matters of medical science, against his objection, unless first compensated by reasonable fee, as for a professional opinion. Refusal to so testify is not punishable as a contempt.]

This was an indictment against Arena Howe for the crime of murder.

Dr. Bennett was called as an expert. Being sworn, he refused to testify unless first paid a reasonable compensation for giving the results of his skill and experience to the court and jury. PARKER, District Judge, declined to regard this refusal as a contempt of court, and held that there was a wide distinction between a witness called to depose to a matter of opinion depending on his skill in a particular profession or trade, and a witness who is called to depose to facts which he saw. When he has facts within his knowledge, the public have a right to those facts, to be used in a court of justice in criminal or civil trials; but that the skill and professional experience of a man are so far his individual capital and property, that he cannot be compelled to bestow them gratuitously upon any party; that neither the public, any more than a private person, have a right to extort services from him in the line of his profession or trade, without adequate compensation; that a physician cannot lawfully be compelled to testify as an expert to matters of medical science against his objection, unless first compensated by a reasonable fee, as for a professional opinion; and his refusal to testify as to matters of medical science without such compensation cannot be punished as a contempt.

[1] [Reprinted by permission.]

Case No. 15,405.

UNITED STATES v. HOWELL et al.

[4 Wash. C. C. 620; [1] 2 Am. Lead. Cas. (5th Ed.) 419.]

Circuit Court, D. New Jersey. Oct. Term, 1826.

BONDS FOR PAYMENT OF DUTIES—RELEASE OF SURETIES—STATUTORY BONDS.

1. If a creditor, whether the United States or an individual, give time to the principal in a bond prior to the breach of the obligation, without the consent of the surety, the surety is discharged, and he may set up the defence at law. Aliter, if the time be given after the breach, for then the only remedy of the surety is in equity.

[Cited in U. S. v. Garlinghouse, Case No. 15,189.]

[Cited in American Button-Hole, O. & S. M. Co. v. Gurnee, 44 Wis. 64. Cited in note to Braman v. Howk, 1 Blackf. 394. Disapproved in Carr v. Howard, 8 Blackf. 192. Cited in Chapman v. McGrew, 20 Ill. 104. Disapproved in Dickerson v. Board, 6 Ind. 131. Cited in Dunham v. Downer, 31 Vt. 259, 265. Cited in brief in Green v. Lake, 13 D. C. 170. Cited in Nicholas v. Austin, 82 Va. 824, 1 S. E. 136; Paine v. Voorhees, 26 Wis. 531.]

2. If the law prescribe the terms of a bond to be taken, and one be taken variant therefrom, it is void, so far at least as it is variant. But the officers of government may, without any law, take securities from the debtors to the public for what they may owe.

[Cited in U. S. v. Brown, Case No. 14,663; U. S. v. Humason, Id. 15,420; U. S. v. Mynderse, Id. 15,850.]

[Cited in brief in Bower v. Commissioners, 25 Pa. St. 70; Cited in Union Wharf v. Mussey, 48 Me. 311; Inhabitants of Scarborough v. Parker, 53 Me. 253; Sooy v. State, 38 N. J. Law, 331; State v. Purcell, 31 W. Va. 61, 5 S. E. 310; Stovall v. Com., 84 Va. 249, 4 S. E. 381.]

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

This was an action of debt on a bond executed by the defendants [Samuel Howell and John L. Howell]. After reciting that certain bonds to the United States for the payment of duties had been executed by Reeve Lewis & Co. and Joseph S. Lewis as their surety, payable on certain days, which are set forth, and that the United States (in some of the counts, and the secretary of the treasury in others), had agreed to extend the time of payment of said bonds for one year from the day of payment thereof respectively, the condition of the bond is, that the obligors in those bonds shall pay to the collector the amount thereof, on or before the expiration of the said periods of one year from those when the same had respectively become due according to the tenor of them, with interest. Breach, that the obligors in those bonds had not paid to the collector the amounts of said bonds, on or before the expiration of one year from the time they had respectively become due, &c. Plea, that on such a day (after the year when the said bonds had become due), the plaintiffs promised and agreed with the surviving partner of Reeve Lewis & Co. to postpone and defer the payment of, and all proceedings at law and claims to the payment of all the said bonds, for a long time after the said respective terms of one year from the periods when the same respectively became due, to wit, &c. And that in pursuance of said agreement, the plaintiffs did postpone the payment, and all claims and demands for the payment thereof, and did allow to the obligors in said bonds further time for payment of said bonds, beyond the said term of one year, &c., which said agreement was made without the assent, concurrence, or participation of the defendants, for which cause they say they are discharged from any liability to the plaintiffs, &c. General demurrer, and joinder.

In support of the demurrer it was contended by the district attorney, that although a new contract between the creditor and the principal, by which the former binds himself to extend the time of payment, without the consent of the surety, will in general discharge him, yet that the surety, where he is bound by a sealed instrument, can not plead this matter at law, and that none of the cases go to that extent. He cited the following cases: 6 Bin. 292; Armstrong v. U. S. [Case No. 549]; [U. S. v. Kirkpatrick] 9 Wheat. [22 U. S.] 736; 2 Southard [5 N. J. Law] 584; 5 Barn. & Ald. 187; Cross v. U. S. [Case No. 3,434]; Shep. Touch. 397, 382; 3 Wils. 352; Cowp. 47; 7 Johns. 332; The Margaretta [Case No. 9,072]; 17 Johns. 384; 2 Johns. Ch. 560; 3 Yeates, 157.

For the defendant, the following cases were cited: [Miller v. Stewart] 9 Wheat. [22 U. S.] 703; 2 Brown, Ch. 578; 18 Ves. 20; 2 Ves. Jr. 540; 2 Johns. Ch. 557; 3 Bos. & P. 365; 2 Bos. & P. 62; 1 Bos. & P. 419; 8 East, 576; 3 Wils. 530; 10 Johns. 180; 2 Halst. [7 N. J. Law] 89; 3 Halst. [8 N. J. Law] 27; Ludlow v. Simmond, 2 N. E. Cases in Error [2 Caines, Cas.] 29; [U. S. v. Fisher] 2 Cranch [6 U. S.] 358, 380, 398; 2 Day, 236; 3 Johns. 369; 7 Johns. 339.

Mr. Elmer, U. S. Dist. Atty.
Mr. Wood, for defendants.

WASHINGTON, Circuit Justice. The main question in this case is, whether the indulgence granted to the surviving partner of Reeve Lewis & Co. by the United States, by extending the time for the payment of their bonds, discharged the defendants, their sureties, at law? [2] The general principle established by all the cases is, that if the creditor, without the assent of the surety, expressly, or tacitly yielded, give time to the principal, by enlarging the credit beyond the period mentioned in the contract, the surety is discharged. The principle of the decisions is, that the surety guaranties the performance by his principal, of a particular contract, and engages for nothing more. If, without his consent, that contract be varied by the act of the creditor, the surety is not bound by the new contract; and by the act of the creditor, the old one cannot be enforced according to its terms without violating the new agreement, which, although not binding on the surety, is so upon the parties to it.

But it is contended by the counsel for the plaintiff, that, since a bond cannot be discharged at law but by something of equal dignity, it is no defence to an action upon the bond against the surety, that, by a parol agreement with the principal, without the assent of the surety, the creditor has bound himself to enlarge the time of payment stipulated in the bond; and in support of this argument, reliance is placed upon the case of Davey v. Prendergrass, 5 Barn. & Ald. 187. I entirely agree in the decision of that case, and in the application of the principle stated to it. The undertaking of the surety, if such he may be considered, was, that he himself would pay, within one month after demand, such balance, not exceeding £500, as, upon the settlement of accounts between the plaintiffs and S. P. and J. P., should appear to be due from the latter to the former, for coals to be delivered by the plaintiff to those persons. As between the plaintiff and the defendant, the latter made himself the principal debtor; and it would therefore be difficult to state any legal principle upon which the defendant could be discharged on the ground of the parol agreement between the plaintiff and those who, it is possible,

[2] The argument relied upon in support of the demurrer was, that this being the case of a surety in a sealed instrument, no contract between the obligee and the creditor for extending the time of payment, can discharge the surety at law. To this position the opinion is confined, on account of the importance of the question to which it gave rise.

were, in relation to the defendant, the principal debtors; although this was by no means obvious from the terms of the defendant's engagement. Indeed the defence could not have been maintained at law, even if the parol agreement had been made with the defendant himself, upon the principles of the common law stated by the court.

If, in this case, the court meant to lay it down as law, that a surety in a bond, conditioned for the payment of money or the performance of certain acts by a third person, cannot be discharged from his obligation except by some instrument of equal dignity, I must be permitted to dissent from such a doctrine, and to maintain that it is insupportable by a single authority. Will not performance, in pais, by the principal, discharge the surety? May not the surety, and may not even the principal, discharge himself by acts in pais, tending to excuse the non-performance, by showing that it was occasioned by the conduct of the creditor? If this be so, (and who can deny it,) where is the legal principle which shall prevent the surety from pleading as an excuse for the non-performance of his engagement, that the creditor interfered, and prevented the performance by entering into a new contract with the principal; by which the performance by him was dispensed with, and postponed to a period beyond that mentioned in the contract which the surety had guarantied? The question at law then is, whether the contract of the surety has, without his consent, been changed by the obligee? If it has, the obligee has, by his own act, defeated the condition of the surety's bond, and consequently discharged him from his obligation at law, as well as in equity. This leads to the inquiry, whether in the particular case in which the surety relies upon a discharge so brought about, the contract which he bound himself to guaranty, has been changed?

If that contract be to pay money, or to perform a particular act on a particular day; before which day, the time of payment or performance is enlarged by a parol agreement between the obligee and the principal, without the assent of the surety; I hold that the surety is discharged; upon the ground that the terms of his contract are varied without his consent, by the act of the obligee. But if the new agreement be made after the time for payment or performance has elapsed, so that the bond of the surety has become forfeited, I do not perceive upon what legal ground it can be alleged, that the contract of the surety has been varied by such subsequent agreement. Such an agreement, I admit, deprives the surety of his equitable right to call upon the creditor to enforce payment or performance, and upon his refusal to ask the aid of a court of chancery to compel the obligee to do so; and since the obligee has, by his subsequent agreement, disabled himself from proceeding against the principal; that court will, upon equitable principles, relieve the surety, and enjoin proceedings at law against him. These appear to me to be the principles which are fairly to be extracted from the numerous cases upon this subject. The difference between an extension of the time by the obligee before and after the bond is forfeited, is laid down by Lord Eldon in the case of Rees v. Berrington, 2 Ves. Jr. 540, and is, I think, founded upon principles of law.

Upon the whole I am of opinion, that since the new agreement with the principal debtors in this case was entered into after the time when their debts to the United States became due, such an agreement does not at law amount to a discharge of the defendants. Cro. Eliz. 46.

It has been made a point whether this bond, not being required to be taken by any act of congress, is a valid one? My opinion upon this point is, that where a statute requires an official bond to be taken, and prescribes substantially the terms of it, it must conform to the requisitions of the statute, and if it go beyond them it is void, so far at least as it exceeds those requisitions. But I have no doubt that the officers of the government may legally take bonds, or other securities, for debts due to the United States, although no act of congress authorises their being taken in the particular case. The opinion given upon these points renders it unnecessary to consider the question raised by the district attorney, whether the principles laid down in deciding the first point can be applied to the United States.

Judgment must be entered upon the demurrer for the United States.

Case No. 15,406.

UNITED STATES v. HOWLAND.

. . . [2 Cranch, C. C. 508.] [1]

Circuit Court, District of Columbia. Nov. Term, 1824.

BONDS FOR DUTIES—ACTIONS—EVIDENCE.

1. The United States may maintain indebitatus assumpsit, for duties not bonded.

[Cited in Stockwell v. U. S., Case No. 13,466.]

2. The collector's books in the handwriting of a deceased clerk, are evidence for the United States.

Indebitatus assumpsit [against Thomas H. Howland] for duties not bonded.

Mr. Fendall, for defendant, contended that indebitatus assumpsit would not lie for duties; and that the collector's books, in the handwriting of a deceased clerk, were not evidence.

But THE COURT (THRUSTON, Circuit Judge, absent) overruled both objections.

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[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,407.

UNITED STATES v. HOXIE.

[1 Paine, 265.] [1]

Circuit Court, D. Vermont. Oct., 1808.

TREASON—RESISTANCE TO LAW.

A resistance of the execution of a law of the United States, accompanied with any degree of force, if for a private purpose, is not treason. To constitute that offence, the object of the resistance must be of a public and general character.

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

This was a trial for treason in levying war against the United States. The offence charged in the indictment was, that the prisoner [Frederick Hoxie], being a citizen of the United States, and intending to oppose the execution of the laws thereof, and especially the embargo law, on the 13th day of June, 1808, at Alburgh, Vermont, assembled with a company of sixty armed men, and resisted the collector of the district of Vermont, in the execution of the duty of his office, and with force and arms, took and rescued from his custody a certain raft of timber which had been seized by the collector when on its way into Canada, and was then moored and guarded by the troops of the United States, who were aiding the collector. And that the defendant, in further prosecuting the war thus levied, and in order more effectually to rescue the said raft, in company with the rest, fired upon the collector and troops, and thereby intimidated them from detaining and keeping possession of the raft: and that the defendant with his confederates then took the raft into Canada. It appeared from the testimony of witnesses examined on the trial, that one Vandusen had sent a raft of timber from Whitehall to be transported into Canada, contrary to the provisions of the embargo laws. When it had reached the Isle of Mott in Lake Champlain, it was seized by the collector of Vermont, and placed in the custody of a company of militia. While the troops were at some distance from the raft, a company of about sixty men hired for the purpose, and armed some of them with a dozen muskets, and the rest with clubs and spike-poles, assembled with the intention of rescuing the raft, and if necessary, of making prisoners of the troops who guarded it. They got possession of the raft, however, without any resistance, no one being near it, and proceeded on with it towards Canada. In about an hour, as the raft passed a point of the shore, twenty rods distant, the troops fired upon it, and those on the raft returned the fire. This firing continued until the raft was beyond the reach of musket shot. About one hundred shots were fired from the raft, and the balls struck trees on the shore, and the shot from shore also struck the raft, but no persons were wounded. The firing was in earnest and intended for execution. The men were to have 800 dollars if they took the raft into Canada, but if they did not succeed they were to get nothing. At the time they took possession of it, the sentinel who had been placed over it was a quarter of a mile off, and the men were told that the collector was willing that the raft should be taken away, and it was believed that they would meet with no opposition. The prisoner was on the raft, firing pretty actively, but he was opposed to the proposition which was made in the first instance, to make prisoners of the troops who guarded it. After the raft was got into Canada, Vandusen paid off the men and they returned home. There was evidence that the prisoner had been engaged in other attempts, to pass the lines with potashes, and that he had occasionally talked about fighting his way through. But there was no evidence that he had ever used force, except in this instance.

D. Fay, U. S. Dist. Atty.

D. Farrand, for the prisoner.

LIVINGSTON, Circuit Justice (charging jury). A very solemn and important office now devolves on you, no less than that of deciding whether a fellow citizen has forfeited his life to the laws of his country. It is not often that we are called to the discharge of a more interesting, and at the same time, more painful and delicate duty. It must, however, whenever it occurs, be met with firmness; and, while it is performed with all the humanity and caution due to a party accused, sight must not be lost of those claims which, if a crime has been committed, the public have upon us. The offence charged in the present instance is that of treason. The indictment having been recently read in your hearing, I will not, at this late hour, trouble you with repeating it. To this charge, the prisoner has pleaded not guilty, and for trial has put himself on a jury of his country. Nor will I detain you with a recapitulation of the facts, as they have appeared in evidence, about which there is no dispute, and on which you are now to say, whether the prisoner at the bar be guilty of the crime of treason. But, although there be little, if any, controversy in relation to the facts on which the public prosecutor relies, you will naturally expect some direction from the court, how far, in point of law, they support the charge alleged in the indictment. This direction, with its reasons, the court will now proceed to give you.

Treason, not only holds a conspicuous, and generally the first place in every catalogue of crimes, but is almost universally punished with death. Government is so high a blessing, and its preservation and support are so essential to the welfare of every member of the body politic, that to attempt its subversion, has ever been regarded a most aggravated offence. But, the resentment so nat-

[1] [Reported by Elijah Paine, Jr., Esq.]

urally enkindled against those who are supposed to aim at the destruction of the only security which we enjoy for life, liberty, and estate, leads us frequently to include, under this high crime, offences greatly inferior in turpitude, much less dangerous in their effects, and in every respect, of a different description and tendency. To prevent, therefore, as far as possible every abuse by the extension of treason to offences, which, in times of public agitation, might, by violent or corrupt constructions, be pretended to belong to it, there was inserted in our national compact, a rule which was to be binding on every department of government. To define and provide punishments for other crimes of federal cognizance, is left to congress; but, with a jealousy on this subject, which a full knowledge of the excesses that had so often been committed in other countries by parties contending for dominion, was well calculated to excite, no other trust was here reposed in the legislature, than that of prescribing in what way treason was to be punished. For its definition, resort was ever to be had to that great fundamental law, which was to be binding at all times; and was not liable to be changed on a sudden emergency, so as to gratify the vengeance, or promote the views of aspiring or designing men. In the constitution we accordingly find this very limited definition of it: "Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

The United States having no public enemy, it is only the first branch of this definition which will require your attention. With all the solicitude which was felt by the framers of our constitution to produce certainty, and to exclude interpretation in a matter so momentous, and with all their circumspection to avoid the use of terms in any degree vague or indefinite, cases have already occurred in this country, and will, no doubt, again arise, in which it will be difficult to say, whether the acts in question amount to a "levying of war," within the meaning of this instrument. Such is the imperfection of language, and so limited human foresight, that it is very difficult, whatever care be employed, always so to describe an offence, as not to leave some doubt of the meaning of the legislature, and still more so, to anticipate every case of a similar nature, which it might have been proper to provide for. To a system of laws so perfect, that Being, who takes in at one view, the past, present, and to come, is alone competent. When doubts, however, arise, as they often must, whether an offence belongs to the class assigned to it in the indictment, their solution in the first instance devolves on the court, whose duty it then is, to give a jury such instructions as it may deem necessary, for their correct understanding of the law.

Having a constitutional regulation on the subject before us, it may be expected by some, that the court will compare with the terms of that instrument alone, the facts which have appeared in proof, and by such test, determine whether the crime of treason has been committed. Were our examination thus restricted, it is impossible a moment's doubt could be harboured of the true character of this transaction. "A levying of war," without having recourse to rules of construction, or artificial reasoning, would seem to be nothing short of the employment, or at least, of the embodying of a military force, armed and arrayed, in a warlike manner, for the purpose of forcibly subverting the government, dismembering the Union, or destroying the legislative functions of congress. These troops should be so armed, and so directed, as to leave no doubt, that the United States, or their government, were the immediate object of their attack.

But, a wider range has been taken at the bar. Not only the constitution, but precedents have been resorted to, to furnish a rule for the present case. The court, so far from feeling a disposition to find fault with this mode of treating the subject, has no objection to adopt it, in its remarks to you. It has already been observed, that, taking the constitution as our guide, not a doubt can be entertained of the prisoner's innocence of treason. Let us see, then, whether the different acts, which in England, or in this country, have been regarded as constituting the crime of "levying war," will make any difference.

In taking notice of precedents, set by British tribunals, the court does not mean to give any opinion on their binding effect in the United States; or discuss a question which has been much agitated—whether, by the use of these terms, it was intended to adopt the technical meaning which they had already received in England: or whether, considering treason as a new offence against a newly created government, the constitution on this point was to be interpreted by itself, without reference to, or with the aid of any common law decisions whatever? These questions will be left unconsidered—a decision of them now not being thought material. For, if the court does not greatly err, no construction in England, and certainly none in America, has yet carried this doctrine the length to which we are at present expected to go.

In the first place, it is well understood, in both countries, that war must be actually levied, and that no consultation or conspiracy to subvert the government, or laws, however atrocious the offence, can amount to treason. In England, all insurrections to dethrone or imprison the king; or, to force him to change his measures, or to remove evil counsellors; to attack his troops in opposition to his authority; to carry off or destroy his stores provided for defence of the realm, if done conjointly with and in aid of rebels, or enemies, and not only for lucre, or some private, malicious motive; to hold a castle or fort against the king, or his troops, if actual force be

used in order to keep possession; to join with rebels freely and voluntarily; to rise for the purpose of throwing down by force all enclosures; alter the established law, or religion; to reduce the general price of victuals; to enhance the price of all labour; to open all prisons; that is, to effect innovations of a public and general concern by an armed force, or for any other purpose which usurps the government in matters of a public and general nature. All these acts have been deemed "a levying of war." So also have insurrections to redress by force national grievances; or to reform real or imaginary evils of a public nature, and in which the insurgents had no special interest; or, by intimidation and violence,—as was the case with Lord George Gordon, who however was acquitted,—to force the repeal of a law. But, when the object of an insurrection is of a local or private nature, not having a direct tendency to destroy all property and all government by numbers and armed force, it will not amount to treason; and, in these, and other cases that occur, the true criterion is, the intention with which the parties assembled.

Having thus brought into one view the principal cases which, in England, have been adjudged to amount to levying of war, the court will now proceed to the trials which have taken place within the United States, for treasons of the same description. In 1794, an insurrection took place in four of the western counties of Pennsylvania, with a view of resisting and preventing, by force, the execution of certain acts of congress imposing a duty on spirits distilled within the United States. In the trial of U. S. v. Mitchel [Case No. 15,788], who was indicted for treason, before a circuit court of the United States, at which Judge Patterson presided, the court held, that "to resist or prevent, by armed force, the execution of a particular act of the United States, is a levying of war against the United States, and, consequently, treason, within the true meaning of the constitution." On the trial of Fries [Case No. 5,126], before the same court, in 1799, for treason, the court (Judge Iredell presiding,) delivered the same opinion, and Fries was convicted. When Fries was again tried, —a new trial having been granted to him,— the same court, then composed of Judge Chase and Judge Peters, delivered the following opinion: "That an insurrection or rising of any body of people within the United States, to attain by force or violence any object of a great public nature, or of public and general or national concern, is a levying of war against the United States." "That any such insurrection to resist or to prevent by force or violence the execution of any statute of the United States, under any pretence of its being unequal, burthensome, oppressive, or unconstitutional, is a levying of war against the United States, within the constitution." Judge Iredell, in a charge to a grand jury, having in view the insurrection in Bucks and Northampton, in the state of Pennsylvania, thus expresses himself: "If the intention be to prevent by force of arms the execution of any act of congress altogether, any forcible opposition calculated to carry that intention into effect, is levying of war against the United States."

The only occasion on which the supreme court of the United States has delivered any opinion on the doctrine of treason was, on the return of a habeas corpus, in the Case of Bollman [4 Cranch (8 U. S.) 75], who had been committed on a charge of that nature. "To constitute this crime," says the court, "war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences: the first must be brought into operation by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed." "There must," says the court, in another part of its opinion, "be an actual assemblage of men, for the purpose of executing a treasonable design." And again, "It is more safe, as well as more consonant to the principles of our constitution, that the crime of treason should not be extended, by construction, to doubtful cases."

Having now stated the principal decisions abroad and at home, on the subject before us, let us go back to the indictment, and the evidence in support of it, and see if it be possible to bring the prisoner's case within any of those that have been mentioned. The offence laid, stripped of its artificial dress, and technical appearance, is nothing more than the forcible rescuing of a raft from the custody of a military guard placed over it by a collector. It is impossible, to suppress the astonishment which is excited at the attempt which has been made to convince a court and jury of this high criminal jurisdiction, that, between this and levying of war, there is no difference. Can it be seriously thought, that an American jury, with the constitution of the United States as a guide to their interpretation, or even on the cases which have been cited, can be brought, by ingrafting construction on construction, to leave far behind them, English judges and English juries, in their exposition of the crime of treason? Gentlemen, they cannot perceive the tendency of the doctrine which it is now asked of us to sanction. On which of the precedents cited do they rely, for our support, or expect us to decide, that an opposition to law, so feeble, so transitory, so free from every traitorous intention, so destitute of every appearance of war, and so evidently calculated for the sole purpose of private gain, was making war against the United States? In what can we discover the treasonable mind, which common sense,

as well as all the authorities tell us, is of the very essence of this offence? Can it be collected from the employment of ten or twelve muskets? Some judges have said, how correctly is here of little moment, that the quantum of force is immaterial. But, when we find it so very small and despicable, it furnishes strong evidence of some intent, very far short of that of measuring their strength with the United States: unless, we can believe, that a force, if it deserve that name, scarcely competent to the reduction of a single family, were meditating hostilities and rebellion against a government, defended by several millions of freemen. But, there is no necessity of any forced interpretation, to arrive at the real intention of these parties. Their conduct shows it to have been of a private nature, and that no further violence was contemplated, than to smuggle a raft which had been seized by the collector, and was then lying at a small distance from a guard, into Canada; for, they forthwith proceeded thither, and having left it a little beyond the line, they returned directly to the United States, not at the head of an army, but peaceably and quietly, each man to his own home, not suspecting that they had a war on their hands, with any power, and least of all with the government of their own country.

Again—Whence is it collected, that their intention was to intimidate congress into a repeal of the embargo laws, or to resist their execution generally? If congress were in session, which was not the case, can gentlemen seriously believe, that means so inadequate would have been employed for purposes which an organized, numerous, and well disciplined army would have found it difficult to accomplish? If you look at the insurrections in 1794, and in 1799, you will be struck with the great difference between the cases which arose out of those occurrences, and the one on which you are now to decide. There is hardly a feature of resemblance; and yet, you are seriously expected to condemn the prisoner, as a traitor, for forcing some lumber from the possession of a collector, because Mitchel, Vigol, and Fries, (who, by the bye, were all pardoned,) were convicted as such, for being concerned in insurrections, which threatened the existence of government, were well calculated to intimidate the legislature, and for a time actually suspended the operation of certain laws which were deemed obnoxious in a large district of country.

It may not be very easy (unless open war and the broad face of rebellion be the criterion,) to fix the exact boundary between treason and some other offences, which partake, more or less, of an opposition to government. But, difficult as this may be, every one will at once perceive a very wide separation, between regular and numerous assemblages of men, scattered over a large portion of country, under known officers, and in every respect armed and marshalled in military and hostile array, for the avowed purpose, not only of disturbing and arresting the course of public law, in a whole district, by forcibly compelling the officers of government to resign, but by intimidation and violence, of coercing its repeal, and a sudden, transient, weak, unmilitary, and unsystematized resistance, and that in a solitary instance, and for the single object of personal emolument. As obvious is the distinction, between a large armed force, embodied in the heart of our country, with designs inimical to government and the laws, assuming an attitude of defiance, and opposition to any force which might be set against it, and a few dozen men, who, having committed an offence on the very confines of the United States, were in the act of flying to another government, and whose hostility, such as it was, could have no other motive, than that of favouring their escape. These cases cannot be considered as parallel, without destroying, at once, every distinction between trespasses, riots, and treasons. Not an instance can be found in England, during a period of several hundred years, which have elapsed since the statute of treasons, in which an act like the present, was determined to be treason.

Has the prisoner, then, it may be asked, been guilty of no offence? His conduct, no doubt, was highly culpable, and, if the courts of the United States have no common law jurisdiction in criminal cases, as some have thought, the legislature may declare such acts a crime, and assign to it such punishment as may be thought proper. It is not very clear, indeed, that the offence, which is now dignified with the name of treason, is not already provided for, by an act of congress, which punishes the resisting or impeding of any officer of the customs, or any person assisting him, in the execution of his duty, with a fine of four hundred dollars.

By another act, whoever shall knowingly oppose any officer of the United States, in the execution of process, or shall beat or wound him in such service, shall be fined and imprisoned; and, provision is made, by the same law, for the punishment of those who, by force, rescue a prisoner after or before conviction for a capital crime. It may also be remarked, that to kill a sheriff in the discharge of his duty, and who is as much clothed with the authority of law, as the collector or his agents were here, whatever be the number concerned, or the weapons employed, has always been held in England and this country, murder, and not treason.

These laws of congress have been mentioned, and others of a like nature might be referred to, to satisfy you, that the legislature never supposed an act of this kind treason, or they would only have declared its punishment; and, although, if it be treason by the constitution, no act of congress can make it otherwise; still, a legislative understand-

ing of that instrument, if not conclusive, is entitled to very respectful attention.

The court, may here again ask, whether it be a greater crime to take from the keeping of one public officer, where no death ensues, a property however valuable, than to force from the custody of another, a person whose life had been declared to be forfeited to the laws of his country; or, to kill a sheriff in the execution of his duty? In all these instances, the laws are opposed, and in the last case, with the aggravation of homicide; but as no traitorous intent exists in either, and no war is made against the United States, neither of them can fall within the meaning of treason.

But as so much stress is laid on the opinions of our own judges, whose attention has been judicially drawn to a consideration of this crime, you will bear with me a little longer, while I show you how very little ground there is for this reliance, and how dangerous a sense you are required to put on these decisions. Nothing will be more easy than to rescue their characters from the reproaches which would adhere to them, if they had really declared, (for such is the language of this prosecution,) that every opposition to a public law, no matter how momentary, how slight, in what shape, or for what purpose, amounted to treason. Not one of them has said any such thing, nor intimated a sentiment of the kind. Judge Patterson and Judge Iredell, who led the way on this occasion, and of whose valuable services death has since deprived their country, were as eminent for their abilities, as venerable for their erudition, and as much admired and beloved for their humanity and virtues, as any men that ever ascended the bench of justice; and it would be a subject of mournful retrospect for them, if such contemplations could now employ their thoughts, that the authorities of their names should be resorted to, for introducing a doctrine which, if here, they would resist with all the energy of talents, and weight of character, for which they were both illustrious. You are already acquainted with the occasions on which these opinions were delivered, and have seen how totally the resemblance fails, between them and the one which has called us together. These opinions have also, in part, been stated to you; but, permit me, now, to read other passages, from them, which apply more directly to the case before us. If a statement of facts like the present, had been submitted to Judge Iredell, and he had been obliged to examine and decide on them, he could not have expressed himself in terms more appropriate, or have delivered an opinion more exactly suited to them, or more in favour of the prisoner, than the one which he gave on the occasion which has been already referred to: after describing what resistance, and with what intent, to a public law, amounted to treason, he proceeds,—"But if the intention be merely to defeat its operation in a particular instance, or through the agency of a particular officer, from some private or personal motive, it does not amount to the crime of treason. The particular motive must be the sole ingredient in the case; for, if combined with a general view, to obstruct an execution of the act, the offence must be deemed treason." The language of Judge Patterson, if not quite as explicit, conveys the same meaning. "The prisoner," says he, meaning Vigol, "went to the house of two different excise officers, in arms, marshalled and arrayed, and at each place committed acts of violence and devastation." "With respect to the intention," he proceeds, "there is not, unhappily, the slightest possibility of doubt. To suppress the office of excise in the fourth survey of Pennsylvania, and particularly, in this instance, to compel the resignation of the officer, so as to render null and void in effect an act of congress, constituted the apparent, the avowed object of the insurrection, and of the outrages, which the prisoner assisted to commit. Combining these facts and these designs, the crime of high treason is consummated in the contemplation of the constitution and law of the United States." On the trial of Mitchel, the same judge observes: "If the object of the insurrection was, to suppress the excise office, and to prevent the execution of an act of congress, by force and intimidation, the offence, in legal estimation, is high treason. The object was of a general nature and of national concern." But Judge Chase is supposed to have gone further. This is another mistake. As little support can be derived to the prosecution from his opinion, in the Case of Fries. That great and truly profound lawyer, on the fullest consideration, concurred in the judgments which had already been delivered by two of his associates, and expresses himself with all the perspicuity, strength, and precision, for which he is so greatly distinguished. What, in his estimation, constituted treason, has already been seen. You will now hear what he thought of a partial opposition to an act of congress, and for a private or special purpose. On this point he is too explicit to be misunderstood; and yet, that must have been the case, or this prosecution would not have been heard of. "The court," says he (for Mr. Peters, the district judge, whose high judicial reputation adds much to the value of his opinions, concurred with him,) "think, that the assembling bodies of men, armed and arrayed in a warlike manner, for purposes only of a private nature, is not treason, although the judges and peace officers should be insulted and resisted, or even great outrages committed to the persons and property of our citizens."

These learned judges also consider the intention as the only true guide in ascertaining whether certain acts amount to treason, or a less offence, and regard the universality, or generality of the design, as forming an essen-

tial ingredient in the composition of this crime. On this point they thus express themselves: "The true criterion to determine whether acts committed are treason, or a less offence, (as a riot,) is the quo animo, the people did assemble. When the intention is universal or general, as to effect some object of a general, public nature, it will be treason, and cannot be considered, construed, or reduced, to a riot. The commission of any number of felonies, riots, or other misdemeanors, cannot alter their nature, so as to make them amount to treason And, on the other hand, if the intention and acts combined amount to treason, they cannot be sunk down to felony, or riot. The intention with which any acts (as felonies, the destruction of houses, and the like,) are done, will show to what class of crimes the case belongs." If these opinions are understood by the court, and there seems no ambiguity or obscurity in either of them, they all, in express terms, exclude from the rank of treason the facts which compose the present offence; and whatever doubts have been and are yet entertained, by many professional gentlemen of extensive erudition, and exalted integrity, of such parts of these opinions as brought the cases of the insurgents within the constitutional definition of treason, no objection ever has, nor perhaps ever will be, made to the exceptions, which have been so cautiously interwoven into them, for the very purpose of preventing their extension to cases of this kind. Once disregard these exceptions, and render the constitutional rule as flexible or comprehensive as it is now suggested to be, and prosecutions for treason will become as common as indictments for petit larcenies, assaults and batteries, or other misdemeanors. If every opposition to law be treason, for very like this is the language we have heard, as all offences partake in some measure of that quality, who can say how many of them will in time become ranged under the class of treason. Neither you, nor the court, can feel any ambition of leading the way, in setting a precedent so dangerous, or one that will in any degree tend to demolish that barrier which has been raised by the constitution against constructive treasons.

You have been reminded, in the course of this trial, that in criminal cases, a jury has a right to take upon itself the decision of both law and fact. There is no design in the court to dispute this position, or in any degree to encroach on your prerogatives. The trial by jury, whatever doubts may exist as to its excellence in civil actions, has uniformly received, and is most eminently entitled to the highest praise, as a mode of determining between the public and a party accused. It is a subject on which the stores of panegyric have been exhausted. Its perpetuity in this country is secured by the federal constitution, which in this respect, is only a transcript of the provisions which had already found a place in those of the several states. But while you have this right, the court has also its duties to perform. As judges, we are not sent here merely to preside at trials, to preserve order, and to regulate the forms of proceeding; we have a much higher and more important trust committed to us: it is our right and our duty to expound the law to a jury in criminal, as well as civil cases; and although it be not denied, that in public prosecutions, you may decide contrary to such interpretations, it is not too much to say, that it is nevertheless your duty to pay a very respectful consideration to every proposition of law you may receive from the court. Judges have ever been regarded as the proper organs of law; and when it is recollected that they act under the same solemn sanction with yourselves, and have the same interest in a pure administration of justice, it is not probable that any motive can exist, intentionally to deceive you. And who, may it fairly be presumed, generally speaking, will be the best informed on these subjects? Those whose attention has for many years been more or less directed to the jurisprudence of their country, or those whose avocations have left little or no leisure for such inquiries? You are not then, to consider as an intrusion, what it would be a dereliction of duty in a judge to withhold from you; his opinion on the law of every case under consideration. You are already apprized of ours on that, on which you are now to decide. I have the satisfaction to say, that there is no diversity of sentiment between the district judge, with whom I have the honour and pleasure of being associated, and myself. It is the opinion of both of us, that if you believe, which abundantly appears from the testimony, and seems to be conceded on the part of the government, that the prisoner, among others, was hired by the owner of this raft, for the purpose of evading the embargo laws, only in this instance, and for his own private emolument, although it may have been part of the plan to use violence, and force were actually employed against the collector or his agents to accomplish this object, but that this formed no link in a conspiracy to resist or impede the operation of these laws within the district generally as far as their means enabled them, (every attempt to produce proof of which has failed,) then the prisoner is not guilty of the crime of levying war; for then, his case falls most precisely within the exception which has already been read to you from the opinion of Judge Iredell. The intention which all the cases speak of, is not understood by the district attorney and the court in the same sense. He seems to consider, that if the intention be to oppose a law, no matter with what motive, treason is committed; whereas, it is the intention with which such resistance is made, not the opposition itself, that forms the criterion: otherwise, every wilful opposition to a statute, would necessarily be a levying of war. With respect

to the prisoner's intention it is made out most satisfactorily, by every witness that has been examined on the part of the public. On this point, there will be, happily for him, no doubt in your minds. There is no testimony of his ever having been before, or since, engaged in a resistance to these or any other laws. The court cannot help thinking that the district attorney must have been greatly deceived in the information which was given to him, of the prisoner's conduct, and that the proofs on trial have fallen very far short of his expectations, or that you would never have been put to the trouble of deciding on this case. But as, notwithstanding the discussion which has taken place, he seems seriously and sincerely to believe treason has been committed, the court has thought it a duty to state to you its opinions, most explicitly, the other way; so that, if any mistake be committed by so great an extension of the crime of treason, neither of us may be chargeable with it; for, "we cannot be too wary," in the language of the great and good Lord Hale, "in multiplying constructive treasons, for we know not where they will end."

The court will now finish its charge. If it has been tedious, you will impute it not to a desire of trespassing unnecessarily on your time, but of guarding you, in a case of very general concern, against those mistakes which the earnestness and eloquence of counsel sometimes produce; and although we might have been content with stating our opinion on the law, in more general terms, we were willing you should know, that it was not merely a speculation of our own, but one which we believe to be sanctioned by the constitution of our country; by decisions in England; by various judgments of our domestic tribunals; and, as far as can be collected from their acts, by the sense of our national legislature.

In addressing you, then, at some length, and with all possible plainness, the court have felt no other motive than a desire to assist you in coming to a correct result on a point which, to the honour of this state, has never before been a subject of public discussion within it.

The whole case, both law and fact, is now committed to you, in the fullest confidence, that you will do justice to your country, the prisoner, and yourselves.

Verdict of acquittal.

Case No. 15,408.

UNITED STATES v. HOYM.

[Oscar Hoym was indicted for affixing fraudulent revenue stamps to boxes of cigars sold by him; was tried, convicted, and sentenced to be imprisoned for two years at Sing Sing. The case is nowhere reported, nor is the opinion or charge of the court accessible. A newspaper account of the trial is contained in 7 Int. Rev. Rec. °69.]

Case No. 15,409.

UNITED STATES v. HOYT et al.

[1 Blatchf. 326.] [1]

Circuit Court, S. D. New York. Oct. Term, 1848.

OFFICIAL BONDS — RES JUDICATA — COLLATERAL UNDERTAKINGS—EQUITY SUITS.

1. Where a bond, with sureties, was given by H. to the government, for the faithful performance of his duties as collector of customs, and subsequently an additional bond, with a different surety, but with a like penalty and condition, was given by H., and a judgment was perfected against H. on the latter bond: *Held*, in a joint action against the obligors in the former bond, that a plea setting up the judgment and averring that in the two actions the plaintiffs sought to recover the same identical sum of money and upon the same identical breaches of each bond, was not a good plea.

2. The second bond did not of itself operate as a merger or extinguishment of the first, being a security of no higher degree.

[Cited in Re Crawford, Case No. 3,363.]

[Disapproved in Rockwell v. District Court of Lake Co. (Colo. Sup.) 29 Pac. 456.]

3. The judgment on the second bond could not, unless it was followed by satisfaction, have any effect on the first bond.

4. The second bond not having been given in satisfaction of the first, and not being between the same parties, was collateral to the first.

5. Separate suits may be brought jointly against all parties whose names are found on different instruments given as collateral security for a principal debt.

This was an action of debt, against Jesse Hoyt [impleaded with Robert McJimsey] and six other persons, on a bond executed and delivered by them to the United States, dated November 30th, 1838, in the penalty of $200,000, conditioned for the faithful performance of the duties of said Hoyt as collector of the port of New York. The declaration assigned as breaches the neglect and refusal of Hoyt to pay over to the plaintiffs divers large sums of money belonging to them, which were received by him by virtue of his office on divers days between the 20th of March, 1838, and the 1st of March, 1841. The action was commenced in April, 1841, and, after issue joined, the cause was continued until the term of the court in October, 1847, when the defendant Hoyt put in a plea puis darrein continuance, setting up that in April, 1841, the plaintiffs brought an action of debt against him and one Phelps, since deceased, in this court, on a bond executed and delivered by them to the plaintiffs on the 14th of December, 1839, in a like penalty and subject to a like condition with said bond of November 30th, 1838; that by that action the plaintiffs sought to recover of him and said Phelps, (in the language of the plea,) "the same identical sum of money as is demanded and sought to be recovered in this suit, and upon the same identical breaches of the said bond as the breaches assigned up-

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

on the bond oyer whereof is annexed to the plaintiffs' declaration in this suit;" that on the 19th of November, 1846, a judgment in said action was rendered for the plaintiffs against the defendant Hoyt, with costs; and that on the 7th of July, 1847, said Phelps died, whereupon said action abated against him, and said judgment became and was perfected and rendered operative against the defendant Hoyt, and still remained in full force and effect. To this plea the plaintiffs demurred, and the defendant joined.

Benjamin F. Butler, U. S. Dist. Atty.
J. Prescott Hall, for defendant.

NELSON, Circuit Justice. The defence set up in the plea assumes that the second bond did not of itself operate as a merger or extinguishment of the first, but that the judgment recovered upon it did. The second, being a security of no higher degree than the first, of course could not operate as an extinguishment of it. Jackson v. Shaffer, 11 Johns. 513; Andrews v. Smith, 9 Wend. 53. And, that a judgment recovered upon it would not have that effect, was the very point decided in Drake v. Mitchell, 3 East, 251. That was an action of covenant against three defendants. The defence was, that Mitchell, one of the defendants, had given to the plaintiff in satisfaction of the demand, his bill of exchange for the amount of it, upon which the plaintiff had recovered judgment. It was admitted by the counsel, that the giving of the bill did not operate as a satisfaction of the debt; but it was insisted that, by reason of the judgment, the bill had become a security of a higher nature, and the covenant was thus extinguished. But the court held that the judgment operated only to extinguish the bill on which the suit was brought, not the covenant. Grose, J., observed, that the bill, not having been accepted as a satisfaction for the debt, could only operate as a collateral security; and that though a judgment had been recovered on the bill, yet no satisfaction having been produced by it, the plaintiff might still resort to his original remedy. And Le Blanc, J., remarked, that the giving of another security, which in itself would not operate as an extinguishment of the original one, could not operate as such by being pursued to judgment, unless it produced the fruit of a judgment. So here, the second bond not operating of itself as a satisfaction, being a security of no higher degree than the first, cannot operate as such by being pursued to judgment.

The case of Holmes v. Bell, 3 Man. & G. 213, bears directly upon this question. It was there held, that, where a banker took a bond from B., his customer, with security, conditioned for the payment of all sums already advanced or thereafter to be advanced, the bond did not operate as a merger; and that a suit would lie against B. for the balance of his account, as upon a debt by simple contract. Tindal, C. J., observed, that the parties to the bond were not the parties between whom the original liability arose; and that the bond was evidently intended only as a collateral security.

The same principle was decided in the case of Bell v. Banks, 3 Man. & G. 258. That was an action upon a promissory note against two defendants. The defence was, that one of them, at the request of the plaintiff, had executed a warrant of attorney to a third person, in trust to secure the payment of the note, and that it was thereby extinguished. The court held that the plaintiff was entitled to recover. Tindal, C. J., considered the case of Drake v. Mitchell as decisive of the question. The other judges regarded the fact that the new security was between different parties, as conclusive against the merger and that it was intended as collateral. These cases, and others that might be referred to on the same point, are clear authorities against the defence in this case.

There is no averment that the second bond was accepted in satisfaction of the first, and it cannot of itself operate as a satisfaction, because it is a security of no higher nature than the first; and it is not made by or between the same, but between different parties. It is, therefore, but a collateral security, and, although it has passed into judgment, the original security remains unless followed by actual payment or satisfaction. Chipman v. Martin, 13 Johns. 240; Davis v. Anable, 2 Hill, 339; Day v. Leal, 14 Johns. 404.

The second bond being collateral to the first, a judgment recovered upon it against Hoyt, constitutes no bar to a joint action against him and his co-obligors upon the first; as separate suits may be brought jointly against all parties whose names are found on different instruments given as collateral security for the principal debt. Whether the obligations entered into in the different instruments given as collateral be joint or several, makes no difference, because the forms of proceeding require that they should be sued jointly or individually, and the law allows the suit to be joint in all cases. Besides, a judgment upon one collateral instrument does not work an extinguishment of another given for the same debt or duty, any more than it works an extinguishment of the principal debt. The remedies upon the different instruments are therefore independent of each other.

The averment in the plea, that the plaintiffs seek to recover the same identical sum of money in this suit that they sought to recover in the other, and upon the identical breaches assigned in that, is entirely consistent with the fact that the one security was collateral to the other, and does not necessarily import an extinguishment. The pleader should have gone further, and have averred that the one was given and accepted

by the plaintiffs in satisfaction of the other, or that satisfaction had followed the judgment on the first bond.

For these reasons, I think the plaintiffs are entitled to judgment on the demurrer.

[See Case No. 15,410.]

Case No. 15,410.

UNITED STATES v. HOYT et al.

[1 Blatchf. 332.] [1]

Circuit Court, S. D. New York. Oct. Term, 1848.

ASSIGNMENT FOR BENEFIT OF CREDITORS — OFFICIAL BONDS—IMPLIED TRUSTS.

1. Where H. made an assignment of his property, in trust to pay any judgment which the United States might recover against him and the sureties on his official bond as collector of customs, and, after the recovery of such judgment, the plaintiffs in it filed a bill for an account by the trustees and the application of the trust funds to the payment of the judgment: *Held*, that a trust in favor of the plaintiffs was created by the assignment by implication of law, and that the bill was properly filed.

2. But, the right of the plaintiffs under the implied trust did not attach till the filing of their bill, that being their first act in affirmance of the trust, and, therefore, the trustees were not bound to account to them for any of the trust funds that were disposed of prior to that time with the consent of the assignor and of the sureties.

In equity. The bill in this case set forth, in substance, that the plaintiffs had recovered a judgment against Jesse Hoyt, for $221,083-39, for monies received by him as collector of the port of New-York, and for which he had neglected to account; that, before the recovery of the judgment, Hoyt was the owner of certain real estate and personal property, described in the bill, and that, on the 9th of March, 1841, he assigned the same to J. Oakley and G. B. Kissam, in trust to convert the same into money and apply the proceeds to the payment of any judgment which the plaintiffs might thereafter recover against him and the sureties on his official bond. The bill then charged that the assignment was void as against the plaintiffs, as an inequitable hindrance to the collection of their judgment; that the property thus held in trust was worth over $25,000; that the trustees had received large sums of money under the trust, but refused to apply them to the payment of the judgment, and were misappropriating the funds, and devoting them to purposes unauthorized by the terms of their trust, and, in particular, had paid large sums to the counsel of Hoyt, for conducting his defence to the suit in which the judgment was recovered, whereas those fees were not chargeable on the fund, and had paid private debts of Hoyt's, which were not charged on the fund; and that the judgment remained unsatisfied, and the trustees were persons of little property. The bill prayed a discovery, an injunction, the appointment of a receiver, an accounting by the trustees, and the application of the trust funds to the payment of the judgment. Hoyt and the assignees were made defendants.

The answers admitted the judgment and the assignment, and described the property, and set forth a statement of receipts and payments.

It appeared in evidence, that before the filing of the bill the assignees had paid out of the trust funds $3000 to counsel, as fees for defending the suit against Hoyt in which the judgment was recovered, and $650 for the services of a clerk, rendered in examining the accounts of Hoyt preparatory to the trial in the suit. These payments were made with the assent of the sureties.

No serious resistance was made to the appointment of a receiver to take charge of the trust estate, for the purpose of converting it and applying the proceeds towards the payment of the judgment, or to the accounting of the trustees for the trust fund while in their hands. The principal question was whether the assignees were bound to account for the sums paid to the counsel and the clerk.

Benjamin F. Butler, U. S. Dist. Atty.
Lorenzo Hoyt, for defendants.

NELSON, Circuit Justice. The plaintiffs are entitled to charge the assignees as their trustees, and to compel the application of the property assigned, to the satisfaction of their judgment, as the property proceeded from the debtor and was designed to be a counter security against the demand now in judgment. The assignees did not receive it in their own right, but as the means of satisfying the debt in question, whenever it should become fixed. On these facts, a trust was created by implication of law, which a court of equity will execute, either by subjecting the property directly to a seizure on execution, or by compelling the trustees to dispose of it under the supervision of the court, with a view to the appropriation of its proceeds towards the payment of the judgment.

The conveyance made by Hoyt to the trustees was a voluntary assignment, to which the plaintiffs were neither parties nor privies, and was intended as an indemnity to the sureties on Hoyt's official bond. It was revocable by the assignor, with their assent, at least until notice of it had been communicated to the plaintiffs and they had affirmed it. Because, where a person without the privity of his creditors, and without consideration, makes a disposition of his property as between himself and trustees, for the payment of his debts, he is regarded as merely directing the mode in which his own property shall be applied for his own benefit, and the creditors named in the instrument are

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

named for the purpose of showing how the trust property is to be applied. Hence, the right of the plaintiffs in this case to seize upon the assigned property and appropriate it to the satisfaction of their judgment, under the implied trust in their favor, did not attach until the filing of their bill, that being, for aught that appears in the pleadings or proofs, the first step taken by them in affirmance of the trust. Therefore, any disposition of the proceeds made prior to that time with the consent of the assignor and of the sureties was valid, and the proceeds so disposed of need not be accounted for by the trustees in the settlement of their accounts.

[See Case No. 15,409.]

Case No. 15,411.

UNITED STATES v. HUDLAND.

[5 Cranch, C. C. 309.] [1]

Circuit Court, District of Columbia. May Term, 1837.

WITNESS—CROSS-EXAMINATION.

A witness, upon cross-examination, is not to be questioned as to any fact, tending to disgrace him, which the party would not be permitted to prove aliunde.

Indictment [against William Hudland] for assault and battery.

Mr. Semmes, for the defendant, in cross-examining John Dixon, a witness for the United States, asked him whether he had been indicted for treason.

THE COURT interposed, and said that this court, after argument, had lately decided, in Washington, that a witness should not, in cross-examination, be asked a question as to any fact, tending to disgrace him, which the party would not be permitted to prove aliunde.

Verdict, "Not guilty."

Case No. 15,412.

UNITED STATES v. HUDSON.

[1 Hask. 527.] [1]

District Court, D. Maine. April, 1874.

NEW TRIAL—DEPUTY MARSHALS—PRESUMPTIONS FROM COMMISSION—"IRON CLAD OATH"—ARREST—BAIL—RESISTING OFFICER—INDICTMENT.

1. A new trial will not be granted because of the exclusion of the question by defendant's counsel to a government witness on cross examination, whether he had not testified to a specific fact on a former trial, when it appears that the defendant has not suffered wrong or prejudice thereby.

2. The production of a deputy marshal's commission and proof that he was in the performance of the duties of his office raises a presumption that he had taken all prerequisite oaths required by statute; and a jury is authorized to so find in the absence of proof to the contrary.

3. Proof that the "iron clad oath," required by the act of 1862 [12 Stat. 502], had not been deposited with the clerk of the district court will not negative such presumption, since it might lawfully have been deposited elsewhere.

4. Forty-eight hours is a reasonable time, under ordinary circumstances, to give a debtor arrested on execution, within which to procure a bond for his release before committing him to prison.

5. An averment in an indictment for resisting an officer, that defendant "did knowingly, wilfully and unlawfully obstruct, resist and oppose" the officer, sufficiently states the manner and method of the resistance.

6. In such case, an averment, that the execution which the officer is attempting to serve is in full force, is unnecessary, when that fact appears from the description of it; nor is it necessary to set out the process in hæc verba.

Indictment [against Henry Hudson] for resisting a deputy marshal in the service of an execution upon which a verdict of guilty had been rendered. Motion for a new trial for misdirection, and that judgment be arrested on account of a defective indictment.

Nathan Webb, U. S. Dist. Atty.

Josiah H. Drummond and Josiah Crosby, for defendant.

FOX, District Judge. The defendant, an attorney at law, resident at Guilford in the county of Piscataquis, having been found guilty of obstructing, resisting, and oppressing one H. A. Head, as a deputy marshal in the service of an execution from the district court against one Jona. H. Hall, now moves for a new trial and also in arrest of judgment.

Mr. Head was called by the government as a witness, and testified that two executions were placed in his hands for collection by Henry L. Mitchell, the creditor, one being against said J. H. Hall and the other against his brother Asher Hall, both of whom resided in the same house at Sawyerville, about six miles from Guilford; that his instructions were, to collect the executions or bring the debtors to Bangor, the jail there being used for the detention of prisoners resident in Piscataquis county, in which no jail is provided; that on 14th of January, he went to the Halls', saw Asher and informed him of his business; that Asher wished to consult with the defendant who was his attorney, and the Halls went that evening to Guilford and saw defendant; that afterwards the same evening he came to the public house where the Halls then were; that defendant then notified him the Halls had real estate which must be taken upon the executions and sufficient to satisfy the same, and that he was bound to levy upon real estate and could not arrest the debtors on the executions in such a case; that a written protest to this effect was drawn up by defendant

[1] [Reported by Hon. William Cranch, Chief Judge.]

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

and signed by the Halls and given to him, Head; that defendant then threatened to sue and arrest Head if he should insist on holding the persons of the Halls upon the executions and taking them to Bangor, and thereupon he stated that he should insist on his rights, but would go to Bangor for advice; that he did so and again returned to Sawyerville on the evening of January 16, and told the Halls they must go with him to Guilford, which they did; that thereupon a complaint and warrant was procured by Hudson for the false arrest and imprisonment of the Halls by Head, which was returnable the next day before one Martin, the father-in-law of Hudson, who appeared as counsel against Head; that he was convicted and sentenced to pay a fine of $10 and costs, which not being paid a mittimus was issued for his committal to the jail at Bangor, to which city he was taken by the deputy sheriff as a prisoner; that while taking his breakfast at the public house at Bangor, and before being taken to the jail, the deputy sheriff was himself arrested on a warrant from Commissioner Rand, and Head was put in charge over him, having been detained as a prisoner under these proceedings before Martin more than four days.

Upon his direct examination, Head was not asked if he arrested J. H. Hall on the execution, but in reply to inquiries put on cross-examination he stated that the first night at the public house, as the Halls started to leave the parlor, Hudson said to him, "Do you consider these men arrested?" and he replied he did; that he touched Asher on the arm; that both the Halls left the room and he did not see them again that night; that he did not arrest or touch J. H. Hall nor recollect to have stated any thing different from what he has said about Asher.

The following question was then proposed by the counsel for defendant. "Did you not say, in your testimony before Commissioner Rand, that you would not state which one of the Halls you touched?" The question being objected to by the district attorney, was excluded, and for this cause a new trial is sought.

This ruling was in accordance with the decision of the supreme court of this state, in State v. Knight, 43 Me. 128, in which Tenney, C. J., says: "It has been regarded as an established rule, that a witness cannot be called upon to state his testimony, given on a former occasion, in a trial where the same evidence is relevant; and the authorities cited for the state sustain this rule." A careful examination of these authorities has not convinced me that they are quite so decisive of this point as the learned chief justice supposed; but the rule thus broadly laid down, whether sustained to the full extent stated by the authorities or not, has, as I understand, since been enforced in the courts of this state, and was frequently applied in cases within my own personal knowledge when I was at the bar. One case in particular is distinctly within my remembrance; upon the second trial of a civil cause, a witness was asked whether on the former trial she had not stated differently as a witness, and Mr. Justice Walton excluded the inquiry. Such has also been the uniform practice in this court for the past eight years, as upon objection, I have in repeated instances ruled in the same way, and so also has Mr. Justice Clifford, in the circuit court in this district, as I am well advised. If this question, therefore, is to be viewed as one of practice merely, then by act of congress of 1872, c. 255, § 5 [17 Stat. 197], this court is bound to adopt and conform to the state practice; but if it is matter of evidence, then by the same act, the court is not to depart from or alter the rules of evidence under the laws of the United States, and as practised in the courts thereof; and the exclusion of the evidence, being in conformity to the practice of the district and circuit court in this district, was correct.

It is claimed that in Knight's Case, the question put involved an inquiry as to testimony given by the witness before the grand jury; but the rule as stated by the chief justice is not so restricted, nor has it since been thus limited in its application, in the practice of the state or federal courts in this district.

In New York and some other states, it has been held, that such a question may be put to the witness, but that he can not be required to answer it, it being a personal privilege of the witness whether to answer or not, and that it is not for the party to the cause to interpose his objection; if this should be considered the better practice (and I am by no means clear that it is not) a court would not be justified in granting a new trial for the exclusion of a question, which a witness was under no obligation to answer, which in no way related to the subject matter of his direct examination, or tended to prove any material fact in controversy; but the only purpose and design of the inquiry could be, to discredit the witness. Bellinger v. People, 8 Wend. 595.

Judge Story in Re Marsh [Case No. 9,108], says: "The question is not whether the ruling on evidence and the directions given by the judge at the trial have been entirely correct, but whether, upon the whole case, the party moving for a new trial suffered any wrong or prejudice or injustice. The books are crowded with cases in support of this doctrine."

If the party, therefore, had at strict law a right to propound the question, it is equally certain he had no right to an answer, and he therefore certainly cannot claim he has suffered wrong or prejudice from its exclusion, especially when in the opinion of the court, there was not a material fact testified to by

Head in his examination in chief, which was not either admitted by the counsel for the defense, or established by the witnesses called by defendant; and the answer to the question thus excluded would have borne but very slightly, if at all, on the credit to be given by the jury to Head's testimony, which was abundantly sustained by other independent evidence. The party therefore was certainly not prejudiced by the exclusion of this inquiry.

It was also objected that Head was not duly qualified and authorized to act as a deputy marshal, it not being shown by any direct testimony, that he had taken and subscribed the oath prescribed by act of July 2, 1862, commonly called the iron clad oath. It was proved affirmatively, that he was in 1870 duly commissioned as a deputy by the marshal of Maine, and took the official oath required by act of Sept. 24, 1789 [1 Stat. 73], and that ever since he had constantly and notoriously acted in the discharge of the duties of a deputy marshal. The clerk of the district court testified that there was not upon the files in his office any evidence that Head had taken the oath of 1862; but no inquiry was made of Head, or the clerk of the circuit court, or of any other person in relation thereto. Upon this evidence the defendant requested the following instructions to the jury:

First: "That the jury must be satisfied beyond a reasonable doubt, that Henry A. Head was a deputy marshal of the district of Maine at the time of the service, or attempted service of the execution mentioned in the indictment."

Second: "That in order that he should be duly qualified, it should appear, that he had taken the oath prescribed by law in the act of congress of July 2, 1862; that there is no evidence presented that he has taken that oath, and therefore there is no sufficient evidence to prove, that he was a duly qualified deputy marshal."

Upon fully considering these requests, the court instructed the jury that it was necessary that they should be satisfied that Head was a deputy marshal, duly qualified and authorized to act as such, and that he had taken the oath prescribed by act of 1862, and that the commission to him as deputy marshal, with the fact that he had taken the oath required in the act of 1789, and his exercising and discharging all the duties of the office from 1870, if the same were all shown to their satisfaction, would justify the jury in finding the allegations in the indictment as to the official capacity of Head true and his qualifications established, without any further proof as to the iron clad oath having been administered.

The request called upon the court to instruct the jury, that there was no evidence that Head had taken the iron clad oath; but certainly, under the rulings of Judge Story, in U. S. v. Bachelder [Case No. 14,490], this would have been erroneous, as in an indictment for resisting an inspector of customs, he told the jury, "that if an officer of customs be duly commissioned and found acting in the duties of his office, the law presumes that he has taken the regular oaths until the contrary is shown." These facts were all established in the present case. The commission to Head, his official oath, and his discharge of the duties of the office, were all admitted or not questioned; and the presumption, if any other oath was required, that it had been duly taken, would arise in his case, equally with that of an inspector of the customs. Com. v. Kane, 108 Mass. 423.

The government testimony adduced before the jury therefore established a full prima facie case of the qualifications of Head as deputy marshal, unless there is something in the nature and character of the oath itself prescribed by act of 1862, which calls for a different construction of the law; and a very extended argument has been presented, to satisfy the court that such is the nature of this oath; that its purpose was to exclude all rebels from any part in the administration of the government; that it required of all officers to bear witness that they had not given aid and comfort to the Rebellion, as well as to testify that they would remain loyal and true, and support the constitution and faithfully discharge the duties of their offices; that all other official oaths applied only to the future acts of the party, while this was a test of his former conduct and loyalty.

Conceding such to be the effect of the oath required by act of 1862, still the court does not perceive any good reason why a different presumption should arise, when one is found openly acting in the discharge of the duties of an office, relative to that oath having been taken, than did before arise, in relation to the oath required by the act of 1789. That act required that the marshal and his deputy, before entering on the duties of their office, should take and subscribe an oath faithfully to discharge the duties which appertain to it; and from the fact of one being found acting as a marshal with a proper commission, a presumption arose, according to the decisions, that the party had taken the oath which was required of him before entering upon the duties of his office. "Omnia præsumuntur rite esse acta donec probetur in contrarium" is applicable to all officers duly commissioned, and in the recognized discharge of the duties of their official positions, whether the official oath extends to their past lives, or to the faithful discharge of the duties of their offices in the future.

In the opinion of the court, a good deal more significance is given by the argument to this oath, than was ever contemplated by the act; undoubtedly it was designed to debar rebels from holding office, by requiring all to take the oath before entering on the duties of the office; but it immediately proceeds to declare,

that they shall take the oath "before being entitled to any salary or other emolument thereof," pretty clearly indicating that if they undertook to discharge the duties of the office before taking the oath, their official acts might be valid, but the consequence would be, that they would not be entitled to the salary or emolument; in no portion of the act, is it anywhere declared, that their official proceedings shall be void, if the oath is not first taken, or that the usual presumption is not to arise from their being found in the discharge of the duties of the office; but on the contrary, the rather suggesting that they might discharge the duties, if they would forego the emolument.

It is now claimed that the evidence from the clerk of the district court proved conclusively that the oath of 1862 had not been taken by Head, as it was not found on the files of the district court. As the court understands the instruction given to the jury, this testimony was not withdrawn from their consideration, although it was not distinctly brought to their notice by the court. The language of the charge was: "It is for the jury to determine as to the qualifications of Head, and from the testimony they would be justified in finding him qualified without further proof as to the iron clad oath having been administered to him." This submitted the question to them to decide, the court saying, that without any further proof that this oath had been administered, they would be justified to find him qualified; thus leaving it to the jury upon all the testimony, no instruction being asked for, as to the effect of the testimony of the clerk of the district court, or how far it should control the presumption, arising from the other facts and circumstances in the case.

If the testimony of the clerk of this court did however conclusively establish the fact, that Head had not taken the oath required by act of 1862, then the jury would not be justified in finding upon the whole evidence that Head was duly qualified, and the instruction should not have been given as it was, and the verdict would be against the evidence.

It is now claimed that the office of the clerk of the district court was the proper depository of the oath when taken, and that it should have been placed upon its files, and not being there demonstrates that it had never been taken by Head. This involves the construction of a provision, found in the act of 1862, which is as follows: "Said oath, when so taken and signed, shall be preserved among the files of the court, house of congress, or department to which the said office may appertain." Does the office of marshal or deputy marshal in Maine appertain to the district court of Maine? I am not satisfied that it does, any more than to the circuit court of Maine, or than it did to the department of the interior in 1862.

It is true, that by the acts of 1789 and of 1806, c. 21, the marshal, when duly commissioned by the executive, gave bond to the approval of the judge of the district court, which could be recorded in that court or upon the records of the circuit court.

The official oath, required by the act of 1789, c. 20, § 27 [1 Stat. 87], could, by act of 1799, c. 19, § 2 [Id. 625], be taken by a deputy marshal before the district judge, or if the deputy resided more than twenty miles from the district judge, it could be administered to him by a judge of the state court or a justice of the peace, and certified by him to the district judge; but beyond these provisions, I find none in any act of congress, which in any way recognize the marshal or his deputy, as appertaining to the district court of his district. These officers have no more to do with the district court than with the circuit court; they execute the process of either court, and the judge of the district or circuit court may, for good cause, remove a deputy marshal for misconduct. By the act of March 3, 1863, in case of a vacancy in office of marshal, the circuit judge may by writing appoint a marshal, and the person so appointed shall give bond to be approved by the circuit judge, which bond, with the written appointment of the marshal, shall be recorded on the files of the circuit court.

The district court has no authority to appoint a marshal or deputy marshal, and in my view it can not be said with any legal precision, that these officers appertain to the district court. If they appertain to either, it is rather to the circuit court, the judge of which court has the power of appointment of the marshal in case of a vacancy. The clerks of the courts and commissioners appointed by the respective courts may well be said to appertain to the several courts by which they are appointed, and to which they are amenable; but it is not so with the marshal and deputy marshal; if they appertain to the district court, they do to both, to the circuit equally with the district, and the oath in such case might as properly have been filed with the clerk of the circuit, as with the clerk of the district court; and a search therefore for a document in one of two places, in either of which it may be legally deposited, would not be sufficient evidence to prove its non-existence, as the presumption might well arise that it would be found in only one of the two places where it should be, and if not found in one, that it was in the other where it well might be. No search or inquiry having been made to ascertain whether such an oath was or not on the files of the circuit court, no presumption could arise that it was not there, and the evidence did not show that the oath in question had not been taken by the deputy.

The marshal, if he appertains to either branch of the government designated in the act, would, in my view, at the present time be considered as the rather appertaining to the department of justice, upon which is now conferred the authority over and supervision

of marshals, which in 1870 was vested in the interior department, and the oath should have been deposited there, instead of with the district court, and such is understood to have been in fact the practice in this behalf. There was therefore in the opinion of the court, upon all the testimony, sufficient to authorize the jury in finding that in all respects the marshal and his deputy were duly qualified and authorized to act as such officers, and that the averments in the indictment in relation thereto were established.

It appeared in evidence, that when at Guilford on the evening of January 14, Hudson asked Head if he had any blank bonds, and he told him if he would go to Bangor and fill out the bonds he would see that they were returned duly signed. Head replied he had no bonds, and that the parties would have to go to Bangor to have the bonds approved; and after this the protest of the Halls was served on Head; on the 16th nothing was said by either party about giving any bonds. The defendant requested the following instruction: "That by law Hall on being arrested by Head was entitled to the privilege of giving a bond to liberate himself from arrest, to be signed by sufficient securities to be approved by the creditor or by a commissioner of the United States; that he could not be expected to have made a bond ready at the moment of arrest, and that he was entitled to a reasonable time to procure it." Considering that the officer is under no obligation to provide a bond, and that the party had from the 14th to the 16th to procure a bond if he intended to avail himself of the provision of the act, if the instruction as a rule of law was correct, the case showed that a reasonable time had been afforded him to procure his bond and take it with him for approval to Bangor, where the creditor resided, as did also the nearest commissioner. I do not find from the testimony that Head ever claimed that his instructions went farther than to take the Halls to Bangor or get the money on the executions, or that he ever stated to them that he should commit them at once to the jail in Bangor on his reaching that place.

The requested instruction admits that Head might arrest the Halls on the execution, and only claims, that a reasonable time should be allowed to procure a bond, before their imprisonment in jail. In the opinion of the court, the forty eight hours which elapsed subsequently to the arrest, in connection with the further fact, that no bond was then offered, that no steps were shown to have been taken to obtain such bond, and no further time requested in which to procure the same, rendered the instruction improper under such circumstances, reasonable time being a matter of law when there are no facts in dispute.

The court in answer to this request read to the jury the various sections of chapter 113, Rev. St. of Maine, relative to arrest and imprisonment on execution, and stated to the jury, "that under these provisions, it was the duty of the officer having such instructions as Head had received, to arrest the debtor, and that when so arrested, the party had the privilege of giving bond without being imprisoned; that the officer was not obliged to purchase or furnish the bond, but that it devolved on the debtor; that when the arrest had once been made, the officer was bound to retain the prisoner in custody, and if he voluntarily allowed him to escape, he could not retake him on that execution, and that the officer was accountable to the creditor for the person of the debtor after his arrest; that in the discharge of the duties of his office, Head was bound to act impartially and without oppression, but that as the responsibility for the appearance of the debtor rested upon him, he had a right to exercise, fairly and honestly, his own discretion as to the means and place of the debtor's detention, even to the commitment to prison for the time being, if he should think proper so to do."

The argument presented by the learned counsel has not satisfied me, that these instructions were erroneous. It is clear that after the debtor is once arrested, the officer must retain him under his custody and control. In the present case, the officer at this time had under arrest both the Halls, and also one Randall; he was forty miles from prison and from the residence of the creditor and commissioner, and I am not aware of any provision of law, which would justify him in detaining and confining his prisoners in the house of any third person, or that would require a third party to act as keeper over them at his request. Jails are provided by law for the detention of prisoners, and when placed therein the deputy is exonerated from the care and custody of his prisoners, and not before. The law no where declares that any certain period of time shall be granted the debtor after his arrest in which to furnish his bond, and that in the mean time, he shall remain in the custody of the officer, without being liable to commitment to prison for safe keeping. The only provision on the subject is that in section 24, c. 113, Rev. St., which says, "When a debtor is arrested or imprisoned on execution he may be released by giving bond." The legal effect of which is, that if he is prepared to give bond before his imprisonment, he is not to be committed; but if the bond is not forthcoming on his arrest, then he may afterwards be released from imprisonment on procuring such bond. While it is usual for the officer to afford the debtor, upon his request, facilities for procuring the bond after arrest, without subjecting him to being imprisoned, I can find no provision of law which makes it obligatory upon him so to do, and if he attempts to imprison the debtor, justifies him and his counsel in obstructing, resisting, and opposing the officer in the dis-

charge of his official duties. It is for the officer to determine whether he shall imprison the debtors for safe keeping, and with these prisoners in his custody at this time, I think he would have been justified in so doing, and that they would have had no legal cause of complaint if he had actually committed them to jail, or intended so to do, which is not made certain, as his only orders from the creditor was to bring the debtors to Bangor, and being there, an opportunity for an adjustment would be afforded, which could not be had if they remained at their own homes without intercourse with their creditor.

The motion in arrest is also overruled. The first cause assigned is, that the averment made in the indictment, "that he did knowingly, willfully and unlawfully obstruct, resist and oppose the said H. A. Head," is not sufficient; that the manner of the resistance, &c., should be set forth.

It is sufficient for this court to find that Mr. Justice Story in U. S. v. Bachelder [Case No. 14,490], has declared that the averment found in this indictment is sufficient, and that further particularity and precision is not requisite. This opinion of Judge Story is fully sustained by Judge Washington in U. S. v. Lukins [Id. 15,639]. In that case there were two counts in the indictment, one for resisting and opposing the officer, being a deputy marshal, and the other for an assault. The judge in his opinion fully sustains the first count, which is not set forth in the report. I have obtained from the files of the circuit court of Pennsylvania a copy of the first count, which is in the same general language as that objected to in the present case, being simply that the defendant "willfully and knowingly did resist and oppose an officer of the United States, &c.," without any averment or allegation as to the character of the resistance.

The present indictment sets out at full length a copy of the execution which Head had in his hands for service, which bore date Dec. 10, 1873, and was returnable the first Tuesday of Feb., 1874. The objection is taken that it is not stated in the indictment that the execution was in full force; that it might have been paid although issued only thirty-five days before the arrest. It was enough to say that on the face of the proofs, the officer had for service, a valid lawful precept, which it was his duty to execute, and which the defendant had no right to resist or oppose. The officer was fully justified by his process, and that is distinctly shown by the averments in the indictment, and by the full recital therein of the execution; this was more than the law required, as it is not necessary to set out in hæc verba the process under which an officer is acting, but it is sufficient so to describe it as to identify it and inform the respondent of what he is called to answer. State v. Roberts, 52 N. H. 492. Motions overruled.

Case No. 15,413.

UNITED STATES v. HUDSON et al.

[3 McLean, 156.] [1]

Circuit Court, D. Indiana. May, 1843.

CLAIMS DUE UNITED STATES — AGENTS FOR COLLECTION—DISCRETION TO COMPROMISE—ACQUISITION OF LANDS.

1. The agent, whose duty it is to enforce legally the claims of the United States against delinquents, may, for the benefit of the government, exercise a reasonable discretion in the management and compromise of suits.

2. This necessarily results from the nature of the duties to be performed.

3. The executive, without authority of law, cannot go into the market and purchase and sell land.

4. But it may compromise doubtful claims, and in the best possible mode secure the interests of the government.

5. Lands so acquired by it, may be sold and conveyed.

At law.

Mr. Cushing, U. S. Dist. Atty.

Wright & Patterson, for defendants.

OPINION OF THE COURT. This action is founded on a note given by the defendants [Hudson and Edridge] to the plaintiffs, on a sale of certain lands conveyed to them in discharge of a debt due to them by Israel T. Canby. The pleas set up the facts which constituted the original transaction between the government and the late receiver Canby, and that the land sold by the government was purchased by it from the said Canby, without authority of law, and consequently that the contract is not binding on the defendants, as no valid title has been tendered, or can be made, &c. To this plea the plaintiffs filed a demurrer.

It may be admitted that the executive cannot purchase and dispose of land, without authority of law. Treaties are made with Indians, by which their right to the soil is extinguished, and the land, then, is authorized to be sold by act of congress. Special and limited powers are conferred for the accomplishment of these objects. And as no such powers were conferred in the case under consideration, it is contended that the whole proceeding in regard to the lands purchased by the defendants was void. The agency of the solicitor in the collection of debts due to the government is limited only, by the exercise of a judicious discretion. Where he considers it to be to the interest of the United States, he may, in the progress of a suit, give reasonable indulgence. And where a demand is considered doubtful, from the inability of the debtor to make payment, the solicitor may take security for the money, and give time for the payment of it. Such a contract would be good at common law, and in no sense opposed to the policy of

[1] [Reported by Hon. John McLean, Circuit Justice.]

the law. On the contrary, it would be sanctioned by a sound policy. Such a power must necessarily exist in every superintending agency for the legal enforcement of the public claims. In the 8th volume of the Laws United States (page 345) are provisions which sustain this view. The cases of Leonard v. Bates, 1 Blackf. 172, and Cunningham v. Gwinn, 4 Blackf. 341, are relied on to show that a defect of title or an inability to make a good title, may be set up in an action for the consideration; and that when the deed is to be made, on the payment of the money, it should be tendered or at least be ready for delivery.

The land having been purchased by Canby, from the government, with the public funds, which caused his defalcation, he relinquished the same to the government as an act of justice, which was accepted by way of compromise; and the land was sold to the defendants through a special agency, and the note given on which this action is brought. We see no defect of power in the officers of the government to make this arrangement. A similar power has more or less been exercised since the foundation of the government. In the nature of things, the title of the defendant, which the government will make, will be indisputable. No adverse claim can in any way arise, by which the validity of the title can be questioned. The demurrer to the special plea is sustained. Judgment.

Case No. 15,414.

UNITED STATES v. The HUDSON.

[See Case No. 6,829.]

Case No. 15,415.

UNITED STATES v. HUGER et al.

[1 Hughes, 397;[1] 2 Am. Law Rev. 782.]

Circuit Court, D. South Carolina. May, 1868.

OFFICIAL BONDS—PAYMENT OF PUBLIC MONEY TO INSURRECTIONISTS.

An officer of the United States in an insurrectionary state of the Confederate government, who had paid money of the United States to the Confederate States during the war, under compulsion, without collusion, contrivance, evasion, or willingness, though actual force was not used to compel him to pay, is not responsible to the United States for its reimbursement, for the reason that the Confederate government had been recognized as a belligerent by the United States, and because the official bond of the officer to the United States implied the obligation on the part of the United States to secure to the obligor such a condition of things as would render his fulfilment of his bond possible.

This was an action on a bond given by the defendant as postmaster of the city of Charleston. The suit was brought to recover a balance of $5,576.41, due the government at the time of the breaking out of the Civil War, with interest. It appeared that Mr. [Alfred] Huger had been appointed by President Jackson, in 1832, that he had held the office from that time to 1861, and that he had satisfactorily performed all the duties enjoined upon him by law. It appeared further, that he had made considerable effort to turn over the property in his hands to the United States government, but that he had not been able to do so, except as regarded a small part thereof, and that he had finally, on demand, surrendered the balance to the postmaster-general of the Confederate government.

D. T. Corbin, Dist. Atty., for the Government.

Porter, Campbell, Magrath & Rutledge, for defendant.

BRYAN, District Judge. The cases cited in the books all having reference to a settled order of things, all having reference to the possible personal private delinquency, or want of care, or misfortune of the obligor, a condition of things anticipated as probable or possible, and therefore in the minds of the parties to the bond, I hold that the rulings of the supreme court can have no proper application to a class of cases wholly different, and that the party cannot be held to an engagement, not in the mind of either party, and in a condition of things not possibly anticipated by either party, in which one party could not possibly fulfil such engagement, and the other party could not give him any proper help to fulfil it, that is, that without any default on his part, and in the absence of a condition of things which rendered it possible for him to execute the bond, he shall be compelled to execute the bond. That condition of things was presented in a state of civil war, where the territory of which the defendant was a resident was held under the domination of a belligerent—the absolute domination of a revolutionary government struggling for its life, compelled to put forth every possible exertion of power, inevitably arbitrary, and unscrupulous from the very fact of its necessities, and alike unable and unwilling to brook opposition. It was in the very nature of things a military despotism, whose commands must unhesitatingly be obeyed, and in the light of the past, it is but truth to say, whose commands were so obeyed.

The great Civil War from which we have emerged not only demanded despotic powers in the South, but almost equally despotic power in the United States. The great government which succeeded in this contest, that great government itself, with all its mighty resources, was compelled to resort to arbitrary power. Civil liberty was scarcely consistent with the struggle between the two governments. Both were essentially military at the time, drawing all powers to themselves, and compelled of necessity to act in an arbitrary manner, liberty itself being the inevitable sacrifice. It was in such a condition of mili-

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

tary domination that the defendant in this case was called upon, as the only act which implicates him in this matter,—which I conceive could implicate him,—was called upon some time after its domination, and after the United States postal service had ceased, to report the amount of property of the United States in his possession. In my esteem, that demand was peremptory. It was a command to be instantly complied with, not a matter of parley. That command carried with it an expression of force which could not be resisted, could not be resisted any more than its cannon or bayonets, which left the party upon whom the demand was made no alternative but to yield. There was no refuge from the wrath of that government, there was no defence against its power. In my esteem, therefore, the defendant under these circumstances was in the position of one yielding to overwhelming and present force, not to a force that was speculative and distant, but present, certain, and instant, a force so great, inevitable, and overwhelming, that the display of cannon and bayonets could not have added substantially to its compulsory power. The attempt at resistance would have been simply an idle parade. The attempt at resistance would have been regarded, under the circumstances, as a question of power to be punished. The power dominant at that time was a jealous revolutionary power, which could not afford to deal as a well-settled government, which could not admit of debate, whose commands were peremptory, whose exactions could not be trifled with. I instruct you that the demand upon Mr. Huger for the public property of the United States by the Confederate States was a demand that he could not dispute. It was a demand, coming to him under the circumstances, carrying a claim of authority which he had no means to dispute, and which he could not dispute.

You will have to scan the testimony in this case, and your prime duty will be to see whether Mr. Huger did any act which implies collusion, consent, or connivance with the Confederate government, any act which indicates the intention or willingness to betray the United States, and put the Confederate government in possession of this property. If you see in any portion of his conduct, if you see in any act of his, a voluntary yielding of this property to the Confederacy, if in any act of his you see that which implies connivance, a collusion, a willingness to give up this property to the Confederates, then he has been false to his trust. And I beg of you to search the case, and if you see in any portion of his conduct any act which implies a willingness to yield this property, and that in parting with this property to the Confederate government he has not acted throughout upon compulsion, moral or physical, equal to the overwhelming force of necessity, then he has been false to his trust.

I am asked to rule thirdly, that said Confederate States or government of which John A. Reagan was an officer or agent, was an unlawful combination of divers persons, citizens of the United States, engaged in unlawful insurrection and rebellion against the government of the same, and within the territory thereof, unlawfully usurping the powers of government, and as such it continued to be unrecognized as having any lawful existence till suppressed by the military power of the United States, hence neither said Confederate government nor its officers or agents could originate any legal action or issue any order which the defendant, Alfred Huger, was bound to obey.

I instruct you that, in so far as that said Confederate States was an unlawful combination of divers persons, citizens of the United States, engaged in unlawful insurrection and rebellion against the government of the same, and within the territory thereof unlawfully usurping the powers of government, and, as such, it continued to be unrecognizable as having any lawful existence, till suppressed by the military power of the United States, etc., I give the instruction, but do not give the conclusion, that is, that the officers or agents of the Confederate government could not issue any order which the defendant, Alfred Huger, was bound to respect. I instruct you, the United States having conceded to the Confederate States (so-called) the authority of a belligerent, the power incident to the authority of a belligerent was conceded to the Confederate States, and they had such right to give an order, which it was not possible for the postmaster or assistant postmaster here to dispute. They had the authority of a belligerent, and it was not within the competency of the postmaster to dispute the regular exercise of that authority.

I am further asked to instruct you, that this is not strictly a case to which the common law of agency or bailment applies, but a case of contract between the United States government and the defendant as equal contracting parties, and that the rights of the one, and obligations of the other, at most, were only suspended, and not impaired, by the late war; that the war having ceased, and physical obstructions removed, the defendant must respond to the requirement of his bond. I instruct you that this bond implies, on the one side and the other, a condition of things which renders it possible for its execution on either part, that is, that the United States on its part shall secure to the defendant that condition of things in which it was possible for him to execute the bond, and, if it does not secure him that condition of things, then he is not to be held to an impossibility. He cannot be called upon to discharge an obligation which it was impossible for him to discharge, by a condition of things which put it out of his power to meet his obligation, and which the United States had left him helpless when the obligation was to have helped him. When the United States was

unable to perform its own part, and was helpless to help him to discharge his obligation, he is not answerable for the failure to discharge that obligation. The obligation is at an end, and he is discharged.

Lastly, I am asked to rule that the surrender of the gold and postal envelopes belonging to the United States, by defendant, Alfred Huger, on the order of the agent of the Confederate government, received by him through the mails, and which contained no threat or suggestion of compulsion, was not a surrender or yielding up of the government property under the pressure of irresistible force.

I charge you, gentlemen, that an order from a government essentially military, and from the nature of things a military despotism, was the expression of a force that could not be resisted, and as peremptory of necessity as if the bayonet were at his throat. It was a command which carried with it irresistible power. I would be understood as negativing the instructions asked for by the district attorney emphatically. I think the negative of this instruction as ruling the very essence of the case, that is, that the defendant living on the soil in such a contest in which such powers were engaged, the one struggling for existence, and the other for the rescue of its rightful authority, the one contending for the establishment of independence, and the other for the re-establishment of rightful constitutional rule and national integrity. In such a tremendous contest a party belligerent making a demand upon any inhabitant or citizen on its soil, made a demand which carried with it the necessity of instant obedience, and the refusal to obey which, if it did not bring harm to the party who might oppose it, would have promptly been executed by the government itself. I repeat, the execution of the demand, if not executed by the party himself, would be executed instantly by the government, and, if the property were not surrendered, it would be taken. The refusal to surrender would have been idle, certainly, and, at the same time, might have become dangerous.

[Under the rulings of the court, the jury found for the defendant.]

Case No. 15,416.

UNITED STATES v. HUGHES et al.

[8 Ben. 29; 11 Alb. Law J. 199; 2 Am. Law T. Rep. (N. S.) 300; 21 Int. Rev. Rec. 84.] [1]

District Court, S. D. New York. Feb., 1875.

REVENUE LAWS—PRODUCTION OF BOOKS AND PAPERS—EX POST FACTO LAW.

The fifth section of the act of June 22d, 1874 (18 Stat. 178), is ex post facto, as to suits then pending for violation of the Revenue Laws of the United States, and, therefore, unconstitutional and void.

[Cited in U. S. v. Distillery No. 28, Case No. 14,966; U. S. v. Three Tons of Coal, Id. 16,515; Boyd v. U. S., 116 U. S. 636, 6 Sup. Ct 535.]

This was an action of debt to recover from the defendants [George Hughes and others] the value of certain importations of merchandise alleged to have been entered by them at the custom house in New York City, on fraudulent invoices. The suit was begun on December 16th, 1873. The defense was a general denial. On the trial of the cause, the district attorney of the United States moved, under the 5th section of the act of June 22d, 1874 (18 Stat. 178), that the defendants be notified to produce certain books and papers, specifying in the notice of motion the facts which the government expected to prove by such books and papers. The defendants objected to the issue of such notice.

Thomas Simons and Roger M. Sherman, Asst. U. S. Dist. Attys.

Sherburne B. Eaton, for defendants.

BLATCHFORD, District Judge. I have no hesitation in saying that the 5th section of the act of June 22d, 1874 (18 Stat. 178), so far as it applies to this suit, is an ex post facto law, and therefore, unconstitutional and void. The language of that section is as follows: "Sec. 5. That in all suits and proceedings other, than criminal, arising under any of the revenue laws of the United States, the attorney representing the government, whenever, in his belief, any business book, invoice, or paper, belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant, by the United States marshal, by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice or paper in obedience to such notice, the allegations stated in said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And, if produced, the said attorney shall be permitted, under the direction of the court, to make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice, or paper as relate to or tend to prove the al-

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission. 11 Alb. Law J. 199, contains only a partial report.]

legation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid." It comes directly within the decisions of the supreme court of the United States, in the cases of Cummings v. Missouri, 4 Wall. [71 U. S.] 277, and Ex parte Garland, Id. 333. It is within the reasoning of those cases, and within the principles laid down in them. It is a law which, within the definition given by Judge Chase, in Calder v. Bull, 3 Dall. [3 U. S.] 386, 390,—which is a leading case on the subject, and has always been followed,—requires less testimony and different testimony to authorize a recovery, than was required when the offense was committed for which the suit is brought. It has always been held that the provisions of the constitution of the United States (article 1, § 9), that no ex post facto law shall be passed by congress, and (article 1, § 10), that no state shall pass any ex post facto law, apply not merely to criminal laws and cases, but to cases for the recovery of penalties and forfeitures. The point of contention before the supreme court in the Cases of Cummings and of Garland was in regard to the question of how far the definition of an ex post facto law extended, and whether a given provision of law amounted to the infliction of a penalty or punishment.

In the Case of Cummings, the constitution of the state of Missouri, adopted in 1865, contained a provision requiring that every priest and clergyman, in order that he might continue in the exercise of his profession in that state, and be allowed to preach or teach, should take and subscribe an oath that he never had aided the Rebellion or committed certain other designated acts, and that, if he exercised such profession without taking and subscribing such oath, he should, on conviction, be punished. Mr. Cummings, a priest of the Roman Catholic Church, was indicted and convicted in a state court of Missouri, for teaching and preaching, as a priest of that religious denomination, without having taken such oath. The case was removed to the supreme court of the United States, and that court held that the provisions of law which deprived Mr. Cummings of the privilege of acting as a priest or minister, and of preaching or teaching, imposed a penalty for some acts which were innocent at the time they were committed, and increased the penalty prescribed for such of the acts specified as at the time constituted public offenses, and in both particulars violated the provision of the federal constitution prohibiting the passage by any state of an ex post facto law; and, further, that they violated such provision of the federal constitution, by altering the rules of evidence with respect to the proof of the acts specified, and assuming the guilt instead of the innocence of the party, and requiring him to establish his innocence by taking the oath, instead of requiring the government to prove his guilt, and declaring that he could show his innocence only by taking the oath. In all these respects the provisions of the constitution of Missouri were an ex post facto law.

To apply these principles to the present case, if the defendants do not produce these books and papers, as required by the 5th section of the act of 1874, the allegations set forth in the written motion, and which are allegations contained in the declaration, are to be taken as confessed. The defendants are obliged to produce the books and papers in order to save themselves from having a judgment entered against them. They are required by the statute to establish their innocence in this case by producing the papers, and there is only one way in which they can establish their innocence, and that is by producing the papers. That is precisely what existed in the Case of Cummings. The fact of the non-production of the books and papers is made conclusive evidence of the guilt of the defendants, unless explained to the satisfaction of the court. In respect to the acts specified in the declaration, which are set forth in the written motion, the statute alters the rules of evidence as to the proof of those acts. The language of the court in the Case of Cummings seems to me to entirely cover the 5th section of the act of 1874, as applicable to a pending suit to recover penalties and forfeitures; for I intend to limit my decision to that point, and do not intend to express any opinion about that section in its applicability to cases arising after the passage of the statute in which it is found. In the Case of Cummings, the court held that the disability imposed on the party to act as a teacher or a preacher constituted a punishment by depriving him of a right he had to exercise a lawful avocation. The court then go on to give the definition of an ex post facto law which is found in Calder v. Bull (above cited), and further say: "The clauses in the Missouri constitution, which are the subject of consideration, do not, in terms, define any crimes, or declare that any punishment shall be inflicted, but they produce the same result upon the parties against whom they are directed, as though the crimes were defined and the punishment was declared. They assume that there are persons in Missouri who are guilty of some of the acts designated. They would have no meaning, in the constitution, were not such the fact. They are aimed at past acts and not future acts. They were intended especially to operate upon parties who, in some form or manner, by action or words, directly or indirectly, had aided or countenanced the Rebellion, or sympathized with parties engaged in the Rebellion, or had endeavored to escape the proper responsibilities and duties of a citizen in time of war; and they were intended to operate by depriving such

persons of the right to hold certain offices and trusts, and to pursue their ordinary and regular avocations. This deprivation is punishment; nor is it any less so because a way is opened for escape from it by the expurgatory oath." Just so, in this case, a way is opened for escape from the consequence of not producing the books, by producing them. "The framers of the constitution of Missouri knew, at the time, that whole classes of individuals would be unable to take the oath prescribed. To them there is no escape provided; to them the deprivation was intended to be, and is, absolute and perpetual. . . . Clauses which prescribe a penalty for an act of this nature are within the terms of the definition of an ex post facto law; they impose a punishment for an act not punishable at the time it was committed."

Then followed immediately the Garland Case, 4 Wall. [71 U. S.] 333. That case arose on the provision of the federal constitution which prohibits congress from passing an ex post facto law. On the 24th of January, 1865 (13 Stat. 424), congress passed an act, providing that thereafter no person should be admitted to practice as an attorney or counsellor in any federal court, or should continue to so practice by virtue of any previous admission, unless he should first have taken and subscribed the oath prescribed by the act of July 2d, 1862 (12 Stat. 502), to the effect that he had not given aid to the Rebellion. The court held, that this operated to exclude from practising law in the federal courts all parties who had offended in the particulars enumerated; that such exclusion for past conduct was punishment for such conduct; and that, in such exclusion, the act imposed a punishment for some of the acts specified, which were not punishable at the time they were committed, and for others of the acts it added a new punishment to that before prescribed, and was thus within the inhibition of the constitution against the passage of an ex post facto law.

In its application to the present case, the 5th section of the act of 1874 seems to me to be clearly open to the objections stated in the Cases of Cummings and Garland. A suit to enforce a penalty or a forfeiture is a suit to inflict a punishment for the commission of the offence set forth in the statute counted upon in the declaration. The act of 1874 provides, that, if the books or papers are not produced, if the defendant fails or refuses to produce them, the allegations stated in the motion, and which are allegations contained in the declaration, shall be taken as confessed, unless the failure or refusal is explained to the satisfaction of the court. The only way to escape this consequence is to produce the books or papers. It will not do to say that the court must grant this motion upon the theory that the defendants will produce the books and papers, and, therefore, that the question will not arise, and that then judgment will not pass against the defendants by confession. The act must be construed as a whole. The court must contemplate that the defendants will fail to produce the books and papers.

The question would perhaps be presented in a better form if the motion now made by the district attorney, for a notice to be issued requiring the defendants to produce the books and papers, under the 5th section of the act of 1874, were to be granted pro forma, and then the defendants were to fail to produce the books and papers. Then, when the district attorney should ask the court to take as confessed the allegations set forth in his motion, the court would, on the objection of the defendants, hold that this could not be done, because the statute is ex post facto, as applied to this case, and unconstitutional. If the defendants should produce the books and papers, no question would arise; except that, perhaps, they might produce them, and, when they were offered in evidence, might raise the objection that it was equally unlawful for the court to receive them in evidence when produced, as for the court to give judgment against the defendants by confession because of their non-production. But, it is to be assumed, that, if the defendants wish them to be excluded, they will not produce them in obedience to the notice. However this may be, it seems to me, that, in a case of this kind, where the statute, after providing for the serving of the notice, specifies what shall follow if the party fails to produce the books and papers, the court must contemplate the consequences of a failure to produce. A resort is had to this procedure with a view on the part of the government to the entire benefit supposed to exist in the statute, which is, that, if the books are not produced, the allegations are to be taken as confessed. If the notice should be issued and served, and the defendants should fail or refuse to produce the books and papers, and the district attorney should then make a motion to the court to take the allegations as confessed, I should deny the motion, upon the ground that to do so would be to enforce a provision of law that is unconstitutional and void, as being ex post facto. Whether it would or would not be more advisable to take this last course which I have suggested, is for counsel to consider. Of course, down to a certain point in the statute, there is nothing ex post facto in it. It is the penalty afterwards imposed that makes it ex post facto; and therefore, the court, when called upon to issue a notice of the kind, must contemplate the consequences prescribed in the statute. At the same time, under these circumstances, the parties being present and understanding the views of the court, such a notice will, if it shall be considered more desirable, be issued in this case, that not being regarded as a precedent for issuing such a notice in any other case.

Case No. 15,417.

UNITED STATES v. HUGHES et al.

[12 Blatchf. 553;[1] 7 Chi. Leg. News, 347; 21 Int. Rev. Rec. 211.]

Circuit Court, S. D. New York. June 25, 1875.[2]

PRACTICE—SEIZURE OF BOOKS AND PAPERS—ADMISSIBILITY IN EVIDENCE—CUSTOMS LAWS.

1. The United States sued H. and others, composing a copartnership firm, in the district court, to recover the value of certain imported merchandise, as forfeited for a violation of the customs revenue laws. Prior to the commencement of the suit, the books and papers of the firm were seized, on a warrant issued under section 2 of the act of March 2, 1867 (14 Stat. 547). At the trial, the books and papers so seized were offered in evidence on the part of the United States, and were excluded by the court, on the ground that section 860 of the Revised Statutes provided, that "no discovery or evidence obtained by means of any judicial proceeding, from any party or witness, * * * shall be given in evidence, or in any manner used, against such party or witness, or his property or estate, in any court of the United States, * * * for the enforcement of any penalty or forfeiture by reason of any act or omission of such party or witness." *Held*, that the books and papers were improperly excluded.

[Cited in Re Vetterlein, Case No. 16,929; Boyd v. U. S., 116 U. S. 635, 6 Sup. Ct. 535.]

2. The evidence contained in the books and papers was not obtained from the party, within the meaning of the statute.

3. The discovery or evidence contemplated is of a personal nature, to which the party can make oath, and not such as is derived from an examination of his books and papers.

[Error to the district court of the United States for the Southern district of New York.]

This case came up on a writ of error to the district court. The United States brought an action, in that court, to recover from the defendants in error, composing the firm of George Hughes & Company, of New York City, the value of certain importations of merchandise alleged to have been entered at the New York custom house on fraudulent invoices and in violation of the revenue laws. The government, claiming that, by reason of such alleged frauds, the whole value of the importations had been forfeited, under the act of March 3, 1863 (12 Stat. 737), sued, in an action of debt, for $100,000 in gold, the alleged value of such importations. The defendants put in a general denial. The books and papers of the defendants' firm had been seized on the 26th of September, 1873, under a warrant of the said district court, issued under the 2d section of the act of March 2, 1867 (14 Stat. 547). This suit was begun on the 16th of December, 1873. On the 26th of December, 1873, the books and papers so seized were returned to the defendants, under a written stipulation, signed by them, that said books and papers should be produced at the trial, and that copies of said books and papers might be used in evidence with the like force and effect as the originals. Copies were accordingly made by the plaintiffs while the books and papers were still held under the warrant of seizure, and the copies so made were attached to the stipulation, as exhibits. In accordance with this stipulation, the books and papers were produced in court at the trial, by the defendants. The district attorney thereupon called Thomas A. Smith, one of the defendants, as a witness, and offered to put portions of such books and papers in evidence. To this the counsel for the defendants objected, on the ground that, under section 860 of the Revised Statutes of the United States, the books and papers which had been seized under the warrant were not competent evidence as against the defendants, in this action. The court sustained this objection, and the plaintiffs excepted. [Case No. 15,419.] The plaintiffs' counsel then offered in evidence the copies of said books and papers which were annexed to the stipulation. These were objected to on the same ground by the defendants' counsel, and were excluded by the court. The exclusion was excepted to by the government. The counsel for the plaintiffs then moved, under the act of June 22, 1874 (18 Stat. 187), that the defendants be notified to produce certain books and papers, the district attorney specifying, in his written motion, the particular facts which the government expected to prove by the books and papers so called for. The court granted the motion pro forma, and the notice was duly served on the defendants in open court. [Id. 15,416]. The defendants thereupon declined to produce the books called for, and declined to make any explanation of such refusal, whereupon the plaintiffs' counsel moved that the allegations stated in the written motion be taken as confessed, in accordance with the provisions of the said act of June 22, 1874. The defendants' counsel objected to this motion, on the ground, that the alleged offences were committed, and this suit was begun, prior to the enactment of the statute of 1874, and the provisions of that statute, if applied to this suit, would be void, as being contrary to the provision of the constitution of the United States which prohibits the enactment of ex post facto laws. The court sustained this objection, and denied the motion, to which ruling the plaintiffs' counsel excepted. The district attorney then served upon Mr. Smith, one of the defendants, a subpœna duces tecum, requiring him to produce the books and papers of his firm. The defendant Smith declined to produce them, on the ground, that their production and use in evidence would tend to subject him to the enforcement of the penalties and forfeitures set forth in the declaration. The district attorney, the defendant Smith being on the witness stand, then moved that the witness be compelled to pro-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

[2] [Reversing Case No. 15,419.]

duce the books and papers called for by the subpœna duces tecum. The defendants' counsel objected, on the ground, that the answer of the witness was sufficient in law, and on the further ground, that the books and papers called for were the same as those which had already been ruled out as incompetent. The court sustained the objection, and the district attorney excepted. The district attorney then offered to prove the contents of the books and papers by the copies annexed to the stipulation as exhibits, to which the defendants' counsel objected, on a ground similar to that taken on the previous objection, and the objection was sustained, and the district attorney excepted. The district attorney then offered to call a witness to prove the contents of the books and papers, said witness, a clerk in the custom house at New York, and employed by the United States, having seen the originals while in the custody of the court under the warrant of seizure, and having, as a clerk in the custom house, and in behalf of the plaintiffs, compared the copies heretofore mentioned with the originals, while the latter were in the custody of the court under the warrant. This proposed evidence was objected to, on the part of the defendants, on the ground that the secondary evidence was incompetent for the same reason which made the primary evidence incompetent. This objection was sustained, and the district attorney excepted. Thereupon a verdict was rendered for the defendants, by direction of the court.

Thomas Simons, Asst. U. S. Dist. Atty.

Sherburne B. Eaton, for defendants in error.

HUNT, Circuit Justice. This action was brought to recover from the defendants certain penalties for violation of the revenue laws of the United States. Before the trial, the collector of the port of New York had taken the proceedings authorized by the act of March 2, 1867 (14 Stat. 547), and had seized certain books and papers, which, it was alleged, contained entries that would sustain the action. The offer of the government to give in evidence these books and papers on the trial, was overruled by the judge, and the correctness of this ruling is the principal question in the case.

The legislation of congress on this subject, of the seizure of books and papers, may be briefly stated as follows: By the act of March 3, 1863 (12 Stat. 740), it was provided, that, upon an affidavit showing, to the satisfaction of the district judge, that a fraud upon the revenue had been committed or attempted by any person, such judge should issue his warrant to the collector of the port, directing him to enter the premises where any papers relating to the importation were deposited, seize and carry away the same for inspection, and retain them as long as was thought necessary by the solicitor of the treasury. The act of July 18, 1866 (14 Stat. 187, § 39), among the provisions by which a general revision of the law relative to smuggling was made, contained a provision authorizing any district judge to issue his warrant for the seizure of such books and papers, to any collector in whose district such books or papers might be thought to be. On the 25th of February, 1868 (15 Stat. 37), was passed the act relied upon as furnishing the ground for the exclusion of the books and papers on the present trial. It is entitled "An act for the protection, in certain cases, of persons making disclosures as parties, or testifying as witnesses," and is as follows: "Be it enacted, &c., that no answer or other pleading of any party, and no discovery or evidence obtained by means of any judicial proceeding, from any party or witness in this or any foreign country, shall be given in evidence, or in any manner used, against such party or witness, or his property or estate, in any court of the United States, or in any proceeding by or before any officer of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture, by reason of any act or omission of such party or witness: provided, that nothing in this act shall be construed to exempt any party or witness from prosecution or punishment for perjury committed by him in discovering or testifying as aforesaid." This provision was afterwards, in the same language, incorporated into the Revised Statutes of the United States (section 860).

The argument of the defendants is this: 1st. This is a suit for the enforcement of penalties against the defendants; 2d. Their books were offered to be "given in evidence" against them; 3d. The evidence contained in the books had been obtained from them by "means of a judicial proceeding." No serious contention is made against the position, that this suit, for the enforcement of a penalty for violation of the revenue laws, is within the view of the act. It is plain, also, that the books were offered to be given in evidence against the parties to the suit. The question is—was the evidence offered "obtained from the party," within the meaning of the statute? Is the evidence which the statute intends to exclude, any other than that obtained from the personal testimony of a party or a witness?

1. It will be observed, that the act of 1868, is not, and does not purport to be, an amendment of the act of 1863, or of that of 1866. The existence of that circumstance would tend greatly to connect it with those statutes, and give an application of its language, that it would not otherwise possess. It is, however, independent of those statutes, is disconnected from them, and is put forth as providing a general rule or principle of evidence.

2. The title and the marginal reading make it applicable to the case of personal testimony only. The title is the work of the legislature as much as the body of the act, and, while it

may not contradict or overrule the body, its language, in a doubtful case, is entitled to great consideration. "An act * * * for the protection of persons making disclosures, as parties, or testifying as witnesses." Any person who, as a party, shall make a disclosure under oath, or any person, (whether party or not,) who shall testify as a witness, shall be protected. No intention to protect books and papers from being given in evidence can be understood from this language. It relates to personal evidence only. The marginal reading is still more explicit. It is in these words: "The testimony of a witness, or the disclosure of a party, in judicial proceedings, not to be used against him in criminal cases, in United States courts." This language plainly excludes the case of books and papers obtained under a warrant issued by the judge. The "testimony of a witness," or the "disclosure of a party," does not include the case of books and papers obtained without such testimony or disclosure. The statute of 1868 is incorporated, without alteration, into the Revised Statutes, and, in the margin of the latter, is a reference to the former statute. The adoption of the old statute, accompanied by this marginal exposition, into the Revision, without change of language, entitles the marginal reading to more consideration than it would ordinarily possess.

3. A critical examination of the language of the statute of 1868, tends to the same conclusion. The answer or other pleading of a party, it is provided, shall not be given in evidence against him. This expression relates to the pleadings in a suit, and, probably, would be held to include nothing else. The answer or pleading referred to was usually given as a response to a bill of discovery, to which the party was compelled to reply, and by means of which he furnished evidence to his opponent, to enable him to sustain or to defend a civil suit. While this means of sustaining pecuniary claims is retained by the act of congress, in accordance with the general rule of law, care is, at the same time, taken not to interfere with that other rule of law, which protects a man from giving an answer which will subject him to a criminal prosecution or to a penalty. To insure this protection, the provision in question is made for the courts of the United States. It was, however, well known, that there are other modes of proceeding of a judicial character, in addition to pleadings in a suit, by which a party could be compelled to make disclosures, on oath, touching his business or property. Nearly every state has its own mode of compelling a debtor to submit to a personal examination, and to make discovery of his affairs. The "evidence" or "discovery" thus obtained by the examination of the party, is ordinarily competent evidence against him. It is, also, at this time, the rule in the United States courts, that a party to a suit may be called as a witness in that suit. What he then states, as a witness and as a party, is evidence against him, and of the highest character. By the statutes of June 30, 1864 (13 Stat. 226, § 14), and July 13, 1866 (14 Stat. 101, § 9), congress had bestowed upon numerous government officials engaged in the collection of internal taxes, the power to summon before them, and examine, parties under oath, as to their property. In some cases, the witnesses had claimed exemption from testifying, on the ground that their evidence would subject them to a penalty. Lippman's Case [Case No. 8,382]. These, among others, are cases where the discovery or evidence may be obtained "from the party or witness." It comes directly from the party or the witness. It may be used against him, in the United States courts, at all times and on all occasions, except in the case of a criminal prosecution against him, or in the case of a suit to enforce a penalty or forfeiture.

The case before us is of quite a different character. No "answer or other pleading" has been given. The party has not been sworn, nor has he testified. No "evidence" "has been obtained from the party." No "discovery" has been made by him. He has been perfectly silent. He has disclosed nothing. He has discovered nothing. His invoices have been seized, and have been offered to the court, but they are not the evidence or discovery referred to in the statute. The statute speaks of evidence or discovery obtained from the party or witness, and not that obtained from invoices and bills of lading which have been wrested from him. If one should be arrested for burglary, evidence that tools suitable for the commission of that offence were found upon his person may be given in evidence on his trial. Upon a trial for counterfeiting the coin of the country, proof that spurious coin, similar to that which was passed, had been found upon the person of the prisoner, or had been passed by him at other times, would be competent evidence to prove him guilty of the offence charged. This would be evidence derived from circumstances, from the tools and from the coin, not a discovery or evidence from or by the party. So, if books and papers contain entries tending to show an offence against the revenue laws of the country, they are competent evidence on a trial of the party, not as a discovery or evidence obtained from the party, but as facts and circumstances—facts or circumstances quite independent of the action of the party in making evidence or discovery, quite in opposition, indeed, to his wish or intention in that respect.

4. The proviso of the statute of 1868, is in harmony with the view taken of the proper construction to be given to it: "Provided, that nothing in this act shall be construed to exempt any party or witness from prosecution or punishment for perjury committed by him in discovering or testifying as aforesaid." The discovery or evidence expected to be given by the party was of a personal nature, to which he could make oath. The statute

contemplated a case where he should make discovery, or give evidence, in such form that he could swear to the truth of his statements, that those statements should not be given in evidence against him, when prosecuted criminally or for a penalty, but that, if he testified or made discovery upon oath, falsely, he should suffer the punishment due to a perjurer.

The case of the internal evidence derived from the contents of books and papers seized upon judicial authority is quite different from this. It is not the "discovering or testifying as aforesaid" contemplated by the statute.

It can hardly be doubted that this evidence would be competent, except for the provision in question. Such was the opinion of the learned judge who tried the cause, and such was the holding in Stockwell v. U. S. [Case No. 13,466]. Although that case was decided after the passage of the act of 1868, that act was not alluded to. It probably escaped the attention of the counsel and the court. On the appeal to the supreme court, the case was decided upon other points. 13 Wall. [80 U. S.] 531.

In my judgment, there is abundant aliment for all the language of the statute of 1868, without applying it to a case like the present, which, I think, is not within its intent, nor necessarily within its words.

For the error in excluding the evidence to be derived from the books and papers, the judgment must be reversed, and a new trial had.

Case No. 15,418.

UNITED STATES v. HUGHES.

[1 Bond, 574.] [1]

District Court, S. D. Ohio. Oct., 1864.

REBELLION—PROCLAMATION OF PARDON—TREASON.

1. The proclamation of the president of the United States, of December 8, 1863 [13 Stat. 737], extending amnesty to persons who directly or indirectly participated in rebellion, included within its terms a citizen of the state of Ohio, indicted for treason against the United States.

2. A citizen who has complied with the requirements of such proclamation, is not excluded from its protection by a subsequent explanatory proclamation of the president, issued after such compliance, debarring persons in civil custody from its operation.

[Cited in Knapp v. Thomas, 39 Ohio St. 382.]

[This was an indictment against Edward L. Hughes upon the charge of treason. On the part of the United States a general demurrer to the defendant's plea of pardon was interposed, upon which the case now comes before the court.]

Flamen Ball, U. S. Dist. Atty.

J. H. Thompson, for defendant.

LEAVITT, District Judge. The indictment against the defendant was returned and filed in this court on March 9, 1863. In this indictment the defendant is charged in two counts with the crime of treason. In the first count, after a recital of the fact of war or rebellion being carried on against the United States by the so-called Confederate States of America, it is averred that the defendant, being a citizen of Ohio, and as such owing allegiance to the government of the United States, on July 16, 1863, at the county of Pike, in said state, and within the Southern district of Ohio, "wickedly, maliciously, and traitorously, did ordain, prepare, and levy war against the United States of America." The second count is similar to the first in its recitals, but avers, as a specific or overt act of treason, that the defendant, on the day before named, at the same county, wickedly and traitorously gave aid and comfort to John Morgan and those associated with him in a forcible and armed invasion of the state of Ohio, prosecuted under the authority of said Confederate States of America, "by guiding, piloting, and escorting the said Morgan and his associates through certain portions of said state." The defendant having been arrested on said charge has appeared and filed, first, the plea of not guilty; and, secondly, a plea of pardon by the president of the United States by the operation of the amnesty proclamation of December 8, 1863. This plea recites the proclamation in full, and then avers that the defendant, on March 1, 1864, appeared in this court and took and subscribed the oath prescribed in said proclamation, in virtue of which he claims that he can not be held to answer to the charge for which he is indicted. The plea also avers that the defendant is not within any of the exceptions set forth in the proclamation.

To the defendant's plea of pardon, the district attorney, in behalf of the United States, has interposed a general demurrer. And this presents the question now to be decided by the court. In the argument upon the demurrer, the only points insisted on by the district attorney, were: (1) That it was not within the scope and intention of the proclamation of December 8, 1863, that citizens of a loyal state charged with treason against the United States should be included in the amnesty or act of grace which it extended to others. (2) That if included in such proclamation, the amended or explanatory proclamation of March 26, 1864 [13 Stat. 741], excludes the defendant from all its benefits.

The first point stated is to be determined by the language of the proclamation of December 8, 1863. If, by a fair construction of its terms, the defendant is within its scope, and has complied with the conditions on which it offers a pardon, he is legally entitled to its full benefits, whatever may be the views of others as to the policy of such a sweeping amnesty. Now the proclamation, after some recitals which it is not necessary to notice, is in these words: "I, Abraham

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

Lincoln, president of the United States, do proclaim, declare, and make known to all persons who have directly, or by implication, participated in the existing rebellion, except as hereinafter excepted, that a full pardon is hereby granted to them and each of them, with restoration of all rights of property, except as to slaves, and in property cases where rights of third persons have intervened, and upon the condition that every such person shall take and subscribe an oath, and thenceforward keep and maintain said oath inviolate." Then follows the form of the oath to be taken by the person wishing to avail himself of the amnesty. Without reciting it at length, it may be stated that it is in substance an oath to support the constitution of the United States, and faithfully to comply with all acts of congress and all proclamations of the president, looking to the suppression of the rebellion. There seems to be no ground for a doubt, that the defendant is within the terms of the amnesty. The offer of grace is "to all persons who have directly or by implication participated in the existing rebellion." Then follows an enumeration of "the persons excepted from" the benefits of the offer of amnesty. It may be noted here that the defendant's plea of pardon avows expressly, as it was necessary to do, that he is not one of the persons exempted from the operation of the amnesty. The demurrer to the plea admits the truth of this averment; and if its truth did not otherwise appear, the court would be bound to receive it as true. But it is clear by reference to the proclamation, that the case of a citizen or resident of a loyal state, charged with treason committed within such state, is not within the enumerated exceptions. These exceptions are minute and very clearly stated in the proclamation, but by no allowable canon of construction is the defendant within the scope or meaning of the words used. Such, it is believed, was the view of all intelligent men when the proclamation was first promulgated. Such certainly was the opinion of the attorney-general of the United States, who issued official instructions to the district attorneys to dismiss all prosecutions where the person accused shall take the oath of allegiance and fidelity to the Union, as provided for in the proclamation.

The second point made by the district attorney in support of the demurrer to the defendant's plea of pardon, is clearly not sustainable. This point, as before stated, is, in substance, that although the defendant may be within the terms, and entitled to the benefit of the original amnesty proclamation, he is excluded from these benefits by the supplemental or explanatory proclamation of March 26, 1864. This proclamation, after reciting that it had "become necessary to define the cases in which insurgent enemies are entitled to the benefits" of the proclamation of December 8, 1862, declares that it "does not apply to persons taking the prescribed oath of allegiance and fidelity to the Union, who are in military, naval, or civil confinement or custody, or under bonds, or on parole of the civil, military, or naval authorities, or agents of the United States, as prisoners of war, or persons detained for offenses of any kind, either before or after conviction."

The only inquiry before the court as to this point is whether the second or explanatory proclamation can in any way affect the status or rights of this defendant. It has been already stated that the plea avers, and such are the facts of the case, that after the return of the indictment against the defendant, namely, on March 1, 1864, he appeared in court and took the oath prescribed. The explanatory proclamation bears date the 26th of that month. It will be obvious, therefore, that when the defendant took the oath, and thereby claimed the benefits of the president's offered amnesty, the first proclamation was in full force. Now, it is a proposition too clear to require arguments or authorities to sustain it, that if the defendant, by a compliance with the terms of mercy proposed in the first proclamation, has entitled himself to its benefits, no subsequent act of the president, or of any other department of the government, could deprive him of the rights so acquired. To give the second proclamation a retroactive operation, and thus doom the defendant to a punishment from which he had been legally exonerated, would be in violation alike of reason and of law. If it were true that the high crime charged against the defendant could be sustained by satisfactory evidence, it is far better that he should escape punishment than that a plain principle of law should be set at naught.

I am clear, therefore, that the special plea of the defendant must be sustained, and the demurrer overruled.

Case No. 15,419.

UNITED STATES v. HUGHES et al.

[21 Int. Rev. Rec. 76.]

District Court, S. D. New York. March, 1875.] [1]

CUSTOMS DUTIES—VIOLATION OF LAWS—RECOVERY OF PENALTIES—EVIDENCE—BOOKS AND PAPERS SEIZED.

In suits to recover penalties under the customs laws, evidence obtained from the books and papers taken from the defendant under a warrant of seizure is not competent, such evidence being excluded under section 860 of the Revised Statutes of the United States, which is a re-enactment in substance of the 1st section of the act of February 25th, 1868.

[Cited in U. S. v. Three Tons of Coal [Case No. 16,515.]

[This was an action of debt to recover from the defendants, George Hughes and others, the value of certain importation of merchandise alleged to have been entered by them at

[1] [Reversed in Case No. 15,417.]

the custom house in New York City, on fraudulent invoices.]

Thomas Simons and R. W. Sherman, Asst. Dist. Attys., for plaintiffs.
Sherburne B. Eaton, for defendants.

BLATCHFORD, District Judge. The district attorney has offered in evidence certain original entries, contained in certain original books belonging to the defendants, for the purpose of proving the allegations contained in certain specified counts of the declaration. These books, were taken from the possession of the defendants by virtue of a warrant of seizure issued under the 2d section of the act of March 2, 1867 (14 Stat. 547), providing for the seizure of books and papers in cases of complaint made of frauds on the revenue. The warrant and the papers connected with it are in evidence. The books in question were delivered up to the defendants on a stipulation made by them to produce them on this trial, which they have done. This is strictly a suit to recover penalties. It is objected by the defendants that the evidence to be furnished by the entries in the books in question is not competent for the reason that section 860 of the Revised Statutes of the United States which is a re-enactment in substance of the 1st section of the act of February 25th, 1868 (15 Stat. 37), makes such evidence incompetent. Section 860 is in these words: "No pleading of any party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him, or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: provided. that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

The question thus presented is an interesting and important one, and I am not aware that it has been passed upon by any court of the United States. My own recollection, and such examination as I have made in the brief time allowed to me, has not led me to any case on the subject. And certainly if the experienced counsel for the government, and the zealous and energetic counsel for the defendant in this action, have found no such case, it may be assumed that no such reported case can be found. In 1868 the United States brought a suit in personam against Stockwell [Case No. 16,406], in the district court of the United States, for the district of Maine, to recover as penalties double the value of certain shingles, and also unpaid duties on such shingles. The books and papers of the defendants had been seized under the provisions of the act of 1867, before referred to; and at the trial before the district judge some of the books and papers so seized were offered in evidence on the part of the United States. Various objections were taken by the defendants to the competency as evidence of the books and papers, and it was contended by them that the district attorney could not put in evidence books and papers obtained and placed in his possession by force of the warrant of seizure. But although the suit was brought and tried after the act of February 25, 1868, was passed, no allusion to that act is found in the report of the case in the circuit court,—Stockwell v. U. S. [Id. 13,466],—to which court it was taken by writ of error, by the defendants, after a verdict and judgment against them, and that act does not appear to have been urged by the defendants as an objection to the putting in evidence of the books and papers. The district judge overruled at the trial all the objections so taken, which included an objection that the act of 1867 was unconstitutional. The case on the writ of error was heard in the circuit court before Mr. Justice Clifford and Judge Shepley. Judge Clifford wrote an opinion which is the leading opinion on this subject, in which he considers all the objections so taken, and there is not in any part of his opinion any allusion to the act of 1868. One of the objections taken at the trial in the district court, and set forth in the bill of exceptions, and considered in the circuit court, was that the district attorney could not, against the objection of the defendants, put in evidence against them papers obtained and placed in his possession by force of the warrant,—an objection which, on the face of it, would seem to have been broad enough to admit the urging of the point that, by virtue of the provisions of the act of 1868, the district attorney was inhibited from putting in evidence in a suit against the defendants for penalties, books and papers obtained from them by force of such warrant of seizure, even though the bill of exceptions did not, on the face of it, contain any specific allusion to the act of 1868. But neither the attention of the district judge, nor the attention of the circuit judges, seems to have been called to this statute of 1868. Various inferences might be drawn from this circumstance by different minds, looking upon the subject from different points of view. One inference might be, that as it is to be presumed that the counsel for the defendants in that case knew of that statute, and as they made no point about it, and did not call the attention of the court to it, the reason was because they thought that the statute had no application to the case, and that as the judges must have had the statute in mind, and made no suggestion that it was applicable, they must have thought that it had no bearing on the case. On the other hand, counsel and judges sometimes overlook the existence of recent statutes. In that connection, it has been stated, on this trial, by the counsel for the defendants, that Judge Lowell, of the district of Massachusetts, is reported to have said, when the matter of the seizure of the books

and papers of Jordan, Marsh & Co. was before him,—In re Jordan [Case No. 7,512],—that such books and papers, if taken on a warrant of seizure, could not against their objection, be used as evidence against them in a suit to recover penalties from them. If the district judge in Maine, or the circuit judges, had in mind the existence of the statute of 1868, they may not have regarded it as their duty to refer to it, inasmuch as the counsel for the defendants did not call attention to it. However that may be, the statute was not, so far as the reports show, called to the attention of any of the courts in that case. The case went up from the circuit court to the supreme court of the United States, and in the latter court—[Stockwell v. U. S.] 13 Wall. [80 U. S.] 531—no question about the books and papers seems to have been urged or considered, and the case turned on other points entirely, and the judgment was affirmed. With the views of the circuit court, as expressed in the Case of Stockwell, in regard to the seizure of books and papers, I entirely concur, as I have stated in my decision in Re Platt [Case No. 11,212]. The principal questions as to the seizure of books and papers, involved in the Stockwell Case, were involved in the Platt and Boyd Case [supra]. One point involved in the Stockwell Case did not arise in the Platt and Boyd matter, but does arise in the present case. In the Stockwell Case it was objected that books and papers coming into the possession of the district judge, under a warrant of seizure, could not be put by him into the possession of the district attorney to be used as evidence on the trial. In regard to this objection Judge Clifford says: "The court is of a different opinion, as the very object of the search is to ascertain whether there are such papers, deposited in the described place or premises, and, if so, that they may be seized and produced 'before the said judge.' Papers so seized are declared by the act of congress to be 'subject to the order of said judge,' but he must allow the examination of the same by the collector of customs, or by any officer duly authorized by the collector for that purpose. Invoices, books, or papers so seized may be retained by said judge as long as in his opinion the retention thereof is necessary; and the court is of the opinion that invoices, books or papers, so seized, like the implements of crime or stolen goods seized on search warrants may, in a proper case, be given in evidence against the offender and perpetrator of the fraud. Com. v. Dana, 2 Metc. [Mass.] 329. Suits in the name of the United States are instituted in the circuit and district courts by the district attorneys, and, while pending there, such suits are controlled by those officers, under the instructions of the attorney-general. They are the proper officers to institute proceedings to recover such penalties as those incurred in this case, and when such a suit is pending and comes on for trial the district attorney may well claim the right to use all legal evidence at command, whether the same is in the archives of the government or on file in the court. Confiscation Cases, 7 Wall. [74 U. S.] 454." That is a well-considered opinion by a judge whose political views have always inclined him to respect most fully the rights of the citizen, and to adhere to a strict construction of the constitution; and, but for the provisions of section 860 of the Revised Statutes, there could be no doubt, in my judgment, that the entries in the books now offered in evidence would be competent testimony.

Simultaneously with the conferring of the power of seizing books and papers, in customs revenue cases, by the 7th section of the act of March 3, 1863 (12 Stat. 740), which was supplanted by the 2d section of the act of March 2, 1867, and which power was undoubtedly conferred, at first, in view of the necessity growing out of the war, for saving every dollar that could be saved in the collection of the customs revenue, there were also passed statutes in connection with the internal revenue, such as the 14th section of the act of June 30, 1864 (13 Stat. 226), as amended by the 9th section of the act of July 13, 1866 (14 Stat. 101), which introduced what were regarded by some persons as harsh and inquisitorial measures for obtaining possession of books and papers by the government with a view of obtaining from them evidence whereby to collect taxes. It had always been a principle of Anglo-Saxon jurisprudence, adopted in this country, that no man could be compelled to give testimony criminating himself or testimony that might subject him to a penalty or forfeiture; and, in the practical administration of that principle, it had always been held that if a party were asked, in the course of judicial proceedings, a question, or were asked to produce a book or paper, and should under oath say that the answer to the question, or the production of the book or paper, might tend to criminate him or subject him to a penalty or forfeiture, he could not be compelled to answer the question or to produce the evidence. Thus, between this principle and the principle of allowing the seizure or requiring the production of the books and papers, there was an apparent antagonism, which the government undertook to reconcile. It was necessary it should have revenue, and to do that it regarded it as necessary to obtain information from books and papers, both in customs and internal revenue matters. It therefore passed the act of February 25, 1868, under which it could compel a party to give the information required, while providing that no evidence obtained from him by means of any judicial proceeding should be used against him or his property in any criminal proceeding, or to enforce any penalty or forfeiture. It thus strengthened the hands of its officers, while it protected the citizen by giving him substantially the benefit of the principle referred to. Before, the party was

not obliged to give or produce the evidence. Now, he must do so, but it cannot afterwards be used against him, in any criminal proceeding or to enforce any penalty or forfeiture.

There have been several prosecutions in this court to recover penalties under the customs laws in which books and papers have been seized under a warrant and put in evidence on the trial, without the question having been raised by the defendants which is now presented; and not only so, but without the questions having been raised, which were raised in the Stockwell Case, under the act of 1867. From this fact some persons might infer that the counsel for the defence in those cases were of opinion that the act of 1868 did not apply. But that is rather a strained inference, because counsel may very well have advised their clients, or the clients may have preferred, not to take any objection under the act of 1868, and not to hesitate to exhibit all their books and papers, because having nothing to fear, and with the idea that any attempt at suppression or concealment would operate against them in the opinion of the mercantile community, if not in the particular case. From the fact that the counsel in any particular case, involving a question where the point might have been raised, did not raise it, the inference is not necessarily to be drawn that, as a purely legal question, they would not have regarded it as applicable. I do not mean, however, to be understood, by anything that I have said, that the raising of the question in this case is a matter which is not altogether proper to be done by the defendants, whatever the counsel in other cases may have chosen to do.

I cannot resist the conclusion that section 860 of the Revised Statutes applies to this case, and that the testimony offered is not admissible. I cannot conceive of any purpose or object for which such a statute could have been enacted except to effect what it says,—that is, that no evidence obtained from a party or witness by means of a judicial proceeding shall be given in evidence or in any manner used against him or his property or estate, in any court of the United States, for the enforcement of any penalty or forfeiture. The language is, obtained from a party "by means of a judicial proceeding." The issuing of a warrant under the 2nd section of the act of 1867, and the seizure of books and papers under it is a judicial proceeding. The judge issues the warrant, and issues it to the marshal, who produces the books and papers seized before the judge, and they are to remain subject to the order of the judge, and he is to allow them to be examined by the collector of customs, and the judge is to retain them as long as, in his opinion, the retention of them is necessary, and the warrant is to be returned as other warrants, to the district court. Any evidence obtained from a party by the seizure of books and papers under such warrant is certainly obtained from him by means of a judicial proceeding. The present suit is one to enforce penalties against the parties from whom the evidence contained in the books and papers seized under the warrant was obtained, and such evidence is sought to be given in evidence and used against such parties. Therefore, the statute applies to this case. The evidence is obtained by the seizure of the books and papers. The statute cannot be limited in its operation to evidence obtained from the oral examination of the party. If he were sworn and examined as a witness, and in the course of such examination produced the books and papers, their contents would be evidence obtained from him by means of a judicial proceeding. And it can make no difference that instead of his producing the books and papers, in the course of giving sworn oral testimony, they are taken from him under process issued in a judicial proceeding.

Against these views, it is urged that congress had, in 1867, passed this act in respect to the seizure of books and papers, revising effectively and thoroughly the former act of 1863 on the subject, and that, if they had intended that the act of 1868 should have the effect of substantially doing away with the benefits and advantages of the act of 1867, they would have repealed the 2d section of the act of 1867, and that, not having done so, they must have believed that there was nothing in the act of 1868 which would interfere with the operation of the act of 1867. This view involves another proposition, that there will be no operation or scope for the 2d section of the act of 1867 if the act of 1868 is allowed to operate. But that seems to me not to be a sound proposition; and the language of the act of 1868, as also found in section 860 of the Revised Statutes, indicates, with great distinctness, the answer to that suggestion. Section 860 only says that the evidence obtained from a party by means of a judicial proceeding shall not be used against him for certain specified purposes. It may be used for all other purposes. There are many purposes for which the contents of books and papers taken from the possession of a party under the act of 1867 may be used. They may be used, for instance, to discover the mode in which frauds on the revenue are committed. Illustrations of this fact are quite familiar to those who know how, for the last few years, the government has, from the seizure of books and papers, obtained information as to the manner in which, in reference to certain classes of goods, frauds on the revenue were initiated and carried on in Europe, and has been enabled to abate such frauds through agents sent abroad for the purpose. So, too, books and papers seized may be used to obtain evidence for use in suits to recover duties from the party, and in suits against other persons. There is, therefore, a wide

field not covered by the restrictions contained in section 860.

It is further suggested that on the 22d of June, 1874, an act was passed (18 Stat. 186) which, while repealing the 2d section of the act of March 2, 1867, enacts, in its 5th section, a substitute, to a certain extent, for the seizure provided for by such 2d section, of the act of 1867, and gives, by that substitute, to the government, the benefit of the evidence contained in books and papers produced by a defendant under a compulsory process, in all suits and proceedings other than criminal, arising under the revenue laws, including suits for penalties and forfeitures. The 5th section of the act of 1874 is in these words: "In all suits and proceedings other than criminal, arising under any of the revenue laws of the United States, the attorney representing the government, whenever, in his belief, any business book, invoice or paper, belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which such suit or proceeding is pending, may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal, by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And, if produced, the said attorney shall be permitted, under the direction of the court, to make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice or paper, as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid." Hereupon, it is contended that in view of the provisions of this 5th section of the act of 1874 it is not to be supposed that congress could have intended that the provisions of the 1st section of the act of 1868 or of section 860 of the Revised Statutes should apply to evidence obtained by means of the seizure of books and papers under a warrant issued in pursuance of the provisions of the 2d section of the act of 1867. It is sufficient to say, in regard to this 5th section of the act of 1874, that while it may, perhaps, be considered as sufficiently broad in its scope to allow such books and papers as may be produced by virtue of proceedings taken under it, to be given in evidence in suits for penalties, and as thus abrogating, in respect to suits for penalties, the provisions of the act of 1868, and of section 860 of the Revised Statutes, in respect to evidence contained in books and papers produced under the 5th section of the act of 1874, yet, on the other hand, the general scope of such 5th section is much more limited than the general scope of the 2d section of the act of 1867. The seizure under the act of 1867 was a seizure without the pendency of any proceeding or suit, and, naturally, with the purpose and intent that the government should use the information it should procure by means of an examination of the books and papers seized, to bring suits; whereas, the 5th section of the act of 1874 requires that a suit or proceeding shall have been brought, and shall be pending. Under the latter act, the attorney representing the government is to make the written motion to the court in the suit, describing the allegation which he expects to prove. Therefore it is not a sound suggestion that the construction of the act of 1868, and of section 860 of the Revised Statutes, must be controlled by the fact that evidence obtained under the proceedings taken by virtue of the 5th section of the act of 1874 may, perhaps, be used in a suit for a penalty or forfeiture.

A suggestion had occurred to me which has not been adverted to by counsel; and I allude to it only for the purpose of saying that, on an examination of it, it does not seem to me to be a suggestion that has force in it. I mention it only that it may be understood that it has occurred to me. It is, that as the 1st section of the act of 1874 repeals the 2d section of the act of 1867, therefore, everything that was done under such 2d section fell with such repeal, and consequently that all right to put in evidence books and papers seized under authority of such 2d section fell with such repeal. But the answer to that suggestion, is this, that it always has been held that where papers are offered in evidence the court can take no notice how they were obtained, whether lawfully or unlawfully, nor will the court form a collateral issue to determine that question. Com. v. Dana, 2 Metc. [Mass.] 329; U. S. v. La Jeune Eugenie [Case No. 15,551]; 1 Greenl. Ev. § 231; Stockwell v. U. S. [Case No. 13,466]. So that, if these papers and books, being in possession of the government, were offered in evidence, the general principles of law would authorize a decision that they could be used in evidence no matter how they were obtained, but for the provisions of the act of 1868, as reenacted in section 860 of the Revised Statutes. They could be used in evidence in a suit to collect duties, and could be so used notwithstanding the repeal of the 2d section of the act of 1867. Therefore, the view that is main-

tained on the part of the defendants in this case, receives no additional support from the fact that the 2d section of the act of 1867 has been repealed. I must therefore exclude these books and papers seized by virtue of the warrant, because, in the language of the act of 1868, and of section 860 of the Revised Statutes, they are evidence obtained from the defendants by means of a judicial proceeding, and this is a suit against them for the enforcement of penalties.

[NOTE. The United States moved that the defendants be notified to produce certain books and papers. The court granted the motion. Case No. 15,416. Subsequently a verdict was rendered by direction of the court for defendants. This judgment was reversed by the circuit court in error. Id. 15,417.]

Case No. 15,420.

UNITED STATES v. HUMASON.

[5 Sawy. 537; 8 Reporter, 70: 25 Int. Rev. Rec. 208; 11 Chi. Leg. News, 328.] [1]

Circuit Court, D. Oregon. June 7, 1879.

OFFICIAL AND STATUTORY BONDS—INDIAN AGENT—PRESUMPTIONS.

1. In the absence of any statute upon the subject, a bond voluntarily given the United States to secure the payment of a debt or the performance of official duty is valid.

2. But where a statute prescribes the penalty and conditions of a bond, one given in a greater penalty or upon substantially other or different conditions is so far illegal and void.

3. An Indian agent appointed for Oregon under section 4 of the act of June 5, 1850 (9 Stat. 437), was required to give bond in the penal sum of two thousand dollars, as provided in section 4 of the act of June 30, 1834 (4 Stat. 735); and he was also a person "charged or trusted" with the disbursement or application of money or property on account of the Indian department, within the purview of section 8 of said act of 1834, and therefore might be required by the president to give a bond in a larger sum than two thousand dollars for the performance of his official duties.

4. The law presumes that official duty has been duly performed, and therefore where the Indian department took a bond from an Indian agent in Oregon in a larger amount than two thousand dollars, the presumption of law is, that the increase in the penalty was required by the executive, and the bond is valid until the contrary appears.

Action [against Phœbe M. Humason] on official bonds.

Rufus Mallory, for the United States.
John Waldo, for defendant.

DEADY, District Judge. This action is brought against the defendant as the executrix of Orlando Humason, deceased, one of the sureties upon the two bonds given by the late William Logan to the United States as Indian agent for Oregon. The defendant demurs to the complaint and upon the argument assigned as cause, that the penalty of the bonds in excess of two thousand dollars was unauthorized by law, and they are therefore so far illegal and void.

The following are the material facts stated in the complaint: In 1861, William Logan, being an Indian agent in Oregon, together with Orlando Humason, aforesaid, executed a bond to the plaintiff in the sum of twenty-five thousand dollars, conditioned for the faithful performance of the duties of his office, and failed to account for one thousand and six dollars and six cents of the public moneys received by him as such agent thereunder. That on July 1, 1862, said Logan being still Indian agent as aforesaid, together with said Humason, executed another bond to the plaintiff in the sum of twenty thousand dollars, upon like conditions, and failed to account for seven thousand six hundred and seventy-eight dollars and sixty-six cents of the public moneys received by him as such agent thereunder.

At the date of the execution of these bonds it was provided by section 4, Act June 5, 1850 (9 Stat. 437), that Indian agents not exceeding three might be appointed for Oregon who shall "give bond as now required by law." The only provision of law then in force in the United States upon the subject of the bonds of Indian agents, was contained in sections 4 and 8 of the act of June 30, 1834 (4 Stat. 735), entitled "An act to provide for the organization of the department of Indian affairs," and enacted with reference to twelve agents for Indians east of the Rocky Mountains. By said section 4 it was provided that such agents should give bond "in the penal sum of two thousand dollars;" and by said section 8 that the president might "from time to time require such additional security, and in larger amounts, from all persons charged or trusted under the laws of the United States with the disbursement or application of money, goods or effects of any kind on account of the Indian department." Rev. St. § 2075.

So far as appears, these bonds were given by Logan and his sureties voluntarily. They relate to the performance of duties concerning the intercourse with Indian tribes—a subject within the jurisdiction of the United States—and are an appropriate means of regulating the same. In the absence then of any statute prescribing a bond with a different penalty or conditions, these bonds would be valid. U. S. v. Howell [Case No. 15,405]; U. S. v. Tingey, 5 Pet. [30 U. S.] 127; U. S. v. Bradley, 10 Pet. [35 U. S.] 357. But there was a statute in this case, prescribing the penalty of an Indian agent's bond, and so far as the penalty of these bonds vary from this standard, they are illegal and void, unless authorized by said section 8. Dixon v. U. S. [Case No. 3,934]; U. S. v. Howell, supra; Farrar v. U. S., 5 Pet. [30 U. S.] 388; U. S. v. Bradley, 10

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 8 Reporter, 70, contains only a partial report.]

Pet. [35 U. S.] 360; Armstrong v. U. S. [Case No. 549].

Section 4 of the act of June 5, 1850, supra, which provides that Indian agents appointed for Oregon should "give bond as now required by law," necessarily referred to the provisions of the act of June 30, 1834, supra, upon that subject, and they thereby became in effect, a part of such act. U. S. v. Babbit, 1 Black [66 U. S.] 56. Upon these premises it is contended by counsel for defendant, that section 4 of the act of June 30, 1834, prescribes the amount of the penalty of the bond of Indian agents for Oregon at two thousand dollars, and that the penalty of these bonds in excess of that amount is void. In support of this conclusion, it is insisted that the provisions of section 8 of the act of 1834, are not applicable to these bonds, for two reasons: (1) Because it does not appear from the complaint that the president ever made any order, either general or special, requiring these bonds to be given in a greater amount than two thousand dollars, and therefore they were so given contrary to law, and are pro tanto void; (2) That said section 8 does not apply to Indian agents, as they are not "persons charged or trusted" with the disbursement or application of money, goods or effects on account of the Indian department.

Speaking from common knowledge, one would say that an Indian agent in Oregon, at the date of these bonds, was a person largely so "charged or trusted;" and a glance at the provisions of the act of 1834 will show that such charge or trust was contemplated by the law-making power. By section 3 of that act the superintendent, under the direction of the president, has supervision over the official conduct and accounts of agents. Section 7 provides: "It shall be the general duty of Indian agents * * * to manage and superintend the intercourse with the Indians within their respective agencies agreeably to law;" to obey the instructions of the secretary of war, commissioner and superintendent of Indian affairs, and to "carry into effect such regulations as may be prescribed by the president." Section 12 directs the agent to be "present and certify to the delivery of all goods and money required to be paid or delivered to the Indians." Sections 15 and 16 authorize the president, under certain circumstances and independent of any treaty stipulation, to furnish Indians with rations, goods, animals and implements of husbandry; and section 17 authorizes the president to prescribe rules for carrying this or other acts relating to Indian affairs into effect.

By these rules an agent may be directly "charged or trusted" as provided in section 8 of the act of 1834; and it is fair to presume that such was the case with the principal in these bonds, for the condition of them is that he will faithfully account for all public money and property which shall come to his hands, while it appears from the complaint that he actually did receive large sums of public money to be expended and accounted for as Indian agent.

But more than this, the act directly provides, as stated, that the agent shall superintend the Indians of his agency and enforce the regulations of the president, which almost necessarily involve the disbursement of money and the application of property, for the supervision of an agent's accounts, which necessarily implies disbursements, and for the agent's presence and participation in the delivery of all goods and money to the Indians, which also implies that he is at least "charged or trusted" with the "application" of the same. It is not necessary that this charge or trust should be solely in the agent, but it is sufficient if he is called upon to act in conjunction with others, or even as an inspector or witness of the actions of such others.

But there are other acts of congress in force at the date of the execution of these bonds which bear upon this section. Section 8 of the act of 1834 is prospective, and applies whenever, by any subsequent legislation or executive regulation, an Indian agent is required to disburse or apply money or property on account of the Indian department. Section 1 of the act of March 3, 1857 (11 Stat. 169; Rev. St. § 2089) authorizes the president to direct the payment of money to Indians or Indian tribes by the superintendent, in the presence of the agent as a witness. Section 1 of the act of June 27, 1846 (9 Stat. 20; Rev. St. § 2092) provides that "no superintendent, Indian agent or other disbursing officer in such service shall have advanced to him on Indian or public account any money to be disbursed in future" until he has settled his accounts for the preceding year and the balances in his hand are ready to be paid over.

By this act it is distinctly assumed that Indian agents are disbursing officers in that department or "service," and so they were. Of this there can be no doubt, although their powers and duties in this respect may have been mainly prescribed by executive regulation. As has been suggested, in Oregon, for years prior to the date of these bonds, it was a matter of common knowledge that the yearly disbursements of the Indian agents amounted to hundreds of thousands, and formed an important item in the circulation and business of the country.

It is also suggested for the defendant that the executive power to require "additional security" from agents does not include the power to prescribe the amount of the original bond. "Additional security" may be either a new or additional bond with the same or other sureties in the same or a greater amount. The security given by an officer for the performance of his duties consists as well in the amount of his bond as the number and character of his bondsmen, and an

additional security necessarily implies an additional bond or one in a greater amount, or with more responsible sureties.

But the power to require "additional security" is not all the power conferred upon the president by section 8 of the act of 1834. He may also require security to be given in "larger amounts"—that is, than the sum of two thousand dollars, as prescribed in section 4 of said act. If this is not the effect of the clause—"and in larger amounts," it has no signification and is superfluous.

As to the first of these objections—that it does not appear from the complaint that Logan was required by the president to give bond in an amount larger than two thousand dollars—I am quite clear that the mere giving and taking the bond in such an amount is sufficient to warrant the presumption that he was so required, until the contrary appears. Official duty is presumed to have been regularly performed, and therefore, when the commissioner of Indian affairs or other officer of the Indian department took these bonds from Logan in an amount larger than two thousand dollars, the law presumes that he did so rightfully rather than otherwise by the direction, general or special, of the president.

The question involving an official act of the executive is triable by the knowledge of the court and must eventually be determined by it from an examination of the executive records and proceedings. If no such direction was ever given, then there was no authority for giving or taking these bonds in any greater sum than two thousand dollars, and all in excess of that amount is void. The demurrer is overruled.

[The plaintiffs' demurrer to the defendant's pleas, subsequently filed, was overruled. Case No. 15,421.]

Case No. 15,421.

UNITED STATES v. HUMASON.

[6 Sawy. 199; 9 Reporter, 107; 26 Int. Rev. Rec. 12; 12 Chi. Leg. News, 138; 8 Am. Law Rec. 466.] [1]

Circuit Court, D. Oregon. Dec. 15, 1879.

OFFICIAL AND STATUTORY BONDS—LOSS OF PUBLIC MONEY—ACT OF GOD.

1. Where an officer is required by his superior, colore officii, to give a bond, with stipulations or provisions in the condition thereof, not required by statute, the bond is void in toto.

[Cited in County of Douglass v. Clark (Or.) 13 Pac. 513.]

2. The parties to an official bond for the safe keeping or accounting for public money are not liable for the loss of the same when such loss is caused by the act of God or the public enemy.

[Cited in State v. Nevin (Nev.) 7 Pac. 655.]

3. The performance of an express contract is not excused by reason of anything accruing after the contract; but in the case of a condition in a bond to do a thing, performance is excused when prevented by the law or an overruling necessity.

The action is brought against the defendant [Phœbe M. Humason], as the executrix of the will of Orlando Humason, deceased, upon two bonds executed by William Logan, in his life-time, as Indian agent for Oregon, together with said Humason and others, as sureties; the one on August 1, 1861, in the penal sum of twenty-five thousand dollars, and the other on July 1, 1862, in the sum of twenty thousand dollars; and both conditioned that said Logan would "carefully discharge the duties" of such office, and "faithfully expend all public moneys, and honestly account for the same, and for all public property which shall or may come into his hands, without fraud or delay." It is also stated in the conditions of the bonds, that Logan had been appointed Indian agent for Oregon, and had accepted the office. The case was before the court on a prior occasion, on a demurrer to the complaint, which was overruled. See [Case No. 15,420].

Rufus Mallory, for the United States.
Seneca Smith, for defendant.

DEADY, District Judge. The breach alleged of the condition of the first bond is a failure to account for one thousand and six dollars and six cents of the public moneys received by Logan as such Indian agent, and of the second, a like failure for seven thousand six hundred and seventy-eight dollars and sixty-six cents.

The answer of the defendant, besides the denial, contains five separate pleas or defenses; the first and third being to the count upon the first bond, and the second and fourth to the count on the second one, and the fifth one to both. The plaintiff demurs to the third, fourth, and fifth pleas, because they do not constitute a defense to the action.

The third plea sets forth, in effect, that the first bond was prepared and sent to Logan by the interior department, through the then acting commissioner of Indian affairs, Charles E. Mix, who required the defendant to execute the same, with sufficient sureties, before he should be allowed to exercise the duties of said office or receive the emoluments of the same; that the conditions of said bond were wholly variant from those required by statute, and enlarged the duties and responsibilities of said Logan and his sureties; and so the said bond was extorted from said Logan by color of office, as a condition of his remaining in said office, and receiving the emoluments thereof, and is therefore void and of no effect.

The fourth plea is similar to the third.

The fifth plea states, that about July, 1862, while in the discharge of his duties as said Indian agent, under the appointment of July 1, 1862, said Logan sailed on the steamship

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 9 Reporter, 107, contains only a partial report.]

Brother-Jonathan from San Francisco for Portland, Oregon, with the sum of five thousand dollars, which he had received from plaintiff as said agent, with instructions to transport the same thereon to Oregon; that said steamship, while pursuing said voyage, was lost at sea, and said Logan was drowned, and said sum of money was, while being so transported, without any fault or negligence of his, lost in the Pacific Ocean.

Section 4 of the act of June 30, 1834 (4 Stat. 735), which was made applicable to Indian agents in Oregon by section 4 of the act of June 5, 1850 (9 Stat. 437), providing for the appointment of such agents, provides that Indian agents shall hold their offices for the term of four years, and "shall give bond, with two or more sureties, in the penal sum of two thousand dollars, for the faithful execution of the same.

By section 4 of the act of June 5, 1850, supra, it was declared that each Indian agent thereby provided for should "perform all the duties of agent to such tribe or tribes of Indians in the territory of Oregon as shall be assigned to him by the superintendent."

All the condition, then, which the statute required in the agent's bond, was, that he would faithfully execute his office,—perform the duties thereof,—and no more was necessary. But the bonds in suit seem to have been prepared without reference to the law, and the conditions are much broader than the statute requires, or was necessary. By these, Logan was not only required to account for the money and property which might come into his hands as Indian agent, but for all public moneys and property, however or in whatsoever character received.

In U. S. v. Bradley, 10 Pet. [35 U. S.] 343, it was held, in the language of the syllabus of the case, that a "bond given to the United States by a paymaster and his sureties, one part of the condition being in conformity with the act of congress which directed bonds to be taken from paymasters, is valid in that part, though it also contained other stipulations not required by the act, these latter being distinct and separable from the former, and it not appearing that any compulsion was used to obtain the bond."

But here it is a question whether the authorized and unauthorized provisions of the conditions are separable or not,—U. S. v. Mynderse [Case No. 15,850]; while it is distinctly alleged in the pleas that the bonds were obtained by compulsion.

In U. S. v. Tingey, 5 Pet. [30 U. S.] 115, the circumstances were exactly like those in the case at bar. The principal in the bond was a purser in the navy, and the condition required by the statute was, that he would faithfully perform all the duties of purser in the navy of the United States, while the condition written in the bond was, that he would account for all public moneys and property received by him or committed to his care, without limiting his liability to such as might come into his hands as purser. The defendant, a surety on the bond, pleaded these facts, and alleged that the bond was extorted from the principal by the secretary of the navy under color of office, as a condition of his remaining in the office of purser and receiving the emoluments thereof. Upon a demurrer to the plea in the circuit court it was held to be a good defense, and the judgment was affirmed by the supreme court.

The court, after stating the fact that the condition of the bond was different from that prescribed by the statute, because it created a liability for all moneys or property received by the principal, "whether officially as purser or otherwise," and that it was not voluntarily given, says: "It (the bond) was demanded of the party upon the peril of losing his office; it was extorted under color of office against the requisitions of the statute. It was plainly, then, an illegal bond; for no officer of the government has a right by color of his office to require from any subordinate officer, as a condition of holding office, that he should execute a bond with a condition different from that prescribed by law."

In Hawes v. Marchant [Case No. 6,240], Mr. Justice Curtis, in considering this case and others cited from the lower courts to the same effect, says: "The rule which avoids such bonds rests upon the want of authority in the public officer to take them, and upon the policy of guarding the citizen against oppression by the illegal exercise of official power. It is well stated by Sewall, J., in Churchill v. Perkins, 5 Mass. 541, that, when the plaintiff demands the fruit of an obligation obtained colore officii, it must be shown that the demand is justified by some authority of the officer, otherwise it is against sound policy, and is void by the principles of common law. By "colore officii," however, must be understood some illegal exertion of authority, whereby an obligation is extorted which the statute does not require to be given. If all parties voluntarily consent to enter into the bond, and the departure from the precise requisitions of the statute is made by mistake, or accident, and without any design to compel the obligees to enter into an undertaking not required by law, the bond is not invalid, simply because it contains something which the statute does not authorize."

Upon these authorities, and particularly the case of U. S. v. Tingey [supra], it must be held that these pleas are a good defense to the action. The demurrer to them is therefore disallowed.

The demurrer to the fifth plea is also overruled. In U. S. v. Thomas, 15 Wall. [82 U. S.] 337, the supreme court, in the language of the syllabus, held that "a receiver of public money, under bond to keep it safely and pay it when required, is not bound to render the money at all events, but is excused if prevented from doing so by the act of God

or the public enemy, without any neglect or fault on his part." In delivering the opinion of the court, Mr. Justice Bradley, after admitting the law to be that the "performance of an express contract is not executed by reason of anything occurring after the contract was made, though unforeseen by the contracting party and though beyond his control," makes a distinction "between an absolute agreement to do a thing and a condition to do the same thing inserted in a bond;" saying that "in the latter case the obligor, in order to avoid the forfeiture of his obligation, is not bound at all events to perform the condition, but is excused from its performance when prevented by the law or an overruling necessity,"—citing Co. Litt. 206a; 2 Bl. Comm. 340, 341, and concludes: "We think that the case is within the law as laid down by Lord Coke, and that the receiver, and especially his sureties, are entitled to the benefit of it; and that no rule of public policy requires an officer to account for moneys which have been destroyed by an overruling necessity, or taken from him by a public enemy, without any fault or neglect on his part."

Certainly, according to the facts stated in this plea, this sum of money was lost or destroyed by an overruling necessity,—the act of God,—without fault or neglect on the part of Logan, and this brings the case within the ruling of the supreme court.

There must be judgment on the demurrers for the defendant.

Case No. 15,422.

UNITED STATES v. HUMPHREYS et al.

[3 Hughes, 201; 7 Reporter, 330.] [1]

Circuit Court, E. D. Virginia. Feb. 11, 1879.

JUDGMENT LIENS—RECORDING.

In order to their being liens upon real estate in Virginia, judgments obtained in courts of the United States, in the state, need not be recorded.

In equity.

L. L. Lewis, U. S. Atty., and Henry T. Wickham, for the United States.

F. W. Christian, for defendants.

HUGHES, District Judge. The very able and informing briefs of counsel leave me nothing to do but state the points of the case, and deduce a decision from the authorities which govern it. The United States obtained a judgment in October, 1877, against Joseph M. Humphreys, late collector of customs at Richmond, and his sureties on his official bond. In January, 1878, Humphreys executed a deed of trust to secure money borrowed, through Thomas N. Page, on lands of his lying in the county of Henrico, near the city of Richmond. The United States brings its bill in equity in this court against J. M. Humphreys and other proper parties defendant to subject this land to the lien of its judgment. And the single question in the case before the court is, whether the judgment is of higher dignity than the trust deed, and can be enforced as against the lien of the debt secured by that deed.

The contention of the trust creditor is that the United States lost its lien and the benefit of its priority in time over the deed by failing to docket its judgment in pursuance of the requirement of the eighth section of chapter 182 of the Code of Virginia, which provides that "no judgment shall be a lien on real estate as against a purchaser thereof for valuable consideration without notice, unless it is docketed" in the county or corporation where the land lies, on the judgment docket required to be kept by the clerk of each county or corporation court of the state, either within sixty days next after the date of such judgment, or fifteen days before the conveyance of said estate to the purchaser.

I shall first consider the question as if the judgment creditor was a private creditor. The sixth section of the same chapter of the Code of Virginia provides that "every judgment for money rendered in this state heretofore or hereafter against any person shall be a lien on all real estate of such person." This provision was first embodied in the Code of 1849. Previously to that time, and, indeed, subsequently until March 26, 1872, the writ of elegit was in use in Virginia; but on that date that writ was finally abolished by special act of the legislature. Such being the law of Virginia as to the lien of judgments in the state courts, the next inquiry is, how does the law thus existing apply to judgments of courts of the United States rendered in the state of Virginia?

It is well-settled law that judgments rendered in the courts of the United States are liens upon the defendant's real estate in all cases where similar judgments of the state courts are made liens by the law of the state. Wood v. Chamberlain, 2 Black [67 U. S.] 430; more particularly page 438 et seq. Many other decisions of the supreme court of the United States might be cited to the same effect. These judgments are liens, not by virtue of the adoption of state laws by the United States courts, by rules of court or otherwise, but by virtue of acts of congress giving the same effect to final process of United States courts as is given by state laws to process of the courts of the states in which they are held; giving the same remedies on judgments and decrees of federal courts as are given by state laws on judgments and decrees of state courts; and giving authority to the United States courts to make proper rules for securing these objects. We are therefore to look to acts of congress on this subject to ascertain how far judgments of United States courts in Virginia are liens up-

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. 7 Reporter, 330, contains only a partial report.]

on lands. If there had been no such act of assembly as that of March 26, 1872, abolishing the writ of elegit in Virginia, it might probably be contended that in Virginia the process act of congress of 1828 [4 Stat. 278], is not repealed by the act of congress of June 1, 1872 [17 Stat. 196], now section 916 of the Revised Statutes of the United States, and that the writ of elegit lies from the United States courts in this state; and that the lien of the writ of elegit is, unlike that given by section 6 of chapter 182 of the Code, not subject to the condition of docketing the judgment imposed by section 8 of that chapter. But the Virginia law of March, 1872, does abolish the elegit, and section 916 in the Revised Statutes, giving the same effect to, and remedies on, judgments of the United States courts as were then (1874) given by state law to judgments of state courts, repeals by substitution in Virginia the process act of 1828 as to the elegit, whatever it may do in other states, under the particular legislation of those states bearing upon this subject. Decisions of United States courts in other states, seemingly in conflict with this view, were rendered upon the condition of state legislation in those states, and do not necessarily apply to the condition of legislation in Virginia.

The judgment in this case against Humphreys became a lien upon his lands just as it would have become if it had been a judgment of a state court; and the remaining question is, whether by the execution of the deed of trust which Humphreys gave in January, 1878, the judgment "ceased" to be a lien under the operation of the 967th section of the Revised Statutes of the United States, which provides that judgments of United States courts within a state "shall cease to be liens on real estate, etc., in the same manner and at such periods as judgments of the courts of the state cease by law to be liens thereon." I do not doubt that so far as this law shall operate proprio vigore in any case —for instance, as a statute of limitations— the lien of a judgment of a United States court would cease just as that of a state court would do under a state statute of limitation; but I am precluded by a current of decisions rendered by courts of the United States from holding that the lien of a judgment of a United States court ceases in the event it is not docketed in accordance with a state law as against a subsequent purchaser without notice. I am precluded from holding that the lien of the judgment in this case ceased in January, 1878, as against the trustee's title under the deed of trust executed in that month by Humphreys. The decisions of the United States courts have been in nothing more uniform, unvarying, and consistent than in holding that where rights once attach under laws of congress adopting laws of the respective states, these rights are not divested by a non-compliance with conditions, restrictions, or limitations contained in those very state laws, where a compliance with the latter would depend upon a resort in any way to state officials, or to the machinery of the state judiciary.

The provision of the Code of Virginia making a judgment for money a lien upon the real estate of the debtor makes, in the eighth section of chapter 182, an exception in favor of a subsequent purchaser without notice, where the judgment has not been docketed. The process of docketing depends upon the action of an officer of a state court in keeping a docket, and upon that officer's actually docketing the judgment of the United States court when presented. There is no law of Virginia requiring this officer to docket the judgment of a United States court. He acts strictly in a ministerial capacity, and is not required by any express law to enter such a judgment when presented for such a purpose. Congress, on its part, has not (as I think it should do) by law required clerks of United States courts to keep such dockets in each district as the law of Virginia requires to be kept in each county. So as to other restrictions, exceptions, limitations, and conditions which state laws conferring rights insert in the laws conferring them. I think it may be laid down as a rule having few exceptions that in any case of a law of a state conferring rights upon conditions, or with exceptions, and adopted by congress as operative in that state, wherever the exceptions or conditions depend upon the action of state officers, so that the enjoyment of rights thus once conferred could be defeated or divested by the action, or refusal to act, of a state officer, such a condition, or exception, in the state law is uniformly held by the United States courts not to limit the rights conferred by the act of congress adopting the state law. This was decided in Palmer v. Allen, 7 Cranch [11 U. S.] 550-64; Wagram v. Southard, 10 Wheat. [23 U. S.] 1; U. S. Bank v. Halstead, Id. 51; Boyle v. Zacharie, 6 Pet. [31 U. S.] 648; and (more particularly in their bearing upon the question now under consideration) Massengill v. Downs, 7 How. [48 U. S.] 760; and Carroll v. Watkins [Case No. 2,457]. In these last cases the law of Mississippi, giving the lien in favor of judgments for money, was modified by provisions requiring judgments to be docketed, and making exceptions in favor of subsequent purchasers without notice as against judgments not docketed—provisions identical in purport with those of Virginia. But the supreme court of the United States held in the former case that in states where judgments create liens a judgment of a United States court has that operation throughout the judicial district in which it is rendered, and any provisions of state legislation modifying the lien of judgments and restricting their operation cannot affect the lien of a judgment of a United States court. I think the deci-

sion of the supreme court in Massengill v. Downs [supra], is decisive of the question under consideration, and requires me to decide that the judgment of this court rendered in October, 1877, is good against the trust-deed executed in January following, and that the lien created by section 916 of the Revised Statutes of the United States, adopting section 6 of chapter 182 of the Virginia Code, is not controlled or affected by section 8 of that chapter of the Virginia Code. This court has decided that a lis pendens in a United States court binds property in litigation, though not recorded and docketed, as required by state law if in a state court. Rutherglen v. Wolf [Case No. 12,175].

I do not think it necessary to go farther and inquire whether a judgment in favor of the United States has the same force as a judgment in favor of the state of Virginia in this state, and as a judgment in favor of the crown in England. I am inclined to believe on authority, and would so decide if necessary in this case, that judgments in favor of the United States stand on the same principle as those in favor of the commonwealth and of the crown; that they are a lien independently of laws making judgments generally a lien upon the estates of debtors, and do not depend upon those laws. Although the ancient writ in favor of the crown of extendi facias is obsolete by mere disuse, having given place to more efficient remedies, yet I imagine that it still lies theoretically; and its theoretical existence is sufficient to establish the liens in this country of judgments in favor of the state and federal governments. Their precedence over all liens in favor of private persons stands upon such broad maxims as "Salus populi suprema lex," "Thesaurus regis est pacis vinculum, et bellorum nervi," and the like. Certain prerogatives of the crown belong, in the United States, not only to the state governments, but to that in the United States. Those which belonged to the king in England as parens patriæ, as distinguished from those which belonged to his person, survive to the government of the United States in this country. Dollar Savings Bank v. U. S., 19 Wall. [86 U. S.] 239. This doctrine is well settled in respect to the state governments; more particularly by Com. v. McGowan, 4 Bibb, 62; Leake v. Ferguson, 2 Grat. 436; and Com. v. Baldwin, 1 Watts, 54. Authorities might be multiplied if it were necessary. It might not be necessary, in respect to recent judgments in favor of the United States, to resort to a bill in chancery for the enforcement of them upon real estate. But where they have been standing for any length of time, and junior liens have supervened, I think the proper method of proceeding is the same as would be proper in respect to judgments in favor of citizens,—that is to say, by bill,—and that such a course has been properly taken in this case.

Case No. 15,423.

UNITED STATES v. HUNT.

[2 Story, 120;[1] 4 Law Reporter, 371.]

Circuit Court, D. Massachusetts. Oct. Term, 1841.

SEAMEN—PUNISHMENTS BY MATE—INTOXICATION OF CREW—MARINE INSURANCE.

1. The authority of the officers in a merchantship, to compel obedience and inflict punishment, is of a summary character, but is not of a military character.

2. The right of the mate or other officers of a ship to inflict punishment on the seamen, when the master is on board and at hand, can be justified only by the immediate exigencies of the sea service, or as a necessary means to suppress mutinous, illegal, or flagrant misbehaviour on the part of the seamen, or to compel obedience on the part of the seamen to orders, or other duties, which require prompt and instant action and interference on the part of the officers, and admit of no delay. In general, it is the duty of the officers to consult the master as to the infliction of punishment.

[Cited in Thompson v. Hermann, 47 Wis. 609, 3 N. W. 582.]

3. If the master of a vessel set sail on a voyage, with the crew in such a state of intoxication, as disables them at the time for the proper performance of the ship's duty, and any disaster arise therefrom; it seems, that any loss from that disaster would not be recoverable from the underwriters, under the common form of policies of insurance.

This was an indictment against [Zebedee] Hunt, founded upon the Crimes Act of 3d of March, 1825, c. 276, § 22 [3 Story's Laws, 2006; 4 Stat 121, c. 65], for assaulting with a dangerous weapon (viz. a cutlass) one Thomas Coombs, on board of the American brig called the Havre, within the waters of Massachusetts Bay, and the admiralty and maritime jurisdiction of the United States. Plea, not guilty.

At the trial the facts appeared to be as follows: The defendant (Hunt) was mate of the ship, and Coombs was a seaman on board. On the 19th of October, 1841, the brig sailed from the inner harbor of Boston bound on a voyage to Savannah. It appeared that the vessel sailed from the wharf at Boston in the afternoon, and was standing out to sea, having reached Nantasket Roads, when it became necessary to secure the anchors, and to heave to, for the purpose of discharging the pilot. Three or four of the crew had been intoxicated ever since they came on board, and had caused the pilot and officers a good deal of trouble; sometimes remaining below and refusing to come on deck. After reaching the Roads, the captain (Carpenter) gave orders to heave the brig to, and asked Hunt, where the rest of the men were. Hunt answered, that he had called them several times and they had refused. (One of the crew testified, that Hunt had called these men up and received very insolent answers.) The captain then called them up, and they answered, that "they'd be d—d if they would come un-

[1] [Reported by William W. Story, Esq.]

til they were a-mind to." The captain then said, "I'll come down to you, then." The men answered, "Come down;" and upon Capt. C.'s stepping down a few steps, they held out their hands towards him, (as he testified,) in a threatening manner. He then went aft, but one of the men, Coombs, came up and followed him to his windlass end, and struck at him with his fist. The blow was spent, but reached the captain's breast. Capt. C. took up a handspike, but Coombs got it away from him. At this moment Hunt seized Coombs, but received from him a blow in the face, which gave him a black eye. Hunt then ran aft to the roundhouse, and came forward with his cutlass drawn, and the scabbard left behind. As he went forward, the pilot told him to be careful, how he used his cutlass. Up to this point there was no discrepancy in the testimony. It appeared, also, that it was rather squally, and there was a hail squall soon after the vessel came to anchor. Hunt then went forward and struck Coombs two or three blows with the flat of his cutlass (as all the witnesses agreed) over the head and shoulders. The captain, second mate and cabin-boy here testified, that after these blows the mate retreated, and Coombs followed him, striking at him with his fists and daring him; that they saw no blows given with particular force by the mate, but that Coombs seemed to be wounded in the melee and confusion of the mate's defence, and attempt to reduce him to obedience. The same witnesses testified, that the melee ended several feet further aft than it began. The rest of the crew testified, that after two or three blows with the flat of the cutlass, Hunt seized the weapon and brought it down several times, with great force, upon the sharp edge, upon the hands and wrists of Coombs, who was only attempting to defend himself. According to the evidence of the crew, Coombs stood between the windlass end and the bow of the long-boat, when Hunt first struck him, and was in the same, or nearly the same place, when the affair ended. The pilot did not see the fight, being on the other side of the boat. Some of the rest of the crew interfered, though it appeared that one of them took hold of Hunt just as he was first attacking Coombs, before he got his cutlass, but, as was admitted, with no hostile intention. Doctors Ayers and Otis testified, that the left wrist of Coombs was nearly cut off, the right hand and arm badly wounded, and that amputation of the left might be necessary, though there were hopes of saving it. The other facts in the case sufficiently appear in the charge of the judge.

R. H. Dana, Jr., for the prisoner, rested the defence upon the following grounds: The repeated and deliberate acts of disobedience, accompanied with insolent language, and finally with an attack upon the captain, constituted, or might have appeared to Hunt to constitute, a mutiny. The taking forcibly from the captain a weapon of defence, which he had seized, and the attack upon Hunt, when he came to the captain's aid, aggravated the case; and another of the crew taking hold of Hunt at the moment, from whatever motive, might, in the excitement, have reasonably given the prisoner a fear of a general mutiny. His striking with the flat of the cutlass several times, showed the moderation of his proceedings, and the fact, that Coombs met him unarmed, and neither retreated nor sought a weapon of defence would seem to be evidence of no violence on the part of Hunt. It should be remembered, too, that Coombs did not even retire to the forecastle, the proper place for a seaman. Although there should turn out to have been no mutiny in fact, yet if the state of things was such as, under the circumstances, might reasonably have led the prisoner to suppose, that there was a mutiny, he must be excused for acting under that supposition, if his acts were moderate and reasonable for a person honestly so supposing. In mutiny, revolt, &c. the maritime law permits, and if necessary, enjoins, the use of dangerous weapons. The master and officers must be their own protectors, and the protectors of the lives and property under their charge. If the prisoner came lawfully in possession of the dangerous weapon and then used it in a moderate, or, under the circumstances, excusable manner, he must be acquitted.

Franklin Dexter, Dist. Atty., admitted the right of an officer to use dangerous weapons, in cases of necessity; but there was no mutiny; no one interfered in behalf of Coombs; and Coombs was known to be drunk. There were the master, pilot, and the mates to manage him, and the vessel had not left the harbor, but might have come to, and sent up to town or made a signal for aid. There was no necessity for using the cutlass. Hunt asked for no aid from any one, and no one offered to help him, showing that there could have been no serious danger. Coombs was alone, unarmed and unsupported by any one. The pilot cautioned Hunt as to his cutlass. The wounds, as testified to by the surgeons, could not have been received by Coombs striking at Hunt. They must have been given by a downward and a strong blow. There is no sufficient justification for using a dangerous weapon, and inflicting therewith a severe and maiming wound. He must be found guilty of the offence.

STORY, Circuit Justice, in summing up the case to the jury, among other things said: There is no doubt in this case that the defendant, (the mate,) committed an assault with a dangerous weapon, (a cutlass,) upon Coombs (the seaman,) in the manner stated in the indictment; and, that the place where the offence was committed was within the admiralty and maritime jurisdiction of the United States, on board the brig Havre, owned by

citizens of the United States. The wounds inflicted by Hunt upon Coombs were exceedingly severe, and it will not be surprising, if it shall turn out, according to the suggestion made by Dr. Otis, that amputation of the right hand should become necessary, although he yet hopes, that it may not be required. Under such circumstances, the offence is clearly established, unless the infliction of these wounds with the cutlass was justified on account of some positive necessity really then existing, or on account of some supposed necessity, then honestly and reasonably believed to exist by the defendant, either justifiable or excusable in point of law. If there was no such necessity, then the act was unlawful, and the defendant ought to be found guilty. So, if there was any such real or supposed necessity, and yet the punishment was excessive, either in kind or degree, the same result ought to follow. It will be important, therefore, for the jury to examine the whole circumstances of the case with scrupulous diligence and care. And here I may say, that where facts, sufficient to constitute the offence are established prima facie by the evidence, the burthen of proof is upon the defendant himself to show, that such a real or supposed necessity existed, which either justified or excused the acts, unless so far, indeed, as the attendant circumstances in the evidence offered by the government, do, of themselves, go to establish such a legal justification or excuse. If the defendant fails to satisfy the jury that there was, in point of fact, any such legal justification or excuse from such a real or supposed necessity, or he leaves it in doubt, then their verdict ought to be for the government.

It is apparent from evidence, that the crew were, at the time when this affray occurred, in a state of intoxication, from the use of spirituous liquors. Under such circumstances, they could scarcely be said to be fit for the due performance of the ship's duty, and were in a state, which might readily lead to disobedience of orders, and even to a mutiny and revolt. The path of prudence, therefore, clearly was, on the part of the master and officers, to avoid, as much as possible, all undue causes of excitement. This seems to have been the notion of the master himself. Indeed it might, perhaps, have been well for the master to have remained in Nantasket Road, until the crew were, in a great measure, recovered from their intoxication, before he sailed on the voyage. And, I desire to say, that it may be a matter of great doubt, whether, if the master set sail on a voyage with a crew in such a state of intoxication as disables them, at the time, from the proper performance of the ship's duty, and any disaster arise therefrom, any loss from that disaster would be recoverable from the underwriters under our common policies of insurance. The ship, under such circumstances, could scarcely be deemed, in the sense of the law, seaworthy for the voyage.

In respect to the right of the mate and other officers of the ship to inflict punishment on the seamen, when the master is on board, and at hand, it can be justified only by the immediate exigencies of the sea service, or as a necessary means to suppress mutinous, illegal or flagrant misbehavior on the part of the seamen, or to compel obedience to orders or other duties, which require prompt and instant action and interference on the part of the officers, and admit of no delay. If the circumstances are not urgent and imperative, it is the duty of the mate and other officers to consult the master as to the infliction of punishment; for he, being in the command of the ship, is alone ordinarily intrusted with the regulation of the ship's discipline; and no other person has any right to inflict punishment without his express or implied sanction thereof. Cases indeed, may, and do often arise, where instant obedience to the orders of the mate is necessary; such as orders to take in sail in a sudden squall, or to cut away the rigging or spars, or to go aloft on a sudden and emergent duty, where the mate may instantly enforce obedience, by the application of positive force, and indeed of all the force required to produce prompt obedience. But, then, every such case is justifiable only from necessity, and the force so used is not so much a punishment as it is a means of compelling the performance of a pressing duty, admitting of no delay. One question, therefore, in the present case, is, whether any such necessity did exist, which either justified or required so harsh and severe a punishment. I must confess, that I have great difficulty in saying, that it is clearly made out by the evidence, and unless it is, the verdict of the jury ought to be against the defendant.

It is certainly true in this case, that the conduct of Coombs (the seaman) was of a grossly mutinous and improper character. The master, in his testimony, states, that when Coombs followed him on deck, he (the master) seized a handspike, not, (as he asserts,) with intent to strike Coombs, but to intimidate him. Coombs immediately struck him, (the master,) which was a most unjustifiable act, unless done in necessary self-defence, in order to repel an attack meditated by the master with the handspike, a weapon of great and dangerous power. The master says, that he did not return the blow, but put down the handspike; and immediately the defendant (the mate) came and took hold of Coombs. Coombs then struck the defendant, and gave him a black eye; upon which the defendant became greatly excited; and said: "I am not here to be pounded; give me my cutlass;" and immediately went into a house on the deck, at about thirty or forty feet distance, and got his cutlass, and came back and struck Coombs two or three blows with the back of the cutlass. Coombs was at that time holding up his hands, and making passes at the mate. After this the mate and Coombs closed. The master did not see the blows

struck by the mate with the edge of the cutlass; nor did he see Coombs take hold of the mate. Such is the substance of the master's testimony upon this point. He does not pretend, that he was under any immediate fear of other blows being struck upon himself by Coombs; nor did he in any manner authorize or require the interference of the mate in his defence. But that interference was a sudden impulse and voluntary act of the mate, without any call for his aid.

From the other evidence in the case, it is abundantly clear, that the blows inflicted by the mate upon Coombs, with the edge of the cutlass, were (as has been already suggested) exceedingly severe, and violent. Coombs's right hand was (as the physicians state) half cut off, the edge of the cutlass having cut directly through the bones of the writ, and divided the joint to the external muscles. Both of the arteries were cut off; and the wound bled profusely. The fleshy part of the left hand also had a deep gash cut across it; and the left thumb also was severely cut. There were, then, three large wounds; and it is as yet uncertain, whether an amputation of the right hand may not become necessary. The physicians also testify, that the wounds could not, in their judgment, have occurred by an attempt merely to ward off blows. There is a great deal of other testimony in the case by several of the crew, to establish, that Coombs did not attempt to strike the mate after he got the cutlass; but merely to defend himself; that he put up his hands to ward off the blows of the mate; and that the mate struck Coombs three times with the edge of the cutlass. On the other side, the second mate testifies, that Coombs struck the captain more than one blow, and that when the mate came with his cutlass, Coombs ran towards him, and the latter retreated five or six feet; that a scuffle then ensued; that he (the second mate) saw none of the blows struck with the cutlass; but he saw Coombs immediately afterwards bleeding. As soon as the affray was over, the defendant (the mate) helped to bind up the wounds of Coombs. The character of the defendant, for general humanity and moderation, is also testified to in a favorable manner. It is certainly difficult to reconcile the testimony of the second mate with that of the master. But the latter stands strongly confirmed by the testimony of the rest of the crew, as well as by that of the pilot, as far as he saw the transactions, and has spoken to the facts. It will be for the jury, however, to judge of the credibility of the witnesses, and to compare and weigh their testimony.

But, under all the circumstances, it appears to me, that the burthen of proof is upon the defendant, to establish by clear and determinate evidence, that the wounds thus inflicted upon Coombs (of the nature and full extent of which there is no controversy), were inflicted by the mate in justifiable self-defence, or on an occasion of some real, or supposed urgent necessity, admitting of no delay, and indispensable to the ship's service, such as I have already adverted to. Has such a case been made out? If it has not been made out, beyond any reasonable doubt, then the defendant ought to be pronounced guilty of the charge in the indictment. If it has been, then he ought to be acquitted. It will not be sufficient, for the defendant, to prove, that he had a strong cause of provocation, or that Coombs was acting in an unjustifiable manner, or was guilty of gross misconduct. He must go farther, and show, that the acts done by himself were, absolutely or apparently, required by the pressing exigencies of the occasion, and that in their character and degree, there was no excess beyond these exigencies. Seamen are not to be treated like brutes, simply because they misbehave themselves; neither has any officer of a ship a right to indulge his own passions or resentments, by inflicting upon them cruel, or harsh, or vindictive punishments. If he does, he is amenable to the justice of his country for his misconduct. Undoubtedly, the mate upon this occasion, acted under strong excitements. But he was bound by his duty, to circumspection and moderation; and, indeed, he had no right (as has been already intimated), while the master was present, to inflict any punishment upon the crew without his consent, unless there was some imperious necessity, which required instant action, and justified the use of the cutlass to the full extent and degree, in which it was used.

The learned counsel for the defendant has asked the court to direct the jury, that the officers of the ship are clothed, not merely with a civil, but with a military power, over the seamen on board. In my judgment, that is not the true relation of the parties. The authority to compel obedience, and to inflict punishment, is, indeed, of a summary character, but, in no just sense, of a military character. It is entirely civil; and far more resembles the authority of a parent over his children, or rather, that of a master over his servant or apprentice, than that of a commander over his soldiers. Properly speaking, however, the authority of the officers, over the seamen of a ship, is of a peculiar character, and drawn from the usages, and customs, and necessities of the maritime naval service, and founded upon principles applicable to that relation, which is full of difficulties and perils, and requires extraordinary restraints, and extraordinary discipline, and extraordinary promptitude and obedience to orders.

It has been also suggested, that the crew were in a state of mutiny; and that the immediate interference of the mate was necessary, to suppress it. But that does not seem to be made out by the evidence; for there is no proof, of any general disobedience by all the crew, or of any general combination and coöperation with each other, to resist orders, or indeed, of any thing but of mere tardiness and reluctance to go to work, probably in

some measure superinduced by intoxication. Nor am I able to perceive in the evidence, if believed, any distinct proofs that the wounds were accidental, or unintentional. On the contrary, all the witnesses, who speak directly to the point of the manner and circumstances, under which the wounds were inflicted, treat them as voluntary acts, and as not accidental or required in self-defence, or from any real, or apparent necessity. However, this is a matter of fact, upon which the jury will exercise their own sound judgments, in deciding upon the credibility of the evidence, and the conclusion to which it ought to lead them.

Verdict for the defendant, "not guilty."

UNITED STATES (HUNT v.). See Case No. 6,900.

Case No. 15,424.

UNITED STATES v. HUNTER.

[1 Cranch, C. C. 317.] [1]

Circuit Court, District of Columbia. June Term, 1806.

EVIDENCE—CONFESSIONS AND ADMISSIONS.

1. A confession made under the impulse of threats or of promises of favor, is not evidence. But facts discovered in consequence of such confession are evidence.

2. Satisfaction to the owner of the goods stolen, is admissible, but if made merely to avoid the inconvenience of imprisonment, and not under a consciousness of guilt, it is not evidence against the prisoner.

Indictment [against Frederick Hunter] for larceny.

Mr. W. H. Dorsey, for the prisoner, prayed the court to instruct the jury, that if the prisoner's confession was made after threats, &c., or promises of favor, then neither the confession, nor the making satisfaction to the owner, is competent evidence against the prisoner in this prosecution.

Mr. Jones, attorney for the United States, contended, that if the confession be corroborated by any facts discovered in consequence of the confession, the confession itself may go in evidence.

THE COURT gave the following instruction, namely: If the jury should be satisfied, by the evidence, that the confession of the prisoner was made under the impulse of threats or of promises of favor, such confession is not evidence. But that any facts discovered in consequence of such confession, which facts would in themselves be evidence against the prisoner, are still good evidence, notwithstanding they were discovered by means of the confession. That the fact of payment, or satisfaction to the owner of the things stolen, is a fact admissible in evidence to the jury; but if the jury should believe the payment or satisfaction was made merely to avoid the inconvenience of imprisonment or of a trial, and not under a consciousness of having committed the offence, it is not evidence against the prisoner. Verdict, guilty, and sentenced to be fined ten dollars, and whipped ten stripes.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,425.

UNITED STATES v. HUNTER (three cases).

SAME v. DAVIDSON.

[1 Cranch, C. C. 446.] [1]

Circuit Court, District of Columbia, Nov. Term, 1807.

COMPETENCY OF WITNESSES — JOINT CRIME — SEPARATE INDICTMENTS.

1. If several persons, jointly concerned in an assault and battery, be separately indicted, each as for his own offence, and all tried at the same time by the same jury, one of the defendants may be examined as a witness for the others.

[Cited in Johnson v. Chapman, Case No. 7,378.]

2. In order to make those liable who were only present aiding and abetting, it is not necessary that they should be indicted jointly, nor with a simul cum.

Assault and battery. These were separate indictments [against John Hunter, Colin Hunter, Joseph H. Hunter, and R. H. Davidson, respectively], and not charged simul cum, &c., but were agreed to be tried at the same time by the same jury.

Mr. Taylor, for the defendants, offered John Hunter as a witness for the other defendants.

Mr. Jones, attorney for the United States, objected, unless the jury should first decide on John Hunter's case, saying that the assault of one is the assault of all present aiding and abetting, and the evidence is that one made the assault and the others were present aiding and abetting.

But THE COURT (DUCKETT, Circuit Judge, absent,) said the witness might be sworn in all the cases but his own, inasmuch as they were not jointly indicted, nor charged simul cum, &c., and the swearing the same jury in the four cases, is but as charging four separate juries.

Mr. Jones then moved to discharge the jury from the consideration of John Hunter's case.

But THE COURT refused.

Mr. Taylor then prayed THE COURT to instruct the jury that none of the defendants can be found guilty unless for his own assault and battery, and that the others cannot be found guilty as aiding and abetting John Hunter. That they ought to have been indicted simul cum, or else jointly.

But THE COURT refused, because all present aiding and abetting are principals.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,426.

UNITED STATES v. HUNTER.

CRARY v. HUNTER.

[5 Mason, 62.] [1]

Circuit Court, D. Rhode Island. June Term, 1828.[2]

INSOLVENCY—CLAIMS AGAINST SPAIN—PRIORITIES—SUBROGATION—SURETY ON CUSTOM-HOUSE BOND—DEBTS DUE UNITED STATES.

1. A claim of a person to compensation for wrongs done under Spanish authority, and provided for by the treaty of 22d of February, 1819 [8 Stat. 252], with Spain, passed to his general assignee upon his insolvency.

[Cited in Jones v. Dexter, 125 Mass. 471; Leonard v. Nye, 125 Mass. 467. Distinguished in Sibbald's Estate, 18 Pa. St. 254.]

2. A surety on a custom-house bond, who has paid it, has the same priority, as the United States, against the estate of his principal in the hands of his assignee.

[Cited in Jackson v. Davis, 4 Mackey, 199; Kane v. State, 78 Ind. 110. Cited in brief in Richeson v. Crawford, 94 Ill. 166. Cited in Zook v. Clemmer, 44 Ind. 29.]

3. If such surety become insolvent, and the same person is assignee of both estates, the funds of the principal to the extent of the debt due such surety, as a priority creditor, are, by operation of law, deemed assets of the surety; and if the latter is also indebted to the United States for other debts, the United States may, by a bill in equity against the assignee, ensure its priority out of such fund or assets.

4. If under the act of 24th May, 1824, c. 140, § 2 [4 Stat. 33], the secretary of the treasury omit to retain the amount of debts due to the United States from a person entitled, by an award under the Spanish treaty, to money provided for payment of such award, it does not prejudice the right of the United States to proceed for payment of such debts against the general assignee, who has received the money from the treasury.

These were bills in equity, which were set down for a hearing upon the bills, answers, and exhibits. The defendant [William] Hunter, as assignee under the insolvent act of Rhode Island, of Archibald and Frederick Crary, had recovered, under the 11th article of the treaty with Spain in 1819, by the award of the commissioners, for a claim of Archibald and Frederick Crary, the sum of $8158 and 81 cents, which sum had since been received by him from the treasury of the United States. The object of the bill brought by the United States was to obtain payment of certain debts due to them from one Jacob Smith, upon which they had recovered judgments, and for which this fund was alleged to be liable. The object of the cross bill of Frederick Crary was, to have the same money paid to him, as surviving partner of A. & F. Crary, upon the ground, that the claim, for which the money was awarded, never passed by their assignment, and that the money awarded belonged therefore to him. Both causes came on to be heard together; and the material facts and circumstances were as follows: A. & F. Crary were merchants in Rhode Island, and became insolvent in 1809, and in June of the same year, were discharged under the insolvent act of that state; and upon that occasion they made an assignment of all their estate and effects to the defendant, Hunter, and one John Meer, since deceased, who were appointed assignees. In February, 1808, a judgment was recovered against Jacob Smith by the United States upon a custom-house bond, executed by him as surety of the Crarys, for the sum of $2064.06, and interest and costs, which was paid by Smith. In August of the same year, another judgment was recovered against him and one Dockray, for $347.50, and interest and costs, upon another custom-house bond, executed by them as sureties of the Crarys, one half of which judgment was paid by Smith and one half by Dockray. Soon afterwards Smith became insolvent, and in February, 1810, he obtained the benefit of the insolvent act of Rhode Island, and subsequently made a like assignment of all his estate and effects to the defendant, Hunter, and one William Littlefield, since deceased, who were appointed his assignees. This assignment bears date on the 3d of September, 1811. The inventory annexed to it contains, as part of the property assigned, "one custom bond paid of Archibald Crary and son (that is, A. & F. Crary), for $2,125. Smith and one William M'Gee were also sureties for one William Peck, the marshal of Rhode Island, and supervisor of the internal taxes &c. in that state, on his official bond to the United States, on which the United States obtained judgment in August, 1811, for the sum of $13580.59 against Peck and Smith. An execution issued on that judgment on the 16th of September, 1811, returnable to the next term of the district court of the United States for Rhode Island district, on which Smith was committed to gaol on the 17th of September, 1811. On the same day Smith (he having previously applied to the then secretary of the treasury for that purpose, by a petition stating the facts) was, by order of the secretary of the treasury, in virtue of the authority of the act of 6th of June, 1798, c. 66 [1 Stat. 577], discharged from imprisonment; and on that occasion he executed to the United States an assignment of all his estate and effects, and annexed thereto a copy of the same schedule of his estate, which was delivered with his assignment under the insolvent act, the latter assignment being then fully known to the officers of the government. That schedule referred to the debt of the Crarys, as above stated. Afterwards the United States imprisoned William Peck (the principal) on the same judgment; from which imprisonment he was discharged by an act of congress, passed on the 24th of June, 1812, c. 104 [6 Stat. 109], and he then executed an assignment of all his estate and effects, in conformity with the requirements of that act. The bill of the United States, after charging the material facts, prayed satis-

[1] [Reported by William P. Mason, Esq.]

[2] [Affirmed in 5 Pet. (30 U. S.) 173.]

faction of their debt and judgment against Smith, out of the proceeds now in the hands of Hunter, upon the ground of the priority of the United States to payment out of the assets of Smith in his hands, and his (Smith's) priority of payment out of the funds of the Crarys received by Hunter, which attached thereto by operation of law.

Dist. Atty. Greene, for the United States.
Hunter, in pro. per.

STORY, Circuit Justice. Some of the questions intended to be discussed in this case have been already settled by the recent decisions of the supreme court. In the first place the point, upon which the cross bill is founded, is, whether this claim of the Crarys was assignable, and if assignable in its own nature, whether it passed under the assignment, by force of the insolvent act, to the assignees. Upon that I need say no more, than that Comegys v. Vasse, 1 Pet. [26 U. S.] 143, has completely settled the doctrine in the affirmative. I have not the least difficulty, therefore, in saying, that the cross bill of Frederick Crary must be dismissed.

Then as to another point, viz. that the discharge of Peck from imprisonment, by the secretary of the treasury, under the act of congress of the 24th of June, 1812, c. 104, was a discharge of his sureties from the judgment obtained against them. The act of congress, after authorizing the discharge of Peck from imprisonment upon his executing an assignment of his estate under the direction of the secretary of the treasury, provides, "that any estate, real or personal, which the said William Peck may hereafter acquire, shall be liable to be taken in the same manner, as if he had not been imprisoned and discharged." The sole object of the act was a discharge of the party from imprisonment, and not a discharge of the judgment itself, upon which he was committed in execution. The debt was to remain in full force as to all intents and purposes, except imprisonment of the party. The case, therefore, falls within the authority of U. S. v. Stanbury, 1 Pet. [26 U. S.] 573; and the judgment was not discharged in favour of Peck, and consequently not discharged in favour of his sureties.

Then upon the general merits, what are the objections to a recovery on the part of the United States? The money received by Hunter, as assignee of the Crarys under the award, was received for, and was distributable among, their creditors according to the priority, as established by law. Smith had paid a custom-house bond, as surety for the Crarys, to the amount of $2,125, in May, 1808, and to this amount he was entitled to the same priority, which the United States would have possessed, if the bond had remained unpaid. That is the express provision of the 65th section of the revenue collection act of 1799, c. 128 [1 Story's Laws, 630; 1 Stat. 676, c. 22]. Hunter being also the assignee of Smith, must, by operation of law, be deemed to hold so much of the fund, as this priority of Smith attached to, as part of Smith's estate. In this view, the priority of the United States upon their judgment and debt against Smith re-attached to the same fund, as part of Smith's estate in the hands of his assignee, which was distributable among his creditors, independently of the special assignment made by Smith, when he was discharged from his imprisonment. There is no pretence to say, that this discharge operated any satisfaction of that judgment.

Then it is suggested, that by the act of 24th of May, 1824, c. 140, § 2, creating five millions of stock, and appropriating the proceeds of it to the payment of the claimants, to whom money was awarded under the treaty with Spain, the United States reserved and secured to themselves the right or power to withhold the allotted compensation from their debtors, unless the amount due to the United States was first deducted or paid; and that full payment was made to Hunter, the assignee, without claiming or making any such deduction. This certainly does not vary the legal rights of the United States, for the fund received is still to be distributed according to law among the creditors; and here the United States are creditors, and have a right of priority of payment. The mere omission to withhold payment was no legal waiver of right of priority; still less an extinguishment of the debt. The clause alluded to is as follows: "Provided also, that in all cases, where the person or persons, in whose name, or for whose benefit and interest, the aforesaid awards shall be made, shall be in debt and in arrears to the United States, the secretary of the treasury shall retain the same out of the amount of the aforesaid awards in the first instance, and a warrant or certificate, as the case may be, shall issue only for the balance." The omission of the secretary to do his proper duty under this act, if there was any, which, as Smith, and not the Crarys, was the debtor, may be doubted, proceeded from mere mistake, and from want of a due knowledge of all the facts, and cannot prejudice the general rights of the United States, derived from other laws, or extinguish the debt due to them. The fund so received by the assignee, Hunter, must still be distributed according to law among the creditors. And we have already seen, that through Smith's priority on the estate of the Crarys the priority of the United States attaches to that part of the fund belonging to Smith in Hunter's hands, and must be distributed accordingly. The United States are therefore entitled to a decree for an account; and a reference must be made to a master to ascertain and report accordingly.

[For a ruling upon a decision of the master, see Case No. 15,427. The decree in this case was affirmed upon appeal by the supreme court. 5 Pet. (30 U. S.) 173.]

Case No. 15,427.

UNITED STATES v. HUNTER.

[5 Mason, 229.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1828.

INSOLVENCY—ACTIONS BY ASSIGNEE—PRIORITY OF UNITED STATES.

1. Where the assignee of an insolvent debtor recovers a demand, and expenses are incurred thereby, the latter are a charge on the fund, and the right of priority of payment of the United States attaches on the residue.

[Cited in U. S. v. Eggleston, Case No. 15,027.]

[Cited in brief in Jack v. Weiennett, 115 Ill. 107, 3 N. E. 445.]

2. The United States are not bound to contribute, pro rata, for the sum due to them.

This was a bill in equity, upon the coming in of the answer to which, and a hearing thereupon, the case was by an interlocutory decree of the court referred to a master at the June term last. [Case No. 15,426.] And now, at the present term, the master made his report. That part of it, which related to the question hereinafter raised, was as follows: "I find and report, that the claim of the United States on the two judgments set forth in the pleadings, amounts on the 15th day of November inst. to the sum of $5064.17; that the said William Hunter received from the treasury of the United States, on the claim set out in the pleadings, $8158.81; from which sum I have deducted $1386.04 for the said Hunter's services, commissions, and expenses, in preferring and prosecuting the claim before the board of commissioners, and for receiving the money from the treasury of the United States, leaving a balance in his hands of $6772.78, subject to the claim of the United States. The defendant contended at the hearing, that the United States were bound to contribute towards the expenses, which had accrued in recovering the money, in proportion, as their debt bore to the whole amount recovered by the defendant from the United States on the claim in question; and that the same should be deducted from their debt. But I have decided, that the expenses should be deducted from the gross amount recovered on the claim; and that the priority of the United States attached on the residue, from and out of which they were entitled to receive their debt in full, if sufficient remained for that purpose."

Upon the coming in of the report, the defendant insisted, by way of exception, on the point respecting contribution, which he had contended for before the master, and which was overruled by the master.

Mr. Greene, Dist. Atty., in support of the report.

Mr. Robbins, for defendant.

STORY, Circuit Justice. The court are of opinion, that the master was right, and therefore overrule the exception. The expenses of recovering the money are first to be deducted from the gross proceeds received by the defendant, as a charge thereon. The neat amount, after all deductions, is that alone, which he is compellable to distribute; and to that the right of priority of the United States attaches. That is the fund, from which they are to receive payment; and, until it is exhausted, their right of priority to the extent of satisfaction is fixed. It is like the common case of administration. There, the expenses are first deducted, and the residue is what is distributable according to the priorities established by law. Decree accordingly.

[1] [Reported by William P. Mason, Esq.]

Case No. 15,428.

UNITED STATES v. THE HUNTER.

[Pet. C. C. 10.] [1]

Circuit Court, D. New Jersey. April Term, 1806.

SHIPPING—PUBLIC REGULATIONS—UNLADING WITHOUT PERMIT—LIBEL OF FORFEITURE—CONSTRUCTION OF STATUTES.

1. A merchant vessel, from which goods are unladen without a permit, after her arrival within the limits of the United States, but before she has reached her port of destination, is not liable to forfeiture under the act of congress, passed March 2, 1799 [1 Stat. 627].

[Disapproved in The Sarah Bernice, Case No. 12,343. Followed in The Active, Id. 33. Cited in U. S. v Twenty Cases of Matches, Id. 6,559; The Coquitlam, 57 Fed. 713.]

2. When a libel is filed, claiming a forfeiture of the vessel libelled, and the facts of the case do not authorise the forfeiture alleged in the libel, but show an offence against other provisions of the same law, under which the forfeiture is asserted to have arisen, the court will dismiss the libel.

3. When the intention of the legislature by the words of a statute is improbable, the court will give a construction to the law.

[Appeal from the district court of the United States for the district of New Jersey.]

The libel in this case stated, that this vessel, being bound from a foreign port to the United States, after her arrival within the limits of the United States, and before she had come to the proper place for the discharge of her cargo, or any part thereof, and before she was authorised to do so by the proper officers of the customs, did unlade six puncheons of foreign distilled spirits, which were landed at a place within the jurisdiction of the court without a permit, &c., with a view to defraud the United States, &c., and that J. Heard, now collector of the customs, did seize the said six puncheons of rum, &c. The claim and answer denied the facts stated in the libel, and the jury having found for the United States, the court passed sentence of condemnation, from which an appeal was entered to this court. [Case unreported.]

[1] [Reported by Richard Peters, Jr., Esq.]

The first point made in the cause was the same as in the case of U. S. v. The Virgin [Case No. 16,625]. Second. That the case stated is that of a vessel, not arrived at her port of discharge, which is provided for by the 27th section of the law (3 Laws [Bior. & D.] 162 [1 Stat. 648, c. 22]), and is punishable only by a fine of 1,000 dollars, on the master or person having charge of the vessel, and a forfeiture of the article. The 28th section forfeits the vessel, receiving the goods so unladen from another, before she has reached her port of discharge. The 50th section (3 Laws [Bior. & D.] 183 [1 Stat. 665, c. 22]) forfeits the vessel if the goods so unladen are not of the value of 400 dollars, and imposes a fine of only 400 dollars on the master; but in that case, the vessel must have arrived at her port of discharge when the unlading took place. This is plain, from the whole structure of the law. The penalties in the two sections, and the persons liable under each, are different. The reason is obvious. Before the vessel arrives in port, she is under the control of the master; it would be unjust to punish the owner, and therefore the master is to pay 1,000 dollars. After she is in port she is under the eye of the owner, and he may be punished by the forfeiture of the vessel, and therefore the penalty on the master is reduced to 400 dollars. Third. The offence is not stated in the libel to have been committed within the jurisdiction of this court; no place within the jurisdiction of the court is stated where the rum was landed. Fourth. The court admitted the libel in a former case against four puncheons of rum, and the sentence by which it was condemned, to be read in evidence in this case; whereas it did not appear on the face of that libel that this rum came from on board the Hunter, nor was there any thing in the proceedings to connect the two cases together. It should have appeared to have been one and the same transaction; and if it did not so appear on the face of the record, it could not be helped out by parol evidence Esp. 44; Parker, 31.

WASHINGTON, Circuit Justice. The second objection is conclusive, and therefore it will not be necessary to consider the others. The question under it is, whether a vessel, from a foreign port destined to the United States, is liable to forfeiture for unlading any part of her cargo, after she has arrived within the limits of the United States, but before she has reached her port of discharge, without a permit from the proper officer? This is the offence laid in the libel. The 27th section provides for this very case, and punishes the master or other officer who unlades the cargo, but does not forfeit the vessel. The 50th section subjects such a vessel to forfeiture, if after her arrival within the United States, she unlades any part of her cargo without a permit. Does this 50th section meet the case laid in the libel, or refer to a vessel after her arrival at her port of discharge? The words are certainly general and broad enough, because it is stated that the Hunter had arrived within the United States. But ought not the law to be so restrained in its construction as to apply only to vessels in port? If it be not restrained, then there are two sections of the same law, on the same subject, giving double penalties for the same offence, viz: 1,000 dollars under the 27th section, and 400 dollars under the 50th section. The legislature may certainly do this if they please, but it is very improbable that such should be their intention. The law is then open to construction. The whole of this law previous to the 30th section, relates to vessels before their arrival in port, and it is clear that the 27th section applies to them only in that situation. The 30th section considers them as arrived, and from that to the 49th section, the act regulates the conduct of the master, and the officers of government, as to the steps preliminary to the last act to be done, viz: the permit to land the cargo. The 49th section states, that the duties being paid or secured, the proper officer is authorised to grant a permit to land the cargo, which had before been reported or entered. Immediately after and in its proper place follows the 50th section, inflicting a penalty on the master, and a forfeiture of the goods unladed, without such permit or a special license. Now this permit cannot be granted unless a vessel is arrived at her port, nor until the previous steps required by law have been taken. In a case of a landing from necessity under the 27th section, no license or permit is necessary, or can be granted. The 50th section then, which constitutes the crime of landing without a permit, must necessarily be confined to a landing after the vessel has reached her port of discharge, because to obtain a permit she must be in port. The object of the libel being to forfeit the vessel, and it not stating a cause within the 50th but within the 27th section, the sentence of condemnation must be reversed. The decree of the district court reversed.

Case No. 15,429.

UNITED STATES v. HUTCHINGS.

[Brunner, Col. Cas. 489;[1] 2 Wheeler, Cr. Cas. 543.]

Circuit Court, D. Virginia. Dec., 1817.

PIRACY—EVIDENCE—COMMISSION FROM UNRECOGNIZED GOVERNMENT—INTERNATIONAL LAW.

1. On an indictment for piracy, a commission from a government whose independence has not been recognized may be given as evidence merely as a paper found on board of the vessel, but not to justify acts done under it.

2. As respects its own government, a nation becomes independent from the declaration there-

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

of, but as regards other nations, only when recognized by them.

The leading facts proved on the part of the prosecution were the following: The schooner Romp, armed with six eighteen pound carronades, sailed from Baltimore early in April last, ostensibly on a commercial voyage for Buenos Ayres. She took with her an American register, and was in all respects documented as an American vessel. About twelve days after leaving the capes of Virginia her crew were mustered, when they were informed of the destination of the vessel against the commerce of Spain. A salute was fired, the colors of Buenos Ayres hoisted, the name of the vessel changed from the Romp to the Santafecino, and articles under the government of Buenos Ayres signed by the crew. There was some disagreement between the witnesses as to the manner in which the crew received the intelligence of this change in the national character of the vessel, some affirming that the colors of Buenos Ayres were saluted with cheers, and some that they were saluted with murmurs. The Santafecino, however, proceeded on her cruise, and in the course of it captured five Spanish vessels, out of which they took everything valuable, sent two of them to Buenos Ayres for condemnation, and gave up the rest to the prisoners. Near a hundred vessels, American, Portuguese, Dutch, English, and others, which were neutral between Buenos Ayres and Spain were spoken during the cruise, all of which were treated politely. The general conduct of the Santafecino appeared to be that of a regular commissioned vessel, her prisoners being treated humanely, and their private property restored to them, and perfect respect always paid to the vessels of neutral nations. Some of the witnesses who were of the crew of the Santafecino further proved that the crew were dissatisfied with the colors under which they sailed, and that the revolt among them was in consequence of this dissatisfaction.

The only evidence offered on the part of the prisoner [William Hutchings] was a paper, purporting to be a commission to the Santafecino, and a commission to the prisoner as sailing master on board of her, from the government of Buenos Ayres. The district attorney objected to their going to the jury, because: First. There was no evidence of their being genuine papers, as there was no proof that Buenos Ayres was an independent government, nor that the seals attached to these commissions was the seal of Buenos Ayres. Second. If the commissions were genuine papers, they obviously did not belong to this vessel, for they bore date in November, 1815, and the name of Santafecino was not borne by this vessel until the April following. These points Mr. Wirt pressed with his usual eloquence and vigor.

Mr. Upshur, for the prisoner, contended that the papers ought to go to the jury as evidence to be allowed, whatever weight they should be entitled to. He contended that the question, whether Buenos Ayres was independent or not, was for the executive to decide, and not the judiciary. That a late correspondence between Don Onis, the Spanish minister, and the American secretary of state proved that the people of Buenos Ayres were in a state of revolution, exerting themselves to throw off the yoke of Spain. That there was an exact and perfect analogy between that contest and the revolutionary contest of our country. That by the treaty of 1783, by numerous decisions of our courts, recognizing the validity of laws passed during the Revolution, and by express decisions on the point, the principle was settled that our existence as an independent nation commenced with our declaration of independence in 1776, and not with the definite treaty of peace in 1783. That by parity of reasoning the independence of Buenos Ayres commenced with their declaration of independence; and as that declaration was matter of notoriety throughout the world, and was more particularly proved by the correspondence between Don Onis and Mr. Monroe, we were bound to consider them an independent people. That the seal of an independent people proved itself, and was not the subject of proof by any other sort of evidence. That it was in its nature the highest species of evidence, because no nation could delegate to subordinate agents a greater power or authority than it possessed itself. That this principle was fully recognized in the supreme court; and it was indeed an offspring of the comity of nations, which all civilized nations acknowledged. That of course the seal attached to the commissions in the present instance proved itself, proved the genuineness and object of the commissions, and that it was incompetent to the prosecution to call for any other evidence as to these points. This argument Mr. Upshur considered applied to both points made by the district attorney; but even if it did not that there was nothing in the second point, because these commissions were executed and dated in Buenos Ayres, in blank, and were left to be filled up by the agent of that government in this country. That this was a satisfactory mode of accounting for the difference of time between the date of the commission and the adoption of the name of the Santafecino, and that there could be no reason to believe that the commissions had ever been used on board of any other vessel.

William Wirt, Esq., for the United States.

Messrs. Upshur and Murdaugh, for the prisoner.

THE COURT (MARSHALL, Circuit Justice) decided that the commissions should go to the jury, merely as papers found on board the vessel. But on the main question, the court was of opinion, that a nation became independent from its declaration of independence, only as respects its own government,

and the various departments thereof. That before it could be considered independent by the judiciary of foreign nations, it was necessary that its independence should be recognized by the executive authority of those nations. That as our executive had never recognized the independence of Buenos Ayres, it was not competent to the court to pronounce its independence. That, therefore, the court could not acknowledge the right of that country to have a national seal, and of course that the seals attached to the commissions in question prove nothing.

Upon this state of the testimony, the case was argued before the jury. The cause occupied the whole of Thursday and Friday. In the course of the argument, Mr. Upshur made the point, whether by the act of congress, under which the prisoner was indicted, a robbery on the high seas amounted to piracy in any case. The words of the act are, that "if any person shall, upon the high seas, or in any haven, bay, or river, out of the jurisdiction of any particular state, commit murder, robbery, or any other crime or misdemeanor, which, if committed in the body of a country, would by the laws of the United States be punished with death, it shall amount to piracy." The argument of Mr. Upshur was, that it was necessary that robbery should first be made punishable with death by the laws of the United States, when committed on land, before it could amount to piracy, when committed on the sea, which was not now the case. That Judge Johnson had so decided in South Carolina, although a contrary decision had been subsequently pronounced by Judge Washington. That the conflict between these two learned judges proved that the law was at least doubtful, that the jury in a capital case were judges, as well of the law as the fact, and were bound to acquit, where either was doubtful.

THE COURT being appealed to for the interpretation of the law, decided that it was not necessary that robbery should be punishable by death when committed on land, in order to amount to piracy if committed on the ocean; but as two judges (for both of whom the court entertained the highest respect) had pronounced opposite decisions upon it, the court could not undertake to say that it was not at least doubtful.

Mr. Murdaugh contended, that the acceptance of these commissions amounted to an act of expatriation. Mr. Wirt, on the other hand, insisted that it was not competent to any one to change his national character by his own act alone, without the concurrent act of the government he adopted.

THE COURT indicated an opinion against Mr. Murdaugh, founded chiefly upon the opinion already pronounced, that the government of Buenos Ayres could not be recognized by the court as existing at all.

The facts were commented on by all the counsel at considerable length.

The jury retired at candle-light on Friday evening, and in about ten minutes returned a verdict of not guilty.

NOTE. International Law—Rights of Sovereignty. The doctrine as laid down in the above case, that a nation becomes independent from its declaration, as respects its own government, and as to other nations, when it is recognized by them, was again pronounced under similar circumstances in Consul of Spain v. The Conception [Case No. 3,137] and The Maria Josepha [Id. 9,078].

Case No. 15,430.

UNITED STATES v. HUTCHINS et al.

[1 Cin. Law Bul. 371.]

Circuit Court, S. D. Ohio. 1876.

CONSPIRACY — INDICTMENT — EVIDENCE — GOOD CHARACTER OF DEFENDANT—PROVINCE OF JURY.

1. To constitute a conspiracy under section 5440 of the Revised Statutes of the United States, there must be some act committed by one of the parties to the conspiracy to effect its object.

2. The evidence to establish a conspiracy is generally circumstantial, and will be sufficient if it proves the fact that an agreement to do the unlawful act existed, although its terms, the time when or the place where it was entered into, may not be shown.

3. The acts charged to have been done to effect the object of such conspiracy must be proved as laid in the indictment, but time and quantity need not so be proven.

4. The general rules as to that which is evidence, its competency and the order of its introduction, is the same in civil as in criminal proceedings; but the measure of evidence required is different. In the former a preponderance is sufficient; but in the latter it must be beyond a reasonable doubt, but the doubt must arise from the evidence in the case; it must be reasonable, not speculative.

5. In all criminal cases the defendant is entitled to put in evidence his good character, and it is to be considered by the jury as other items of evidence in the case.

6. The jurors are the judges of the weight of the evidence, and of the credibility of the witnesses, but are not required by law to reject the testimony of an impeached witness, but to consider it in connection with corroborating testimony in the case, and give it such credit as under all the circumstances they may think it entitled to. If the testimony be contradictory, they are to reconcile it if they can do so; if not, they will reject that which they think is not entitled to credit.

Indictment [against Rue P. Hutchins and others] for conspiracy to defraud the government of its taxes on distilled spirits, and for removal of spirits without the payment of taxes.

W. M. Bateman, Dist. Atty., Channing & Richards, and A. Dyer, Asst. Dist. Attys., for the United States.

E. M. Johnson, I. N. Jordan, and Sullivan & Byrkett, for defendants.

SWING, District Judge (charging jury). The first count charges that Rue P. Hutchins, Andrew Cochran, Thomas L. Wiswall, Henry Bryant, Samuel Bennet, William F. C.

Eichmeyer, John Horn, Benjamin F. Kaufman, John C. Mitchell and Adam M. Link, on the first day of January, A. D. 1874, conspired together, with other persons unknown, to defraud the United States of its revenue under the internal revenue law, to wit, taxes on distilled spirits; and in pursuance of said conspiracy, and to effect the object thereof, that Rue P. Hutchins did open and enter the cistern room connected with the distillery of Andrew Cochran, known as distillery No. 6, at Tippecanoe, in the absence of the gauger assigned to the charge of said cistern room; and in further pursuance of said conspiracy and to effect the object thereof, the said Andrew Cochran did remove certain, to wit, ten packages of distilled spirits from said distillery, which had not been duly inspected, marked and stamped, as required by law; and in further pursuance of said conspiracy, and to effect the object thereof, the said Henry Bryant, being then and there employed as a hand at a certain rectifying establishment of Horn & Kaufman in said town of Tippecanoe, having emptied ten barrels of distilled spirits in said rectifying establishment, did not destroy the marks and brands thereon; and in further pursuance of said conspiracy, and to effect the object thereof, the said Andrew Cochran removed ten empty barrels from the rectifying establishment of Horn & Kaufman to said distillery, with the marks and brands and stamps thereon theretofore affixed before removal from the distillery; and in further pursuance of said conspiracy, and to effect the object thereof, the said William F. C. Eichmeyer did open and enter the cistern room connected with said distillery No. 6, in the absence of the gauger assigned to said room.

The second count in the indictment is nollied.

The third count charges that the defendants, on the first day of January, 1874, unlawfully removed one hundred barrels of distilled spirits, on which the tax imposed had not been paid, from the distillery of Andrew Cochran, No. 6, at Tippecanoe, to a place other than the distillery warehouse provided by law.

The fourth count charges that the defendant, on the first day of June, 1875, removed one hundred barrels of distilled spirits, on which the tax imposed had not been paid, from the distillery of Andrew Cochran, known as distillery No. 4, at Tippecanoe, to a place other than the distillery warehouse provided by law.

The fifth count charges that Andrew Cochran, on the first day of January, 1874, unlawfully removed one hundred barrels of distilled spirits, on which the tax imposed had not been paid, from his distillery at Tippecanoe, known as No. 6, to a place other than the distillery warehouse provided by law; and the other defendants aided and abetted in said removal.

The sixth count charges that Andrew Cochran, on the first day of June, 1875, unlawfully removed one hundred barrels of distilled spirits, on which the tax imposed had not been paid, from his distillery No. 4, in Tippecanoe, to a place other than the distillery warehouse provided by law; and that the other defendants aided and abetted in the removal of said spirits.

The defendants Andrew Cochran, John Horn and Benjamin F. Kaufman have not been arrested, and therefore are not now upon trial; and their acts in the premises cannot be inquired into, excepting so far as to ascertain under the first count, whether any of the defendants may have conspired with either of them to defraud the government of its taxes, as charged, or whether either of them did either of the acts charged to have been done to effect that object. And under the fifth and sixth counts, to ascertain whether the defendant, Andrew Cochran, removed the spirits, with which the other defendants are charged with aiding and abetting. As to the defendants Thomas L. Wiswall, Samuel Bennet and John C. Mitchell, the district attorney consents that you may return a verdict of not guilty; leaving the defendants Rue P. Hutchins, Henry Bryant, Wm. F. C. Eichmeyer, and Adam M. Link, upon trial, the guilt or innocence of whom is to be determined by you from the evidence in the case.

The indictment in the case is under two sections of the laws of the United States; the first count is under section 5440, Rev. St., the provisions of which are as follows: "If two or more persons conspire either to commit any offence against the United States, or to defraud the United States, in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such a conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment for not more than two years." The third, fourth, fifth and sixth counts are under section 3296, the provisions of which are as follows: "Whenever any person removes, or aids or abets in the removal, of any distilled spirits on which the tax has not been paid, to a place other than a distillery warehouse provided by law, * * * he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed, and shall be fined not less than two hundred dollars nor more than five thousand dollars, and imprisoned not less than three months, nor more than three years."

To justify a verdict of guilty under the first count in the indictment, the evidence must establish the fact that two or more of the defendants now on trial, conspired together, or that one or more of them conspired with Cochran, Horn or Kaufman, or with some person or persons whose names were unknown to the grand jurors, to defraud the government out of taxes due it upon distilled

spirits. Upon this branch of the count, it will be sufficient to show that two or more of the four defendants now on trial conspired together, or that they or any of them conspired with the defendants Cochran, Horn or Kaufman, or with a person or persons whose names are unknown, to defraud the government as alleged; and the evidence must further show that some one of the acts charged to have been done to effect the object of the conspiracy was committed by one of the defendants, as charged in this count. The word "conspire" means "to agree, to confederate, to combine"; so that the conspiracy charged in this case would be an agreement, or combination, to defraud the government of the taxes imposed upon distilled spirits. I cannot give you a better idea of the evidence necessary to establish this than by reading you what is said by Mr. Greenleaf upon that subject: "The evidence in proof of a conspiracy will generally, from the nature of the case, be circumstantial. Though the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed in terms, to have that design, and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same, so as to complete it, with a view to the attainment of that same object, the jury will be justified in the conclusion that they were engaged in a conspiracy. Nor is it necessary to prove that the conspiracy originated with the defendants, or that they met during the process of its concoction; for every person entering into a conspiracy or common design already formed is deemed in law a party to all acts done by any of the other parties, before or afterwards, in furtherance of the common design." 3 Greenl. Ev. p. 120, § 93. Justice McLean in the case of U. S. v. Cole [Case No. 14,832], tried in this court, says: "A common design is the essence of the charge; and this may be made to appear, when the defendants steadily pursue the same object, whether acting separately or together, by common or different means, all leading to the same unlawful result."

So that, applying these rules to the evidence in this case, if from all the facts and circumstances proven, it is established that there existed an agreement between these defendants, or between any of them and Cochran, Horn or Kaufman, or with persons whose names are unknown, to defraud the government of its taxes on distilled spirits, it will be sufficient, although the terms of the agreement, the time when, and the place where, the same was entered into have not been shown; and although a portion of the parties may have been the owners and employés of the distillery, and another portion of them owners and employés of the rectifying and alcohol house, if they were engaged in carrying out different parts for the accomplishment of the common purpose and design. If the evidence in the case fails to satisfy your minds beyond a reasonable doubt, that there existed an agreement, combination or confederation between two or more of the defendants now upon trial, or between one or more of them and Cochran, Horn or Kaufman, or between them or one of them and persons whose names are unknown, then the defendants would not be guilty under this count of the indictment; but if it does satisfy you of the existence of such an agreement, combination or confederation, you will then proceed to ascertain from the evidence in the case whether either of the five acts charged to have been committed to effect the object of such agreement was in fact committed, to wit: The opening and entering by Rue P. Hutchins of the cistern room connected with the distillery No. 6, of Andrew Cochran, in the absence of gauger; or the removal from said distillery by Andrew Cochran, of ten packages of distilled spirits, which have not been duly inspected, marked and stamped as required by law; or that Henry Bryant, being employed in the rectifying establishment of Horn & Kaufman, emptied ten barrels of distilled spirits, and did not erase and destroy the marks, stamps and brands thereon; or that Andrew Cochran removed from said rectifying establishment, to said distillery, ten empty barrels with the marks, brands and stamps thereon, theretofore affixed before removal from the distillery; or that William F. C. Eichmeyer opened and entered the cistern room connected with said distillery in the absence of the gauger assigned to it. If the evidence fails to establish the commission of either of these acts, the defendants would not be guilty under this count; for not only must the conspiracy have existed, but some act must have been done by one of the defendants to have carried it into execution; but if the evidence does establish the commission of either one of these acts by one of the defendants as charged, they would be guilty under this count.

The third count charges all the defendants with removing, on the first day of January, 1874, from the distillery No. 6, of Andrew Cochran, to a place other than the distillery warehouse provided by law, one hundred barrels of distilled spirits upon which the tax had not been paid; if the evidence fails to establish the removal of distilled spirits upon which the tax had not been paid, from said distillery to a place other than the distillery warehouse, then the defendants would not be guilty under this count; but if it does establish the fact that any such spirits were so removed to the rectifier, or alcohol house, or to any other place than the distillery warehouse, such defendants as were engaged in such removal would be guilty.

The fourth count is in terms as the third, except that it charges the removal to have been on the 1st day of June, 1875, and from distillery No. 4; and the rules I have given you as to that count, you will apply to this. Under these two counts it was not necessary that there should have been any previous agreement between the parties to do the act, but if removals were made, all those who were actually engaged in such removals, would be guilty.

The fifth count charges that Andrew Cochran, on the 1st day of January, 1874, removed one hundred barrels of distilled spirits, on which tax had not been paid, from his distillery No. 6, to a place other than the distillery warehouse provided by law, and that the other defendants aided and abetted in such removal. If the evidence fails to establish the removal of any such spirits, the other defendants charged with aiding and abetting, could not be guilty; but if it establishes the fact that the defendant Cochran did remove any of such spirits as charged then the jury will inquire whether the evidence shows that either of the other defendants aided or abetted in such removal. To aid and abet, is to advise, counsel, encourage, incite or instigate to commit the unlawful act; to do this it is not necessary that the party charged should have been present at the time the act was committed, so that if you find from the evidence that either of the defendants advised, counseled, encouraged, incited or instigated the defendant Cochran to remove the distilled spirits as charged, such of defendants as did so would be guilty under the fifth count; if you do not so find, then the defendants would not be guilty under this count.

The sixth count is similar to the fifth, except that the time when the removal is alleged to have been made, is June 1, 1875, and the place from whence made is the distillery of Andrew Cochran No. 4. In determining, therefore, the guilt or innocence of the defendants, you will be governed by the rules applicable to that count. It is not necessary to prove time and quantity as laid in the indictment; but proof of any time, from the latter part of 1873, to the returning of the indictment in 1876, will be sufficient; and so the proof of any number or quantity will be sufficient to support the allegations of number or quantity in the indictment. The general rule as to that which is evidence, its competency, admissibility and the order of its production, are the same in criminal as in civil cases; but the measure or quantity of evidence required in each is different; in civil cases the jury are authorized to find a verdict for the party in whose favor there is a preponderance of evidence; but in criminal cases a greater measure or quantity of evidence is required. The law presumes every man who is charged with the commission of a crime to be innocent, and this presumption of innocence can only be overcome by such measure or quantity of evidence as will establish the guilt of the defendant beyond a reasonable doubt. The reasonable doubt referred to is such a doubt as arises from the evidence in the case. The doubt must, however, be a reasonable doubt, not a speculative doubt; for everything relating to human affairs, and depending upon evidence, is open to some possible or imaginary doubt. As a general rule, parties to civil cases cannot put their character in evidence; but in criminal cases the defendant may always give in evidence his good character. The purpose and object of such evidence is to show the jury that, the life and character of the defendants having been uniformly good, it is improbable that they would violate the laws of their country. I am aware that it has been held by learned jurists that evidence of good character was only admissible in doubtful cases; but I think it competent in all cases; for there may be cases in which the evidence is such, that the previous good character of the defendant would make it doubtful whether he had been guilty of the crime charged. The evidence, therefore, of good character must be considered and weighed by the jury with the other evidence in the case, and its effect is to be determined by them in connection with it.

It is the province of the court to determine the competency of the evidence; what shall be permitted to go to the jury for their consideration; but it is the exclusive province of the jury to judge of the weight of the evidence and the credit which shall be given to the testimony of the witnesses. A witness may be impeached, either by proof of general bad reputation for truth and veracity, or by showing that he has made statements out of court, upon a matter relevant to the issue, differing from those he has testified to upon the trial. If a witness has been thus impeached, the jury may reject his evidence, but are not bound by law to do so; but may consider it in connection with corroborating evidence in the case, and give to it such weight as under all circumstances they may think it entitled to. If different witnesses have testified differently in the case, it is the duty of the jury to reconcile their testimony if they can do so; but if this cannot be done, you will believe the one which under all the circumstances you think should be credited, and reject the testimony of the one which you think under all the circumstances unworthy of confidence.

Case No. 15,431.

UNITED STATES v. HUTCHINSON.

[1 Hask. 146.] [1]

District Court, D. Maine. March, 1868.

SHIPPING—OMISSIONS FROM MANIFEST—LIABILITY OF MASTER—REMISSION OF PENALTIES—PLEADING—VARIANCE.

1. The master of a vessel, for importing goods without a manifest, is liable to the penalty imposed by section 24 of the act of 1799 [1 Stat. 646], even though he may not have known that the goods were on board.

2. He is liable for the penalty when the goods have been brought on board by one of the crew secretly, and are concealed by him.

3. He is not entitled to the proviso in the act, if the goods are unshipped.

4. Throwing goods into the dock, protected so that they may be reclaimed, is unshipment.

5. The secretary of the treasury may remit penalties in such cases.

6. A declaration, alleging the goods imported to belong to the master, and to have been consigned to him, is not supported by evidence that they belonged to and were smuggled on board the vessel by one of the crew.

7. Such variance is fatal to a verdict against the master.

Debt by the United States against [James H. Hutchinson] the master of an American vessel, to recover under section 24 of the act of 1799 a penalty for importing goods without a proper manifest, the penalty being equal to the value of the goods so imported. The action was tried upon the plea of nil debit, and a verdict was rendered for the United States. The defendant moved for a new trial for misdirection in matter of law.

George F. Talbot, U. S. Dist. Atty.

Almon A. Strout and George F. Shepley, for defendant.

FOX, District Judge. This is an action of debt, brought to recover the value of certain goods, wares and merchandise, viz: 2,300 cigars, three demijohns of rum, and two bottles of gin, brought into this port in the barque Sarah B. Hale from Cardenas, of which barque the defendant was master, the same not being on the manifest. The 24th section of the act of 1799, on which this action is founded, enacts that "if any goods, wares and merchandise, shall be imported or brought into the United States, in any ship or vessel whatever, belonging in the whole or in part to a citizen or citizens, inhabitant or inhabitants of the United States, from any foreign port or place without having a manifest or manifests on board agreeably to the directions in the foregoing section, or which shall not be included or described therein, or shall not agree therewith, in every such case, the master or other person, having the charge or command of such ship or vessel, shall forfeit and pay a sum of money equal to the value of such goods not included in the manifest or manifests; and all such merchandise not included in the manifest, belonging or consigned to the master, mate, officers or crew of such ship or vessel, shall be forfeited. "Provided always, that if it shall be made to appear to the satisfaction of the collector, naval officer, and surveyor, or to the major part of them, where those officers are established at any port, or to the satisfaction of the collector alone, where either of the other of the said officers are not established, or to the satisfaction of the court in which a trial shall be had concerning such forfeiture, that no part of the cargo of such ship or vessel had been unshipped after it was taken on board, except such as shall have been particularly specified and accounted for in the report of the master, or other person having the charge or command of such ship or vessel, and that the manifests had been lost or mislaid without fraud or collusion, or that the same was or were defaced by accident, or incorrect by mistake, in every such case the forfeiture shall not be incurred."

The articles in question were brought in the Sarah B. Hale, a vessel belonging to citizens of Portland, from Cardenas. The goods were the property of the second mate, and were put on board the vessel by him secretly, not only without the knowledge of defendant, but against express orders and directions given by him to the officers and crew as to their bringing on board any articles to be smuggled into this country. The captain did not know that the goods were on board, and they were not entered on the manifest. One evening, after the stevedores had left off discharging and whilst the inspector was on board, the second mate, having stowed a portion of the cigars in a canvas bag, threw them into the dock, from which they were soon after fished up by the inspector, a small portion only of the cigars being injured by the water. A verdict was rendered for the government, and the defendant now moves for a second trial, for alleged misdirection by the judge, who instructed the jury "that the master would be liable in this action, if the other facts, which were required to make out the case, were established, even if he had no knowledge of the goods being placed on board the vessel of which he was master, or if they were placed there clandestinely by the mates or crew without his assent, or any intent, on his part to so import them; that in order for the defendant to avail himself of the benefit of the proviso in the 24th section, he must show that none of the goods not contained on the manifest had been unshipped; that it would not be sufficient for the master to show that his manifest was incorrect by mistake, if the jury should find that any part of the cargo, other than that specifically accounted for in the report of the master or other person having charge or command of such ship or vessel, had been unshipped."

The defendant contends that a master is not

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

liable to this penalty, when the goods were concealed on board by third persons without the knowledge of the master, and without negligence on his part; that he is excused, if the goods were brought on board without his knowledge, and he has been diligent to prevent their being so on board.

The answer to this construction of the statute is, that no such excuse is found in the act; the language is absolute, prohibitory, and there is not a syllable that hints at any such limitation of the master's liability, and which is to relieve him from accountability if he can establish the fact that the goods were on board without his privity or consent, and without negligence. The language of the act is most positive and unlimited. If goods not on the manifest are brought into the United States, the master shall forfeit the value of such goods unless he is protected by the proviso. I adopt the doctrine as laid down in the case of The Industry [Case No. 7,028]. "We are undoubtedly bound to construe penal statutes strictly, and not to extend them beyond their obvious meaning by strained inferences; on the other hand, we are bound to interpret them according to the manifest import of the words, and to hold all cases, which are within the words and the mischiefs, to be within the remedial influence of the statute." See, also, U. S. v. Winn [Id. 16,740].

The master is made absolutely liable by the very words of the section, and how can a court be justified in restricting this liability to certain cases, qualifying it so as to reach the master only, when he has not been personally concerned in the violation of the law, or has endeavored to prevent it.

If we consider for a moment, the relation which the master of the ship bears to the vessel and her crew, no one will hesitate as to the correctness of the construction which was given at the trial to this section of the statute. The vessel is under the entire control of the master; he employs the crew, and they are answerable to him for all damages he may sustain by their doing an act prohibited by law; all of the other officers and the crew are the direct servants of the master in different grades of authority; the relation of master and servant therefore exists between the captain and his crew, and he becomes accountable for their actions. As laid down in Schieffelin v. Harvey, 6 Johns. 177, the master is responsible for any injury that might have been prevented by human foresight or care; he is liable for goods stolen or embezzled on board the ship by the crew or any other persons, although no personal fault or negligence may be imputed to him, because he is bound for the personal fidelity of all his servants, and this rigor of the law arises from public policy, in order to prevent the combinations that might be made with thieves and robbers. In that case it was said the goods were stolen by some of the customs officers in England, and the court says: "It was the duty of the master to guard against such accidents as theft" by custom-house-officers, "and if he has neglected to do it or been so unfortunate as not to detect the theft, he and not the shipper must bear the loss; this was one of the risks which he agreed to assume. The master was left in full possession of the ship, and his control over her and her cargo * * * was complete."

This was the liability of the master as a common carrier by general principles of law, and not so declared by any statute. It exhibits the responsibility the master is under to the owners of goods in his charge, makes him a guarantor for the honesty and fidelity of all under him, and if this is not considered unjust and unreasonable in relation to his duties and liabilities to individuals, it certainly cannot be deemed unjust to hold him alike responsible to the government, and to a like extent for the honesty and fidelity of his crew, and for their not violating the laws of his own country.

In my opinion the object and intent of congress was, to make the master a surety for the fair and upright conduct of all on board under his orders and control. Without connivance on his part, goods to any considerable amount could hardly be smuggled from the ship, and the strong inducement to watchfulness, to integrity and prompt interdiction of illegal traffic, would be wholly lost upon the construction of this act claimed by the defendant. The law did not intend to allow the master in his defence to be heard to aver his ignorance of the goods and merchandise brought in his ship; it makes it his duty to know; and he is not to be excused by saying he did not know such articles were on board, as Sir William Scott remarks in The Hoop, 1 C. Rob. Adm. 220: "The intention of the parties might be perfectly innocent, but there is still the fact against them, of the actual contravention of the law, which no innocence of intention can do away." The law has prohibited the act, and it is immaterial whether the party supposes it to be an offence or not. The penalty attaches for its violation.

A careful examination of other sections of the act now under consideration will leave no doubt in the mind of any one as to the intention of congress, and the correct interpretation of the 24th section. In various sections, it will be found that congress has imposed upon the master or other person in charge of the ship or vessel duties and responsibilities of a personal nature in connection with the employment of the ship or vessel, and from the penalties of which, in case of their infraction, he is not relieved by reason of his own faithfulness and diligence. The act makes him a surety and guarantor to the government in these cases of the fidelity of his crew and all others employed about the vessel, and if there is any infringement, holds him personally accountable therefor.

By the 50th section, it is enacted that no goods, wares or merchandise, brought in any vessel from any foreign port, shall be unladen therefrom but in open day, except by special license, nor at any time without a permit, and if any such goods shall be unladen contrary to the direction of the act, the master or other person having the charge, and every other person, who shall knowingly be concerned therein, shall forfeit and pay the sum of $400.

By the 54th section, officers of the customs may board ships in port, or at sea within four leagues of the coast, and may seal boxes, chests, &c., found on board separate from the residue of the cargo, and if, upon arrival of the vessel at the port of entry, such boxes, chests, &c., are missing, or if the seals shall be broken, the master shall pay $200 for each box so missing, or the seals of which are broken. Will it be contended that the master would be exonerated from liability in an action for the penalty, by proof that one of the crew without his knowledge had sent on shore the box or chest, or had broken the seal upon it? No such excuse is found in the act, and it would savor of legislation to so construe it. It is not, in my view, in accordance with the intention of congress to thus exonerate the master from the liability so imposed upon him without limitation of any kind; on the contrary, the ship and all on board are under his command and control, and bound to obey him. It is a presumption of the act, that whatever is transacted on board his ship is with his knowledge and consent, and could have been prevented by him, if he chose so to do. He is therefore held personally accountable, and bound to see that all the requirements of the statute are fully complied with, and that there are no violations of any of its requirements. Any other construction would afford opportunities for the grossest frauds on the government, with but little chance for their discovery or prevention.

The same section (54) subjects the master or other person in command to a penalty of $500, if the customs locks are broken or removed after the vessel is in charge of an inspector, excepting in his presence, or if any of the goods or board are clandestinely landed. If these provisions and requirements are violated, the master is made absolutely liable for the penalty, and he would not be permitted to defend himself on the ground that the locks were broken, or the goods so landed in his absence by one of his crew, or a stranger, even, and without his privity and knowledge. The liability being imposed upon him by the statute, he is bound to take measures sufficient to prevent a violation of the law, not merely ordinary means, but such as will be sure to accomplish the purpose, otherwise he must abide the consequences.

By the 45th, 57th, and 60th sections of the act, penalties are imposed on the master for an infraction of these provisions, from which penalties faithfulness and diligence on his part would afford no relief, if the requirements of the sections are not complied with.

It is argued with great earnestness, that it is unjust thus to punish the master for an infraction of the law by others, which he was in no way concerned in, and to which he never gave his consent; but on the contrary, one answer to this objection has already been presented, and that is, the violation was committed by the servants of the defendant while in his employment, and therefore on general principles he should be held accountable; but this objection is one, which has been often addressed to the courts of the United States in revenue cases, but has never induced them to insert in a law a substantial requirement which it did not contain.

It was held in England in 1776, in case of Mitchell v. Torup, Parker, 227, that a ship, importing 221 lbs. of tea put on board in Norway by mariners on their own account without the privity of the master, mate or owners, was forfeited. The act of 12 Car. II. prohibited importation of such goods, excepting from place of growth or manufacture. Parker, C. B., in delivering his opinion says: "These words of the act are negative, absolute and prohibitory; they not only operate upon the goods, but equally the ship, and there is not a syllable that hints at the privity or consent of the master, mate, or owners. The reason of penning this clause in these strong terms is to prevent as much as possible its being evaded; for if the privity or consent of the master, mate or owners, had been made necessary to the forfeiture, it would have opened a door for perpetual evasion, and the provisions of this excellent act for the increase of the navigation would have been defeated. * * * It is objected that the penalty or forfeiture is only applicable to cases where there is some crime or guilt; but no crime or guilt can be imputed to the master, mate or owner, without their privity, the mariners being the only criminal or guilty persons, and therefore they ought to be the only sufferers. To which I answer, that though penalty or forfeiture, generally speaking, is the consequence of some crime or guilt, yet, neither penalty nor forfeiture necessarily imply the one or the other, though punishment always does."

By the same act, 12 Charles II., goods brought from British possessions in vessels which were not British owned, British built, or navigated by a British master with three-fourths of her crew British mariners were forfeited. In case of The Beaver, 1 Dod. 158, Sir William Scott, whilst he admitted such a regulation operated with great hardship on the owners of the goods, declared "that if the strongest possible case of ignorance were made out, it would not avail to protect the parties from the penalties imposed by the statute. * * * Cases of this kind therefore, though they may operate with great hardship upon innocent individ-

uals, yet, they are hardships which the legislature has thought fit to impose as necessary to maintain the great ends of the law."

In case of The Malek Adhel, 2 How. [43 U. S.] 210, which was a proceeding to obtain condemnation of the vessel for a piratical depredation by her crew, Mr. Justice Story, on page 233, says: "The next question is, whether the innocence of the owners can withdraw the ship from the penalty of the confiscation under the act of congress. Here again it may be remarked, that the act makes no exception whatsoever, whether the aggression be with or without the co-operation of the owners. * * It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel, in which, or by which, or by the master or crew thereof, a wrong or offence has been done, as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. This doctrine also is familiarly applied to cases of smuggling and other misconduct under our revenue laws, and has been applied to other kindred cases. * * In short the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs." In the case of U. S. v. The Little Charles [Case No. 15,612], the same argument was upon that occasion addressed to Chief Justice Marshall. The learned judge in reply said, "It is a proceeding against the vessel for an offence committed by the vessel, which is no less an offence, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner. It is true that inanimate matter can commit no offence. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master."

It thus appears that in such a case an innocent owner is made to lose his property, his vessel, by reason of its misuse and illegal employment by his agents in charge. It is after all, holding the owner responsible through a forfeiture of his property for the misconduct of his servants and agents; and in like manner the master is made accountable pecuniarily under the 24th section of the act for the misconduct and illegal acts of his crew.

The general principle in relation to this class of cases is laid down in Smith's Master and Servant (page 145): "So also masters have been frequently held liable to informations for penalties, incurred by the breach of some statutory regulations by persons in their employ, although the masters themselves may have been perfectly ignorant that in that particular instance any breach of the law has been committed. These informations, it is true, do in strictness partake more of the nature of civil proceedings, to recover that which is a debt to the crown, than a criminal proceeding; but still, they are penal proceedings. Perhaps the most familiar instances of the master's liability to this kind of proceeding are to be found in cases of informations for breach of the revenue laws, in which cases, if a master were not held responsible for the acts of his servants, the revenue laws might, as was observed by Pollock, C. B., on a recent occasion, be evaded with the utmost facility and impunity, and they would be reduced to a mere dead letter."

At a meeting of influential merchants in London in A. D. 1851, a series of articles were agreed upon as a foundation of a proposed alteration in the customs laws. One of these articles was as follows: "Merchants, ship-owners and others, shall not be made responsible for the crimes or offences of their servants or crews, except where guilty knowledge, or the most culpable negligence is clearly traced home to them;" strong evidence certainly that the liability to which they were subject was of a much more absolute and stringent nature.

The respondent invokes a principle to be found in Peisch v. Ware, 4 Cranch [8 U. S.] 363, "that a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of the forfeiture may be employed." That case was one where goods were saved from a wreck, and a claim of forfeiture was made, because they were landed without a permit, and the court well says, that the application of this section of the law to require a permit before landing, and whilst the goods might be discharged before the permit could be procured, would be in fact preventing every attempt to save a cargo about to be lost on the coast. Such a case could never have been within the intent of the legislature, as the end would not be accomplished when the permit was procured. There would be no goods to land. The application of the principle as laid down in Peisch v. Ware, to the present case, is not quite so apparent to the court, as there can be no doubt that it was not an impossibility for the master to obtain accurate knowledge of all goods on board his vessel and enter the same on his manifest, and by so doing, of course, escape the penalty for those which were not thus entered.

Such being the construction of this section, how far is it modified by its proviso? What is its true meaning and effect? The language is: "Provided always, that, if it shall be made to appear to the satisfaction of the collector, etc., * * or to the satisfaction of the court, in which a trial shall be had concerning such forfeiture, that no part of the cargo of such ship or vessel had been unshipped after it was taken on board, except such as shall have been particularly specified and accounted for in the report of the

master, or other person having charge or command of such ship or vessel, and that the manifests had been lost or mislaid without fraud or collusion, or that the same was or were defaced by accident, or incorrect by mistake, in every such case the forfeiture aforesaid shall not be incurred."

To come within the proviso and escape the forfeiture, no goods not on the manifest must have been unshipped; if they are still on board, the government has a remedy for its duty; it can easily ascertain the precise amount it is entitled to by an examination of the article, and they remain as security for the payment; their being left on board is also strong proof of good faith, and of no intent to smuggle and defraud the government, whilst by their being unshipped, a contrary presumption would arise. I apprenend therefore, that if the goods have been unshipped, the forfeiture is incurred and inevitably follows, although the other conditions of the proviso may be proved to the entire satisfaction of the court.

Congress did not intend the master, after discharging the goods, should escape the forfeiture by showing that his manifest was lost, or mislaid, or incorrect by mistake or accident; but it required, that when the party claimed to have acted in good faith, and to be excused by reason of accident or mistake, the goods should remain on board to testify as to the alleged error or mistake. If the goods remain on board, the master may then show in excuse, that his manifest has been lost or mislaid without fraud or collusion, or if in existence, that it was defaced by accident, or incorrect by mistake. The counsel admit as I understand them, that if the manifest is lost or mislaid, the master cannot escape a forfeiture if the goods have been unshipped; but they claim that he may escape, if he produce the manifest and shows that it was defaced by accident or incorrect by mistake, although the goods have been unshipped; that the disjunctive "or" separates this clause from that portion of the paragraph respecting the unshipping, and constitutes the production of the erroneous manifest with proof of accident or mistake a sufficient protection.

No good reason is presented for such a construction. The one case is equally within the mischief as the other. The goods themselves are as necessary to show the nature and amount of the error in the manifest when produced, and whether the same was caused by accident or mistake, and also the true amount of duties to which the goods are liable, as when the manifest is wanting. If the goods are not within the control of the customs officers, but have been clandestinely landed, what proof in many instances could be presented upon which the court could decide as to the error in the manifest, its nature and extent, and whether intentional or accidental? For all practical purposes the goods themselves are as necessary in the case when the manifest is forthcoming, as when it is missing; and I cannot think that congress intended to establish any such distinction. In my view, it is not in accordance with a correct construction of the language employed, and is not called for by the purpose or spirit of the provision.

This construction of the proviso in question is sustained by the opinion of Mr. Justice Washington in U. S. v. Fairclough [Case No. 15,068]. That was an action of debt against a master of a foreign vessel, to recover for a violation of the 57th section of this same act a penalty of $500, for having on board a quantity of white lead more than was on the manifest. The lead had not been unladen. The proviso to section 57 was, that if it appeared that no part of the goods had been unshipped, except such as were contained in the manifest or report, and pursuant to permits, or that the said disagreement is by accident or mistake, the penalty shall not be inflicted. It was contended "that if the master gave satisfaction as to either of these matters it was sufficient, the disjunctive 'or' necessarily requiring that construction." Certainly such was the exact and literal language, and yet, Judge Washington after examining the 57th section, and comparing it with the 24th, the one now before us for construction, came to the conclusion that both were in pari materia, that there should be no incongruity between them, that it was the duty of the court to give a similar construction to each of them, and that under the 57th section the defendant, to claim the benefit of the proviso, must not only show that the goods were not unshipped, but further that the disagreement between the goods on board and the manifest was by mistake or accident.

Whether the goods had been unshipped was a question of fact for the jury. Their attention was called to the evidence with appropriate instructions bearing on the question, and I do not, on a careful review of the rulings at the trial, find any error on this point, or in the construction given to the 24th section and its proviso.

The argument, from the injustice and severity of holding a master responsible for a violation of the law by his crew, is stripped of much of its force, when we remember that the proviso to the 24th section will often afford him complete protection; if his manifest is lost or mislaid, or accidentally incorrect, and the goods have not been unshipped, he is released from liability. Certainly it is not exacting much of a master to have such care and oversight of his ship and cargo, as to prevent goods from leaving her before the duties are paid thereon. A very little extra time, a few more fastenings, could easily prevent anything of this sort.

If the goods have been unladen, so that the party can not derive protection from the proviso, he is still not wholly remediless and without relief; and I cannot do better on

this branch of the case than to adopt the language of Judge Livingston in case of U. S. v. Morris [Case No. 15,816].

The learned judge says, "A system of revenue laws must necessarily contain so many and such minute provisions, enforced by a corresponding number of penalties and forfeitures, as frequently to subject to difficulties the most upright and wary merchant, and expose his property to seizure and confiscation. That such cases must occur was early foreseen. and yet it was not thought proper to trust any court with the power of acquittal, founded solely on the innocence of the party. If the tribunal, having cognizance of the fact of forfeiture, might also have inquired into the quo animo, a sentence of confiscation would never have been pronounced if the innocence of the claimant had been made out. * * If the fact be made out, which by law produces a forfeiture, a court is bound to pronounce sentence accordingly.

"To have left the system here, would justly have exposed the American government to the charge of injustice in making no discrimination between the innocent and guilty. Provision therefore was made to rescue property which might innocently become liable to forfeiture from the penal sanctions of the law. By the 89th section of the collection act, the collector is enjoined to cause suits to be commenced for all penalties, and to prosecute them to effect." This law "requires of the court where the prosecution is depending to hear and determine the cause according to law; which can only mean, that if the fact which works a forfeiture be proved, the court must decide without reference to the innocence of the person to whom the forfeited article belongs.

"On the 3d of March, 1797, after the hardships and injustice of the existing system must have been felt, in leaving liable to sequestration property whose owner had been guilty of no willful neglect or fraud, congress for the first time conferred on the secretary of the treasury the power in question." This act "authorizes him in a mode therein prescribed to mitigate or remit altogether any fine, forfeiture, or penalty, or any part thereof, if in his opinion the same shall have been incurred, 'without willful negligence, or any intention of fraud on the person or persons incurring the same,' and to direct the prosecution, if any shall have been instituted for the recovery thereof to cease, and be discontinued upon such terms and conditions as he may deem just and reasonable."

In a case of this kind, when the master does not appear to have had the slightest connection with the violation of the law, it is certainly not a pleasant duty for a court to visit upon him the penal consequences of other's acts in which he was not a participator. To use the language of a very great judge, Story: "But I cannot bend the rules of law to cases of individual hardship; my duty leads me through a harsh and narrow path; but I have the consolation of knowing that another avenue is open to a department which has the power to temper the severity of the law, and yield relief to innocent sufferers." An appeal I may say that is always received with favor, and according to my experience never made in vain by the innocent.

Another reason for a new trial, is presented by the master of an entirely different nature, simply a question of pleading and evidence, coming out of the allegation contained in the declaration. There is but one count, and that, after setting forth the number of the cigars and the quantity of liquor, proceeds with the averment that "they then and there belonged and were consigned to the master of said ship," and in the conclusion, the allegation is, "whereby the said defendant forfeited and became liable to pay a sum equal to the value of the said goods belonging and consigned to the master thereof."

It is contended by the district attorney, that under the facts in the case, the master may be deemed the consignee of these articles, as in the case of U. S. v. Ten Thousand Cigars [Case No. 16,450]. In that case, the master took the cigars on board without any bill of lading or invoice, with an intention to smuggle or enter them as he might elect. They were under the entire possession and control of the master, and were on board with his knowledge and assent; the master under these facts was certainly the consignee; but in the present case the facts are very different; the master had no knowledge that any of these goods were on board, but the owner was in charge of them, and they were brought on board by him, and during all the time remained in his possession and custody; I therefore cannot consider the master as consignee of the goods in question.

The allegation in the count, being that the master was owner or consignee of the goods, and the proof not sustaining, but on the contrary negativing this fact at the trial, the counsel of the defendant claimed that this averment was material, and that it was incumbent on the government to prove it, and not being proved, there was a material variance.

The force of this objection was apparent to, and acknowledged by the court at the trial, and with hesitation the jury were instructed that if the other facts required to render the defendant accountable were established, they might consider this averment as surplusage. On further reflection and an examination of the authorities, the opinion I entertained and expressed at the trial is corroborated, and the ruling cannot be sustained. The allegation of ownership, as it is set forth in the writ, becomes a material part of the description of the property; it identifies the property, and it is only that

particular property thus identified and made certain, which the defendant is to be held accountable for. It is quite similar to the case of Com. v. Wade, 17 Pick. 399, where the defendant was indicted for setting fire to the barn of N. and G. whereby the house of D. was burnt. It was shown that G. had no interest in the barn, and the court says: "Then the question arises, whether the allegation may not be rejected as surplusage. Whether it be necessary to state the name of the owner of a building set on fire by which a dwelling house is burnt, we do not determine; but an allegation of such ownership being here inserted, we think it material, and not surplusage. It constitutes a part of the description of the offence, and must therefore be proved." See, also, State v. Weeks, 30 Me. 182; 1 Greenl. Ev. § 65.

The rule being well established that matter of description must be literally proved, and the district attorney having as a part of the description and identification of the property alleged it to belong and be consigned to the master, he was bound to prove that averment, and not having done so, for that reason,

Verdict set aside; new trial ordered.

Case No. 15,432.

UNITED STATES v. HUTCHINSON.

[7 Pa. Law J. 365; 4 Pa. Law J. Rep. 211.]

District Court, E. D. Pennsylvania. April 24, 1848.

FEDERAL COURTS — CRIMINAL JURISDICTION — EMBEZZLING PUBLIC MONEYS.

1. The United States courts derive their only power to try, convict or punish in criminal cases from the constitution and the laws made in pursuance of it.

2. The jurisdiction of offences which are cognizable at common law resides in the state courts alone, even though the general government may be the party immediately aggrieved by the misdeed complained of.

3. The acts of congress of 13th August, 1841 [5 Stat. 439], and 6th August, 1846 [9 Stat. 59], under which the prisoner was indicted have obvious reference to persons entrusted by some act of congress with the legal possession of public moneys,—not to those subordinates, who, not having been entrusted with such possession, could be punished for a fraudulent conversion, as felons, without any congressional legislation. The act of 1846 throughout applies not to clerks, workmen, or other servants.

4. A person appointed under the act of 18th January, 1837 [5 Stat. 136], to be clerk for the treasurer of the mint cannot be indicted under the acts of congress of 13th Aug. 1841 and 6th Aug., 1846, for embezzlement of the public moneys.

KANE, District Judge. By the act of congress of 18th January, 1837, it is enacted that "the officers of the mint of the United States shall be a director, a treasurer, a melter and refiner, a chief coiner, and an engraver;" and these are to be appointed by the president, with the advice and consent of the senate. Of the treasurer so appointed, it is required among other things (section 2) that "he shall receive and safely keep all moneys which shall be for the use and support of the mint; shall keep all the current accounts of the mint, and pay all moneys due by the mint, on warrants from the director." The act then provides for the appointment of assistants to certain of the officers, and of clerks for the director and for the treasurer, in case they shall be needed; these are to be appointed by the director of the mint, with the approbation of the president of the United States, the assistants "to aid their principals," and the clerks to "perform such duties as shall be prescribed for them by the director." Section 3.

The prisoner was appointed under this act in the year 1840, to be a clerk for the treasurer of the mint; and among the duties prescribed for him by the director was the charge of the ordinary or contingent fund, by which name the moneys for the ordinary uses of the mint were designated. In this capacity he received the moneys of that fund as they were remitted or transferred to the treasurer of the mint by the orders of the treasury department; and paid them out as warrants were drawn upon the treasurer of the mint by the directors, making the proper entries of such receipts and payments in the books of account of the mint. He had the key of a closet in which the moneys of this fund were kept, but the outer key of the vault of which the closet formed part was in the charge of another person. The books of account were, all of them, kept in the name and on behalf of the treasurer; the acknowledgments for all moneys received were made by the treasurer personally, and the charges for such moneys were entered against him; and all vouchers for payments were taken in the treasurer's name, and he received credit for such payment. The name or intervention of the clerk did not appear in any of the books, vouchers or accounts, either in the mint or in the accounting department at Washington, with which it corresponded.

At the end of the year 1847, it was ascertained that a large sum of money was missing from the contingent fund; and the prisoner, having been arrested, was indicted for embezzlement under the acts of congress of 13th August, 1841, and 6th August, 1846. He was tried in the district court, and found guilty.

I had serious doubts while the case was before the jury, whether it fell properly within the provisions of the acts of congress; and, as the question was of the first impression, I was desirous that it should be discussed more fully than it could be at bar. I therefore charged against the prisoner upon the several points of law, announcing my purpose, as the case was one in which the circuit and district court have concurrent jurisdiction, to solicit the advice and aid of Judge GRIER upon the hearing of a rule for new

trial, if the verdict should make such a rule proper. He acceded to my wish, and the whole subject has been reviewed before us by the district attorney and the counsel for the prisoner in the most ample manner. The result is an unhesitating concurrence of opinion between my learned brother and myself that the verdict cannot stand. We regard the history and spirit of these acts of congress, as well as their phraseology, altogether conclusive upon the question.

At the common law, the party who, by the confidence of another, is entrusted with the possession of his property, cannot commit the crime of larceny by appropriating it to his own use. The fiduciary character of the delinquent forms his defence, for the criminal law, until it was modified by statute, took no cognizance of breaches of trust. At the same time it distinguished between the legal possession of property, such as the very existence of a trust implies, and that mere charge or supervision which is devolved on a servant or clerk. The servant having a bare charge, to use the words of the law, became guilty of theft by a fraudulent conversion. Thus, on the one hand, a butler, who had charge of his master's plate, the shepherd who watched over his sheep, and the shop-boy, who attended behind his counter, might be convicted of larceny, if they converted to their own use their master's property. While, on the other hand, the attorney who pillaged his principal, the guardian who defrauded his ward, and the officer who embezzled public moneys which the law had confided to him, were not answerable as for crime. See the cases in Mr. Wharton's Am. Cr. Law, 405, 406.

The United States courts have no common law jurisdiction; that is to say, they derive their only power to try, convict, or punish from the constitution, and the laws made in pursuance of it. The jurisdiction of offences which are cognizable at common law resides in the state courts alone, even though the general government may be the party immediately aggrieved by the misdeed complained of. Until the year 1840 the congress of the United States seem to have been, in general, content with the protection, which the laws of the several states gave to the public property within their limits. The integrity of subordinates, who were not themselves entrusted with public money, though they might, from their position, have a certain charge or custody of it, was guarded of course by the common law and the local statutes, as administered by the state courts. Under these, such a subordinate, whether called by the name of watchman, servant, clerk, or assistant, might be punished criminally for a fraudulent conversion to his own use of the moneys of the general government. But the higher officers, the heads of departments, the treasurers of the United States and of the mint, the collectors of customs, land officers, and others, depositories of important public trusts, though required in some instances to give security for their official fidelity, were punishable only by impeachment before the senate of the United States. Several very large defaults having occurred, however, on the part of important public officers of the revenue, it was thought necessary to protect the treasury by additional safeguards. On the 4th of July, 1840 [5 Stat. 385], an act of congress was passed "to provide for the collection, safe-keeping, transfer and disbursement of the public revenue." This act created and defined the crime of embezzlement and made it applicable to all those officers who were charged by the provisions of the act itself with the "safe-keeping, transfer, or disbursement of public moneys." As to all others, officers as well as servants or clerks, except those connected with the post office (to whom it was specially extended,) it left the law unchanged. The act of 1840 was repealed on the 13th of August of the following year; but the provisions respecting embezzlements were re-enacted in a slightly modified form, so as to include among those who might become subject to its penalties all "officers charged with the safe-keeping, transfer or disbursement of the public moneys, or connected with the post office department." But as to all but officers so charged it left the law as it stood before the year 1840. The act of 1846 followed. This substantially re-constituted the treasury system which had been rescinded in 1841, but made further provision also for the punishment of embezzling. Its terms are somewhat broader, perhaps, than those of the two preceding acts, for they apply to "all officers and other persons charged by this act or any other act with the safe-keeping, transfer and disbursement of public moneys." But its spirit and objects are the same; and the detailed provisions of its several sections have obvious reference to persons entrusted by some act of congress with the legal possession of public moneys,—not to those subordinates, who, not having been entrusted with such possession, could be punished for a fraudulent conversion, as felons, without any congressional legislation. The act throughout applies not to clerks, workmen, or other servants, but to the legally authorized custodians of public moneys, the "fiscal agents" recognized as such at the treasury of the United States, charged there with receipts, and credited with disbursements,—in a word, to officers or agents "entrusted" by law or under law with the possession of public money, and bound to account for it.

The duties which it enjoins—the safeguards and checks which it creates; the direct accountability which it prescribes and enforces; the evidence it appeals to as establishing the fact of delinquency,—even the allowance it makes for certain official expenses,—all together stamp on it this limited character. Thus, it requires of the officer that he shall keep an accurate entry of each sum that he receives, and each payment or transfer that

he makes; obviously with reference to the account he is to render of his receipts and disbursements at the treasury department; it makes him punishable if he transmits to the treasury a false voucher, or a voucher that does not truly represent a payment actually made, a transcript from the treasury books, showing a balance against him is made sufficient evidence of his indebtedness,—"a draft, warrant, or order, drawn by the treasury department upon him," and not paid, is the primary proof of his embezzlement,—and provision is made for the necessary clerk hire and other expenses of a large class at least of the officers included within its terms.

It needs no argument to show that these enactments are without just application to a person who is merely a clerk himself—who is known to the treasury department—who is neither charged nor credited with public moneys there or elsewhere—who transmits no vouchers, because he renders no account—against whom therefore, no treasury transcript can ever be produced,—on whom no treasury draft, warrant, or order can be drawn under any circumstances, and to whom neither the act of 1846 nor any other act has ever entrusted public moneys, either personally or by official designation. The prisoner was such a person. In point of fact, he was never in legal possession of the moneys he has abstracted. They were moneys of the United States, in which he had no special or qualified property, which had been entrusted to the safe-keeping of the treasurer of the mint by the express language of an act of congress, and which could not be withdrawn from his legal custody and charge except by warrant of an appropriate officer in the form designated by law. We do not understand that the prescription of the clerk's duties by the director was intended or supposed to interfere with this official charge of the treasurer. Had it been so, there would have been some record, some book entry, some memorandum at least in the mint, showing the character, if not the amount, of liabilities, from which the treasurer could claim to be relieved, by the clerk's assumption of them. There would have been some recognition of the fact at the treasury in Washington, if the clerk had been constituted a receiving, safe-keeping, or disbursing officer. He would have been called on, as by law all such officers are called on, to render his accounts, to declare from time to time what moneys he had received, to exhibit vouchers for his disbursements, and thus to define the extent of his liability to the United States. But whatever may have been the terms or the usage, or the understanding, which proposed to set forth the prisoner's duties as a clerk, they could not absolve the treasurer from that legal custody with which the act of congress and his commission had invested him. The clerk's possession, whatever it was, was in law the possession of the treasurer; and the clerk's liabilities therefor, upon the facts found by the jury, are those of a servant merely, not of a person either "charged" or "entrusted by law," with the safe-keeping, transfer or disbursement of the public moneys.

The case is one to which the statute does not extend and the rule must therefore be made absolute.

Case No. 15,433.

UNITED STATES v. HUTTON et al.

[10 Ben. 268; [1] 25 Int. Rev. Rec. 57.]

District Court, S. D. New York. Feb. 11, 1879.

RIGHTS OF MERCHANTS—CUSTOM-HOUSE PAPERS—POWER OF SECRETARY OF TREASURY TO MAKE REGULATIONS—DUTY AND POWER OF COLLECTOR—MANDAMUS—PRODUCTION OF PAPERS COMPELLED BY ORDER—BY BILL OF DISCOVERY—BY STAY OF PROCEEDINGS—REMEDIES AGAINST THE UNITED STATES AS PLAINTIFF.

1. In a suit brought by the United States to recover duties, the defendants, on proof by affidavit of a demand by their counsel on the collector of the port, for an inspection of the invoices, entries, warehouse bonds, entries for withdrawal and permits, and the custom-house memoranda of payment of duties on the same or in the books of the custom-house in which payment of the duties should be noted, if the same were paid, and of the collector's refusal to exhibit the same, and also on proof by affidavit that they had entrusted the money to make the payments to one of their clerks and that their own books and papers do not furnish means of ascertaining the amount of the duties as liquidated, nor what payments, if any, were made at the custom-house, and that the collector supported his refusal by reference to a regulation of the treasury department, forbidding any person not connected with the custom-house to inspect or have access to or to take copies of any custom-house paper, except upon written application to the collector, stating his personal interest in the application and providing for a statement to be made on such application to be submitted to the collector and by him furnished to the applicant, if deemed consistent with the public interest and necessary to the rights of individuals (said regulation being made under Rev. St. U. S. § 251, which authorizes the secretary to make regulations to promote the public convenience and security and to protect the United States as well as individuals from fraud and loss, and regulations not inconsistent with law to be used under and in the enforcement of the laws relating to raising revenue from imports, etc.); and on further proof by affidavit that the defendants could not safely answer the complaint without an inspection of these papers, the defendants having moved for a mandamus against the collector requiring him to exhibit the same or for other relief,—*held*, that any regulations made by the secretary under Rev. St. § 251, not inconsistent with law and fairly within its scope and purpose and not infringing upon any existing legal rights of individuals, have the force of law.

2. Such of these custom-house papers as belong to the merchant when delivered to the collector, as, for instance, invoices, continue his property, though required by law to be impounded at the custom house, and that he has a legal right to inspect them and also other custom-house papers relating to his transactions with the custom-house in respect to his importations, under reasonable restrictions.

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

3. The regulation referred to, so far as it was calculated to preserve custom-house papers from improper and unauthorized inspection, and to provide a proper and orderly mode for the exercise of the right of access by the merchant having a special interest therein, is a reasonable regulation under Rev. St. § 251, and not inconsistent with law.

4. If construed to deny all access to and inspection of said papers by the merchant specially interested therein, it would be inconsistent with law and so far would be void, but it seems that such is not its necessary or proper construction.

5. Mandamus is a proper remedy to enforce such right of inspection if denied, but that the circuit and district courts of the United States have no original jurisdiction to issue the writ, but may issue the same in a pending suit under Rev. St. § 716, "if necessary for the exercise of their jurisdictions and agreeable to the usages and principles of law."

6. Under Rev. St. § 716, the writ could be issued, if in this cause under a lawful order of the court it should become the duty of the plaintiff to permit an inspection of the papers and the performance of that duty should be obstructed by the refusal of the collector to exhibit the same.

7. The remedy by mandamus, however, would not lie if the defendant has any other remedy to obtain the same relief.

8. The remedy generally open to a defendant to obtain inspection of books and papers is by bill of discovery, and after issue joined by order of the court on motion under Rev. St. § 724.

9. As this matter of the production of books and papers is expressly regulated by act of congress, it is not a matter in which by Rev. St. § 914, the practice of the state courts, which is broader and allows this relief before issue joined, is adopted.

10. The circumstance that the United States cannot be made defendant in a bill of discovery will not be allowed by the court to defeat a substantial right of the defendants which such bill of discovery would have secured to them.

11. Whether before issue joined and independently of statute the court could, on motion, compel the production of books and papers, quære.

12. In this case, as on the undisputed facts the defendants have a right to the production of the papers called for, and a bill of discovery will not lie, the court can and should stay the plaintiff's proceedings in the suit till their production, and in case of the refusal of the collector to exhibit them within a certain time limited by the court, that a writ of mandamus issue for their production.

13. The regulation above referred to does not make it unlawful for the collector to exhibit said papers under the order of the court nor to produce them in court under subpœna or at the request of the district attorney.

14. The collector was justified in refusing to exhibit the same to the defendants' counsel, no order of the court having been made for their inspection or production.

[This was an action at law by the United States against Benjamin F. Hutton and others, to recover duties on imported goods. Heard on motion for a writ of mandamus.]

S. L. Woodford, U. S. Dist. Atty., and J. D. Jones, Asst. U. S. Dist. Atty.

R. M. Sherman and John N. Whiting, for defendants.

CHOATE, District Judge. In this case, which is a suit at law to recover duties on goods imported by the defendants, they move for a mandamus against the collector of the port to obtain the inspection of certain custom-house papers, or, if that motion is not granted, for a stay of the plaintiff's proceedings. The complaint alleges the importation and entry of the goods, the liquidation of the duties and their non-payment. Before answering and professedly for the purpose of enabling them to answer, the defendants' counsel applied to the collector of New York for an inspection of the papers in the custom-house relating to these importations, especially the warehouse bonds, the entries for withdrawal and the permits, and the memoranda made on these papers or on other papers or books of the custom-house which show, or in the ordinary course of custom-house business should show, any payments made on account of duties on these goods. The defendants' affidavits show that they entrusted to one of their own clerks the money necessary for paying all duties on these imported goods, and that their own books and papers do not furnish them with the means of information as to the amount of the duties as liquidated or as to what payments in fact, if any, were made through this clerk at the custom house. The collector refused the inspection, and referred the defendants' counsel to a regulation of the treasury department which is as follows: "No person (not connected with the custom-house or treasury department) is to be allowed access to or permission to inspect, examine, take copies of or have copies furnished of or be advised of the information contained in any record, document, paper, letter or account belonging to the custom-house, except upon the following terms and conditions, viz: Upon application in writing to the collector, by any individual having a personal interest, setting forth the nature and object of the application and his interest therein, and specifying the particular information or data requested. Upon receipt of such application the collector will direct some suitable and competent person attached to the custom-house to make the requisite examination of the record, paper, letter or account, as the case may be, and prepare a statement in writing of the information called for, to be submitted to the collector who may, should he deem it consistent with the public interest and necessary to the rights of individuals, furnish the same to the applicant; but if he entertains any doubt as to the propriety of furnishing it he will report the matter for the direction of the department. All persons attached to the custom-house are expressly forbidden from communicating, either orally or otherwise, any information contained in the records or files of the custom-house to any person not attached to the customs or revenue, except such as may be necessary to aid merchants

and others in the regular daily routine of business passing through the custom-house. And any clerk or other subordinate officer employed in the custom-house, who may furnish information to private individuals or shall accept or receive any fee, reward or compensation other than that allowed by law, or shall accept any gratuity whatsoever for any services he may perform for any person which are not devolved upon him by law or regulations; any such clerk, subordinate officer or other person so offending will become subject to removal from office or employment and must be suspended from employment forthwith, and the collector, naval officer, appraisers or surveyor, as the case may be, is enjoined to report to the department the name of any person so offending for its directions." This regulation was made under section 251 of the Revised Statutes, which authorizes the secretary of the treasury "to make and issue from time to time such instructions and regulations to the several collectors, as he shall deem best calculated to promote the public convenience and security and to protect the United States as well as individuals from fraud and loss; he shall prescribe the forms of entries, oaths, bonds and other papers and rules and regulations not inconsistent with law, to be used under and in the execution and enforcement of the various provisions of the internal revenue laws, or in carrying out the provisions of law relating to raising revenue from imports or to duties on imports or to warehousing; he shall give such directions to collectors and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law."

It is clear that any regulations made under this statute which are not inconsistent with law, and which are fairly within its scope and purpose, and which do not violate or infringe upon any existing legal rights of individuals, have the force of law. Aldridge v. Williams, 3 How. [44 U. S.] 29.

The argument for the defendants is that merchants, by reason of their special interest in the custom-house papers, which relate to their own importations, have a right to inspect and take copies of them; that especially, when sued by the government in respect to some obligation growing out of such importations, they have such right of access to these papers, when necessary to enable them to make their answer or prepare for their defence; that this regulation does not apply to such a case nor take away this right; that, if it is to be construed as doing so, it violates their legal rights, and so is not consistent with law; that the enforcement of this right of access to the papers can be secured when denied, by the writ of mandamus, if no other remedy is given therefor, and that the laws of the United States afford no other remedy, the provisions of statute for the discovery of books and papers being inapplicable to suits in which the United States is a party, or, if applicable thereto, not extending to the compelling of a discovery of books and papers until after issue joined in the action; and that this court has power to issue the writ of mandamus in an action of which it has jurisdiction where the issuing of such writ is necessary to the exercise of the jurisdiction and agreeable to the usages and principles of law, and that the issue of the writ in this case is necessary to the exercise of the jurisdiction and agreeable to the usages and principles of law.

The statutes defining the duties of collectors of customs do not specify his duties in respect to the custody or mode of preserving the papers that are required to be lodged in his office or the records made therein, nor the rights and privileges of other parties in respect thereto. Rev. St. § 2621. From the nature of the documents and the relation of the government to the merchant to whose business these papers and records relate, and the necessity out of which such deposit of papers and the keeping of such records arise, the duties of the collector in regard to them, may, however, with certainty be deduced. Some of these papers are, notwithstanding their deposit in the custom-house, the personal property of the merchant, as, for instance, invoices which he receives from his foreign correspondent and which constitute his proper and original paper title or assurance of title to the goods. While the public good undoubtedly requires that these invoices should be impounded at the custom-house, yet this necessity does not affect in the slightest degree the ownership of the paper. And I think it would require a positive statute most explicit in its terms to take away from the merchant the right to inspect and take a copy of his own invoice in the custom-house. As to other papers in the custom-house relating to his importations, such as entries, bonds, permits, etc., the right of access to them may not be based on a strictly proprietary right, and yet they are the written memorials and the only ones (for no duplicates are delivered to the merchant) of business transactions between him and the government, which for safe keeping and for reasons of public policy are required to be kept in this public office. They appear to me to be public records in which the merchant has a special interest, which implies the right of access to them on his part, under reasonable restrictions as to their preservation and the proper and orderly conduct of the public business of the collector's office. Revenue laws should be construed, as far as is consistent with carrying into full effect their legitimate purposes and objects, so as to infringe as little as possible on existing private rights and to embarrass as little as possible merchants in the transaction of their business.

But besides the duty of preserving carefully these papers and records, subject to the exist-

ing rights of the merchant to whose business they relate, the collector is also, from the nature of the papers and of that public necessity which requires them to be kept at the custom-house, equally bound by his official duty to guard them against the prying or mischievous curiosity of parties having no interest in them. These papers are not public records in the sense of being placed in a public office for the information of all the world. On the contrary, they are papers relating to the private business of the merchant, which a public necessity, connected with the collection of the public revenues alone, requires to be entrusted to and kept by the government. Hence follows the duty of the government to preserve as confidential the secrets of business thus disclosed to it, so far as is consistent with that public necessity which alone led to their disclosure.

The regulation of the treasury department above recited was evidently intended to provide for, and is, in some respects, well adapted to meet this two-fold duty of the collector in respect to the care of the papers in his office, viz.: To secure to the merchant reasonable access to them, and to guard them against the impertinent or mischievous curiosity of unauthorized persons. It is claimed by the defendants that it unduly restricts the merchant in his right, under reasonable conditions, to inspect and take copies of the papers. Construed literally, indeed, it prohibits all inspection, by any one not connected with the government service, and permits only the delivery to the merchant of a statement of the contents of papers, or copies of them prepared by a subordinate in the custom-house. The right to see the papers themselves must often be quite as important to the merchant as the right to have such a statement or copies. Perhaps, however, the regulation, in view of the purposes intended to be subserved by it, may be construed so as to permit an actual inspection of the papers. If not, it seems in that respect to go beyond the authority conferred by the act of congress, and to be inconsistent with law, because it infringes upon existing legal rights. That the regulation, though strict, is entirely proper and legal in requiring a written application for access to or information concerning the papers, and in directing that the application should be made to the collector himself, and in forbidding under penalty of dismissal any subordinate to give such information, is evident enough. These regulations are not only reasonable, but in the interest of the merchants themselves, as guarding the secrets of their business against unwarranted intrusion.

That the writ of mandamus is an appropriate remedy to enforce any right of inspection of custom-house papers, which a merchant has, and which the collector may deny, cannot admit of question; but the district and circuit courts of the United States are not authorized by law to issue the writ of mandamus as an original writ. These courts are, therefore, powerless to give this relief for violation of this right of inspection, so far as it is simply the right of the merchant based upon a right of property or special interest in the papers. These courts, however, are expressly authorized "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law." Rev. St. § 716. The question whether this statute includes the writ of mandamus, is settled by the authority of the supreme court, which has held the writ properly issued under this state to commissioners of a county to compel the levy of a tax which was necessary for carrying into effect a lawful decree of the circuit court. Com'rs of Knox Co. v. Aspenwall, 24 How. [65 U. S.] 383. And this case is conclusive authority that a mandamus against the collector is the appropriate remedy, in case, under a lawful decree or order of this court in this cause, it should become the duty of the United States to permit an inspection of these papers, and the performance of that duty should be obstructed or prevented by the refusal of the collector to permit the same.

The writ of mandamus, however, does not issue if the party has another remedy to obtain the same relief. However clear might be the absolute right of the defendants to inspect these papers, that absolute right would not avail them in this proceeding. Their right to relief here must rest on their rights as parties in the cause according to the usage and practice of the court, and the statutes, if any, regulating the subject matter. That the defendants have become involved in a lawsuit with the government, in relation to the duties to which these papers relate, cannot take away nor abridge any such absolute right. On the other hand, the necessity or convenience to them of the exercise of the right, if it exists, makes the denial of any such right, if it has been denied, a more flagrant act of injustice than it otherwise would have been. But by reason of the want of power to issue a writ of mandamus, except as is necessary to the exercise of jurisdiction, the court is powerless to enforce any such right otherwise than as it shall be necessary to the exercise of its jurisdiction, and unless according to the principles and usages of law the defendants can require it as parties to this action.

We are brought, therefore, to the question, What rights, if any, have the defendants, as defendants in this suit, to the inspection of these papers, and if any such right exists, how is it to be availed of and enforced? I think the defendants show that they cannot safely or properly answer the complaint of the government without an inspection of these papers. The right of one party in a suit to demand an inspection or copies of books and papers in the possession of the other, either for the purpose of preparing a pleading or of preparing for trial, has long been recognized as a right

which the courts should, in some form and under proper circumstances, enforce. Independently of statutory provisions, the right has generally been enforced by bringing a bill of discovery in chancery for the purpose. But to avoid the delay and expense of such a proceeding, statutes have been passed, both state and federal, substituting, for the bill of discovery, a proceeding in the action itself, by way of motion and order. The production of books and papers is, so far as the federal courts are concerned, regulated by Rev. St. § 724, as follows: "In the trial of actions at law the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant, as in cases of non-suit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default." In the recent case of U. S. v. Youngs [Case No. 16,783], it has been held that a motion for the production of books and papers may be made under this statute against the United States where it is the plaintiff. And in case such an order is made and not complied with, a mandamus in the suit will lie against the collector, or the court may non-suit the plaintiff. But this statute seems clearly to limit the remedy to cases in which issue is joined, one test of the statute to the right to a production of the books and papers being that they contain evidence "pertinent to the issue." I do not think, however, that this statute is to be construed as taking away any right to have relief by bill of discovery, except in cases where the new remedy, by motion, is given. The relief by bill of discovery covered many matters not provided for by this section, and bills of discovery are not abolished by it. Beardsley v. Littell [Id. 1,185]. The object of the statute was to give a more summary remedy in certain cases, not to take away any existing remedies. A bill of discovery would lie to obtain the production of books and papers to enable a party to draw his pleading, and I see no reason why that remedy should not now be open to the defendants, if it were possible for them to make the United States respondent in such a bill. This is a merely technical objection, and one which a court of equity certainly would not allow to defeat the substantial right of a party to a discovery. In the case of U. S. v. Wagner, 2 Ch. App. 582, an objection was made to a bill, brought by the United States to recover property formerly in possession of the so-called Confederate States, that some officer should be joined on whom as a co-defendant service could be made in case a cross-bill for discovery should be filed; but the judges were all of opinion that the objection that such person was not joined in the bill, was not well taken, and that the fact that a bill of discovery would not be effectual against the plaintiff as sole defendant, would not defeat the defendant's right to a discovery, since the court could and should stay all proceedings, unless the plaintiff should name some person against whom the bill of discovery might be effectually brought. Lord Chelmsford says (page 590): "If the defendant wishes to obtain a discovery, and files a cross-bill for the purpose, he may apply to the United States to name some person from whom the authority sought for may be obtained, and if they refuse to furnish him with this information the court will be justified in staying the proceedings in the suit until the defendant's demands are complied with." And Lord Cairns says (page 595): "I apprehend that the only rule is that the person, state or corporation which has the interest must be the plaintiff, and the court will do the best the law admits of to secure to the defendant such defensive discovery and relief as he may be entitled to. The court can in all cases suspend relief on the original bill until justice is in this respect done to the defendant." A court of law, as well as a court of equity, can stay proceedings in a suit, to prevent injustice, and this case is a sufficient authority for staying a suit, if the defendant cannot get a discovery of books and papers, which by the usages and principles of law he is entitled to, by reason of technical difficulties in obtaining a discovery by bill against the plaintiff.

Rev. St. § 724, gives no remedy by motion and order until after issue joined. I think it excludes such relief before issue joined under the Code of New York, because, where the statutes of the United States have expressly provided the mode of practice, there the state practice is not adopted by section 914 of the Revised Statutes. Beardsley v. Littell [supra]. The defendants' right to compel the production of papers by motion independently of statute, especially before issue joined, must be considered doubtful, although there is some authority for it.

In England the practice seems to have been adopted by the common law courts of compelling the production, on motion, of papers which could be obtained by bill of discovery (Grah. Prac. 524, and cases cited), and in some cases in this country, such relief was given on motion. Bronson v. Kensey [Case No. 1,927]; Wallis v. Murray, 4 Cow. 401, and cases cited. But in New York, at any rate, the proceeding by bill of discovery was held, except in some early cases, the proper course until the matter was regulated by statute. Grah. Prac., ut supra. And see Birdsall v. Pixly, 4 Wend. 196.

But what necessity is there in the present case for a bill of discovery, even if that is the appropriate remedy? All the material facts which it would be the office of such a suit to ascertain are admitted. The exist-

ence of the papers; that they are in the custody of the collector; that they relate to the goods in respect to the importation of which this action is brought; that they show the liquidation of the duties—all these facts are admitted. The only fact denied is that there is any record of the payment of these duties. It is alleged in the moving affidavits and not denied that in the course of the business of the custom-house a memorandum of payment of duties is made on the warehouse bonds and other papers called for. Enough appears, therefore, which is not denied, to entitle the defendants to an inspection of these papers before they answer. I think, therefore, that a stay may be properly granted until the plaintiff shall permit an inspection of these papers, and that the defendants should be allowed twenty days after such inspection to file their answer.

The objection that the regulation of the treasury department makes it unlawful for the collector to exhibit these papers has no force. That regulation was not designed to provide for, nor to prevent or embarrass, or indeed in any way to relate to the production of custom-house papers as evidence in courts of justice. Its purpose is apparent on its face. It simply regulates their production or information respecting them to be furnished, on application of private persons claiming the right of inspection or information by reason of their special interest in the papers. It is matter of every day practice in this court for these papers to be produced on subpœna, both in suits brought by the United States and in suits between private parties. And the duty to produce them upon the order of the court for purposes of evidence or discovery is equally imperative, and not in any way affected or intended to be affected by this regulation. Among the duties of the collector of the customs is that of aiding the United States attorney in the prosecution of all suits for duties and for frauds upon the revenue, and there can be no question that it is his duty upon the request of the district attorney to produce in court any papers in the custom-house required for the proper prosecution of such suits. This is as clearly his duty as it is to produce them upon the subpœna of another party; and his constant practice in this respect shows that the practical interpretation put upon this regulation has not prevented the unembarrassed production of these papers in court for the purposes of justice. If, therefore, this action is stayed for want of the production of these papers it will, I conceive, be the official duty of the collector, in order that he may give that assistance which is due from him for the proper and diligent prosecution of the action, to furnish these papers to the district attorney or himself to exhibit them to the defendants.

As to the claim of the defendants that the collector should have complied with the demand of their counsel to see these papers, I am of opinion that, considering the claim as made on their behalf as defendants in this suit, the collector was not under any obligation to comply with it. It is for the court and not for the parties to determine whether justice requires an inspection or the production of papers, and until there is an order of the court giving such a right of inspection, or, as in this case, granting relief by a stay of the proceedings of the United States because of their non-production, which equally imposes on the collector the duty of exhibiting the papers, he is justified in refusing all applications for them by counsel for use in a suit, which do not conform to the regulations of the treasury department.

A stay of the plaintiff's proceedings is not a complete remedy. It may operate as a perpetual bar to the determination of the cause. If within a reasonable time such stay shall not have the effect of obtaining the discovery the defendants desire, I see no good reason why a mandamus should not issue against the collector. That is necessary to the exercise of the jurisdiction which is necessary to carry into effect the lawful orders of the court. And any attempted distinction between the issue of the writ against a ministerial officer not a party to the cause, to compel the performance of a duty made imperative by the decree of the court and necessary for the execution of that decree, and the issue of the writ to such an officer to compel the performance of a duty made imperative on him by the order of the court, and the performance of which is necessary to the progress of the cause, and the rendering of any judgment, would be too nice. Either case is within the terms of Rev. St. § 716.

Let orders be entered denying the motion for a mandamus, and staying all proceedings of the plaintiff in the action, until twenty days after the papers described in the petition have been exhibited to the defendants' attorneys. And in case such papers shall not be exhibited within ten days after the entry and service of this order, let an alternative mandamus in this cause issue to the collector, requiring him to exhibit said papers or show before this court on the next motion-day thereafter why a peremptory writ of mandamus should not issue.

Case No. 15,434.

UNITED STATES v. HUTTON.

[See Case No. 15,433.]

Case No. 15,435.

UNITED STATES v. HUTTON et al.

[8 Reporter, 37; [1] 25 Int. Rev. Rec. 305.]

Circuit Court, S. D. New York. May 24, 1879.

DEPOSIT IN COURT — ATTACHMENT — SUBSTITUTION OF BOND.

Where money is deposited in court under a stipulation to abide the issue to discharge an attachment, the court will not permit a bond to be substituted and the money withdrawn.

Motion for substitution of a bond with sureties in place of money deposited in the registry of the court.

A. B. Herrick, Asst. U. S. Dist. Atty.

J. N. Whiting and R. M. Sherman, for defendants.

BLATCHFORD, Circuit Judge. The stipulation recites the issuing of the attachment, and states that the money has been deposited in the registry of this court to abide the determination of the issue in this action, and that it is stipulated and agreed by and between the parties plaintiff and defendant herein that if, by the final determination of this action it shall be adjudged or decreed that the said sum of money, or any part thereof, is not due from the firm of Benkard & Hutton to the United States government, the said sum of money or so much thereof as is found not to be due to the government, shall be refunded to the said Benkard & Hutton. This stipulation is signed by the district attorney and the attorney for the defendants. The motion now made by the defendants is for an order allowing the defendants to withdraw such money and to substitute in lieu thereof a bond with sureties. It appears that the United States having the lien created by the levy of the attachment, discharged the attachment on the deposit of the money and the making of the stipulation. The defendants could have procured the discharge of the attachment originally by substituting a bond for the lien. If that had been done, the question, if any, arising as to the money which had been placed in the hands of the collector would have remained to have been disposed of. That money would not have been in this court to abide the determination of the issue in this suit. The United States could not have enforced its deposit in court, and the defendants could have compelled the United States to accept a sufficient bond in the suit. The defendants waived all questions as to the circumstances under which the money went into the hands of the collector by making the stipulation. The deposit of the money in court, instead of giving a bond to secure the discharge of the attachment, was wholly voluntary, and the collector gave up the money he had for the purposes of such deposit and of such stipulation. After the discharge of the attachment under such circumstances it is no more proper for this court to deprive the United States, without its consent, of the superior security than it would be to put an unsatisfactory bond in the place of a satisfactory bond.

Motion denied.

[1] [Reprinted from 8 Reporter, 37, by permission.]

Case No. 15,436.

UNITED STATES v. IDELL.

[16 Int. Rev. Rec. 147; 4 Leg. Gaz. 347.]

Circuit Court, E. D. Pennsylvania. Oct. 23, 1872.

SEAMEN—UNLAWFUL SHIPPING CONTRACTS.

1. Under section 8, Act Cong. June 7, 1872 [17 Stat. 262], a person not a shipping commissioner who ships and engages seamen for a vessel of which he is not at the time the owner, consignee, or master, is liable to the penalties enumerated in said act.

2. The provisions of said act apply as well to vessels engaged in the coastwise as to those engaged in the foreign trade.

An information was filed by the United States district attorney, at the instance of the shipping commissioner in Philadelphia, under section 64 of the act of congress of June 7, 1872 (17 Stat. 262), charging the defendant, James D. Idell, with violating the provisions of section 8, of said act, in that, "on the 14th day of September, 1872, James D. Idell, not then and there being a shipping commissioner, did, within the jurisdiction of this court, perform certain duties which, by the provisions of the act of congress in such cases made and provided, pertain to a shipping commissioner, viz.: did ship and engage one Frederick W. Freeman as a seaman to go on board the schooner J. W. Allen, a vessel of the United States merchant marine, said James D. Idell at the time he so shipped and engaged the said Frederick W. Freeman, not then and there being the owner, consignee, or master of the said schooner, contrary to the form of the act of congress in such case made and provided, and against the peace and dignity of the United States of America." Whereupon the said attorney prayed process, and that the said James D. Idell might be arrested and held to answer the said complaint and information, and be dealt with according to law.

The defendant, Idell, filed a demurrer alleging specially that, "for further cause of demurrer the said John D. Idell says that the United States ought not further to impeach him, the said John D. Idell, touching or concerning the premises whereof he, the said John D. Idell, is by the said information accused, because he says that true it is that he did ship and engage a seaman called Frederick W. Freeman to go on board the said schooner J. W. Allen on or about the said 14th day of September, 1872, as by law he the said John D. Idell was authorized to do, the said schooner J. W. Allen being then and there an American vessel of the United States merchant marine, and en-

gaged in the coastwise trade of the United States, and was not a ship or vessel bound from a port in the United States to any foreign port, nor a ship of the burden of seventy-five tons or upwards, bound from a port on the Atlantic to a port on the Pacific, or vice versa. And this he is ready to verify, wherefore he prays the judgment of the court, and that he may be dismissed and discharged of the said information."

Henry Flanders and John K. Valentine, for the United States.

Franklin Swayne, Edwin L. Abbott, Joseph T. Pratt, and John P. O'Neill, for defendants.

The case was argued on demurrer before Judges STRONG and McKENNAN.

McKENNAN, Circuit Judge. And now, October 23, 1872, it appearing to the court by the admission of James D. Idell in his answer that he is not a shipping commissioner, but that he did, within the jurisdiction of this court, assume to perform the duties imposed by law upon said officer by shipping and engaging one Frederick W. Freeman as a seaman to go on board the schooner J. W. Allen, a vessel of the United States merchant marine, and that he was not at the time the owner, consignee, or master of said vessel, he is therefore adjudged to have violated the eighth section of the act of congress of June 7, 1872, entitled "An act to authorize the appointment of shipping commissioners," etc. And it is also adjudged that he pay into the registry of this court, within ten days, the sum of fifty dollars as a penalty for such violation of the act of congress, and the costs of this suit, and in default of such payment that he be imprisoned, as provided by the said act.

Case No. 15,437.

UNITED STATES v. ILLINOIS CENT. R. CO.

[2 Biss. 174;[1] 1 Chi. Leg. News, 427; 5 Am. Law T. Rep. 309.]

Circuit Court, N. D. Illinois. Aug., 1869.

DEDICATION—BY GOVERNMENT—AT COMMON LAW—GENERAL AND SPECIAL—EMINENT DOMAIN—CONDEMNATION PROCEEDINGS.

1. The making and recording by a proper government agent of a plat of land belonging to the United States, a portion of which was designated as "public ground forever to remain vacant of buildings," with a memorandum added to the plat declaring that this portion, "is not to be occupied with buildings of any description," is a dedication of such portion to public use of the kind and character mentioned in the plat.

2. All the provisions of the state law not having been complied with, it was not a statutory but a common law dedication; the fee did not vest in the city under it.

3. A distinction can be taken between a general and a special dedication, and in this case the fee remained in the United States, which still retain control over it so far as is consistent with the purposes for which it was specially dedicated, and no further.

4. Property having been specially dedicated to a particular purpose, neither the state nor the municipality has the right to divert it from that purpose, except under the right of eminent domain.

5. The right of eminent domain cannot be granted; it can be exercised only by the courts and by the legislature.

6. The legislature cannot take land from the owner and give it to a corporation, even for a public purpose; it must proceed in conformity to the law, and the compensation must be judicially ascertained, and cannot be fixed by statute.

7. The United States has such an interest in the land that it can appeal to a court of equity.

This was a motion for a preliminary injunction on a bill filed in behalf of the United States to restrain the Illinois Central and other railroad companies from taking possession, for depot and other purposes, of the south portion of fractional section 10, township 39 north, range 14, and commonly known as a part of the Lake Front in Chicago.

J. O. Glover, U. S. Dist. Atty.

George Trumbull and J. N. Jewett, for defendants.

DRUMMOND, District Judge. The questions involved in this case are of the very highest importance, affecting interests of great magnitude, and they should be more fully considered and opportunity given for further argument and investigation. I do not propose, now, to do more than state the conclusions at which I have arrived, with perhaps, some incidental argument indicating why I have reached those conclusions.

The facts stated in the bill are not controverted, and are substantially these: After the litigation concerning the south fraction of section 10 in township 39, range 14, east of the third principal meridian, upon which Fort Dearborn was situated, had been settled by the decision of the supreme court of the United States, reported in the case of Wilcox v. Jackson, 13 Pet. [38 U. S.] 498, in favor of the right of the United States to the land, the secretary of war, under the act of congress of 1819 [3 Stat. 520], proceeded to dispose, by sale, of a portion of the land, the right and title to which had been determined to be in the United States by this decision. With the view of facilitating the sale, Mr. Burchard, in 1839, as the agent of the government, made a plat of the land, dividing it into lots, blocks, and streets, etc., by analogy and in conformity with the practice existing under the law of the state concerning town plats. This plat was recorded in the recorder's office. Upon the plat, thus made and recorded, there was a strip of land, south of Randolph street and north of Madison street, and between certain lots and blocks and Lake Michigan, designated as "public ground forever to remain vacant of build-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

ings," and by a memorandum added to the plat, it was declared that "the public ground between Randolph and Madison streets, and fronting upon Lake Michigan, is not to be occupied with buildings of any description." Sales were made at the time of many of the lots, in conformity with the plat, and title given under the authority of the secretary of war.

In 1850 [9 Stat. 466], congress granted to the state of Illinois certain lands for the construction of a railroad from Cairo, with branches to Chicago and Galena; and by an act of the legislature of 1851, of this state, the Chicago branch of the Illinois Central Railroad, was terminated at Twelfth street, in the city of Chicago. By a subsequent act, in 1852, authority was given to the Illinois Central Railroad Company to proceed from Twelfth street to the south branch of the Chicago river, and by a contract made with the city and an ordinance affecting the same, between the city and the railroad company, a track was constructed about 400 feet east of Michigan avenue, and from Twelfth street to the south branch of the Chicago river.

The bill alleges that this was done without authority on the part of the United States, and that the latter was not a party in any way to the arrangement.

It will be seen from what has been stated, after the land had been thus set apart, in the way described, that the city of Chicago assumed a certain control and authority over it, making the contract and passing the ordinance upon that assumption. The track thus made by the Illinois Central Railroad Company was used from the time of its construction up to the passage of the recent act of the legislature of April 16, 1869, which has given rise to this controversy.

By that act there was granted to some of the defendants a tract of land described as the south fraction of section 10, for the erection thereon of a passenger depot, and for "such other purposes as the business of said companies may require." In consideration of this grant, thus made by the act of the legislature, the railroad companies, the Illinois Central, Chicago, Burlington and Quincy, and Michigan Central, were required to pay to the city of Chicago $800,000 in the manner therein described; and the common council of the city of Chicago were authorized and empowered to quitclaim and release to the Illinois Central Railroad Company and others, any and all claim and interest affecting the said land.

The bill alleges that under this act of the legislature, these companies threaten to proceed and erect buildings upon the land thus described and set apart for the special public purpose mentioned.

Although the bill has a wider scope as affecting the rights of navigation, yet the only question now submitted is whether, as the case is presented, they have a right, under this act of the legislature, thus to proceed.

First, as to the position of the United States touching this land, the south fraction of section 10.

There can be no doubt, I think, under the facts as stated, that with the consent of the government, through its authorized agent, the land was dedicated to public use of the kind and character mentioned. It may be asked whether this dedication was what is called a statutory dedication, or whether it was a dedication at common law. I think it was a dedication at common law and not under the statute. It is true that there was an attempt, to conform to the conditions required by the law in relation to town plats. It was made out, and recorded, but all the various provisions required by law do not seem to have been complied with. And I understand the rule to be, that, if they are not, it is not a statutory dedication, the effect of which is to vest in the public the fee to the streets and public grounds named and designated upon the plat as such; and this seems to be the result of the decision in the case of U. S. v. City of Chicago, 7 How. [48 U. S.] 185. That decision could not have been made if the supreme court of the United States had supposed that the title in fee of the streets was vested in the city of Chicago, as representing the public. It was a question that necessarily arose in that case, and one submitted and certified up to the supreme court, and upon which the decision of that court was required and given.

It seems to me that a distinction can be taken between a dedication which is general, without any restriction or limitation, and a special dedication for a particular purpose. Here the condition annexed to the dedication was, "public ground forever to remain vacant of buildings." The United States, therefore, hold the title in fee to the land subject to the dedication which had been affixed to it, having, however, no control over it inconsistent with the purpose for which it was dedicated, but, as I apprehend, still having entire control over it consistent with that purpose.

Then, there being this special dedication, the question is as to the power of the general public over it, either the city of Chicago, for certain purposes, representing the rights of the public, or the state of Illinois, for other purposes, so representing them, and of course independent of the power exercised over it as public ground merely, about which there is no controversy here.

It is the undoubted right of every person owning property to dispose of it in such a manner as he chooses, consistently with law and public policy. It is therefore the right of every property holder, unless there is some law or some public policy which prevents, to dedicate his property to public use, general or special; and I apprehend there could not be and was not any law, state or federal, to prevent the special dedication of this property in the way in which it was

designated on the plat by the agent of the government. That being so, when property is thus dedicated what are the rights of the public over it? Can they change the object and purpose of the dedication? Would not this be interfering with the undoubted right of every person to dispose of his property as to him shall seem fit?

There may be, perhaps, some force in the argument which declares that when property is dedicated generally to the public, without specifying the particular purpose, the public may use it for one purpose at one time, and for another at a different time, but where the owner of property dedicates it to a particular public purpose, being not inconsistent with the law or public policy, I deny the right of the state or of the municipality to divert it from that purpose, except under the general authority which the public has to take property for public uses, which is sometimes termed the right of eminent domain. If an individual shall grant a lot of land or square in a city, for the purpose of constructing a school house upon it, or a church, or an institution of science, or for any useful public purpose, that property cannot be taken, as I apprehend, by the public except in the same way that any property can be taken. In one sense, the property of every man, of course, is subject to the control of the government, but then, when thus subject to the government, it is in conformity with law, and in our system under the adjudication of the law by the courts. It is not alone by a simple stroke of legislation, and I think none of the authorities that have been cited are inconsistent with this principle.

The case of Williams v. New York Cent. R. Co., 16 N. Y. 97, proceeds upon the correctness of this doctrine. There the owner of land dedicated a portion of it to the use of the city of Syracuse as a public street. The legislature undertook to grant to the railroad company a portion of the street for a railroad track. The court of appeals of New York held that it could not be done without accountability to the owner of the street. And although some cavil is made with this decision in the case of People v. Kerr, 27 N. Y. 188, still the principle of it is conceded.

The Case of Wellington and Other Petitioners, reported in 16 Pick. 87, is in conformity with this doctrine. The opinion of Chief Justice Shaw proceeds upon the basis that there had not been a diversion, by the act of the legislature, of the land from the public use to which it was appropriated by the owner. That undoubtedly is a strong case, where the question distinctly came up.

The case of Wager v. Troy Union R. Co., 25 N. Y. 526, is also in conformity with this principle.

In fact, what safety would there be in any other rule than this? And when it is enunciated, coupled with the qualification that the state may take the land for public purposes under the right of eminent domain, there certainly cannot be any objection to it; "salus populi est suprema lex;" and this leaves the right of the individual over his property, and the rights of the state, in harmony with each other, maintaining in full force the right of the owner to annex such qualification to the disposition of his property as he chooses, subject, however, to that supreme law, which looks to the safety of the state and which authorizes the appropriation of the property when that safety demands it.

Now what is done in this case? Is the action of the state or of these defendants in conformity with this principle? It grants to these companies the right of the state of Illinois in this land. What is that right? It can only be independent of the easement, and so far as the owner of the property is concerned, the right to appropriate it for public use in conformity with law. Has the legislature of the state the right to divert land which has been appropriated to a special purpose from that purpose, and say that in consequence of that they will give such a compensation to the owner? Is not this what this act does, to all intents and purposes?

It declares that, in consequence of the grant made by the state of Illinois, these defendants, the railroad companies, shall pay to the city of Chicago $800,000 only, while the bill alleges the value of even that part of the grant inclosed between Madison and Randolph streets, to be $2,500,000. It is certainly a diversion, so understood, so contemplated, and not denied by counsel, from the purpose for which the land was originally dedicated.

If this was not the object and purpose, for what were the $800,000 to be given to the city of Chicago?

True, it is said that there are rights affecting this property. There is the right of the owners of lots abutting upon the property; the right of prospect; the right of air and view. That is one thing. But has not the public, in relation to the various streets and public grounds, certain rights as well as owners of lots abutting upon the streets, public squares? And is that right, by a mere stroke of the pen, to be taken away from each individual of the public, where the ground is dedicated to a special purpose? In other words can a mere legislative enactment close up our public streets and parks, and squares? Is there nothing required to give effect to it, and is the individual to be left without any other redress, except what may arise indirectly by an action against the wrongdoer, which shall sound in damages?

This will not be claimed. This is not claimed, as I understand, in this case.

It is said that all that is granted by this legislative act is the rights of the public; that the rights of individuals have to be affected by some other proceeding. That may be true.

There can be no doubt, I apprehend, of the right of every individual owner who may be injured by the wrongful act of these defendants to proceed against them for that injury, and to apply to the court for redress. What is the result in the meantime? The land thus taken, if used for the purpose claimed under this law, can be built up. In other words, the condition annexed to the dedication, declaring that this land was forever to remain vacant of buildings, can be nullified by the construction of buildings and depots. It would seem as though there should be a preventive remedy which may arrest this violation of the dedication, rather than to leave the parties to the inadequate redress of an action at law and sounding in damages, merely.

Then, I hold that these principles are true in this case: That the United States remained the owner of this land, subject to the use conferred upon the public by the dedication that was made; that neither the state nor the city has a right to divert the land from the special dedication thus affixed to it, except by the exercise of the right of eminent domain, which must be, not alone by an application to the legislature, but by an application in conformity with the law, and where the rights of the parties can be ascertained.

[2] [The only remaining question is, whether the United States is in a position to apply to a court of equity to prevent those acts from being done which the railroad companies seek to do under this law. This is a question about which there may be, and is, some considerable difficulty. No adjudication has been referred to, on either side, where the question has been distinctly presented. It is true that in the case in 27 N. Y. 188, already referred to, the public, together with the owner of the lots abutting upon the street, was made a party plaintiff, and no objection seems to have been taken on that ground. There is a case reported in 11 Paige, 414,—Stuyvesant v. New York,—where the owner of property dedicated a square to public use in the city of New York, to which the municipality assented, and in relation to which they made a contract. The court there held that the owner could call upon the city to comply with its contract. But looking at it upon principle, the question is whether the United States cannot, under the circumstances of the case, call upon a court of equity to effectuate the condition of the grant?

[Under the circumstances detailed, these railroad companies, defendants, threaten to block up land thus dedicated in this particular way to public use. The bill alleges, and for that purpose it must be admitted that there was a warranty, by implication, it is true, on the part of the government to these various persons to whom the property was sold, that the land should thus remain dedicated, in the particular way designated, and, in point of fact, there can be no doubt of the object and intent of all the parties to this transaction. It was the understanding of the government, through its agent, that this land was to be forever free from buildings, so that there could be an outlook upon the lake. It was dedicated for public purposes, and might be used in various ways, but this never was to be the purpose; buildings never were to be constructed there. Under these circumstances, upon principle, has not a trustee, who thus holds the land subject to the dedication, and to the conditions annexed to it, the right to appeal to a court of equity to enforce the purpose? It seems to me that he has.

[A bill has been filed by the owner of a lot abutting upon this ground, similar in most of the allegations to the bill in this case, and I have been requested to consider a motion for injunction as also made in that case. With the view I have taken of the law of the case, it will be seen that I do not doubt the right of such owner to apply to a court of equity to prevent such a diversion as is contemplated here, and under the circumstances indicated, and I suppose it is not very material in which case the order of the court is made, whether in this or the other. I think it, however, a matter of the very highest importance that, where rights so momentous are involved, and where the consequence of permitting these defendants to proceed and construct buildings might affect so seriously the right of the public, and of private owners, if it should be ultimately determined that this statute of the legislature is not in conformity with those interests, that the order of the court should be made now, on the threshold, before any buildings are constructed.

[It is true that where there is a doubt as to the right for the injunction, that a court of equity does not grant it. But where the court has no doubt of the right to the injunction, and the question is one of pleading, to a certain extent, perhaps the principle might not apply. Looking at it in the absence of authority, and with the best consideration that I have been able to give the subject, I think that the United States may appeal to a court of equity, as it has done.

[It is not necessary to decide whether the act of the legislature causes the property to revert to the original owner or whether it still remains subject to the rights of the public, and the act itself, is alone illegal. The supreme court, in what is called the Pittsburgh Case, reported in 6 Pet. [31 U. S.] 496, seems to think that, where there was a diversion of the land from the original purpose of the dedication, that the land would still remain subject to the original condition and purpose, and that the attempt at diversion would simply be ineffectual. Again, I must confess that I have not been uninfluenced perhaps by the legislation which has been adopted in this case. Do these rail-

[2] [From 1 Chi. Leg. News, 427.]

road companies want land for the construction of their buildings? There is a way in which they can apply, under the law, for the condemnation of that land, whenever it is for a public purpose. As I understand, the legislature cannot, by a mere enactment, take land from a private owner and give it to a corporation, even for a public purpose. It must proceed in conformity with law, and, if compensation is to be given, the amount is to be properly ascertained, and not determined in advance by a mere word in a statute. The injunction will be granted.] [2]

NOTE. If ground is surveyed and laid off for a public place, and sales made in reference thereto, that amounts to a dedication to the public. Godfrey v. City of Alton, 12 Ill. 29; Trustees of Watertown v. Cowen, 4 Paige, 510. No particular form is necessary to constitute a valid dedication. Marcy v. Taylor, 19 Ill. 634; Waugh v. Leech, 28 Ill. 488; Canal Trustees v. Haven, 11 Ill. 554; Manly v. Gibson, 13 Ill. 312; Dummer v. Selectmen of Jersey City, 20 N. J. Law, 86; Rector v. Hartt, 8 Mo. 448; Woodyer v. Hadden, 5 Taunt. 125; Poole v. Huskinson, 11 Mees. & W. 827; City of Cincinnati v. White's Lessee, 6 Pet. [31 U. S.] 431; Post v. Pearsall, 22 Wend. 425; Knight v. Heaton, 22 Vt. 480; Hobbs v. Inhabitants of Lowell, 19 Pick. 405. Nor is it necessary that the fee be diverted; Kelsey v. King, 33 How. Prac. 39. Property once dedicated cannot be aliened or diverted. City of Alton v. Illinois Transp. Co., 12 Ill. 38; Proctor v. Town of Lewiston, 25 Ill. 153. A plat of an addition to a town, not executed, acknowledged and recorded in conformity with the statute of the state, operates as a dedication of the streets to public use, but not as a conveyance of the fee to the corporation. Banks v. Ogden, 2 Wall. [69 U. S.] 57. The exhibition or publication of a map of a town with streets and squares marked thereon is evidence of a dedication to public uses. Lownsdale v. City of Portland, 1 Or. 397; Chapman v. School District No. 1 [Case No. 2,607]. If a tract of land be dedicated to the public, as an open square, the public acquire a vested right in it for such purpose. McConnell v. Lexington, 12 Wheat. [25 U. S.] 582; New Orleans v. U. S., 10 Pet. [35 U. S.] 662. Cincinnati v. White, 6 Pet. [31 U. S.] 431; Sargeant v. Bank of Indiana [Case No. 12,360]. The government in laying out the city of New Orleans left an open space in front of the houses, and toward the river marked "Quai" on the plat; *held*: a dedication to public purposes. Municipality No. 2 v. Orleans Cotton Press, 18 La. 122. See, also, City Council of Lafayette v. Holland, Id. 286; Pulley v. Municipality No. 2, Id. 278; Barrett v. City of New Orleans, 13 La. Ann. 105.

Case No. 15,438.

UNITED STATES v. IMBERT.

[4 Wash. C. C. 702.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1827.

HOMICIDE ON HIGH SEAS—NATIONALITY OF VESSEL—HOW PROVED.

1. Upon an indictment for manslaughter, committed on board of an American vessel on the high seas, or in a foreign port, it is essential for the prosecutor to prove that the vessel belonged to a citizen of the United States.

2. Quære, if the register of the vessel is the only legitimate evidence of ownership.

The defendant [Lewis A. Imbert] was indicted for manslaughter committed by him, being one of the ship's company of the Arabella, belonging to citizens of the United States, on another of the ship's company of said vessel, in the river Elba. After the evidence was concluded, it was objected by the defendant's counsel that no evidence having been given to prove that the vessel on board of which the offence is alleged to have been committed, belonged to a citizen of the United States, a verdict could not be found against the defendant. They further insisted that the only legal proof of ownership is the registry.

Ashmead & Griffith, for defendant.

WASHINGTON, Circuit Justice. The objection taken on the ground of defect of evidence is insurmountable. Manslaughter is no offence against the laws of the United States, unless it be committed on the high seas, or in some place under the sole and exclusive jurisdiction of the United States, or on board of a vessel belonging to a citizen or citizens of the United States, on some water within a foreign jurisdiction, by one or more of the ship's company, or a passenger, upon some other passenger or member of the ship's company. It is therefore essential for the prosecutor to prove that the vessel belonged to a citizen or citizens of the United States, if the offence be committed within a foreign jurisdiction. Whether the registry be or be not the only legal evidence to prove the fact, need not be decided in this case; since there has been no evidence of any kind given to establish the fact. This being the case, the jury ought to acquit the defendant.

Verdict, not guilty.

Case No. 15,439.

UNITED STATES v. IMSAND.

[1 Woods, 581.] [1]

Circuit Court, S. D. Alabama. Dec. Term, 1869.

VIOLATION OF INTERNAL REVENUE LAWS—INDICTMENT — TAX ON DISTILLED SPIRITS — EVIDENCE—DECLARATIONS.

1. The last clause of the seventy-eighth section of the act of congress, approved July 20, 1868, entitled an act imposing taxes on distilled spirits and tobacco (15 Stat. 159), contains no exception so incorporated in the body of the enactment that it must be negatived in an indictment founded on the clause.

[2] [From 1 Chi. Leg. News, 427.]

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

[1] [Reported by Hon. William B. Woods. Circuit Judge, and here reprinted by permission.]

2. The presumption of guilty intent cannot be rebutted by proof of declarations of the accused made after the commission of the offense.

The jury by which this cause was tried, having returned a verdict of guilty, a motion was made in arrest of judgment, "because there is an exception in the section upon which the indictment is founded, so incorporated with the enacting clause, that one cannot be read without the other, and in such cases the exception must be negatived in the indictment, which in this case is not done."

J. P. Southworth, U. S. Atty.
John Little Smith, for defendant.

WOODS, Circuit Judge. The rule requiring exceptions in a statute to be negatived in an indictment has been well expressed in these words: "If there is an exception in the enacting clause, the party pleading must show that his adversary is not within the exception, but if there be an exception in a subsequent clause or subsequent statute, that is matter of defense, and is to be shown by the other party." 8 Am. Jur. 234. For example, the statute (19 Geo. II. c. 30, pt. 1) enacts, that no mariner who shall serve on board any privateer employed in the British sugar colonies in the West Indies, nor any mariner being on shore in said colonies shall be liable to be impressed by any officer of a ship of war, unless such mariner shall have before deserted from an English ship of war. A penalty of £50 was given by the same statute to any person who should sue therefor against any officer who should impress a mariner contrary to its provisions. In an action on this statute, judgment was arrested because the declaration did not allege that the mariner had not previously deserted from any of his majesty's ships of war. Spieres v. Parker, 1 Term R. 141. In this case it was said, that the penalty was not imposed for impressing a mariner in the sugar colonies, but for impressing a mariner there who had not previously deserted; that the word unless, in the statute, had precisely the same sense and operation as if it had been in so many words enacted, that the penalty should be inflicted on any officer who should impress a mariner who had previously deserted. So in Gill v. Scrivens, 7 Term R. 27, Lord Kenyon said, "the writ ought to state all the circumstances that entitled the plaintiff to execution;" and Lord Mansfield said. "the plaintiff must aver a case that brings the defendant within the statute."

A statute of Massachusetts forbids labor and traveling on the Lord's day, except from necessity or charity. Labor or traveling merely is not forbidden, but unnecessary labor and traveling, and labor and traveling not required by charity. The exception is in the enacting clause, and the absence of necessity and charity is a constituent part of the description of the acts prohibited, exactly as if the statute had in totidem verbis forbidden unnecessary labor and traveling, and labor and traveling not demanded by charity. An English statute makes it a penal offense for any person other than those employed in his majesty's mint, to make or mend any instrument for coining. This exception must be negatived in an indictment. The want of such authority is part of the description of the offense itself. 1 East, P. C. 167. These examples are sufficient to illustrate the meaning and reason of the rule. The reason is simply this, that unless an exception in an enacting clause is negatived in pleading the clause, no offense appears in the indictment. The case provided for in the clause pleaded is not made out on the record. It is only when the matter is such that its affirmation or denial is essential to the apparent or prima facie right of the party pleading, that it must be affirmed or denied by him in the first instance.

Now, to apply the doctrine to the case at bar. This indictment is founded on the last clause of section 78 of the act of congress, approved July 20, 1868 (15 Stat. 159). This section contains three distinct clauses. The first provides that every dealer in manufactured tobacco and snuff shall, on the first day of every month, make and return to the assistant assessor of the proper division, an inventory of the tobacco and snuff which he has on hand at the time; the second clause provides that after January 1, 1869, all smoking, fine cut chewing tobacco and snuff, and after July 1, 1869, all other manufactured tobacco shall be taken and deemed to have been manufactured after the passage of this act, and shall not be sold or offered for sale unless put up in packages and stamped, as prescribed by this act, except by retail dealers from wooden packages, stamped as provided by this act. The evident purpose of this clause is to make uniform in practice, at as early a day as possible, the provisions of the law regulating the tax on tobacco. In a previous section of the act, section 62, it had been provided that after the passage of the act, all manufactured tobacco should be put in certain described packages, fine cut tobacco in packages weighing ½, 1, 2, 4, 8 and 16 ounces, or in wooden boxes containing 10, 20, 40 and 60 pounds each, and all such packages should be stamped. Now this second clause put the law in force so far as fine cut tobacco or snuff is concerned, on January 1, 1869, by creating the presumption, after that day, that such tobacco and snuff were manufactured after the passage of the act, whether such was the actual fact or not, and prescribes that no such tobacco shall be sold unless in packages and stamped as required by the act; but allows retail dealers to sell at retail from the wooden packages stamped as provided for by the

act. The third clause provides that after the 1st day of January, 1869, any person who shall sell, or offer for sale, any smoking, fine cut chewing tobacco or snuff, not so put up in packages and stamped, shall, on conviction, be fined, etc.

This last clause it seems to me, contains no proviso or exception, and this is the clause on which the indictment is founded. It is complete in itself, except only that it refers to the second clause by the words, "so put up in packages and stamped." But the second clause does not inform us how the tobacco is to be packed and stamped, but refers to the previous section (section 62). So that this third clause may well be construed as if it read "as provided in section 62." There is nothing excepted from the operation of this clause; all tobacco must be packed and stamped as provided by the act, and to sell any tobacco not packed and stamped is made an offense by this clause of the statute. But there is not even in the second clause of this section, any exception to the provisions of the act that all tobacco sold must be packed and stamped in a certain way. What is relied upon as an exception in the second clause is simply a permission to retail dealers to sell in a certain way not unstamped tobacco, but tobacco put up in a prescribed way and duly stamped. If the third clause of the section had provided that it should be unlawful to sell tobacco unless stamped, but that tobacco manufactured, say before 1869, or tobacco manufactured at Lynchburg, Virginia, might be sold without stamps, then it would be necessary in an indictment under this clause, to negative these exceptions. But this clause does not make these exceptions, or any others. All tobacco sold must be packed and stamped as prescribed, and the sale of any tobacco not so packed and stamped is made an offense. Nor does the second clause make an exception. It simply provides that certain persons may sell tobacco packed and stamped, as provided by law, in a certain way, but they are nowhere in the section authorized to sell tobacco unstamped. It introduces no new element or qualification into the offense, but leaves it just as broad and unqualified as the third clause leaves it. So that when this indictment alleges that on a certain day, and at a certain place, the accused sold tobacco which had not paid the revenue tax, and was not stamped as provided for by law, it describes fully and completely an offense under this statute. There is no exception to be negatived, because the law makes no exception. Therefore for the reason, first, that no exception is made in the clause on which the indictment is based; and second, because no exception is made in the second or any other clause of this section, I hold that the objection to the indictment is not well taken.

It is urged on behalf of Imsand that the court erred in not admitting evidence of what the accused said or did on a day subsequent to the commission of the alleged offense. While I do not see how this can be taken advantage of on motion in arrest of judgment, yet I have reflected upon the question thus raised, and am satisfied with the ruling. Where an offense against the law is shown to have been committed, the law raises the presumption of guilty intent. To allow this presumption to be overthrown by the declarations of the accused, made subsequent to the commission of the offense, would be to make him a witness in his own behalf, and his unsworn declarations made in his own favor after the offense was committed and completed, to be used to exculpate him. What he said at the time of the transaction may be admitted as part of the res gestæ, but I know of no rule of law by which a prisoner can give his own declarations, made at a subsequent time.

Case No. 15,440.

UNITED STATES v. INGERSOLL.

[Crabbe, 135.] [1]

District Court, E. D. Pennsylvania. April 5, 1837.

ALLOWANCE OF COSTS—TRIAL—FEES OF DISTRICT ATTORNEYS—EXTRA SERVICES—LOSS OF MONEY BY NEGLECT.

1. The allowance of costs to a district attorney is altogether in the jurisdiction of the judge, and not within the power of the officers of the treasury.

[Cited in U. S. v. Waters, 133 U. S. 212, 10 Sup. Ct. 249.]

2. Under the provisions of the act of 3d March, 1797 [1 Stat. 512], a district attorney's claim for a credit for costs, not taxed, but taxable, cannot be admitted on a trial, unless it has been presented to and disallowed by the accounting officers of the treasury.

3. Where a defendant has pleaded payment, and, at the trial, adopts such a course as to throw the whole affirmative proof on the plaintiff, the plaintiff has the right to reply.

4. The discharge of a debtor, before or after judgment, is not, of itself, a ground of charge upon a district attorney.

5. A district attorney is liable for money actually received by him, or which has been lost by his unwarranted neglect; but he is not answerable for the default, inattention, or frauds of the marshal.

6. Charges by a district attorney for what are called extra official services rendered by him to other subordinate officers of the government, on their application and request; which are not provided for by any act of congress; and were not performed on the call or requisition of either of the executive departments, and have not been sanctioned by them, or either of them; and which are not sustained by a usage so certain, uniform, and notorious as to be understood and known to both parties, so as, in effect, to be taken as part of the contracts; should not be allowed as a credit or charge against the United States.

[1] [Reported by William H. Crabbe, Esq.]

7. Where the United States succeed to a claim of their debtor which is in suit against a third party, and the action is prosecuted to a termination in the supreme court of the United States, by a district attorney, by order of the government, he is entitled to a fee from the United States, for his services therein.

In the year 1815, the defendant [Charles J. Ingersoll] was appointed attorney of the United States, for the Eastern district of Pennsylvania. Many bonds, taken by collectors before that time, were transferred to him by his predecessor. These, together with bonds taken by collectors during his attorneyship, and given to him for suit, and various other official transactions, created an account between the defendant and the United States, consisting of a great number of items, and involving very large sums of money. Notwithstanding the efforts of the defendant, this account became more and more involved, and no effectual attempt seemed to be made by the proper officers to bring about the regular periodical settlements. Various letters from Mr. Ingersoll on the subject, ranging from the 26th July, 1815, to the date of the present suit, were produced at the trial, all urging the officers at Washington to a settlement. Among others, a letter dated 15th June, 1831, was addressed to the first comptroller of the treasury by the defendant, in which he stated that he then held the sum of $7,971.14 in trust for the United States, that he would make use of that deposit to procure justice, and apprised the comptroller that he would forthwith apply it to his own use and indemnity, requesting that no time might be lost in commencing suit against him on that ground.

This action, which was for money had and received, was commenced on the 25th May, 1836. The defendant pleaded payment and set-off, with leave to give special matter in evidence.

The account as stated by the plaintiffs charged the defendant with		$2,785,939 04
And credited him with		2,748,047 33
Leaving due to the plaintiffs		37,891 71
On which they charged interest		38,599 29
Making the whole amount claimed		$76,491 00

The defendant acknowledged the following debts:

Amount received in Toler v. Armstrong		$ 3,158 82
Amount received on bonds of Rodman and Waln.	$5,487 86	
Interest, &c.	2,483 28	7,971 14
Interest on that amount to date of suit		493 42
Amount received from Kinsman and Wright.	$2,023 43	
Less, fees and costs, &c.	344 36	1,679 07
		$13,302 45

And claimed credits as follows:

Costs in revenue cases, taxed	$1,740 05	
Costs in criminal (tea and forgery) cases taxed	5,083 20	$ 6,823 25
Fees in Conard's cases		1,000 00
Fee in Toler v. Armstrong		1,000 00
Fee in Amelia Island cases		1,000 00
Fees in militia cases		1,000 00
Fees for extra official services, from 1815 to 1829		11,675 00
Moiety of Edw. Thompson's forfeitures		12,500 00
		$34,998 25

Leaving due to defendant a balance of $21,695 80.

The plaintiffs founded a portion of their claim on the fact that the defendant had marked certain suits as satisfied, without receiving the full amount due, and they claimed damages for this negligence of their attorney. In regard to the item of taxed costs claimed by the defendant, it was shown that Mr. Ingersoll had given to the marshal his receipts for the amount in order that that officer might have vouchers for his requisitions on the treasury; and that, the marshal being a defaulter, the treasury took the receipts in question and then passed the amounts to the marshal's credit, to balance his debts to the government.

During the trial, and in the course of the evidence, the following points arose:

On the 22d March, the defendant put in evidence a letter from the first comptroller of the treasury to the marshal of the Eastern district of Pennsylvania, dated 7th April, 1828, in which the payment of the clerk's and marshal's costs in certain suits was directed, while those of the district attorney were to be retained till further orders.

HOPKINSON, District Judge. The treasury officers have nothing to do with the allowance of costs. The law directs the judge to certify what is to be allowed.

On the same day, the defendant offered to give evidence of a set-off consisting of attorneys' fees, not taxed, but taxable.

Gilpin, U. S. Dist. Atty., objected, because the item had never been presented to and disallowed by the treasury. And the matter was passed over for that time.

On the 23d March, the defendant's counsel again offered the evidence.

C. J. Ingersoll, for defendant. This is not a case under the act of congress of 3d March, 1797 (1 Story's Laws, 464 [1 Stat. 512]). The defendant does not hold any money as a receiver of public money. He is an individual who happens to have money in his hands, and is sued for it. The act only refers to officers who have money to disburse. The first, second, and third sections refer to revenue and disbursing officers; and while the fourth section refers to individuals, it does not reach this case. These are taxable costs. They cannot be presented to the treasury, for

that department has nothing to do with them. The certificate of the judge is all that is required to allow them. U. S. v. Buford, 3 Pet. [28 U. S.] 29; U. S. v. Jones, 8 Pet. [33 U. S.] 383; U. S. v. Robeson, 9 Pet. [34 U. S.] 325.

Mr. Gilpin, for the United States. The defendant is a person accountable for public money. He receives as much as the collector. He is here charged as a public officer. His accounts have been adjusted at his own request. These three points bring the defendant within the first three sections of the law; and the fourth section applies to suits against any individual. The defendant has presented all his claims at the treasury but this one, and they have been regularly disallowed. The whole reason of the law applies to this case. It intended that the treasury should settle all just claims without controversy, unless it was impossible to procure vouchers, or accident prevented their procurement. This is not only the statute, but also the decision of the supreme court in U. S. v. Robeson, 9 Pet. [34 U. S.] 325. It was not here impossible to procure the vouchers, nor did accident prevent their procurement; and the defendant cannot avail himself of the exception, as he does not come within either of the reasons on which it is founded. The fact that the costs are ascertained by the court is no reason to take the case out of the act. The marshal's costs are ascertained in the same way; and if the rule now contended for is valid, his accounts could never be settled at the treasury. While congress made the taxing by the court conclusive evidence of the debt, yet that evidence must be regularly offered at the proper place. The cases cited from 3d and 9th Peters's Reports do not apply to us in this suit; and see U. S. v. Duval [Case No. 15,015].

J. R. Ingersoll, for defendant. The only case in which the credit claimed must be presented to the treasury is where the treasury transcript is made evidence. The transcripts are never evidence except where the account is of such a nature that it necessarily arises at the treasury. It is only to such cases that any of the provisions of the law apply. These costs never could have come within the knowledge of the officers of the treasury. Act May 8, 1792 (1 Story's Laws, 257 [1 Stat. 275]); Act Feb. 28, 1799 (1 Story's Laws, 569 [1 Stat. 624]). Above all, the act of 3d March, 1797, only refers to receivers of public money, which district attorneys are not.

THE COURT reserved the point for future consideration.

On the 25th March, Judge HOPKINSON said: "As to the point reserved on Thursday, I cannot admit the item. It has not been submitted to the treasury."

On the 23d March, the defendant's counsel asked the opinion of the court in regard to the right of reply.

J. R. Ingersoll, for defendant. Whether the United States or the defendant is to commence, I conclude. The plea of payment always gives the right to begin and reply. Latapee v. Pecholier [Case No. 8,101]; Norris v. Insurance Co. of North America, 3 Yeates, 84; U. S. v. Thompson [Case No. 16,487].

HOPKINSON, District Judge. If this case had gone on merely on the pleadings, it would have been a different matter. But here the defendant has forced the district attorney to prove his whole case at the outset as fully as if the plea had been non assumpsit. He objected to the treasury transcripts, and the district attorney went through the proof carefully and from various sources. The affirmative was thrown entirely on him; and the evidence of the defendant, except as to the set-off, has been confined to disproving the district attorney's allegations. The plaintiffs have the right to conclude.

The evidence having been closed on the 29th March, the district attorney commenced summing up.

Mr. Gilpin, for the United States.

The first thing required here is to accurately understand the plaintiff's claim. I do not pretend that all the items are of equal validity; some ought to be yielded. Our account was made from the best data, which are far from being perfect. The claim of the United States is for $37,891.71 principal, and $38,599.29 interest, being, altogether, $76,491.00. The items have been all exhibited, and the charges arise from the defendant's neglect, the suit being founded upon the principle that an attorney is liable to his client for loss suffered by his negligence. On the other hand the defendant, having charged himself with but $13,302.45, claims an offset of $34,998.25, for various items—principally for services rendered. This is the whole case, and on the evidence offered by either party, subject to the direction of the court on the legal points which may arise, the jury must decide the matter.

C. J. Ingersoll, for defendant.

The claims of the plaintiffs are all more than six, some more than twenty years old, which will account for the obscurity attending them. I agree to the law as laid down by the district attorney, but I must ask that, as there is no limitation against the United States, the jury will not condemn the defendant because of doubts or obscurity as to the circumstances of the items. The burthen of proof is on the plaintiffs; the plea of payment was put in to throw that burthen on the defendant, but, under the turn which the court have given to the proceedings, the plaintiffs are only entitled to what they prove to be actually due. The principle on which the plaintiffs' case rests is that the defendant's negligence has caused loss to the United

States. That is, they must have sustained loss by the defendant's neglect, and this negligence must be strong—what no man in his senses would do—for as the collector and other similar officers are not held liable for losses arising from honest errors—as in the case of the sureties taken by a collector becoming suddenly bankrupt—neither should a district attorney be held so liable. The sums admitted to be due by the defendant have been stated to the jury, and they must decide, from the evidence before them, whether the defendant is chargeable on the other items pressed by the district attorney.

Now examine the defendant's set-off. The first two items of $1,740.05 and $5,083.20, are for costs allowed by the law, but applied by the United States to pay another man's debts. The third item, of $1,000, is for fees in suits for the government under the act of 28th February, 1795 (1 Story's Laws, 389 [1 Stat. 424]), and is for a less amount than is charged by any other person. It is urged that the defendant was employed by the marshal, and not by the government; nevertheless, the United States are liable. Act Feb. 28, 1795; Act Feb. 2, 1813 (2 Story's Laws, 1291 [2 Stat. 797]); Report to Congress on Militia Fines in Pennsylvania, 25th April, 1822. The fourth item is for a fee in a case acknowledged by the government, but in which they only allow the defendant $850, and he now appeals to the jury to say whether that is a sufficient amount. The fifth item is for a fee in a case which the government prosecuted under a citizen's name. The sixth and seventh items are for services in suits prosecuted at Washington for the government; the assistance of the attorney-general was refused, the defendant was alone in difficult and voluminous suits, and it is in evidence that his successor has received $1,500 for subsequent and less services in the same matter. The eighth item is for fees for extra official services for fourteen years; it is about $800 a year. The defendant does not stand on common ground as to this charge. It is in evidence that he notified the comptroller on the 26th June, 1815, of his charges; that on the 18th July, 1815, they were authorized; that on the 12th June, 1816, the secretary of the treasury said there were various services which were not comprised in the general allowance, and which the comptroller was to revise and pass when certified by the auditor. The secretary ordered the comptroller to allow all that there was law for, and there is law for these, proved as they are. U. S. v. Wilkins, 6 Wheat. [19 U. S.] 135; U. S. v. Duval [Case No. 15,015]; U. S. v Fillebrown, 7 Pet. [32 U. S.] 28, 50; Lynch v. Com., 16 Serg. & R. 368; The Apollon, 9 Wheat. [22 U. S.] 376; Morris v. Hunt, 1 Chit. 544. It is scarcely necessary to cite cases to show that the United States had no right to pay the marshal's deficit with the defendant's money. Yet it will appear more fully by Bartlett v. Pentland, 10 Barn. & C. 760; Hogg v. Snaith, 1 Taunt. 347; Howard v. Chapman, 4 Car. & P. 508; Scott v. Irving, 1 Barn. & Adol. 605; Vyse v. Clarke, 5 Car. & P. 403. As to the charge of interest, there is no right to make it unless the defendant improperly withheld money belonging to the plaintiffs, which he did not. Arnott v. Redfern, 3 Bing. 353; Du Belloix v. Waterpark, 1 Dowl. & R. 16; Uhland v. Uhland, 17 Serg. & R. 269; Harrington v. Hoggart, 1 Barn. & Adol. 577; Bainbridge v Wilcocks [Case No. 755]. If interest is chargeable against the defendant, it is also chargeable for him on an amount of $34,998.25. It is admitted that the defendant is chargeable with various sums (which Mr. Ingersoll stated at length), amounting in the whole to $13,302.45, as already stated.

J. R. Ingersoll, on the same side.

The defendant was district attorney at a very important period, and was in office for fourteen years. Numerous officers of the government, in various capacities, were relying on the defendant's advice to govern their conduct, and on that alone they acted. Eight years after he left the office, this suit was brought. During all that time no charge had been made that he retained public money, although he had given notice that he did so. He had presented his claims year after year; he had begged for suit, and it was not brought till the officers were fairly goaded into it. The defendant wished to be sued, because he knew that time deprived him of his chances of proof; death or fire might have taken from him every particle of his evidence. He went boldly before a committee of congress; and, when his affairs came to the notice of that body, they saw that the accounting officers had been guilty of great negligence, and so they reported. Thus urged, the plaintiffs set to work to make an account. They had no proofs of his indebtedness at the treasury, and they sent a fishing commission here to search for charges; they go back to the earliest times; to the collectorships of men who were dead before the defendant came to office. At first, they charged the defendant with upwards of $1,900,000. This was so absurd that they had to reduce it; and they now sue for a sum a little over thirty-five thousand dollars.

The plaintiffs' claim rests on four principles, as follows: (1) Claims growing out of alleged official misconduct and neglect on the part of the defendant. (2) A refusal to allow the regular costs due for the official business of the district attorney. (3) A refusal of just compensation for meritorious services rendered by the defendant at the request of government. (4) A refusal of indemnity for the unjust act of their officers in taking away bonds on which the defendant had a just lien for services rendered.

The claims under the first of these principles amount to some $32,000, and are in the

main obliterated by the evidence. The defendant has admitted that he is to account for about $13,000; this he meets by counter claims, similar to those allowed counsel in like cases, and which leave a balance in his favor of over $10,000. If we add to this the claim for a moiety of Thompson's forfeitures, amounting to $12,500, we have a balance in his favor of over $23,000. The earliest receipt of the money now retained by the defendant, was in 1826; before that time these claims had been regularly certified to and presented. The charges against the defendant are not for money proved to have been received—there is no proof of that—but they arise from the alleged negligence of the defendant, and from suits having been wrongfully settled, compromised, or marked satisfied by him. There is no wrong in entering satisfaction unless there is collusion to do so without any actual payment, or authority from the principal. An attorney has no means of proving the directions given him to enter satisfaction, or not to bring suit. It must first be shown that he had instructions and neglected them; we are not at liberty first to presume that he had no instructions for an act, and then make him liable for doing it. To make the defendant liable, there must have been neglect, and there must have been loss. We do not say that there must be exact evidence of these, but there must be some evidence of both.

Look for a moment at the character of the claims which are given to a district attorney for suit; they are almost uniformly desperate. No merchant comes to such a pass as to be unable to meet his bonds given to the United States, unless he is reduced to the greatest difficulty and necessity. All these suits are against insolvent men, and the very fact of insolvency gives to the United States all the debtor's property, to the preference of every other creditor whatever. If, then, a district attorney fails to recover the amounts due, the presumption is (if there is no evidence to contradict it). not that he has neglected to obtain the full amount, but that it was impossible to do so. There must be both gross neglect and loss. Smede's Ex'rs v. Elmendorf, 3 Johns. 185; Gilbert v. Williams, 8 Mass. 57; Dearborn v. Dearborn, 15 Mass. 316; Russel v. Palmer, 2 Wils. 325; Pitt v. Yalden, 4 Burrows, 2061; Huntington v. Rumnill, 3 Day, 390; Eccles v. Stephenson, 3 Bibb, 517; Alexander v. Macauley, 4 Term R. 611. The defendant was in office for nearly fifteen years, the number of suits brought by him were 4087, and, with all the exertions of government to make them more, the number of mistakes alleged against him are surprisingly small.

I now proceed to the defendant's claims.

Taxed costs in civil cases. These are settled by law. They are regularly taxed; and those due to the clerk and marshal, from the same cases, have been paid. They have been refused to the defendant because of the unsettled state of his accounts.

Taxed costs in criminal cases. This charge arises altogether from the neglect of the government officers, for there never was any objection to the claim. The defendant gave a receipt to an agent to enable him to receive the money. The treasury officers took the receipt but refused the payment, applying the amount as a credit to the account of the agent —the marshal. Now in law, this power to receive money did not authorize the agent to surrender the receipt for a mere credit; he had a right to ask for the money, and without it the receipt was not to be resigned. It was given up without payment, but the defendant cannot be made to suffer for this.

Extra official services. Where such services are rendered by a district attorney, he is entitled to a fair compensation. The distribution and compensation of duties do not depend on positive law, but on the discretion of the head of the department for which they are done. U. S. v. Macdaniel, 7 Pet. [32 U. S.] 14. And this usage governs past transactions. U. S. v. Ripley, Id. 18. Wherever services are necessary and unexpected, they are to be compensated according to usage. The compensation must be fair, and the service necessary, or sanctioned by the government. U. S. v. Duval [Case No. 15,015]. And funds in the hands of a party rendering such services may be retained to meet the compensation. U. S. v. Macdaniel, 7 Pet. [32 U. S.] 14. The services rendered by the defendant were meritorious and valuable. They were expressly stated to the comptroller of the treasury as early as the 1st July, 1822, on a request from him that the exact nature of the services should be explained, and were accompanied by certificates from the collectors, &c., to whom they were rendered. In 1816, the defendant wrote to the comptroller to know whether he should perform these services, and how he was to be paid for them. The comptroller told him he was to perform them and retain the compensation out of the moneys in his hands; but when, in 1822, the defendant sends his accounts he receives no answer till the 3d March, 1824, and then he is told they have been received, "and will meet with due consideration." This retaining an account for two years will make the party retaining it liable for its amount. After numerous applications by the defendant, the comptroller writes him, on the 31st August, 1830. "when your claims are acted upon, you shall be advised of the result." The defendant now appeals to the jury to make the settlement which has been evaded by the government. What are extra official services? Official services are defined by law. See Act Sept. 24, 1789, § 35 (1 Story's Laws, 67 [1 Stat. 93]). The attorney in each district is to prosecute crimes against the United States, and all civil actions in which the United States are concerned, except in suits in

the supreme court, and for his compensation is to receive fees taxed. He has, then, nothing to do with business out of court, as advice to government officers, &c. His duties, 1st, must be within the district; 2d, must be the prosecution of crimes against the United States, or, 3d, must be for civil suits in which the United States are concerned. The compensation given by law is that for the suits brought in court, together with the per diem. Suits are paid for out of their proceeds, attendance at court out of the allowance therefor. The legal compensation is adapted to the services positively required by law, and to nothing more. For undefined employment there is an undefined compensation; the only question is, who is to pay it? When a government officer calls on a professional man for advice for the benefit of government, the party benefited must pay for it. People v. Van Wyck, 4 Cow. 260. These services were matter of contract between the defendant and the government. It is in evidence that immediately defendant was appointed district attorney, he entered on extra services; that he announced this to the comptroller, stated what certificates of such services he would send, and what compensation he would ask; and that to this the comptroller agreed. But even if all this was not in evidence the implied contract which would arise from the performance of the services would suit the defendant equally well. The right to retain a just compensation for such services out of funds in the defendant's hands has been clearly recognised. U. S. v. Wilkins, 6 Wheat. [19 U. S.] 135. Now as the defendant had a right to retain this money, surely there is no right to charge him for doing so; no right to impose interest upon him when he kept the money with the plaintiff's consent, and was waiting to settle his account at any moment. The defendant's demand is also sanctioned by what appears to have taken place in every analogous case, according to the evidence given. As to the fee claimed in Toler v. Armstrong [Case No. 14,078], the facts as proved are fully sufficient to justify the demand. The United States succeeded Toler in his suit against Armstrong. They succeeded to the charges incident to the suit as well as to the benefits. One of these charges was for professional compensation, and this charge fairly attends the suit in the hands of the United States.

Now, let us look at the claim of $12,500 for a moiety of Thompson's forfeitures. What has been proved as to this charge? The collector in Delaware made certain seizures, and was entitled thereon to certain forfeitures. He employed the defendant as his counsel, and agreed to allow him a certain proportion of those forfeitures, giving him a bond therefor. The defendant had also certain bonds in his possession, given by parties whose goods had been seized, and out of which he could have obtained the amount agreed to be paid him. These bonds the United States took out of his hands. I agree that they had a right to withdraw the bonds; but, doing so, they took them subject to the defendant's lien thereon, and this lien is now claimed as a set-off. Gallagher's Ex'rs v. Roberts [Case No. 5,194].

Mr. Gilpin, for the United States, in reply.

We will first see what the facts of the case are, and then examine the law applicable to them. The demand of the United States is for a principal amount of $37,891.71, and interest thereon amounting to $38,599.29. It arises from fifty-four sets of items, and is money charged to have been received by Mr. Ingersoll for the plaintiffs, and not paid over, or not collected when he should have collected it. The defendant has admitted the following sums to be due to the United States, subject to his set-off: that is,

Money received on Rodman & Waln's bonds	$ 7,971 14
Accumulation thereon	493 42
Money received in Toler v. Armstrong	3,158 82
Money received on Kinsman's account	1,679 07
	$13,302 45

If there are other sums due, they must be added to this amount. We contend that $4,951.44, principal, and $2,475.66, interest, must be added to the amount chargeable on Rodman & Waln's bonds. The facts, as proved, and on which this claim is rested, are simply these. On the settlement of the bonds in question, the defendant gave them up on the payment of $4,951.44 less than the amount due on them, having, as he alleged, compromised the matter for the amount of $7,971.14, because the bonds were partly invalid, or, at least, of doubtful validity, although he had judgments thereon for the full amount due. He also produced a receipt from the collector for $7,971.14, in full of Rodman & Waln's bonds, but it is in evidence that the receipt was given under a promise by Mr. Ingersoll to correct any mistakes on his part; that the check he gave the collector for that amount was offered to be returned to him on the mistake being discovered; that he refused to receive it; that it was never presented for payment; that the defendant has stopped the payment thereof, and has invested the sum of $7,971.14 in trust for the United States. On these facts, and subject to the opinion of the court on the law, we think that on this item $4,951.44, principal, and $2,475.66, interest, should be added to the $13,302.45 admitted by the defendant.

(The district attorney then urged other items to be added, amounting to $1,310.75, principal, and $1,364.09, interest, and continued.)

The facts of these cases are that the defendant has entered satisfaction, released the liability of debtors to the United States, given up securities, or neglected to bring suits, with-

out authority, and made compromises against his instructions and duty. All this is a clear violation of law. It amounts to the fullest degree of negligence; and he is answerable for it.

1. It would amount to negligence sufficient to charge an attorney in a common suit; and so it should be, for the client submits everything to his attorney. Negligence is doing that which a skilful attorney ought to know he should not do, or leaving that undone which he ought to know he should do. The authorities are uniform, both in England and America, that an attorney is chargeable with a debt he is authorized to collect, if he acts in such a manner as to release the debtor. Russell v. Palmer, 2 Wils. 325; Pitt v. Yalden, 4 Burrows, 2061; Field v. Gibbs [Case No. 4,766]; Gable v. Hain, 1 Pen. & W. 264–267; Floyd v. Day, 3 Mass. 403; Gilbert v. Williams, 8 Mass. 57; Dearborn v. Dearborn, 15 Mass. 316; Williams v. Reed [Case No. 17,733]; Huntington v. Rumnill, 3 Day, 390; Smede's Ex'rs v. Elmendorf, 3 Johns. 185; Kellogg v. Gilbert, 10 Johns. 220; White v. Skinner, 13 Johns. 307; Haynes v. Wright, 4 Hayw. [Tenn.] 65; Eccles v. Stephenson, 3 Bibb, 517; Crooker v. Hutchinson, 1 Vt. 73; Paley, Prin. Ag. 4, 220.

2. In case of a public agent the rule is much more imperative. Much is left to private attorneys, and the law will infer an authority because the principal may compromise. But no officer of the United States has any right to compromise a debt due to them. This is the settled law, and nothing can be shown to the contrary. The treasury never compromises; time is sometimes granted, but relinquishment never.

3. It is not necessary for the plaintiffs to establish any loss. (It is, however, apparent and actual here.) The defendant's plea of payment admits the receipt, and throws the negativing of loss on him. The United States have a right to rely on this plea as an acknowledgment of the receipt, and as proof of their demand; and, till the contrary be shown, the defendant has no right to call upon us to prove loss. In fact and in law, then, these sums are chargeable to defendant, in addition to what he has acknowledged to be due. The next amount which, we think, subject to the opinion of the court, is to be added to the defendant's indebtedness, is $3,687.79, principal, and $4,601.02, interest. This charge arises from various sums collected by the marshal in suits which that officer marked "Settled," thereby discharging the parties. The defendant was the principal law-officer of the United States; he should have examined all these cases, and have had the money paid into court. The duty of an attorney does not end with the judgment.

(The district attorney then adverted to an item of $5,149.40, principal, and $5,409.64, interest, for suits in which the parties were discharged, for insolvency, by order of the treasury; and one of $14,323.01, principal, and $13,456.10, interest, on suits said by the defendant to be erroneously referred to by the accounting officers. These items, however, he urged very slightly, admitting in both cases that, if the evidence was to be believed, the defendant was not chargeable.)

The total amount, then, which the plaintiffs have offered evidence to charge the defendant with, is $29,422.39, principal, and $27,306.51, interest; and, adding to this principal the sum of $13,302.45, we have the full amount claimed, viz., $42,724.84, and interest.

As to the claim of interest, the defendant is certainly chargeable with it on those sums which are due because of his errors, neglect, &c., it will be damages for his default of duty. Thus then the United States is entitled to a verdict for, at least, $19,564.64, and interest, perhaps for $42,724.84, and interest, unless the defendant can show claims of his own to an equal amount. Has he done so? The first item he claims is $1,740.05 for taxed costs in revenue cases, not yet paid. If these costs have been proved to be taxed, which is for the jury to decide, they are a fair set-off. So of the second item of $5,083.20, for taxed costs in criminal cases. To the four claims of $1,000 each, arising from the militia cases, Amelia Island Cases, Toler v. Armstrong, and Conard's Cases, it is answered that no authority from any competent person has been shown, under which the defendant acted; and we shall see presently how impossible it is to admit that the United States shall be liable for professional services rendered at the request of subordinate officers. The next item claimed is for extra official services from March, 1815, to March, 1829, and amounting to $11,675. This claim is most important and unprecedented, and will require consideration at some length. It is not supported by the proper vouchers; but, if it were, it is altogether unlawful, and the defendant has no right to it. Contract, usage, and authority have been relied on as sustaining the charge, but neither of them exists. There never was any ground to suppose that a contract existed, unless indeed it is contended that a contract can arise from continual claim, which is, at least, a novelty.

There is no usage any more than there is a contract. No evidence of usage whatever has been given. There are now fifty district attorneys performing exactly the same services; since the claim was made there have probably been two hundred; all these claims, if usual, must have been presented at the treasury. Yet the defendant has not shown one instance of the kind. Indeed, the only evidence produced by the defendant to prove the usage in fact proves the opposite. There is no authority for such an allowance. It has not been contended that any direct authority exists, but that a similar principle has been recognised in four cases, viz., U. S. v. Wilkins, U. S. v. Macdaniel, U. S. v. Ripley, and U. S.

v. Duval [supra]. What is the point to be established? "That an attorney of the United States gives professional advice to a subordinate officer of the government, to aid him in performing his duty, without the instructions or assent of a head of department, is entitled to an annual sum to be charged on a general account, and paid by the government." Does U. S. v. Wilkins, 6 Wheat. [19 U. S.] 135, sustain this? Wilkins contracted with the secretary of war to furnish provisions, without fixing a price; he furnished them, and the secretary refused to pay as much as he asked. The court decided that Wilkins was entitled to a reasonable compensation, which a jury might fix. This does not approach the principle to be decided. Does U. S. v. Macdaniel, 7 Pet. [32 U. S.] 1, 14, meet the case? Macdaniel was a clerk in the navy department, and received his salary there. He was expressly appointed to perform two distinct and additional services for the secretary of the navy—to pay pensions, and discharge navy agent's duties. He was expressly and previously allowed a fixed and certain commission on moneys distributed for these services; he received it for twelve years regularly; in 1829 it was refused, and the court said that usage gave him a right until he received notice of change. There is nothing to support the defendant's claim. U. S. v. Ripley, Id. 18, instead of being authority for the allowance, expressly decides that, when the services are extra official, they must be performed to the government, with the sanction of a head of department, or in a peculiar emergency. In U. S. v. Duval [Case No. 15,015], it is laid down that a usage must be so settled as necessarily to make part of the contract, and allowances are confined to cases acted on by a head of department. Neither of these was the case here. These are all the cases, and they do not meet the present one either in principle, fact, or analogy. There is, therefore, neither contract, usage, nor authority to sanction the defendant's claim. Neither is it just in itself; it is a service rendered by one subordinate officer to another, according to their own agreement. What right have they to bind the government? To what combinations might it not lead? What right has an officer receiving a large salary to ask the government to pay his counsel fees? State officers, sheriffs, &c., make no such claim. The law meant to provide certain emoluments for district attorneys; these emoluments may be inadequate, but the legislature have thought otherwise. Perhaps the law should be different, but still it is the law.

Another item of the defendant's set-off is for $12,500, being a moiety of E. Thompson's forfeitures; bonds thereon having been given to the defendant by Mr. Thompson, and taken from him by the United States. The facts of this matter, as they are in evidence, should totally destroy the extraordinary claim which has been made. The collector in Delaware engaged Mr. Ingersoll as his private counsel, the government knowing nothing of the transaction. The defendant sued Thompson here, and, without authority, took bonds for large sums due to the collector. When this matter became known to the government, the comptroller expressed his surprise, and demanded the bonds; they belonged to the United States, were for duties and penalties due in another district. The defendant at once relinquished the bonds. The United States directed their own officer to collect the bonds; the defendant permitted Thompson to pay over the money without interposing a word; allows the United States to receive it without ever knowing of this claim; and eleven years afterwards he requires them to pay him a fee which he says the collector had agreed to pay him for his private services, which fee the collector denies to be due, and is now being sued for. A case has been cited to sustain this claim: Gallagher's Ex'rs v. Roberts [Case No. 5,194]. But there the damages were ascertained; they were on a protested bill. Owing, however, to a rule of law (being damages), they could not be set off. Judge Washington said that they might be set off in equity. Is there any analogy? Here the whole claim is denied by the collector,—much more by the United States; and nobody knows whether it is good or bad.

Now, the utmost of all these claims which can be allowed are

Taxed costs in revenue cases.....	$1,740 05
Taxed costs in criminal cases.....	5,083 20
Fee in Toler v. Armstrong.....	1,000 00
Fee in Conard's case.....	1,000 00
	$8,823 25

This sum deducted from $19,564.64, which, we have seen, is the least sum the defendant owes, leaves due to the United States $10,741.39, and interest; or even if deducted from the sum which the defendant himself admitted to be chargeable against him, leaves a balance of $4,479.20, and interest, due to the United States.

HOPKINSON, District Judge (charging jury). The claims of the plaintiffs were arranged or classed under four heads:—

1. Custom-house bonds put in suit during the collectorship of Delany and Latimer, and remaining unpaid and unaccounted for to the treasury of the United States.....	$ 37,992 22
2. Bonds put in suit during the period in which Mr. Dallas was district attorney, and remaining unpaid and unaccounted for	128,319 63
3. Bonds put in suit while the defendant, Mr. Ingersoll, was district attorney	2,616,468 37
4. A debt recovered from Toler v. Armstrong, and received by the defendant.....	3,158 82
The total amount of these charges is	$2,785,939 04

The credits or deductions that have been allowed to the defendant at the treasury are as follows:

1. The whole of the first of the above items of claim, which may, therefore, be expunged from the account		$37,992 22
2. On the second of the above items of claim, he is allowed, for bonds not received by him	$ 82,536 15	
On this item he is also credited with the amount of bonds collected by him and paid into the treasury, being	43,481 93	
	$126,018 08	
Leaving a balance against him on this item of		$ 2,301 55
3. On the third of the above items of claim, that is, bonds received by him from the custom-house for collection while he was district attorney, he is credited as follows:		
I. Bonds on which he received no money	$1,668,077 83	
II. Payments which were made by him	822,556 39	
III. Payments made by his successors	93,402 76	
Making his whole credit on this item	$2,584,037 03	
Leaving a balance against him on this item of		32,431 34
4. To these is to be added the amount received by him from Toler v. Armstrong		3,158 82
		$37,891 71

The balance, or principal sum, then, which is now claimed from the defendant, is thus made up:

Balance due on Mr. Dallas' bonds	$ 2,301 55
Balance due on defendant's own bonds	32,431 34
Amount received in Toler v. Armstrong	3,158 82
	$37,891 71

The residue of the claim of the United States is made up of interest, calculated on each bond from the time it was put in suit to the 15th December, 1836, making the total amount claimed $76,491.00, with interest from the 15th December last.

You will understand that the ground of prima facie charge, or charge in the first instance, against the defendant is not that he has actually received the money or the bonds claimed from him, or that they have been lost by any misconduct or neglect on his part, but simply that if it appears, by the records of the suits, that the party against whom they were brought has in any manner been discharged of the debt, either before or after judgment, by a discontinuance of the suit, or by an entry that the demand has been "settled," it is then thrown upon the defendant, under whose direction the suits were placed, to show how they were settled, to show why the defendants were discharged from the claim, or to show that it was not by the payment of the debt to him, or in any other manner, to make him legally or equitably liable to the United States for it.

As a principle running through the whole case, I will here say to you that the discharge of a debtor, before or after judgment, is not of itself a ground of charge upon the defendant. He is liable for the money actually received by him, or which has been lost through his unwarrantable neglect; but he is not answerable for the defaults, inattention, or frauds of the marshal. He also is an officer of the United States; they take from him surety at their pleasure for the faithful performance of his duties; and the district attorney is not officially the surety of the marshal. The principle, however, is to be taken with the qualification that the loss arising from the marshal may not be traced to the official negligence of the district attorney.

(The judge then recapitulated the facts appertaining to each of the items of the plaintiffs' account, as they appeared from the evidence; and continued, as follows:)

We now come to the consideration of the most important and interesting part of the case; that is, the claim made by the defendant upon the United States by way of set-off. So far as they depend upon questions of law, they involve principles of vital importance; and I shall feel it to be my duty to speak of them in the most explicit manner, not only to prevent any misunderstanding on your part, but to give the party affected by my opinions an opportunity to have them reversed and corrected if I am mistaken.

The first is a claim or charge of seventeen hundred and forty dollars for fees taxed, allowed, and credited, but unpaid. No reason has been shown to me, either by any of the treasury documents, or by any evidence or argument offered at this trial, why this money should not be all paid to the defendant. They are legal fees to which he is entitled by act of congress. It is objected, and I remember no other objection, that they require the allowance of the judge. That is nothing but the evidence of the claim or right to be given to the treasury. But we are not confined to this evidence: at any rate, that allowance may now be given, either in the form it is now given by me, or by a certificate on the account.

Second, a claim of five thousand and eighty-three dollars and twenty cents, for fees taxed and allowed, but applied by the treasury to the payment of a debt due to the government by Marshal Conard. I can see no difficulty in this item of charge. The marshal was the officer who received from the treasury, not only his own fees but those of the district attorney and clerk. In the account he presented to be settled with the treasury, he charged these fees, which he was to pay over to them when received from the government, and was not bound to make advances to them. Conard goes to the treasury to settle his account; in it there was a charge against the government, of a certain sum which included the fees due to the clerk and district attorney. Two objections were made to the allowance of this credit claimed

by the marshal: 1st, that the fees of the clerk of the district and district attorney were not receipted; 2d, that it was undecided whether they should be paid by the treasury or the collector of the customs. In other words, the treasury required vouchers to support these claims made by the marshal. These vouchers were some account or receipt from those officers. In answer to this, all the officers put in Mr. Conard's hands the receipts in question, known to be for the mere purpose of enabling Mr. Conard to receive from the treasury the money due to them; and if, on these receipts, the treasury had paid the money to Conard, it is certain these officers would have been obliged to look to him for it. But the account with Conard was settled, and he would have been largely a debtor to the United States had they not allowed him a credit for these fees due to the clerk and district attorney; that is, had they not applied their money to pay his debt. If they supposed, which is hardly credible, that Conard had actually paid them this money, it was a mistake; but, at any rate, there was a misapplication of this money to Conard's account which ought to be corrected. Conard had authority to receive their money, but not to pass it in a credit to himself in his account. As the clerk had no other means of obtaining a return of this money, he applied to congress, who have honestly corrected the error.

We now come to a class of charges to which I request your serious attention; as, in my opinion, they depend upon principles of the highest importance. I shall not hesitate to give you my opinion upon them in clear and decided language, that you may understand my views of them, and the parties have the benefit of an exception to them if they shall think them erroneous. They shall be submitted to you under such instructions as I shall deem it my duty to give. They consist of charges or claims upon the United States for: (1) Counsel fees in the militia cases; (2) counsel fees in the Amelia Island cases; (3) attorney's fees for extra official services; consisting of advice, and, perhaps, other services rendered through the course of fourteen years, to various officers of the government, such as those of the custom-house, of the direct taxes, and of the naval and military establishments. These last claims amount to $11,675.

The first feature is, that these services form no part of the official duty of the district attorney. They are, indeed, claimed because they did not; and that they were performed by him simply as a professional man; and that the persons employing him had it at their option to go to any other lawyer in the same manner, for the same purposes, and in the same rights. The contract of Mr. Ingersoll, whatever it was, express or implied, for more or less, was a personal individual contract between him and the officers who employed him, and he was bound to take care that they had authority to contract with him. This question then is presented for decision in this case: Whether the subordinate officers or agents of the government employed in the custom-houses, or the collectors of taxes, or in the army and navy, amounting to hundreds and thousands, all and every one of them, have in themselves and by virtue of their offices, without any act of congress, any authority from any department of the government, to make contracts with whom they please, binding on the United States? This is a most startling question, and if the law of the United States sustains this right, I will venture to say that no other law of any other government ever has done so, and that no government can live under it.

The ground of these charges is, that a custom-house officer, from time to time during the period mentioned; that the collector of taxes; that the marshal of the district; that certain naval and military officers—marines or recruiting sergeants—came to the defendant, not as the attorney of the government, not as the officer of the government, but as their attorney, selected by them; and engaged him in service on such terms as they chose, expressly or by implication, to make with him; and this contract is a contract made for the United States, which they are bound to perform and fulfil. Under such contracts, made by such officers, some $14,000 or $15,000, are charged upon the United States.

But let us turn from the circumstances of this case; from the services which I doubt not were meritorious; from the charges which may be just and reasonable; for these are utterly insignificant—a mere bauble, compared with the principle by which they are sustained. If these officers may make contracts with a lawyer binding on the United States, why not with anybody else, and for any other purpose they may imagine to be connected with the public service? We do not know that many of these cases of service and advice may not have been strictly personal, for which the officer was himself only liable. But I put this out of the question. No law of the land, no usage, no precedent, no authority of any sort or kind, has been shown to support such an authority to such officers. Are we now to make the law for the first time in nearly fifty years? What should be the regular course in such cases? The collector of the customs wants advice in a certain difficulty; let him, if there is time, consult the department; if there is not time, let him go to any counsel he pleases; let it be an affair between him and his counsel; let him make the contract for the service and pay it; and then, in his account with the government, he may charge it to contingent expenses. The officers of the treasury will examine it, and allow it, if it be such a service as they ought to pay for. He is a debtor of his lawyer, and the government is his debtor. But can he raise up a

creditor of the government without their knowledge or consent, unless he is authorized to do so by some act of congress, or by some official usage authorizing him to do so? In the cases where counsel fees are charged, as the militia cases, or a contract made by Marshal Smith (a defaulter and insolvent), there was no hurry, no emergency, requiring immediate action, so that the department could not be consulted. On the contrary, in all these cases the government had their counsel and paid their counsel, and the defendant was not the counsel they employed, but the counsel of the marshal, who had a large personal interest in the suits, and could afford to have his counsel; but in neither case was there any authority from the government to employ him.

As to the charge of $1,000, for services performed in the Amelia Island cases, in the district of Delaware, it stands upon a different footing from the militia cases. The services rendered by Mr. Ingersoll in Delaware, appear to have been performed by the direction, or at least with the approbation of the secretary of the treasury. In relation to these services the comptroller writes that he has had conversations with the secretary, and they had determined to allow eight hundred dollars for the several cases in the district of Delaware; but it appears that antecedent to this Mr. Ingersoll had settled with the collector of Delaware and paid him the moiety of the forfeiture belonging to the United States in the case of the Good Friends, and the collector had allowed Mr. Ingersoll one thousand dollars as his professional compensation from the United States. This the collector had no right to do. It was a transaction between him and Mr. Ingersoll, and was probably not known to the treasury when the comptroller wrote his letters, as no remark is made about it. The treasury, however, acquiesced in this addition of two hundred dollars to the sum they thought sufficient for the services rendered them, and supposed, it is presumed, the whole affair was settled. Mr. Ingersoll now alleges that the one thousand dollars received from the collector, was only for his services in the case of the Good Friends, and asks a further sum of one thousand dollars for Thompson's cases. He relies upon the receipt given by the collector to him to prove this. The receipt is not explicit. The one thousand dollars are said to be a compensation "for his professional services from the United States." It may refer to all his professional services, or it may be confined to the case then settled. But this receipt was a separate paper between Mr. Ingersoll and the collector. It has no binding power on the United States. It is to be recollected that in the comptroller's letter to Mr. Ingersoll, he is informed that the treasury had determined to allow him eight hundred dollars for all these cases. We have, as far as I recollect, no reply from Mr. Ingersoll to these letters, from which we may infer that he acquiesced in this determination, with the addition of the two hundred dollars he had received; if there was this acquiescence, there is no foundation for the claim. He should have said at once, that so far from receiving eight hundred dollars as a full compensation for all the cases, he had already charged one thousand dollars for one of them, and expected another thousand for the rest. If you should not think that there was this silence and acquiescence, still if you think the one thousand dollars paid was adequate under all the circumstances (in which you may fairly take into your consideration his receipt in the same cases from the collector), you will not allow this item of $1,000.

In support of these claims, the letters of President Monroe, and Mr. Dallas, the secretary of the treasury, have been referred to. It is said the former has sanctioned the charge of counsel fees in the cases mentioned. Let us see if he has. I would premise that although the president has a right to employ any particular person on any particular service for the government, and to direct him to be paid for it; yet giving his opinion on a past case for past services, not performed under his direction and authority, but being in the nature of an opinion on a question of law, that opinion is of no authority here. I speak of authority. It will be respected, but it makes no law, nor does that of the secretary of the treasury. But what has the president said on this occasion? Mr. Ingersoll, for whom the president had a strong personal attachment, wrote to the president, stated his case, and urged his claim. What was the answer of the president? A most safe and prudent one. He sent Mr. Ingersoll's communication to the comptroller, who is the law officer of the treasury, and writes to know "if the district attorney of Pennsylvania has been called to render professional services to the United States, out of the state, and out of the line of the practice in that state?" I pay no regard to the verbal criticism of whether "and" means "or"—that is not the important part of this letter. But what follows? "And that if the call was made upon him by either of the executive departments, it forms a just claim to a reasonable compensation." This is exactly in conformity with the opinion of the supreme court, delivered several years after. But does it say, if the call was made upon him by a collector of customs in a different or the same state, or by a marshal, or a collector of taxes, at whose instance the service in question was rendered, that the counsel fees are allowable? No such thing, and the law officer, on this letter (if it were an authority) could not allow them.

In relation to these counsel fees, a usage has been attempted to be made out. That is Mr. Wirt's case. It is enough to say his services were performed by direction of the

president, at an arranged amount of compensation. As regards these fees, there is no act of congress; there is no order or authority from any of the executive departments; there is no usage; nay, there is no like instance from the beginning of the government to this day, nearly fifty years.

As to the item of advice, &c., to collectors, and naval and military officers, an attempt has been made to give it support by the sanction of Mr. Dallas, then secretary of the treasury, and, before that time, district attorney. The account was presented by defendant to the comptroller, and by him referred to Mr. Dallas, because of his knowledge and experience on the subject. What is Mr. Dallas's reply? "There are many services performed by the district attorney for which compensation is not provided by the acts of congress, nor by the state fee bill. The inequality and injustice of his compensation, compared with the compensation of attorneys of other districts, are correctly stated in Mr. Ingersoll's letter." This applies to the fee bill at New York, not to such charges as these. "If any law or precedent will authorize the settlement of Mr. Ingersoll's account, I think it ought to be allowed and paid." But as there was no law or precedent found for it, it was not allowed by the comptroller. As the letter from the comptroller to the defendant has also been relied upon to support these charges, it is proper to advert to it. It is dated on the 18th July, 1815, and in reply to one received by him from the defendant. After saying that he will refer the question of the fees to Mr. Dallas, he adds: "The manner in which you propose to keep and settle your accounts, and to receive the moneys which may be due to you for your official services, will be perfectly agreeable to me." In Mr. Ingersoll's letter, he had proposed to keep and render his account for these services, and says, "Instead of presenting separate accounts to each department, it would be more agreeable to me to state one entire account of the whole, and to present it to the comptroller for examination and settlement." To this manner of keeping and settling the account the comptroller has no objection. Mr. Ingersoll proceeds: "Should this mode of stating the account be approved, the mode of payment might in like manner be arranged so as to admit of the deduction of the whole sum due out of any fund paid into my hands." To this mode of paying what shall be due the comptroller also agrees; but as to the charges in question, he refers them to Mr. Dallas, and we have seen what he has said about them.

As to precedent or usage on this item: 1st. Mr. Dallas, the secretary of the treasury, who had been for many years district attorney, and in the stirring times of the embargo, &c., knew of none, or he would not have referred the question to the comptroller. Yet, doubtless. he rendered the same services, and probably in at least an equal number of cases. 2d. Mr. Dallas, the younger, says he rendered similar services, and never made any charge for them. 3d. Of all the district attorneys of the United States (probably not less than forty), no account or precedent has been produced of such claims allowed or made. Their accounts are placed in the treasury; some are, indeed, dead, but their accounts are there; and many are still living. The comptroller who settled the accounts of all the district attorneys knew of no claim like this. I do not inquire into the equity of these charges, nor how much of this service was performed by the defendant; we must have a lawful authority for them. The principle is this: if he had an application a day, and another district attorney but one a week, the right is the same.

I leave this part of the case, however, upon the argument on both sides; we must look to higher grounds to stand on. The question with us is not what were those services, or how reasonable are the charges, but, is the government answerable for them? Had the persons who made the contract for the services a right to bind the United States to pay for them? Are we now to make a new rule for this district, which is found in no other, and never has been in this or any other? Will the other districts follow us in the innovation? or are there to be as many rules for settling district attorneys' accounts as there are districts? Will the treasury officers of the United States settle such accounts in such various ways? It has been well put by the district attorney, whether two subordinate officers of the government can sit down together and make contracts with each other binding on the United States. Enormous would be the extent of the power; there are thousands of such officers all over the United States. The more or less of the service done is nothing; it is the principle, the power, which is the thing to be looked at. It has been argued by the defendant that, if there was no law for these charges at the time Mr. Dallas wrote his instructions to the comptroller, it has since been found by the supreme court, and cases have been referred to. These I shall briefly notice. The first is U. S. v. Macdaniel, 7 Pet. [32 U. S.] 14. Macdaniel was a salaried officer, a clerk in the navy department. The services for which he claimed compensation beyond his salary were no part of his duty for which the salary was paid; but they were required of him by the head of the department in which he was subordinate as a clerk, and he had no discretion to decline the labor imposed upon him. This is clearly within the principle of Mr. Monroe's letter. The service was required by the head of the department; it was no part of his duty under his salary, and formed a clear claim to compensation. The next is U. S. v. Ripley, Id. 18. Without recapitulating the details of the case, the extra claims were for planning

fortifications and disbursing moneys; but the principle laid down by the court was that equitable allowances should be made for extra services performed by an officer, which did not come within his official duty, and which he performed under the sanction of the government, or under circumstances of peculiar emergency; and this must be shown on his part. Now, we can understand how a military commander at a distance from the seat of government, or an Indian agent, as in Duval's case, may be called upon to disburse moneys or perform services indispensable to the public service, on the moment, and without the possibility of obtaining the sanction of the government; but whenever that sanction can be had, it must be obtained, else the officer acts at his peril. Now, whatever emergency there may have been in the case of any particular application to Mr. Ingersoll by a custom-house collector, or by a military or naval commander, yet at any time he might know, in a few days, whether the government would sanction such charges or no. Indeed, he made the application, and received no sanction. If the government was silent, Mr. Ingersoll should have suspended these services until he had their sanction. The next case is U. S. v. Fillebrown, Id. 28. There the defendant, Fillebrown, was secretary to the commissioners of the hospital fund, at a fixed salary. He claimed compensation for extra services in bringing up the records of the board, antecedent to his appointment, and also for disbursing moneys under the order of the board. It was, in the first place, held by the court that his having a salary did not exclude him from charging for these disbursements; that it was not necessary the board of commissioners should have passed a resolution for the payment of the commissions claimed by the defendant for making the disbursements, nor that the board should have sanctioned his claim for them. But it further appeared to the court that the secretary of the navy considered the agency of the defendant, in relation to this fund, as entirely distinct from his duty as secretary of the board, and that he was to have extra compensation for it,—that is, for that agency; and it also appeared that all this received the direct sanction of the commissioners. The secretary of the navy was the acting commissioner, and had authority for doing what he did. It was, therefore, says the court, "an express contract entered into between the board, or its agent, and the defendant, and that the board could not, after the service had been performed, rescind the contract, and withhold from the defendant the stipulated compensation." This was simply the case of the same individual holding two distinct appointments, with a stipulated compensation for each, and, of course, he was entitled to both. U. S. v. Duval [supra], decided in this court, was simply a recognition of the principles established in the foregoing decisions of the supreme court.

The charges, then, which are made by the defendant, as a set-off against the United States on account of extra official services rendered to them or their officers, cannot be admitted, unless they are good and valid debts owing by the United States to the defendant; and they are not such debts,—unless the various persons by whom they were contracted might, at their discretion, and by their own authority, make contracts binding on the United States. This cannot be. It is my clear opinion that all the charges made in this case, by way of set-off against the United States, for what are called extra official services, rendered by the defendant to certain subordinate officers of the government, and on their application and request,—such as collectors and other officers of the customs, in this or any other district, collectors of taxes, the marshal of the district, and military or naval officers,—which are not provided for by any act of congress, and were not performed on the call or requisition of either of the executive departments, and have not been sanctioned by them, or either of them, and which have not been sanctioned by a usage so certain, uniform, and notorious, as to be understood and known to both parties, so as, in effect, to be taken as part of their contract, should not be allowed to the defendant as a credit or charge against the United States. I think that they should not have been allowed (as they were not) by the president, or the head of any department; and they are submitted to you, with these instructions as to the law. The seventh and eighth items of the defendant's set-off, as stated in the treasury transcript, are for "counsel fees in the suits of Nicholl v. Conard, and of Atlantic Ins. Co. v. Conard [Case No. 627]." The services were rendered; and our first inquiry is, whether he was employed in them by a competent authority. I think this is sufficiently shown. On the 27th November, 1828, Mr. Ingersoll wrote to the secretary of the treasury, giving him an account of the trial and termination of the suit of Nicholl v. Conard, and of the part he had taken in it. At the same time, he presented his charge of seven hundred and fifty dollars for his fees in that case, and a further charge of two hundred and fifty dollars for retaining fees in the insurance companies' suit, to which suits he says he appeared, according to the instructions of the secretary. On the 1st January following, the secretary writes to Mr. Ingersoll. He makes no objection to the charge in Nicholl's suit, on the ground that Mr. Ingersoll was not employed by the United States, nor on any other ground; nor does he deny that he had instructed Mr. Ingersoll to appear in the other suits. On the contrary, he says: "By direction of the president, I have to request you will take part, on behalf of the United States, in the argu-

ment of Atlantic Ins. Co. v. Conard [supra]." It appears to me that he acquiesces both in the authority for the services, and the amount of the charges for them.

There remain for my observation only the claims made by the defendant for his services in the suit of Toler v. Armstrong (vide 11 Wheat. [24 U. S.] 258), and for one-half of the moiety of certain forfeitures, of which he alleges he was deprived by the wrongful interference and acts of the treasury officers of the United States. As to Toler v. Armstrong [supra], I understand it to be, that a suit was brought in the circuit court of this district by Toler against Armstrong; Mr. Chauncey being the attorney and counsel of the plaintiff. Before it was terminated, the United States became entitled to the sum claimed by the plaintiff, by virtue of an assignment made to them. The original plaintiff, the client of Mr. Chauncey, having no longer any interest in the suit, turned it over to Mr. Ingersoll, as the attorney of the United States. Mr. Ingersoll took charge of it, conducted and argued it as the sole counsel of the United States, both here and in the supreme court at Washington, and finally succeeded in recovering and receiving the sum of $3,158.-82. From this amount he deducts one thousand dollars as his professional fee, and is ready to pay over the balance to the United States. I confess that there is no item in any of the accounts of the parties to this suit which has embarrassed me so much as this. I have turned it again and again in my mind, to reconcile what appeared to me to be the equity of the claim with the higher obligations of the declared law of the land.

It has been made a question in the argument of the defendant, whether, in performing this service, he should be considered as acting for the United States, or for Toler, the party and plaintiff on record to the suit. I cannot consider him as acting as the attorney of Toler; he had no authority from, or intercourse with him, nor did Mr. Chauncey surrender the action to him in that character, but clearly as the attorney of the United States. Toler had no longer any interest or lot in the suit or claim, and it was because he had not that his counsel abandoned it, and it was put into the hands of the attorney of the party who had succeeded to Toler's rights, and for whose benefit the suit was therefore prosecuted. I must consider Mr. Ingersoll as acting as the attorney of the United States in the prosecution of that action. How does his claim for compensation stand in this view of the service? The act of congress of the 24th September, 1789 (1 Story's Laws, p. 67, § 35 [1 Stat. 93]), enacts that "there shall be appointed in each district, a meet person, learned in the law, to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office, whose duty it shall be to prosecute in such district, all delinquents for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the supreme court (which then was held in this city), in the district in which that court shall be holden," and "he shall receive, as a compensation for his services, such fees as shall be taxed therefor, in the respective courts before which the suits or prosecution shall be." Now, it is very clear, and has always been so understood, that for all the duties and services imposed upon and performed by a district attorney under the directions of this act, his fees, taxed as aforesaid, are the only compensation he can claim from the United States. Our question, then, is reduced to the inquiry whether the services performed by the defendant in the case of Toler v. Armstrong are such as are described and intended by the act of congress? The words are: "All civil actions in which the United States shall be concerned." They are sufficiently comprehensive in their literal sense to include this case; but yet I have very serious doubts if they were ever intended to be so applied. They, indeed, had an interest in the money to be recovered in this action, and they were so far concerned in it; but they were not concerned as a party to the subject of controversy, directly or indirectly. If the money should be recovered, it would be theirs; if the plaintiff should fail, the judgment for the defendant would have no operation upon the United States in any way, or for any purpose. Their interest—their concern in this action—was accidental, collateral, contingent. The court in which the suit was prosecuted knew nothing of the United States as a party concerned in it. These considerations, and others of a similar character, have raised an unquieted doubt in my mind whether the defendant should be excluded from a reasonable compensation for this service; but I think his claim may be put upon a more certain ground. I would not say that this was an extra official service, but rather an official service, or service performed for the United States directly (not by implication, in the person of a subordinate officer), for which no compensation is provided by law, and for which the executive or a head of department might and should allow compensation. It will be remembered that the act I have referred to expressly excepts from the duties of the district attorney (for which the compensation is provided by that act), civil actions before the supreme court; and this was the case when the supreme court sat in this city, at the door of the district attorney. It was no part of his duty, even then, to argue the cause of the United States in that court. If we then should lay out of this case all that was done by the defendant in the circuit court of this district, we find him following the case to Washington, and there arguing it alone (as appears by the report), against Mr. Webster and Mr. Wheaton; he succeeded, and the treasury of the United States is so much enriched by his la-

bors. But was this a mere volunteer service, for which he can raise no claim for compensation? By no means. The United States accepted the service; they relied upon it alone, they had no other counsel, and this is enough to raise a contract for compensation for the service. It is entirely different from the cases in which the defendant entered into the service on the application, and as the counsel of other persons, although they were officers of the government. In these cases the United States neither originally required, nor ever accepted the service, as rendered for them, or by the requisition or sanction of any of the heads of department.

The last item of set-off, or charge against the United States which it is necessary to call your attention to, is that stated as the tenth item in the treasury transcript. It is a claim for twelve thousand five hundred dollars for a moiety of the fines and forfeitures received from E. Thompson and others, for which a bond had been given to the collector of Delaware, which bond was in the hands of the defendant, and was taken out of his hands by the comptroller of the treasury. The defendant alleges that he was thereby prevented from getting into his hands the money due on it, and from retaining out of it the one-half the moiety belonging to the collector, according to an agreement between him and that officer.

The transactions upon which this claim is founded are very clear and intelligible. Certain vessels had been seized in the district of Delaware, by the collector, for a violation of the laws of the United States, and prosecutions for the fines and forfeitures incurred, were instituted against them in that district; of course the district attorney of this district had, officially, nothing to do with these proceedings. But the collector of Delaware, having himself a large interest in these forfeitures, thought it expedient to come to Philadelphia and engage Mr. Ingersoll as his counsel, as he might have done any other gentleman of the law here or elsewhere. He made an agreement with Mr. Ingersoll, which was purely personal on both sides, by which he bound himself to divide with Mr. Ingersoll the moiety of these forfeitures, which would belong to him in the event of a recovery in the prosecutions. After this agreement was made, Mr. Ingersoll negotiated a compromise of the suits with the owners of the vessels and cargoes; one of which belonged to S. Girard, and two others to E. Thompson and others. From Mr. Girard Mr. Ingersoll received the sum of $53,245.10, one-half part of which belonged to the United States, and the other half to the collector and his counsel, with whom he had agreed to share it. A compromise was also effected with the owners of the other vessels and cargoes; but, they being unable to pay down the money as Mr. Girard had done, Mr. Ingersoll took their bond for the amount. With this the treasury officers were highly dissatisfied, and denied the authority of Mr. Ingersoll to do it. This bond, given by Mr. Thompson, was left by the collector in the hands of Mr. Ingersoll; some time after, but before the bond was paid, Mr. Ingersoll received a letter from the comptroller, in reply to a letter from Mr. Ingersoll which we have not; in this the comptroller says he has had a conversation with the secretary of the treasury, and continues: "We are of opinion that the bonds ought to be transmitted to the treasury. You will, therefore, send them to this department." Mr. Ingersoll immediately transmitted the bonds to the comptroller, making no objection of any kind, claiming no right in them, nor giving any intimation of his interest in them under his agreement with the collector, or in any other way. The bonds were afterwards, by the collector, put into the hands of Mr. Duane, and the whole amount recovered and paid to the collector. The amount recovered was finally divided between the United States and the collector; the United States having received not a dollar more than their own money; and the collector having in his hands his own part as well as that which is claimed by Mr. Ingersoll. The ground of this charge then against the United States is, not that they have received and held the money belonging to the defendant, but it rested on the allegation that an officer of the United States wrongfully dispossessed the defendant of the bonds; that, if he had not done so, the defendant would have recovered the money, and not Mr. Duane, and thus have been enabled to retain from the collector the share due to himself. Supposing that the United States would be answerable to him, in this suit, for a tortious act, a wrong done by one of their accounting officers; where was the wrong here? The bond was given to a collector of the United States; as such he was a trustee for the United States, at least for one-half of the amount secured by it. The direction to send it to the treasury was, as I understand, with the approbation of the collector, the other party interested in it; at least, we have heard of no objection on his part. Where then was the wrong on the part of the treasury officer? He knew nothing of Mr. Ingersoll's claim or interest; he had no notice of his right; no violence was used to obtain possession of these bonds, no menace, hardly an order. The comptroller states the opinion of the secretary and himself, and thereupon says to Mr. Ingersoll: "You will, therefore, send them to this department." It was done; and it was not until many years afterwards, that the treasury knew of Mr. Ingersoll's claim, or the agreement by which he supports it. The money claimed by Mr. Ingersoll is in the hands of the collector, whom he has sued for it; and in that suit, the questions, whatever they may be, between him and the collector, will be examined and settled by a court and jury; and should we charge the United States with it, and the col-

lector should afterwards show that nothing is due to Mr. Ingersoll, how could we remedy the injustice? If Mr. Ingersoll thought the bond was improperly and wrongfully called out of his hands, he should and might have resisted the call, and stated his reasons. The bond did not come into his hands as the attorney of the United States, as a public officer; and he was not bound to obey the call for it as a public officer, but had the same right over it as over any other paper placed in his hands by a client. I cannot see the shadow of a claim, in law or equity, upon the United States to answer this demand.

Every controversy brought before a judicial tribunal for decision must consist of matters of fact, and matters of law; and the legal justice of the case depends upon the facts as they appear by the evidence, and the due application of the law to those facts. Our system of trial is admirably contrived to obtain a decision consistent with the law and the facts. The latter are referred to a jury, whose natural intelligence and knowledge of men, and the business of men, make them excellent judges of the credibility and effect of evidence. On the other hand, the judge, from his legal education and studies, is better qualified to declare and apply the law to the case. The whole value of this mode of trial depends on the separate but harmonious action of these two powers; the power of the jury over the facts; of the court over the law. The law is a permanent system for all cases, and should be intrusted to an authority which is constant and permanent; the same to-morrow as to-day; for one man as for another. The judge in pronouncing it, acts under a personal as well as official responsibility. It must stand on an authority which is not versatile and uncertain, or there will be no security for any of the rights of persons or property for anybody. The opinion of one jury is no rule for another; the verdict of one has no binding power on another; it would be ruin to us all to confide in such a tribunal for the law. A great part of this case belongs to you, and be assured that I shall not disturb your possession of it. On the other hand, I deem it to be equally my right and duty to take possession of the part that belongs to the court, and to maintain the authority of the law, according to the best of my judgment, so far as it is intrusted to me.

There is another most valuable trait in our mode of trial. I mean its publicity; whether the final decision, as it respects money and property, may or may not be satisfactory to the parties, they are sure of this important effect from the trial, that the true character of the controversy will be fully explained and understood. If unjust, or illiberal imputations have gone abroad; if the motives, the conduct, the integrity, and fidelity of either of the parties have been misrepresented by injurious rumors, they will be dissipated, and the truth be made known by a public and thorough examination of the whole circumstances of the case before an impartial tribunal.

On the 6th April, 1837, the jury rendered a verdict for the plaintiffs for $3,985.78 and costs. The items appearing, from a paper handed by them to the district attorney, to be as follows:

Dr.		
Mr. Ingersoll, with amount received from Rodman; but, as payment was immediately tendered, without interest		$ 7,971 14
Amount received in Toler v. Armstrong		3,158 82
Amount received from Kinsman		1,679 07
		$12,809 03
Cr.		
Mr. Ingersoll with costs in revenue cases taxed	$1,740 05	
Costs in criminal cases, taxed	5,083 20	
Counsel fees in Nicholl v. Conard, and Insurance Cos. v. Conard	1,000 00	
Counsel fees in Toler v. Armstrong	1,000 00	
		8,823 25
		$3,985 78

Case No. 15,441.

UNITED STATES v. INLOTS.

[2 Am. Law Rec. 314, 513.]

Circuit Court, S. D. Ohio. Nov., 1873.

CONSTITUTIONAL LAW—POWERS OF UNITED STATES IN RESPECT TO EMINENT DOMAIN — CONDEMNATION OF LAND FOR POST-OFFICE BUILDING — JURISDICTION OF CIRCUIT COURTS—STATE STATUTES—PROCEDURE—MEASURE OF DAMAGES.

[1. The constitutional provisions giving to congress authority to establish post offices and post roads, and to make all laws for carrying into effect the enumerated powers, taken together with the declaration that all laws made in pursuance of the constitution shall be the supreme law of the land, invest congress with authority to condemn lands situated within a state for use as a post-office site.]

[2. By an act of March 12, 1872 [17 Stat. 39], congress authorized the secretary of the treasury to purchase a site for a post-office, customhouse, etc., in Cincinnati. By the subsequent act of June 10, 1872 [17 Stat. 353], it appropriated money for the "purchase, at private sale or by condemnation," of the site selected. *Held*, that the latter act was a construction of the previous one and clearly recognized it as conferring power to condemn the lands if necessary.]

[3. A proceeding brought by the United States to condemn land for public use is a suit of a civil nature at common law, within the meaning of the judiciary acts vesting jurisdiction in such cases in the circuit courts of the United States.]

[4. By the act of February 15, 1873, the state of Ohio provided a mode of proceeding in its courts for condemnation of land by the United States where previous consent of the state legislature had been obtained therefor. *Held*, that by the provision of the judiciary act of June 1, 1872, adopting the practice, etc., of the state courts in proceedings other than eq-

uity and admiralty causes, this method of proceeding was to be adopted by a federal court in condemning lands within the state.]

[5. The Ohio statute regulating the condemnation of lands (69 Laws, 88) allows separate trials as to separate parcels of property only, and not as to the separate interests of different parties in each parcel; but, where no controversy exists as to the title to such interests, they may be separately presented to the jury, in such order as may be convenient, and the jury will be instructed to state the several amounts to which the claimant is entitled.]

[6. The measure of compensation, where property is condemned for the use of the United States, and the entire property is taken, is the fair, full market value of the property, in cash, without any allowance for loss of custom of storekeepers carrying on business in the building, by failure or delay in finding another place, or for depreciation of stock during suspension of business, and loss of sales by removal to a less favorable location, or for the value of movable property not attached to the premises.]

By act of March 12, 1872 [17 Stat. 39], congress authorized the secretary of the treasury to purchase a site for a public building in Cincinnati, and by act of June 10, 1872 [17 Stat. 353], appropriates money for the "purchase, at private sale or by condemnation," of the site selected. In March, 1873, the secretary of the treasury selected the grounds described in this case, and authorized the district attorney to proceed to condemn the same. By act of Ohio legislature April 20, 1872, consent of the state was given and jurisdiction ceded, when "the United States shall have acquired the title to the said lands, by purchase or grant, or by lawful appropriation under the right of eminent domain." By act of February 15, 1873, the legislature provided by general law for proceedings of condemnation by the United States, which, according to the provisions of that law, should "in all respects be governed" by the act prescribing the mode of assessment, etc., of compensation to the owners of private property by corporations, of April 23, 1872, and acts amendatory thereof, that shall be in force when such proceeding shall take place. Under the authority of the secretary of the treasury, and in pursuance of such laws of the state of Ohio, the district attorney filed a petition in the circuit court, against the land and the owners thereof, for the condemnation of the site selected. Some of the owners demurred to the petition, and others moved to dismiss the case for want of jurisdiction.

The case was heard on the demurrers and motion before EMMONS, Circuit Judge, and SWING, District Judge.

Judge Hoadly, Judge Whitman, and E. W. Kittredge, in behalf of the demurrers.

Warner M. Bateman, U. S. Dist. Atty.

Judge Taft, in behalf of other owners, in support of the jurisdiction.

Judge Whitman opened the case and insisted—First, that the government did not possess the right of eminent domain; second, that congress had not authorized the condemnation; and, third, the laws of congress had not conferred jurisdiction on the circuit court in such proceeding.

Judge Hoadly, in the same behalf, insisted:

1. This proceeding is strictissimi juris,—being an effort to take property of citizens without their consent. Therefore all reasonable doubts must be resolved against the government, and unless the jurisdiction is clearly shown to have been conferred by law, it does not exist. 46 N. Y. 546.

2. The circuit court is not a court of general, but limited, jurisdiction, and has no power but such as is expressly given by law. As was said by Chief Justice Ellsworth, in 1799, this court has only jurisdiction in a few well-ascertained cases. [Turner v. Enrille] 4 Dall. [4 U. S.] 8; [McCormick v. Sullivant] 10 Wheat. [23 U. S.] 192.

3. Even if the right of eminent domain is vested by the constitution in the United States, the constitution does not execute it in this regard, but legislation is necessary to confer the power to execute it upon the circuit court. [Sheldon v. Sill] 8 How. [49 U. S.] 449.

4. The act of Ohio of February 15, 1873, does not confer any jurisdiction on this court, nor can the state confer any jurisdiction on this court. The proceedings under that act are, by its express terms, to be had in the probate court of Hamilton county, and cannot be taken elsewhere. [The Orleans v. Phœbus] 11 Pet. [36 U. S.] 175.

5. Nor does the Ohio act of April 20, 1872, authorize a condemnation proceeding in this court or elsewhere. It only cedes jurisdiction over the land when purchased or condemned, and gives the state's consent as required by the constitution to the acquisition of the title by the United States. It does not even profess to authorize a condemnation.

6. The decisions of the supreme court of the United States limit the jurisdiction of the federal courts, as founded on state statutes, to cases arising under general rules of property, or general rules applicable to injuries, to individuals in their persons or estates, not to instances of state consent to specific acts and transactions, as here to condemnations limited to the probate court only. [Chicago & N. W. R. Co. v. Whitton] 13 Wall. [80 U. S.] 270.

7. No act of congress authorizes this condemnation. The only act ever passed by congress even mentioning condemnation, is the appropriation act of March 10, 1872, which has long lost its force by lapse of time, and has been repealed by the act of March 3, 1873, substituting an appropriation of $750,000, and which only recognizes the secretary's right to purchase, not condemn.

8. Nor can this court take a concurrent jurisdiction under the act of 1789, for this is not a suit at law or in equity, but a proceeding sui generis, known in the law as an appropriation

or condemnation proceeding, and which both by the Ohio Code and the act regulating proceedings to appropriate, is distinguished from the civil action in which suits at law and in equity are in Ohio fixed. Nor is there any suit that can be concurrent, because the Ohio proceeding is limited to appropriations in favor of private corporations, and so far as the act of February 15, 1873, authorized the United States to proceed in the probate court, limited it to that court, and thus forbade concurrence. There can be no suit concurrent with another suit when that other suit forbids and is exclusive of the former, and of every other.

Warner M. Bateman, Dist. Atty., on behalf of the United States, maintained that the United States possesses the right of eminent domain within the limits of its enumerated powers; that that right is an incident of sovereignty, and belongs to the state for the general uses over which it has control, and to the general government for such uses as come within its powers. U. S. Const. art. 1, § 8, pars. 8, 19; Id. art. 6, par. 2; Const. U. S. Amend. art. 5; 23 Mich. 472; Cooley, Const. Lim. 525; 1 Kent, Comm. 268, note A; 2 Story, Const. § 1274; 7 Dana, 119, 126; 14 Md. 478; 7 Op. Attys. Gen. U. S. 144.

Second. That the purpose for which the ground that in this case is sought to be condemned, is a public use and indispensable to the exercise of the powers and performance of the functions vested in the government by the constitution. U. S. Const. art. 1, § 8, pars. 2, 8; Id. art. 3.

Third. The act of March 2, 1872, authorizing the secretary of the treasury to purchase, and of June 10, 1872, making appropriation for the purchase, at private sale or by condemnation, authorizes the condemnation and determines the necessity of the appropriation.

(a) The term purchase embraces, in its legal signification, condemnation of property under the right of eminent domain. 106 Mass. 364, and text-books.

(b) In this sense has congress used the term in this case and in contemporaneous legislation. 17 Stat. 24, 353; U. S. v. Block, 121 [Case No. 14,610].

Fourth. The provision of section 11 of the judiciary act of 1789, defining the jurisdiction of the circuit court, embraces this class of cases as "suits of a civil nature at common law," in which "the United States are plaintiffs or petitioners," and of which the state courts have a concurrent jurisdiction.

(a) By the law of February 15, 1873, the legislature of Ohio conferred jurisdiction upon the probate court in proceedings of condemnation of property, for its own use, by the United States, and the jurisdiction claimed in the circuit court is therefore concurrent with that of the state courts. 70 Ohio Laws, 36.

(b) This proceeding, with its petition, demand, process, parties, trials, verdicts, judgments, and execution, is a "suit." [Parsons v. Bedford] 3 Pet. [28 U. S.] 433; 2 Bouv. Inst. 558; [Weston v. City Council of Charleston] 2 Pet. [27 U. S.] 449; [United States v. Wood] 14 Pet. [39 U. S.] 440; [West River Bridge v. Dix] 6 How. [47 U. S.] 529; [Cohens v. Virginia] 6 Wheat. [19 U. S.] 264; Conkl. Adm. (4th Ed.) 30.

(c) It is a suit at "common law," being brought to enforce a right at law as distinguished from a right and remedy in equity or admiralty. Parsons v. Bedford, 3 Pet. [28 U. S.] 433.

Fifth. A mode of proceeding derived from the laws of Ohio, exists, by which the jurisdiction may be exercised.

(a) Irrespective of express legislation of congress, the United States, having the right to sue in the circuit court, has the right to pursue therein the remedies and modes of proceeding authorized by the state in its own courts in like cases. Parsons v. Bedford, 3 Pet. [28 U. S.] 433; Wilson v. Mason, 1 Cranch [5 U. S.] 45; Ex parte Biddle [Case No. 1,391]; Supervisor v. Rogers, 7 Wall. [74 U. S.] 175; Clark v. Soheir [Case No. 2,835].

(b) Nor will an express provision in the local law, limiting the right or remedy to the local courts, affect the right of a party otherwise authorized to sue, to pursue them in the federal courts. Radway v. Whitten, 13 Wall. [80 U. S.] 270; Ingham v. Broadnax, 14 Pet. [39 U. S.] 67; Union Bank of Tenn. v. Jolly, 18 How. [59 U. S.] 506; Hyde v. Stone, 20 How. [61 U. S.] 170; Payne v. Hook, 7 Wall. [74 U. S.] 425.

(c) But the act of June 1, 1872 (17 Stat. 197), prescribed that the "practice, pleadings, and forms and modes of proceedings in other than equity and admiralty causes in the circuit and district courts of the United States, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceedings existing at the time, in like causes, in courts of record of the state," etc.

(d) The legislature of Ohio, by act of February 15, 1873 (70 Ohio Laws, 36), has provided a mode of proceeding for the condemnation of lands by the United States in the probate court, a court of record of the state. By virtue of the act of congress, above referred to, this law of the state is made the rule of practice in like causes in the federal courts, and in precise pursuance of this practice the pleading in this cause is framed and filed.

E. W. Kittredge, in behalf of defendants, presented the following points of argument:

First. That the power of eminent domain of the national government is entirely distinct from the power inherent in the state government.

Second. That the plaintiff must come into this court under the power inherent in the one or the other of these governments. That is, it can not come here in this cause to take property for the public use as the agent of the state by virtue of its power of eminent domain, and at the same time be here to take

the property by virtue of the power of eminent domain of the national government.

Third. If the government of the United States has not authority, the exercise of its power of eminent domain, for the purpose specified in this petition, within this or any other court, can have jurisdiction of a cause wherein it is sought to appropriate this property by virtue of the power of eminent domain inherent in the government of the United States.

Fourth. Congress has not authorized the exercise of the power of eminent domain inherent in the national government to take this property. It is not included in the power of the secretary given in one or all of the three acts to purchase a site for a court-house. Nor has it authorized this court to exercise any jurisdiction in this case under its power of eminent domain. 17 Stat. 39, 352, 523; 106 Mass. 356. The state's power of eminent domain is a sovereign power; when granted to any corporation or individual it is exercised by it as the agent of the state. 18 Ohio St. 92.

Fifth. That is just as true when the agent to whom the power is or may be granted by the state is the national government, as when it is a private corporation.

Sixth. The case is entirely different from the grant of a new remedy or right of action by a state law, as in the case of an action for death caused by negligence, or of a remedy for the partition of real estate. In such cases the state law can not, strictly speaking, create or confer a right. It simply prescribes a remedy to enforce a right. That is to say, it removes an obstruction and provides a channel for the administration of justice. In such a case the United States court may have jurisdiction to administer the remedy without regard to the provision of the state law upon that subject. But when the state grants to its agent authority to exercise its own power of eminent domain, it can affix to the grant whatever limitations or conditions it chooses. It may prescribe in what form, in what tribunal, and on what conditions the power shall be exercised by its agent, to whom it is granted. And the United States, if it accepts the grant, like every other corporation or individual, must accept it and exercise it precisely in the mode, and in the tribunal, and subject to all the conditions which the state legislature has prescribed. [Chicago & N. W. R. Co. v. Whitton] 13 Wall. [80 U. S.] 285; Ex parte Biddle [Case No. 1,391].

Seventh. And finally, I submit that the national government has not authorized the exercise of its power of eminent domain at all to acquire property for this purpose. And the state has not authorized the exercise of its power of eminent domain by any proceeding in this court, or in any court except the probate court of Hamilton county, and therefore this proceeding in the circuit court of the United States is wholly unauthorized by law, and without the jurisdiction of this court.

Before EMMONS, Circuit Judge, and SWING, District Judge.

SWING, District Judge. The petition sets forth in substance the grant of power to the secretary of the treasury to purchase a site for post office, custom-house, and other government buildings: that the secretary is unable to agree with the owners of the site selected as to its value, and prays its condemnation. To the petition a demurrer has been filed by one defendant, and others have filed a motion to dismiss the petition. Each raises the question of jurisdiction of the court, but the questions presented and argued go to the very foundation of the power of the government to exercise the right of eminent domain.

There are three provisions of the constitution that bear upon the question of the right of the government to exercise the power of acquiring the title to the property, for the uses alleged, by condemnation. Article 1, § 8, par. 8, authorizes congress to establish post offices and post roads, and paragraph 19 of the same section authorizes it "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." And article 6, par. 2, provides that "the constitution and the laws of the United States, that shall be made in pursuance thereof, . . . shall be the supreme law of the land, . . . anything in the constitution or laws of any state to the contrary notwithstanding." By the 5th article of the amendments to the constitution, it is among other things provided, "nor shall private property be taken for public use without just compensation." It has been repeatedly decided that this limitation is upon the power of the federal government to take private property in the exercise of the right of eminent domain. The distinction between state and federal sovereignty is well defined by Chief Justice Taney, in Abelman v. Booth, 21 How. [62 U. S.] 516. He says: "The powers of the general government and the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres;" and again: "That in the sphere of action assigned to the general government, it should be supreme and strong enough to execute its own laws by its own tribunals, without interruption from a state or from state authorities." This seems to us the only true view of the respective powers of the state and federal governments. Each within its own sphere is supreme and independent of the other. But in case of a conflict the constitution of the United States provides that the federal jurisdiction under it shall be supreme. It is a fundamental principle recognized by all jurists, that the right of eminent domain inheres in, and is a part of, the powers belonging to sovereignty. The constitution has expressly delegated to congress the power to

establish post offices and post routes. This necessarily includes the right and power to acquire sites for post offices. Having this power, is there any limitation upon the power of the United States as a sovereignty, in the mode of acquiring title? It seems to us there is not, and that as an incident of its sovereignty it may acquire title by its own appropriation, being governed in the exercise of this power by the provision we have quoted from article 5, of the amendments to the constitution. It is clear that contingencies are possible in which this is the only mode in which the federal government could be enabled to perform its functions within the states. Suppose, for instance, that the state of Ohio should forbid the acquisition of property for a post office in Cincinnati, or for the establishment of the necessary custom-houses, arsenals, or court-houses, would the federal government be powerless? If so, it would be practically excluded, from Ohio, in its most important functions. It seems to us its right to appropriate private property, for its public uses, is clear. The use alleged in the petition is of the class expressly provided for in the constitution. It is claimed, however, that this is not a public use, and the views of Judge Woodbury, in West River Bridge Co. v. Dix, 6 How. [47 U. S.] 507, was cited. They were given in arguendo in his dissenting opinion on a point that did not arise in the case. He says: "But when we go to other public uses, not so urgent, not connected with precise localities, not difficult to be provided for without this power of eminent domain, and in places where it would be only convenient but not necessary, I entertain strong doubts of its applicability. Who ever heard of laws to condemn private property for public use, for a marine hospital or prison? So a custom-house is a public use for the general government, and a court-house or jail for a state. But it would be difficult to find precedent or argument to justify taking private property, without consent, to erect them on, though appropriate for the purpose."

This doubt expressed by Judge Woodbury is certainly not warranted by the later authorities, and practice of the general and state governments. The laws of Ohio, of frequent application, provide for condemnation of lands for school-houses, jails, and other such public purposes, and the acts of congress cited in argument, provide for condemnation of sites for custom-houses and post offices. Those of Boston, Chicago, and St. Louis, now in process of construction, were acquired in that way. Cooley, Const. Lim. p. 533, 33 Vt. 271. The learned judge seems to confound public use with the necessity for the appropriation. Of the latter the legislature is the sole judge. There are few uses that can be conceived of more public than that of a post office, to the citizens of Cincinnati, and those of the whole country in communication with them, than the post office proposed to be erected. So the business of the courts to be provided for is of the greatest interest to the public. Sixteen hundred cases in bankruptcy, pending and disposed of in the district court of this district, affect every business interest of its citizens.

We have not overlooked the decisions in 3, 9, and 13 Howard, and 6 McLean, referred to by counsel for the defense. The first three decide that the right of eminent domain in land, between high and low water mark, is in the state exclusively, and the latter relates to the power of the state government. For general public uses the power of eminent domain exists with the state which, under our form of government, has control over such uses. Judge Cooley states the principle in his work on Constitutional Limitations (page 525): As under the peculiar American system the protection and regulation of private right, privileges, and immunities in general property pertain to the state governments, and those governments are expected to make provision for those conveniences and necessities which are usually provided for their citizens through exercise of the right of eminent domain, the right itself, it would seem, must pertain to those governments, also, rather than to the government of the nation; and such has been the decision of the courts. So far, however, as it may be necessary to appropriate lands or other property for its own purposes, as for forts, lighthouses, military posts, or roads and the like, the general government may still exercise the right within the states, and for the same reasons on which the right rests in any case, viz., the absolute necessity that the means in the government for performing its functions and perpetuating its existence, should not be subject to be controlled or defeated by the want of consent of private parties or of any other authority." But it is said that no law has been passed by the general assembly authorizing the exercise of this right by the United States. It may be doubtful whether the state can impose any limitation upon the mode by which the United States may acquire title, but in this instance the act of April 20, 1872 (69 Ohio Laws, p. 81), not only does not prohibit, but authorizes the acquisition by this mode. The first section grants the consent of the state to the purchase, and the fourth section vests jurisdiction when the United States shall have acquired the title to the land, by purchase, grant, or by lawful appropriation under the right of eminent domain. The act of February 15, 1873 (70 Ohio Laws, p. 36), provides a mode of proceeding in its own courts for appropriation of land by the United States, and vests jurisdiction therein in the probate court.

It is further said that congress has not authorized, in this case, the condemnation of private property. We recognize the fact that the condemnation of private property is in derogation of common right, and accept the rule as stated by the court in New York & H. R. Co. v. Kip, 46 N. Y. 546, that the

grant of power is not to be extended by implication, and the act conferring it must be strictly complied with; but the laws granting it are not to be construed so strictly and literally as to defeat their object. Applying these principles of construction to the acts of congress providing for the erection of a post office in Cincinnati, what was their object? Was it to provide for the acquisition of property in a particular mode or to authorize it generally? The several acts, being in pari materia, must be construed together. The first act of March 12, 1872 (17 Sess. Laws, p. 39), simply authorizes the secretary of the treasury to purchase a suitable site for the erection of a building for the accommodation of the United States courts. It is conceded that the term "purchase" technically includes the acquisition of title by condemnation, and must be so construed when the terms of the law recognize that mode of acquisition. The subsequent act of June 10, 1872 (17 Stat. pp. 352, 353), clearly adopts the technical meaning of the term "purchase." It provides the necessary funds "for the purchase at private sale or by condemnation." From these statutes, taken together, it must clearly appear that congress has authorized the taking of private property, for the purpose of the public buildings named, by the process of condemnation in the exercise of the right of eminent domain vested in the federal government.

It is further claimed that the laws of the United States provide no rules of practice or mode of proceeding for the condemnation of private property for public use. The necessity for such provision is conceded. By the fifth section of the act regulating the practice in the federal courts, approved June 1, 1872 (17 Stat. 197), it is provided: "That the practice, pleading, and forms and modes of proceeding in other than equity and admiralty causes, in the circuit and district courts of the United States, shall conform, as near as may be, to the practice, pleading, and forms and modes of proceeding existing at the time, in like causes, in the courts of record of the state within which such circuit or district courts are held." The laws of Ohio prescribe the mode of proceeding for the condemnation of private property on the part of the state for its public works, and on the part of municipal and private corporations for various public uses, and by act of February 15, 1873,—the legislature of the state (70 Ohio Laws, p. 36),—a mode of proceeding in its courts is provided for the condemnation of lands for public buildings by the United States, where the previous consent of the legislature shall have been obtained therefor. By virtue of the 5th section of the act of congress above referred to, this act of the legislature of Ohio is made a rule of practice and proceeding in like causes in this court, not as a law of Ohio, but as a law of the United States. It is as much a rule of procedure for this court, as the Code of Ohio, prescribing the pleading and practice in cases at common law, or as the laws prescribing the forms and modes of civil process, in the courts of the state. This law provides for the filing of a petition setting forth, among other things, the authority for the condemnation, the selection, and description of the property to be condemned, and the names of persons claiming legal and equitable interests therein; for the issuing and service of process against resident, and for publication of notice against non-resident owners; for the selection and impanneling of a jury, their oath, and the proceeding upon trial, the payment of the compensation assessed and costs. The law carefully secures the rights of property owners, and provides every guard against unreasonable hardships of such compulsory appropriation of their property.

It is further claimed that congress has conferred upon this court no jurisdiction to entertain and try this case. The right of eminent domain existing in the United States, the authority for making the condemnation having been granted by congress, and a mode of procedure existing for making it, we think jurisdiction is vested in this court to entertain and conduct it. Section 11 of the judiciary act of 1789 (1 Stat. 78) provides, that "the circuit court shall have original cognizance concurrent with the courts of the several states, of all suits of a civil nature at common law . . . when the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs."

The definition of a "suit" by text-writers is very comprehensive. But our supreme court has repeatedly construed the term. In Parsons v. Bedford, 3 Pet. [28 U. S.] 747, "suits at common law" are construed to be proceedings in which legal rights are to be ascertained and determined, as distinguished from equity and admiralty proceedings. This is the case whether the rights are created and proceedings prescribed by statute, or exist at common law. Ex parte Biddle [supra]. In Cohens v. Virginia, 6 Wheat. [19 U. S.] 264, Chief Justice Marshall says: "What is a suit? We understand it to be the pursuit of some claim, demand, or request. In law language it is the prosecution of some demand in a court of justice." Although we are not aware that the term "suit," as used in the eleventh section of the judiciary act, has been passed upon by the supreme court, it has several times construed the term as used in the 25th section. In Weston v. Charleston, 2 Pet. [27 U. S.] 449, it is applied to a writ of prohibition; in Holmes v. Jennison, 14 Pet. [39 U. S.] 540, to a proceeding in habeas corpus; and in West River Bridge Co. v. Dix [supra], which was a proceeding for condemnation of land for a school-house, under the laws of Vermont, no question seems to have been raised as to the jurisdiction of the supreme court, but it was acted upon as a suit. We know

of no reason for giving the term "suit," as used in the 11th section, a different definition from that clearly established as to the term, in the 25th section of the judiciary act. The distinction claimed by the counsel for the defendants, seems indeed arbitrary and unreasonable when we look into this case. It has all the essential forms, proceedings, and objects of ordinary suits at law. It has pleadings, parties, issues, and process, a jury, trials, verdicts, and judgments, bills of exception, and writs of error, as other cases. It ascertains and adjudges damages, and awards execution.

EMMONS, Circuit Judge, concurred in the opinion given by SWING, District Judge. The demurrers and motions to dismiss must be overruled.

THE COURT having found upon a preliminary inquiry provided for by the statute of Ohio governing the proceeding that there exists a necessity for the appropriation—a legal right to make it—and that the United States was unable to agree with the property owners as to compensation, a motion was made, on behalf of numerous claimants, leaseholders, for longer or shorter terms, for a separate trial of the value of their several interests.

Judge Whitman, Mr. Kittredge, Mr. Von Seggern, and Mr. E. M. Johnson, on behalf of the lessees, cited in support of the motion: Chase, St. 1475; Symonds v. City of Cincinnati, 14 Ohio, 175; Cooper v. Williams, 4 Ohio, 265; Bates v. Cooper, 5 Ohio, 115; Ellis v. Welch, 6 Mass. 251; Parks v. Boston, 15 Pick. 203; Patterson v. City of Boston, 20 Pick. 159; Giesy v. Cincinnati, W. & Z. R. Co., 4 Ohio St. 300; Foote v. City of Cincinnati, 11 Ohio, 408; Tayl. Landl. & Ten. § 519; 7 Wend. 210–215; 69 Ohio Laws, 88.

Judge Taft claimed, on behalf of two of the owners in fee, that while the statute of Ohio, under which the proceeding was conducted, provided that there should be separate trial as to each parcel of property appropriated, it contemplates that the jury in their verdict should severally assess and determine damages to which the owner of each interest therein was entitled.

The district attorney contended that the law governing the proceeding (69 Ohio Laws, 88) required that there should be but one trial as to each parcel, irrespective of the division of interest, and one verdict for the total damages. That the measure or compensation when the entire property was taken, being its fair market value in cash, the law did not charge the petitioner with the burden of controversies arising in its division among the parties in interest; but that, inasmuch as the mode provided by law (sections 19 and 20) for apportioning this compensation among the owners of the different interests was inapplicable to the judiciary system of the United States, it would be both convenient and proper that the court, following the practice of the state law in condemnation of property by municipal corporations, should permit the value of the several interests to be shown on the trial, and to instruct the jury to ascertain and determine them in their verdict as parts of the total compensation to be paid by the government.

SWING, District Judge, taking the motion under consideration, on a subsequent day overruled it, holding that the law allowed of separate trials as to separate parcels of property only, and not as to the separate interests therein; but that, where no controversy existed as to the title to such interests, they could be separately presented to the jury in such order as might be convenient, and the jury would be instructed to return in their verdict the several amounts of the compensation to which each claimant would be entitled.

Defendants further moved for a special venire for a jury from Hamilton county, in which Cincinnati is situated, which THE COURT overruled, holding that such divisions of territory under the state government could not be taken into consideration in electing and impanneling juries in the federal courts. Thereupon, on motion of both parties, a struck jury was ordered, and selected by mutual agreement, and the cause adjourned for trial to November 3, 1873.

The half square appropriated consisted of twenty-four separate parcels or lots, of which the district attorney selected a lot in the center of the square, and extending through to the alley in the rear, to begin with. The improvements thereon consisted of a new stone-front and an old building, both fronting on Fifth street, and a frame stable on Patterson alley. On the 5th of November the panel was completed and jury sworn, when the claims of the several persons interested were in order stated to the jury, beginning with the owner in fee, F. Bodman. The old brick building was occupied by John A. Smith as a dry-goods store, under a lease from month to month. He claimed as damages: 1. Loss of goodwill. 2. Cost of removal of stock. 3. Injury to stock in removing it. 4. Profits lost and expenses during suspension of business in changing to new location. 5. Increased rent he would have to pay at another suitable location. 6. The value of fixtures, consisting of shelving, counters, stools, desks, show-cases, and glass show fronts,—amounting in all to about $16,000.

John B. Briggel, who occupied the first story of the stone-front, under a lease of four years, signed and sealed but not acknowledged. He obtained the lease after this property had been spoken of as a site for the post-office, and after he had taken possession. When he applied to F. Bodman for the lease, he stated that he wanted it so as to enable him to make claim against the

United States if it should appropriate the property, but agreed with Bodman that in the event of such appropriation the lease should be void as against him, and he would make no claims against him. In addition to claims similar to those presented by Smith, he made further claim for the value of the unexpired term of his lease, amounting in all to about $21,000.

Fox & Brothers occupied the second story of the stone-front house for a term, under a verbal lease, that the lease should be null and void in the event of the appropriation of the property by the United States. They were engaged in the manufacture of silverware, and had a furnace, benches, gas fixtures, and plumbing, for which they claimed compensation; they also claimed for the value of their unexpired term.

H. H. Davis occupied the stable, under a lease for a term of years, duly executed and acknowledged, and claimed compensation for the value of the use of the stable, over and above the rents paid, and also the value of the building which he had himself erected. The stable was used in connection with a livery stable on the opposite side of the alley, for which use the lease was claimed to be very valuable.

Lentz occupied the fourth story of the stone-front as a box-factory, and claimed value of his fixtures and of his unexpired term. His lease is sufficiently described in the charge of the court.

After a large amount of testimony was given by Bodman, as to the value of the land and improvements, numerous witnesses were examined by the tenants severally, as to the damages claimed, as aforesaid, by them. This testimony was admitted subject to objections by the district attorney, and at the close of the testimony by the claimants, he moved to exclude all evidence as to damages demanded by the tenants, except such as related to the value of the unexpired term, and of store-fronts and shelvings.

The district attorney and Assistant District Attorney Richards insisted that the only rule of damages applicable in the case is that of the constitution, which provides: "Nor shall private property be taken for public use without just compensation." Article 5, Amendments. Statutes frequently increase this liability by including damages incident to and resulting to the owner from such taking. It is not the case here. The government is only liable to make "just compensation" for the property taken.

2. The rule of compensation, when the whole of a tract or lot of land is taken, is its fair market value at the time of taking. Dill. Mun. Corp. 417; Cooley, Const. Lim. 565; Giesy v. Cincinnati, W. & Z. R. Co., 4 Ohio St. 331; Robb v. Maysville & Mt. S. T. Road Co., 3 Metc. (Ky.) 117.

3. When a part of a tract or lot only is taken, a more complex rule is necessary in ascertaining the measure of just compensation. Of this class of cases are the cases of Patterson v. Boston, 20 Pick. 162, 23 Pick. 425; Giesy v. Cincinnati, W. & Z. R. Co., 4 Ohio St. 331.

4. That the taking of the property by the United States is lawful, and in virtue of its transcendent right and title, and it is, therefore, not liable for damages resulting from such taking, unless the law authorizing it so provides. 5 Ohio St. 573; Sedg. Dam. 565; 4 Comst. [4 N. Y.] 196; 4 Ohio St. 583.

5. That the damages for loss of good-will, loss of profit, and expenses during estimated period of suspension, and increased rents in another suitable location, are consequential, and so remote and uncertain as to be incapable of just computation. They are not allowable upon principle or authority. Schuylkill Nav. Co. v. Thoburn, 7 Serg. & R. 420; Henry v. Pittsburg & A. Bridge Co., 8 Watts & S. 85; Searl v. Lackawanna & B. R. Co., 33 Pa. St. 63; Hatch v. Vermont Cent. R. Co., 25 Vt. 67; Burbridge v. New Albany & S. R. Co., 9 Ind. 546; 2 Barn. & Adol. 198; 22 E. C. L. 91.

6. As to costs of removal: The claimants being bound by the conditions of their respective leases to remove their property at the end of their terms, the act of appropriation only changes the time when the removal should take place, but does not occasion the obligation to remove, and that, therefore, the government is not justly chargeable with the losses consequent upon removal, but is only liable for the value of the right to remain or of the occupancy for the unexpired term of the lease.

As to the value of the store-fixtures attached to the building and becoming a part of the property of the landlord, as a part of the realty upon the tenants leaving them without removing them, the district attorney waived any question and assented that, if the tenant desired to leave them, the government should be charged with their value as for property appropriated.

Judge Mallon, on behalf of the tenants, insisted that the government was not only liable for the value of the property, but all losses to the owner resulting from its taking it. He cited Foote v. City of Cincinnati, 11 Ohio, 408; Robb v. Maysville & Mt. S. T. Road Co., 3 Metc. (Ky.) 117. In the loss to be compensated for was good-will and fixtures. Hathaway v. Bennett, 10 N. Y. 108; Sedg. Dam. 664, 665; St. John v. New York, 6 Duer, 319; 9 Q. B. 443; 1 Q. B. 98; McArthur v. Kelly, 5 Ohio, 140.

Mr. Kittredge, in behalf of tenants, contended that the state law did not affect the liability of the government, but that compensation under the constitution must be an equivalent for the whole loss sustained by the property owner. Alton & S. R. Co. v. Carpenter, 14 Ill. 190; White v. Charlotte & S. C. R. Co., 6 Rich. Law, 47. He is entitled to the full value of the property to him, for the uses he makes of it or for those to which it

is best adapted (Brown v. Providence, W. & B. R. Co., 5 Gray, 35; Lincoln v. Saratoga & S. R. Co., 23 Wend. 425), and for good-will (2 Thrust & Couls, 58), and for loss of time and expenses of removal (Patterson v. Boston, 20 Pick. 162, 23 Pick. 425).

SWING, District Judge, disposing of the motion, held that all testimony as to good-will, loss of custom by failure to find another place, of depreciation of stock during suspension of business, loss of sales by removal to less favorable location, and of the value of movable property not attached to the premises, was incompetent and must be excluded from the consideration of the jury; that these items were not elements of damages for which the claimants were entitled to compensation. He distinguished between the case of Patterson v. Boston and this case; that was an appropriation under the law of Massachusetts for a part of the premises, where the mode of ascertaining compensation was necessarily indirect, difficult, and complicated. In that case there was permanent occupation of part, and temporary disturbance of the possession of the balance of the premises, and the consideration of the items of damages then allowed would seem to be the best attainable mode of reaching a fair estimate of the value of the right appropriation. In this case the whole property is taken. It has a market value, as a subject of ordinary commerce that can be directly shown by testi nony. The rule of ascertaining compensation in such cases, recognized by the authorities, is simple: What is the fair, full market value of the property in cash? The payment of this market value is compensation.

THE COURT reserved the question as to the expense and damage to personal property in removing it, for instruction thereon in his final charge to the jury.

[There were verdicts in these cases in favor of the United States, upon which the court rendered judgments, and adjudged that writs of possession issue, requiring the marshal to remove the defendants from the premises, and to place the United States in possession. Case No. 15,441a. From this judgment Mary R. Kohl and others sued out a writ of error in the supreme court. The judgments were affirmed. 91 U. S. 367.]

Case No. 15,441a.

UNITED STATES v. INLOTS.

[2 Am. Law Rec. 577.]

Circuit Court, S. D. Ohio. 1873.[1]

EMINENT DOMAIN — EFFECT OF TAKING LEASED PROPERTY—RIGHTS OF LANDLORD AND TENANTS —RULE AS TO COMPENSATION—CONSTRUCTION OF LEASES—PAROL EVIDENCE—OHIO STATUTES.

[1. Under the Ohio statute relating to the condemnation of lands, which requires that all parties having any interest therein shall be made parties, and that their rights shall be adjudged in the proceedings, the taking of lands which are subject to an unexpired lease, or in which interests are held by contract with the owner, puts an end to all the rights and obligations as between the parties. But the rights of the parties must be determined by the legal effect of their leases or contracts as they stand at the time of condemnation.]

[2. Where, after the expiration of a five-years lease, the tenant sought a renewal thereof, but this was refused on the ground that the property would probably be taken by the United States for public use, and the tenant was thereupon allowed to remain in possession without any definite understanding, *held*, that he could not be regarded as having entered upon a new term of five years, or even for a single year, and hence, on the condemnation of the property, was not entitled to compensation for any unexpired term under the lease.]

[3. An agreement for renting property for less than three years, with a clause declaring that the agreement shall be null and void in case the premises are condemned for public use, ceases and determines when such condemnation takes place; and the tenant has no right, as against his landlord, to hold the property thereafter.]

[4. Where a party claimed a right in premises which were being condemned for the use of the United States by virtue of a lease not executed with the formalities required by law, *held*, that it was competent to show that he went into possession under the instrument, with a parol agreement that he would claim no right under it as against his lessor, but that it was to be used only as the foundation of a claim against the United States in case the property were condemned.]

[5. The Ohio statute prescribing the formalities required in the execution of deeds, mortgages, leases, etc., contains a proviso that nothing therein shall affect a lease for a term not exceeding three years. *Held* that, where a tenant went into possession under a paper not executed with the required formalities, but which merely recited a verbal lease for a term of five years, such lease could not be considered as a valid lease for three years, but was wholly void. Richardson v. Bates, 8 Ohio St. 257, followed.]

[6. Where property in Ohio was condemned by the United States for public use, the whole of the property being taken, *held*, that the measure of compensation, both under the constitution of the United States and the laws and decisions of Ohio, was the fair market value at the time of condemnation, not as ascertainable in cases of forced sale, but as upon a sale by the owners themselves. But it seems that, if the condemnation take place during a temporary depression due to a stringency in the money market, the value may be estimated as of the period immediately preceding such depression.]

[7. The rule that where part of certain property is condemned damages must be given not only for the land taken but for the injury to that not taken by reason of the severance, is inapplicable to a case where a livery stable keeper owned stables, etc., on one side of an alley, and leased a building on the opposite side for use in connection with his business, and the leased property was condemned. In such case, only the value of the lease can be awarded to him.]

[8. Where leased property is condemned, the lessee is entitled to so much out of the market value of the property as his unexpired term is fairly worth, over and above the amount of rent he is bound to pay.]

[This was a proceeding brought by the United States to condemn certain lots in Cincinnati, Ohio, for use as the site of a public building. The case was heretofore heard on demurrers to the petition, and on

[1] [Affirmed in 91 U. S. 367.]

motion to dismiss the same. Case No. 15,441.]

SWING, District Judge (charging jury). After the patience with which you have listened to the testimony in the case, and to the arguments of counsel, it only remains for the court now to give you the rules of law which shall govern you in your examination of this testimony, for the purpose of enabling you to arrive at correct conclusions as to the rights of the several parties in the case. In this particular branch of the case submitted to you now, there are seven different claimants for compensation and damages, upon each of whose claims you will be required to pass. First is that of Mr. Bodman, who claims compensation for fee; second, that of J. A. Smith, J. B. Brigel, Fox Brothers, John Lentz, Hiram B. Davis, and Wringerman. The last six claim an interest in the property as lessees. The claim of the owner in fee is for the value of the ground and buildings; that of the lessees for the value of their unexpired terms, for improvements made to the buildings, for fixtures constructed for the purpose of their business or trade, for movable articles or property used by them in their business and for damages they have sustained by reason of being compelled to move from the premises. Embraced in this latter claim is the cost of removal, damages sustained in business, for depreciation in the value of stock, for loss of goodwill, and the difference in the rents paid by them for the premises they now occupy, and those they will be able to get. These are the respective claims of the several parties against the government. The government claims that it is liable only for the value of the property taken as an entirety; and the jury, by their verdict, must apportion to the several claimants the value of their several interests therein. On behalf of the owners in fee it is insisted that the lessees have no legal ownership, or right to any portion or interest in said property, and that, as to some of them, they have no leases or contracts for the occupancy of said premises. As to those that have leases, it is said they are void, because some of them are not in conformity with the statutes of Ohio, and because others contain an express proviso that if the property is taken by the government, they shall be null and void; and, further, that the appropriation of the property by the government terminates all rights that previously existed, growing out of said contracts or leases, if any there should have been.

As to the effect of the condemnation of property upon the relation of landlord and tenant, upon the authorities abstractly, there may be some doubt. In the case of Folts v. Huntley, 7 Wend. 215, it was held by the supreme court of New York that an appropriation did not relieve the tenant from the payment of rent and performance of covenants. And such was the ruling of the supreme court of Ohio in the case of Foote v. City of Cincinnati, 11 Ohio, 411. It may not be an eviction by title paramount, and yet it is the assertion of a right by the government to the property as against both landlord and tenant, by which the landlord is deprived of all control of the property, and by which the tenant is turned out of the possession thereof; and it becomes unlawful for the landlord to in anywise control the premises, or for the tenant to further occupy them, and he cannot, therefore, enjoy the consideration of his covenant. And it is said by the supreme court in Siebern v. Nicholson, 13 Wall. [80 U. S.] 156: "Whenever the property was lost to the owner by the paramount act of the state, which neither party anticipated, both are put an end to." And it is said by Kent, in the third volume of his Commentaries (page 463), that "the obligation of a tenant to pay rent ceases when the consideration ceases, and which was the enjoyment of the land." And Taylor, in his Landlord and Tenant (page 383), says: "If, therefore, a lot of land or other premises under lease is required to be taken for city or other public improvements, the lease, upon confirmation of the report, becomes void." Without attempting to analyze the nice distinctions which some of the books have taken in regard to the effect of eviction under title paramount upon the covenants of a lease, we may say that much of the reasoning of the authorities which hold that it has not the effect to discharge the tenant from the payment of rent is based upon the fact that only a portion of the property had been taken; and yet there are two cases cited, one from New York and the other in Ohio, in which all the interests of the tenants were taken and appropriated. Without attempting to decide whether this would come within the reasoning as applicable to evictions by title paramount, or the discharge of a party from the doing an act which it was lawful for him to do at the time he agreed to do it, and which afterward became unlawful, we may say in this proceeding that our statute requires that the names of the owners and of all persons having any interest, legal or equitable, in the property, shall be set forth in the petition, and the owner or owners shall be summoned. Under this statute all these parties have been brought before the court. The court has jurisdiction of them, and they have consented that their rights may be fixed and adjudged by this tribunal. Whatever, therefore, might be the legal effect of an appropriation upon the relation of landlord and tenant, and upon the covenants of the lease, the effect of the verdict of the jury in determining their several rights, and the judgment of the court upon the verdict, must of necessity put an end to these so far as it relates to any future rights or obligations arising out of the contracts as between landlord and tenants. But the present rights of the

parties, we think, must be determined by the legal effect of their leases as they now stand.

These leases are of two characters—written and unwritten. The first section of the statute of Ohio in regard to deeds and mortgages requires that the instrument by which lands shall be conveyed or otherwise affected or incumbered shall be signed and sealed by the grantors, etc., and the signing and sealing properly acknowledged. It is admitted by the parties in this case that but one lease is in conformity with this section of the statute. The ninth section of the statute provides that nothing in the act shall affect any lease of school or ministerial lands for any term not exceeding ten years, or of any other lands not exceeding three years, or to require such lease to be attested, acknowledged, or recorded; so that, if there be in this case any lease for a term not exceeding three years, it is not required to be signed, acknowledged, attested and recorded.

The lease of Mr. Davis is the only one executed in accordance with the provisions of the first section of this statute. What is the legal effect of leases not executed according to the terms of the statute? It is contended by Mr. Bodman that there was no verbal or written agreement with two of these tenants; that they are simply remaining there as tenants at will, or tenants by sufferance. I speak of Mr. Smith and Mr. Wringerman. If there is no agreement existing between Mr. Bodman and Mr. Smith for the use and occupancy of these premises for any particular length of time, he has no term in this estate. So with Mr. Wringerman. There has been nothing that I remember brought before this jury of a definite character (but of this the jury must be the judges) in regard to the time, as proven before them, when Mr. Wringerman commenced the use and occupancy of these premises, what the original contract was and when it ended, and if he entered upon a new term. If, originally, he had been a tenant for one year, and had been permitted by the landlord to enter upon a second year, he would have been entitled to the tenancy from year to year.

And so with Mr. Smith. If you find from the testimony in these cases that there was a definite agreement between the parties, originally, that the tenants should have it for one year, beginning with a certain day and ending with a certain day, then, if they were permitted to enter upon the second year, they would be entitled to hold till the expiration of that year. In the case of Mr. Smith it is admitted that he entered upon the possession of the premises in 1858, and remaining in them till 1867. When he made a contract with Mr. Bodman for a term of five years, at the close of that term he endeavored to secure from Mr. Bodman a lease for another term, but that Mr. Bodman declined to give it, and that he remained there without any agreement as to a certain length of time in which he should continue in possession of the premises; that he had spoken to Mr. Bodman several times about it, and that Mr. Bodman, taking into consideration the uncertainty of his being able to hold the property, supposing it might be appropriated by the government for public buildings, declined to encumber his property with any agreement or lease whatever, but that the tenant remained there simply to await events that might follow. He could not be said to have entered upon a new term of five years or of a single year. He therefore had no right whatever in the term, so far as the lease was concerned.

So far as the Fox Brothers' lease is concerned, that would be good under the statute of Ohio if it had merely been a verbal one, for it is for a period of not exceeding three years. But you must take this contract as it reads, and determine the rights of these parties by giving to each and every part of the contract full force and effect. The agreement between these parties contains a clause that it should be null and void in case the government of the United States or the state of Ohio should condemn the property for public use. It may be said to be a proviso, and, strictly and technically speaking, we may not give to the proviso the same force and effect that we would to a condition. Still, taking this paper as it reads, it is free from ambiguity, and expresses clearly the intention and agreement of the parties that it should be null and void in case the property should be condemned for the use of the government of the United States or for the state government. Therefore, as far as this lease is concerned, it in nowise, as against Mr. Bodman, gives any claim or right to hold this property beyond the period at which it was condemned, either for the use of the United States or for the state. If he had rented it from year to year, and the party had occupied it the first year, and had entered upon the second year, he might be entitled to hold it to the close of the year. But it is not of that character. It is a renting for an entire term of three years, and, so far as this contract is concerned, it must expire at the time of the condemnation of the property.

So far as the lease of Mr. Brigel is concerned, that, in the opinion of the court, occupies no better position than the lease of Fox Brothers. While it is true that this lease is more formal than that of Mr. Fox, still it is not in accordance with the statute of Ohio, except the attestation and signing; and besides this, while I recognize very fully that an instrument can not be explained or contradicted by parol evidence, still you may always show by parol evidence the circumstances under which the instrument was executed. The supreme court of the United States says that it becomes the duty of the court and jury, in endeavoring to understand and determine the proper character of a paper, and the rights of parties growing out of

it, that they should be placed precisely in the condition that the parties were at the time the paper was executed. This enables us to better determine the rights of the parties. Now, if the testimony in the case showed that Mr. Brigel went into possession of this property prior to the execution of this instrument, and that after he had been in possession for some time he had applied for a lease, and it had been refused him; or if he had entered into possession without a lease, and afterward applied to Mr. Bodman for one, and agreed with Mr. Bodman that the only use for which he wished that paper was that he might use it, as against the United States in case this property was condemned; that he would make no claim whatever against Mr. Bodman for any rights under or growing out of it, Mr. Bodman is not in law bound for the use of this property by Mr. Brigel.

That leaves but a single lease, namely, that of Mr. Lentz, respecting which I have more difficulty, and the ruling I shall make in regard to it is one of which I have some doubt. The paper is not signed at all. It merely recites that a verbal lease has been made for five years. Now, a verbal lease for five years is certainly not in conformity with the statute. The difficulty grows out of this state of facts. It is a verbal contract. The party is put in possession under and by virtue of its terms; the possession is referable solely to it. Whether, under the statute of frauds, possession of property taken by virtue of a lease takes it out of the statute which requires that all instruments for the encumbrance of property, or for any interest therein shall be in writing, or not, is not determined. I am forced, however, to submit to a decision of the supreme court of Ohio. The federal courts in all cases touching the validity and construction of statutes relating to realty must be governed and controlled by the construction given such by the supreme court of the state. This case comes within the decision in the case of Richardson v. Bates, 8 Ohio St. 257, which holds such a lease to be void.

Mr. J. G. Douglas: I would ask the court, in that case, whether the lease is not a lease for three years, and if he should not be paid for a three-year lease as one outside the statute?

COURT: In my examination of the case I tried to treat it as such. If the lease had been for three years, I should, undoubtedly, hold it good. But the lease is for five years, and, although the party went into possession under a verbal lease, if he is to derive any benefit from the lease whatever he must derive it according to the terms of the contract itself. If he has made a lease for five years, I do not think it is in the power of the court, and I do not think the law would justify me in saying that, so far as it was a lease for five years, it was null and void, yet hold it good for three years; it would be a change of contract, a change of obligation of the parties, which I do not think we can do. The lease of Mr. Davis is in conformity with the statute.

But disposing of the question of leases does not dispose of all questions of the rights of these various parties under them as against the government, or in relation to the improvements in fronts, or as to fixtures or other items which I reserve till I come to another part of the case.

We come next to a very important question in this case, and that is the rule of damages or compensation as applied to the owner in fee, and also to the lessees as to any rights they may have against the government or against Mr. Bodman. Without going fully over the arguments of the learned counsel,—for I cannot command the time to do so,—I will say the language of the constitution of the United States is: "Nor shall private property be taken for public use without just compensation." The language of the old constitution of the state of Ohio was: "Private property ought and shall ever be held inviolate, but also subservient to the public welfare, provided a compensation in money be made to the owner." [Const. 1802, art. 8, § 4.] The language of the new constitution is: "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war, or other public exigency imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner in money, and in all other cases where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner." [Const. 1851, art. 1, § 19.] In discussing the clause of the federal constitution in the case of Chesapeake & O. Canal Co. v. Key [Case No. 2,649], Judge Cranch says: "Just compensation means a compensation which would be just in regard to the public, as well as in regard to the individual." And in the case of Calder v. Bull, 3 Dall. [3 U. S.] 386, Judge Patterson says: "Highways are run through private grounds; fortifications, light-houses, and other public edifices are necessarily sometimes built upon the soil owned by individuals. In such and similar cases, if the owner should refuse voluntarily to accommodate the public, they must be constrained, as far as the public necessity requires, and justice is done by allowing them a reasonable equivalent." Also, in Goodin v. Cincinnati & W. Canal Co., 18 Ohio St. 169, Judge Welsh says: "The true value of anything is what it is worth when applied to its legitimate use, its best and most valuable use, and not for any special or inappropriate use."

Judge Cooley, on Constitutional Limitations (page 565), says: "If the whole of a man's

estate is taken, there can be little difficulty in fixing upon the measure of compensation; for it is apparent that, in such a case, he ought to have the whole market value of his premises, and he can not reasonably demand more. The question is reduced to one of market value, to be determined upon the testimony of those who have knowledge upon the subject, or whose business or experience entitles their opinions to weight. It may be that in such a case the market value may not seem to the owner an adequate compensation; for he may have reasons peculiar to himself, springing from associations, or other causes, which may make him unwilling to part with the property on the estimates of his neighbors; but such reasons are incapable of being taken into account in legal proceedings, where the question is one of compensation in money, inasmuch as it is manifestly impossible to measure them by any standard of pecuniary value." In the case of Giesy v. Cincinnati, W. & Z. R. Co., 4 Ohio St. 331, Judge Ranney says: "Whether property is appropriated directly by the public or through the intervention of a corporation, the owner is entitled to receive its fair market value at the time it is taken,—as much as he might fairly expect to be able to sell it to others for if it was not taken,—and this amount is not to be increased from the necessity of the public or the corporation to have it on the one hand, nor diminished from any necessity of the owner to dispose of it on the other. It is to be valued precisely as it would be appraised for sale upon execution, or by an executor or guardian, and without any regard to the external causes that may have contributed to make up its present value." And Judge Dillon, in his "Municipal Corporations" (page 487), says: "He is entitled to the fair and full market or pecuniary value of the property at the time it is appropriated, but no more."

We might go through a number of the authorities upon these propositions, but the substance of all of them would be the same. In view of the provisions of the constitution of the United States, and of the state of Ohio, and the authorities, I think that just compensation, or the compensation to which the owner of private property, when taken for public use, is entitled, is its full and fair market value at the time of its being taken; and this market value is not to be ascertained by what it would bring at a forced sale, but what it would bring fairly, for any and all purposes, if the owners themselves should offer it for sale. This value is not to be diminished because the owner may be compelled to part with his title to the government, nor increased because the United States may be desirous of making the purchase; and in this particular case the value is not to be increased because of the amount of the appropriation made by congress, and the guarantee fund for the purchase of this site; neither, on the other hand, is it to be diminished because of the insufficiency of appropriation for the purchase of the site. In ascertaining its value you are to take the testimony of the witnesses, and all the facts that have been proven in the case. You are to take, in connection with that, your own knowledge as to the locality of these premises, as to their surroundings, as to the nature and character of them as ascertained by actual view upon the premises. And, in determining what weight the testimony of the witnesses shall have, you are to take into consideration, as has well been said, the testimony both for the government and for the claimants, the opportunities of knowledge the witnesses have had of the subject upon which they have spoken; whether they are conversant with the city of Cincinnati, with all the elements that go to make up the value of this particular piece of property; and taking into consideration all the facts, you may look to the reasons which the witnesses both for the government and claimants have given, and ascertain whether the conclusions which they have arrived at, and to which they have testified to the jury, are supported by the reasons which they assigned as leading them to such conclusions. You are to take all this into consideration, and then you are to test it again by the knowledge which you yourselves have been permitted by the court to derive from inspection of the locality of these buildings, from the character of these structures, from the locality of the ground, and the general purposes which you, as jurors of Cincinnati, from this testimony, and from your own knowledge, know that this property is adapted to. You are to take all these things into consideration, and when you have gone through with it all, and arrived at your conclusions, you are to give to these parties, as I said before, the full and fair market value at the time of taking—at this present time—and considering the uses to which it can be most profitably appropriated, you will give to the parties what it would fairly bring for any and all of such purposes, if the owners themselves were to-day to put it upon the market for sale. I say, "at the time of taking," but in the examination of witnesses it was admitted that the jury might take into consideration what it would have brought in case it had been offered for sale two or three months ago.

Mr. Bateman: As far as I am concerned, I am willing that the jury should give what it would have brought three months ago.

COURT: While the language of the law or its construction is that its value must be fixed as at the time of its appropriation or taking of the property, still it is not right that you should subject these parties to the consequences of what we all suppose to be a temporary depression and stringency of the money market. If this were permitted, it might have a great effect upon the value of this property. Therefore, you will not

take into consideration the state of affairs existing to-day, but of, say two months ago, relieving it from the pressure which may now be upon it. This rule applies more particularly to real estate.

Upon the motion to withdraw from the jury certain testimony, I overruled or withdrew from the jury all testimony under the fourth claim of these lessees which related to damages by delay in their business, damages by depreciation of stock, damages from the loss of good will, and damages that may result to them from the difference in the amount of rent which they may have to pay at other points and the uncertainty of getting rooms, as compared with that which they pay where they now are. I reserved, however, for further consideration one or two elements which are embraced in that fourth claim, namely, the cost of removal and damages to property in removal. These, with the value of the several articles of movable property used in carrying on the business of those parties, the value of the fixtures which they may have erected or attached to the building for the purpose of carrying on their trade, and the value of the improvements made upon the buildings of a permanent nature different from the fixtures, fronts, etc., are the claims undisposed of by the rulings then made.

In relation to the fronts which have been in controversy, made by Mr. Smith and Mr. Brigel, they have not been estimated in the value as placed upon the property by the witnesses for the claimants; they have been, I understand, by a portion of the witnesses for the government.

Mr. Bateman: Mr. De Camp estimated it at a valuation of $19,000. I do not think any of our witnesses placed any other valuation.

Judge Whitman: Mr. Bell said he estimated it just as it stood.

COURT: So far as those improvements in the fronts of the two stores are concerned, if they were affixed to the freehold in such a way as that they could be removed without injury or damage to the freehold, the tenant would have the right of removal prior to the expiration of his term. But if he left them beyond the expiration of his term, then that right would cease, and the property would be the property of the landlord. So, if he had attached them to the freehold in such a manner that they could not be removed without damage and injury to the freehold, they thereby became part and parcel of the freehold, and he would have no right to remove them either before or after the expiration of his term.

You have heard the testimony as to the nature and character of these improvements. If it be that the property can be removed without injury to the freehold, then, although technically the term of Mr. Smith has expired, still, in remaining in possession of the property by consent of the landlord, I do not think the technical termination of his term would, of itself, take from him the right to remove this property, but that he still possesses the right to remove it. From all the facts in the case, Mr. Smith, I think, is entitled to the removal of those fronts upon his placing the property in precisely the same condition in which it was before he made the improvement. But I think that it would be just to Mr. Smith to allow him the fair value of those improvements; that is, whatever they would bring in their present condition, if he sees proper to leave them there. For, while there may be a possibility of his removing them, still they are affixed to the house in such a way that they may be said to have become part and parcel of the freehold; and as Mr. Bodman did not expect to enjoy the improvements, no agreement being made when he leased the property that they should be made, I therefore think it would be fair to allow Mr. Smith what those improvements would add to the value of that property,—what they are worth to the property as attached to it now. But you must be careful in making an estimate of the value of that property that you do not overlook the fact that, in the estimation of the defendants' witnesses there has been no estimate of that character added to it. You must not, therefore, take it from Mr. Bodman's, unless you add to the property the value of the improvements. Your verdict, as far as this is concerned, would be that he was entitled to so much, specifying what it was for. On the other hand, if Mr. Smith wishes to remove it, he has the privilege, on condition of placing the property as it was before.

As to the fixtures, the shelving, etc., of Mr. Smith, the law is the same as that applicable to the fronts. The party has a right, during his term, to remove them, provided he can do so without damage to the freehold. If he does not, or if they cannot be removed without such damage, they are a part and parcel of the freehold, and become the property of the landlord. But in this case their value has not been estimated; they have been excluded. Therefore Mr. Smith may be entitled to a fair compensation for the use of those fixtures, if you find he had any term there. But if he had no term there, you may give what Mr. Smith's fixtures were fairly worth to the building; what they would add to the building, if anything.

Next, that which relates to the several articles of property used in carrying on the business,—tools, counters, and everything of that character. These are removable property, and the party is not entitled to any compensation for such property. He is entitled to take them and use them wherever he goes, and a party taking that place of business is not compelled to take any such property; in a word, everything which is not attached to the freehold and which may be removed. In regard to these two items they are not to be

taken out of the value of the building, as they were valued separate and apart from it. That leaves the costs of removal and damages to the property in the removal.

Judge Mallon: I think your honor said, in your ruling before, that you would consider also the loss of trade during the time of removal.

COURT: That is so. I intend to review what the supreme court of Massachusetts has ruled in favor of the tenant where there was a partial appropriation of the term which the parties may have had in these premises. If, in this case, the parties had a right to a term under these leases, whether for three or four or five years, or for one year, I am not certain in my own mind, that they would not be entitled to the costs of removal, damages in the removal of property, as breakage, etc., and loss of trade during the time of removal. But there is but one single case in these six where, according to the ruling of the court, the parties under their written contracts are entitled to any term whatever; it is at an end; they have no right to remain longer in the premises. Under these circumstances, I do not think it is the law, though it is a question about which I had doubt when I ruled before; and upon further examination of the authorities I am not so clear in my own mind as I should like to be. Yet the better inclination of my mind is that those parties are entitled to no compensation for the removal, for the loss of trade during the time of removal, or for damage done to their goods in removal.

This disposes of all, except the lease of Mr. Davis. Mr. Davis has a term secured to him by a legally executed lease, and, as against his landlord, he is entitled to compensation for whatever that lease may be worth, applying the same principles to this that I apply to the value of the real estate. We must look at the terms of this lease in order to ascertain what Mr. Davis is fairly entitled to. By the terms of it he was to build the shed and fit it up at his own expense; he was to have the use of it for five years. At the end of five years he was to leave it, and it was to be the property of Mr. Bodman. He is deprived by the act of the government of its use for this period of time; and Mr. Bodman, by the same act, three years and a half before the time when he should receive the full value of the shed. Now, what rule shall we adopt in order to ascertain the damages to which Mr. Davis is entitled.

It was contended by the learned counsel for the claimant that the rule should be applied which is applied to cases where a part of the estate is taken; that we must ascertain how much less valuable the remainder of it would be to the owner on account of this portion having been taken, and that you might look to see what would be the true value of this property to Mr. Davis in connection with his other stable. I recognize that rule as sound law. It is held by the authorities that where a portion of an estate is taken you must consider not only the value of the particular portion taken, separate from the remainder, but you must take into consideration the damage to the remaining portion, and give the amount of the two combined. But I do not think the rule applies to a case of this kind. There is no connection whatever between the estate which Mr. Davis has remaining and the one which is taken. He may derive some benefit and make some profit from their use in connection, but there is not that identity and connection which warrants the application of this rule. Neither can you take into consideration what he might have made as profits from their use, because it is a speculation into which you cannot go. It is so uncertain in its character that courts and juries cannot go into such an examination to ascertain values. How, then, can you estimate its value? Judge Whitman said that, inasmuch as they would get the value of the property, it would be just to Mr. Davis that he should have that value, and that he should have for the remainder of his term the difference between what this property in its present condition would fairly rent for, and the amount which he was to pay for it. Mr. Davis might not be strictly entitled to the value of this shed as appraised. The legal rule, in its strictness, would entitle him to the value of the use of it for the remainder of the term, not the value of the building itself. But inasmuch as counsel, in his liberality, has said to the jury that they might give him the present value of it, you may do so, and also give him the difference between a fair rent of the property now and what he agreed to pay for the remainder of the term.

Judge Whitman: Will your honor add to that that it is to be based upon the hypothesis that Mr. Davis still continues to pay $400 a year?

COURT: If I say that the jury must give to Mr. Davis the full value of the rent, he must still continue to pay the rent; but we simply give to him the difference.

Mr. Bateman: As between Mr. Davis and Mr. Bodman, it is a matter to be adjusted between them.

COURT: The jury understand that.

And now, gentlemen of the jury, having given you, as carefully as I could, the law of the case, I think it not inappropriate to remark that, in consideration of the importance of this case, which you full recognize, we are certainly under great obligations to you. With the cares of business pressing upon you, you have consented to waive the interests of your own business for the time being, that you might attend to the public business. It would be a matter of great congratulation to the country if gentlemen of your character and standing would feel themselves called upon to attend public matters when the public interests demanded it. You have been prompt in your

attendance and patient in listening to the testimony, and argument of counsel, and the charge of the court. We now give the case to you. You will, in returning your verdict, say how much each one of these parties is entitled to. Should you return a verdict for the lessees, you will say how much each one is entitled to, and for what items.

The jury returned the following verdict:

"We, the jury heretofore impaneled to ascertain and determine the compensation due to the owners by reason of the appropriation of in-lots 118, 119, 143, and 144, in the city of Cincinnati, by the United States, do find the amount due to the several owners and claimants of lot No. 14, as described in the petition, being a part and parcel of said in-lots, as follows:

Ferdinand Bodman, for ground.....	$48,000
For improvements on same.....	22,000
Total	$70,000
J. A. Smith, for plate-glass and other portions of store front.....	$500
And for shelving	200
Total	$700
J. B. Brigel, for glass and other portions of store front.....	$300
And for shelving	200
Total	$500

"To H. H. Davis, for the unexpired time of his lease, sixteen and two-thirds dollars per month, or $655 37, and three hundred ($300) for the building, to be deducted from the amount herein awarded to Mr. Bodman.

"Messrs. Smith and Brigel have the option of removing their store fronts and shelving, in lieu of receiving the award upon condition of placing the property 'as it was before.'"

Verdicts in like form were rendered in the other cases. In some of the subsequent cases, the jury, under direction of the court, returned in their verdict findings of the costs of removal of goods, subject to the final judgment of the court as to the liability of the government for such damages. The sum of such findings being, however, very small, the district attorney, upon final judgment, and to avoid delay, waived objection and allowed judgment to go for them.

In the valuations of lots 21 and 22 the heirs of D. K. Cady, who own a perpetual leasehold estate therein, claimed that their estate was wholly independent of that of the lessor, and should be valued without reference to the total value of the property or the value of the remaining interest. The court charged the jury in respect thereof as follows:

SWING, District Judge. In the taking of private property for public use, under the right of eminent domain, the government pays to the owner the full, fair market value thereof. In this case it is the land and the improvements thereon which are a part of the land itself. If the title in fee simple and possession and right of possession is vested in the same person, there is no difficulty in determining the questions as to the amount and person to whom the damages shall be paid. The amount will be the full and fair market value, and the award will be to the owner. If, however, the owner in fee has leased the property, then the lessee or tenant is entitled to the value of his term in the property. This value is to be determined by ascertaining how much more the term is fairly worth than the amount of rent which he is bound to pay to the owner of the fee, and this amount he is entitled to out of the market value of the land, and the owner is entitled to the remainder of such value. The proceedings in condemnation have put an end to the relations of landlord and tenant. The tenant having received the full value of his lease, over and above the amount of rent he was bound to pay, cannot claim the enjoyment of the premises, and the landlord having received the value of the property, subject only to that, cannot claim from the tenant the payment of the rent.

Numerous motions for new trials having been overruled, John Gerke, treasurer of Hamilton county, Ohio, appeared, and made written application for the payment of the taxes owing upon the several pieces of property out of the compensation assessed by the jury, and the district attorney made motion on behalf of the United States for the same order. These taxes amounted to the sum of $9705 14.

District Attorney Bateman claimed that the state had two remedies for the collection of its taxes upon real property, viz., one personal by distraint or otherwise against the property owner, and the other by special proceeding against the land. Under the act of cession the effect of this proceeding was to transfer the jurisdiction over the property condemned to the United States, and to extinguish all liens as it was to destroy all remedies against it for taxes. The state was still entitled to claim its interest in the property out of the fund when paid into court, which by virtue of the law it had provided for its condemnation was intended to take the place of the property and of all the interest in it.

Judge Whitman and others, in behalf of the property owners, insisted that, inasmuch as the state had not been made party, nor its interest submitted to the jury for valuation or adjustment, as among the other interests in the property, the court could not apportion and deduct the taxes from the valuations the jury had awarded.

SWING, District Judge. The statutes of Ohio provide that taxes for each year shall be a lien from the day preceding the second Monday in April thereof, and until they shall be paid. Swan & S. p. 762. They further provide that whenever land shall be sold at

judicial sale, the taxes thereon shall be paid upon order of the court out of the proceeds of sale. 2 Swan & C. p. 1465. But it is very doubtful whether this is a judicial sale; and upon examination of the statutes of Ohio, so providing for payment of taxes above referred to, I am unable to reach the conclusion it is such. Neither the law of Ohio ceding jurisdiction, nor the law prescribing the mode of proceeding for condemnation by the United States, provides for the payment of the taxes; and inasmuch as the state of Ohio has not been, and in fact could not have been, made a party so as to present its claims to the jury, and inasmuch as the parties are personally liable to the state for taxes, we must leave it where we find it as to the claim of the state for its taxes. Whether the state would retain its lien for taxes upon the property after condemnation may be doubtful. We are not called upon to decide that question. The law of April, 1872, ceding jurisdiction, provides that when title shall have been acquired by the United States by purchase or appropriation under the right of eminent domain, jurisdiction shall vest in it, and the property 'shall be and continue exonerated from all taxes, assessments, and other charges, which may be imposed under the authority of this state." The application of the treasurer and motion of the government must be overruled.

Having disposed of the foregoing motions, judgments were entered as to the several pieces of property in the following form: "This cause coming on to be further heard upon the petition of the United States, the findings of the court upon the preliminary inquiries and upon the claim of the treasurer of Hamilton county for taxes, and the verdict of the jury duly impanelled and sworn to ascertain the compensation due to the several owners and claimants of the property described in the petition, and it appearing to the court that said property has been legally appropriated by the United States under the right of eminent domain, that Ferdinand Bodman, John B. Brigel, H. H. Davis, John Lentz, John A. Smith, J. A. Ringerman, and Fox Brothers appeared and claimed compensation by reason of the appropriation of Lot No. 14, as described in the petition, and that the jury has found the amount due by reason of such appropriation to be, to Ferdinand Bodman, $69,044 63; to Jno. A. Smith, $700; John B. Brigel, $500; and to H. H. Davis, $955.37: It is therefore ordered, adjudged, and decreed by the court that upon full payment by the United States of said sums of $69,044 63 to Ferdinand Bodman, $700 to Jno. A. Smith, $500 to John B. Brigel, and $955 37 to H. H. Davis, or into court for their use, the title to said lot (No. 14, as described in the petition) shall vest in the United States, and a writ of possession is awarded to put the United States in possession thereof. And it is further ordered that the United States pay the costs herein, taxed at $——."

R. H. Stephenson, disbursing officer, having paid the amounts adjudged to each claimant upon the judgments entered, mainly to the claimants, but a small portion into the registry for the use of such as failed to appear, and the costs taxed. an entry was made finding such judgments in detail, and "that the United States has become entitled to the possession of said premises, under and by virtue of its appropriation aforesaid," and it was thereupon "ordered and adjudged that a writ of possession issue upon the precipe of the district attorney to the marshal, commanding him to remove from said premises the said occupants thereof, and to place the United States, by its agents and officers, in possession of the same."

Some of the counsel for claimants moved the court to retax the costs so as to allow a docket-fee to the attorney of each claimant, upon which Judge SWING held that it was not a case embraced within the fee-bill as to attorneys' fees, and the motion was thereupon withdrawn.

Bill of exception was allowed to Mary S. Kohl and others, claimants of a leasehold interest in one of the pieces of property condemned, as to the order of the court overruling the motion to dismiss for want of jurisdiction, and as to the order overruling the motion for a separate trial and verdict as to their interest, and the cause taken to the supreme court.

[The judgment of this court was affirmed in the supreme court. 91 U. S. 367.]

Case No. 15,442.

UNITED STATES v. INSURGENTS.

[3 Dall. 513.]

Circuit Court, D. Pennsylvania. 1799.

FEDERAL COURTS—SPECIAL CRIMINAL SESSIONS—POWER OF JUDGES.

[The act of March 2, 1793, empowering the judges to direct special sessions of the circuit court to be holden for the trial of criminal cases, at any convenient place within the district, nearer to the place where the offences may be said to be committed than the place appointed by law for holding the session, vests in the court a legal discretion, to be exercised upon considerations of convenience and practicability.]

[Cited in Memorandum, Case No. 9,411; U. S. v. Cornell, Id. 14,868.]

Several indictments were found against persons charged with high treason, by levying war against the United States, in the counties of Northampton and Bucks, in the state of Pennsylvania; and the prisoners having pleaded "not guilty," Lewis & Dallas, their counsel, filed a suggestion, that all the offences were charged to have been committed either in Northampton or Bucks, and moved for a trial of each indictment in the proper county, on the provision contained in the twenty-ninth section of the judicial act (1

Swift's Laws, 67 [1 Stat. 88]): "That in cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence." The motion was opposed by Rawle, the attorney of the district, and Sitgreaves.

BY THE COURT. The mere circumstance of delay, in trials of so much expectation and importance, though entitled to some consideration, would not be sufficient of itself to prevent a compliance with the present application. And, we think, that the twelfth section of the judicial act ought to be so construed, as to vest in the judges a power of holding a special court, in the proper county, if in other respects they do not deem it greatly inconvenient. The act of congress, passed the 2d of March, 1793 (2 Swift's Laws, p. 226, § 3 [1 Stat. 333]), empowers the judges to "direct a special session of the circuit court to be holden for the trial of criminal cases, at any convenient place within the district, nearer to the place where the offences may be said to be committed, than the place, or places, appointed by law for the ordinary sessions;" but this provision does not expressly discriminate between cases of a capital, and of an inferior, nature; and a provision having been previously made for capital cases, it would be justifiable to apply this to inferior cases. At all events, any criticism upon the word "nearer" (considering the whole state as a district, or county, in relation to the United States) would not prevent our appointing a special court in the proper county, if such an appointment was, otherwise, eligible. The truth is, that the act gives to the court a legal discretion upon the subject. A trial in the proper county might have been ordered, when the offences were committed; but no candid man will say, that, at that time, such an order would have been justifiable. The next step, therefore, was to bind the offenders over to this court, having complete jurisdiction of the case; and, now, the only questions are, whether it is practicable to refer the trials to the counties, respectively, in which the offences were committed? And, if practicable, whether it can be done without great inconvenience?

On the question of practicability, two difficulties occur: (1) Whether the indictments found at this court, can be transferred to a special court? [U. S. v. Hamilton], 3 Dall. [3 U. S.] 17, 18, was cited on this point. And (2) whether the motion is not too late; for, as "the indictment ought to be considered as "inseparably incident to the trial, and in truth a part of it" (Fost. Crown Law, 235, 239), can the trial be commenced here, and be terminated elsewhere? But even if it were practicable, on legal principles, to direct a special court, can it be thought convenient, or safe, in the present state of Northampton and Bucks counties, to do so? It is evident, that nothing but an armed force has recently been sufficient to quell the insurrection, and to arrest the insurgents; and, we hope, that it will never be expected from the exercise of a judicial discretion, that a court of justice shall be voluntarily placed in a situation, where the execution of its functions, and the maintenance of its authority, must depend on the same military auxiliary.

Upon both grounds, however, we think the motion ought to be rejected. Motion refused.

Case No. 15,443.

UNITED STATES v. INSURGENTS.

[Whart. St. Tr. 102; 2 Dall. 335.] [1]

Circuit Court, D. Pennsylvania. May 18, 1795.

CRIMINAL LAW—SUMMONING JURORS IN FEDERAL COURTS—JURY LISTS—COPY OF INDICTMENT.

[1. The twenty-ninth section of the judiciary act, which refers the federal courts to the state laws for certain regulations respecting juries, applies only to the mode of designating the jury by lot or otherwise, and to the qualifications of jurors, and not for the purpose of fixing the number of jurors. The number thereof must depend upon the common law, under which the court may direct any number of jurors to be summoned upon a consideration of all circumstances under which the venire is issued.]

[2. In the lists of jurors furnished to the prisoner the designation of their abode should state the township in which they live, and a mere description of their residence as being within the state is insufficient.]

[3. A copy of the caption of an indictment must be delivered to the prisoner, along with the indictment of which it naturally forms a part.]

The act of congress of the 3d of March, 1791 [1 Stat. 199], which imposed a duty upon spirits distilled within the United States, produced at once great opposition, both in and out of congress. A majority of the Southern and Western members, even before the bill was passed, proclaimed an organized agitation for its repeal; and hardly had the president's signature been obtained before the measure was assailed violently from the country at large. It was branded with the name of an excise, a term very hateful to the people, as connected with the former oppressions of the British government. It was declared unnecessary and tyrannical. The legislatures of Maryland, Pennsylvania, Virginia, and North Carolina united in solemn declarations of rooted dislike, and of resistance, in some cases hardly to be reconciled with constitutional opposition; and by the latter state a position was assumed, which in later days would have been called nullification. But it was in the western parts of Pennsylvania and Virginia, and particularly in the counties of Alleghany, Washington, Fayette, and Westmoreland, in the first-mentioned state, that resistance to the bill was most violent, and it

[1] [2 Dall. 335, contains only a partial report.]

was there an agitation was started which, in the course of a few years, ripened into an organized insurrection and involved its leaders in the crime of treason. The peculiar opposition of these portions of the Union may be accounted for by the circumstance that the war of the Revolution, by cutting off the trade in foreign spirits, had turned the attention of the grain growing districts of these states to the distillation of rum and whisky. This soon grew into a very considerable business: the greater part of the United States was supplied from these sources, and spirits were even exported into Canada. So lucrative did this trade soon become, that almost the whole local population, at the end of the Revolution, was connected with it. The "Western Country," as it was then called, swarmed with distilleries. Not only were whisky and rum articles of commerce and of consumption, but from the natural deficiency of specie in a wild country they also were used universally as currency. Payments were made in them; and they were received in satisfaction of debts. The agricultural interests became enlisted in the traffic by the immense amount of grain thus consumed. At one time, such was the quantity disposed of in this manner, that a famine was dreaded, and, moved by popular clamour, the legislature was compelled to interfere and pass a law to prevent the distillation of any kind of grain; which was, however, afterwards repealed, so far as regards rye and barley. The attention of the legislature of Pennsylvania was early called to this as a productive source of revenue. In the year 1772, even before the trade had acquired any great importance, an excise law was passed upon domestic and foreign spirits. At first, however, as to home distilled spirits it was not executed, and, indeed, hardly any steps were taken for the purpose, particularly in the older counties. But, during the Revolutionary war, the necessities of the state, and a temporary unpopularity of distillation, before alluded to, rendered the collection of the duties both necessary and practicable; and a considerable revenue was thereby obtained. Towards the end of the war it again ceased.

In 1780 congress resolved that an allowance of an additional sum should be made to the army, to compensate for the depreciation of its pay. This was distributed among the states for discharge. Pennsylvania made several appropriations for the purpose, but the funds so applied turned out to be unproductive. The depreciation fund having always been treated as a favoured claim, on application of the officers of the Pennsylvania line another effort was made, the revenue arising from the excise was appropriated to this end, and vigorous measures were taken for its collection. If the duties on domestic spirits could have been enforced, there was no doubt, such had been the increase in the business in the few years previous, that, in a short time, it would have paid both principal and interest of the fund. Aware of this, in the year 1786 Mr. Robert Morris offered to farm the revenue, and to pay into the state treasury the sum of £70,000 per annum. This was, however, rejected, from a prejudice to the mode, which was supposed to be peculiar to despotic government; but there was no question at the time that that sum could have been so produced, if it could have been collected. The ordinary means were therefore to be adopted. But great changes had taken place in the disposition of the people since the first imposition of these duties. The neighbouring states were free from the burthen; and in New Jersey, where a law had been passed for the purpose, its execution had been entirely prevented by a powerful combination. The Pennsylvania law, therefore, met with great opposition; especially from the inhabitants of the counties west of the Alleghanies, as they more particularly felt its rigour. Outrages of a very serious character were perpetrated upon the inspectors, and others were threatened. The opposition was successful. A very small sum was collected, and that with difficulty. The act of congress of 1791 was, therefore, received with great dislike by a people who had just been successful in their resistance to a similar law of their own state. Added to this, from the western parts of Pennsylvania had sprung the greatest opposition, so far as that state was concerned, to the ratification of the constitution of the United States. And the resentment which had been excited in the undisciplined minds of the settlers by the destruction of their hopes of an independent ultramontane empire, had not been subdued by lapse of time, or by a better acquaintance with the federal system. Under this state of things, and encouraged by the legislature of their own state, who had, by a resolution, emphatically expressed their disapprobation of the course of congress in this respect, it was not likely that the inhabitants of Western Pennsylvania and Virginia would suffer a law which so materially affected their interests to pass quietly into operation.

The first indication of a spirit of discontent was manifested in the general circulation of opinions unfavourable to the law, and calculated to discourage the acceptance of offices under it, or any compliance on the part of those who might be so disposed. This was soon followed by a pretence of a cessation of distilling. Then succeeded secret associations to abstain from compliance with the law, which were very general. These were found ineffectual. The law went into operation in June, 1791, and the offices were pretty generally accepted. The officers then became marks for insult and opprobrium. Threats against them were frequent. Soon actual violence was resorted to, to prevent the execution of the law. Before these, however, another engine was employed—the expression of discontent by means of public meetings. The first of these meetings of any

moment was held at Redstone Old Fort, on the 27th of July, in the same year. It was there resolved to petition congress for a repeal of the obnoxious act, and a committee was appointed to meet at Pittsburg and draught one. The committee was authorized to correspond with citizens of other parts of the country who might be disposed to join in such a petition. It was also recommended to the different counties to appoint committees to superintend the signing of the petitions and the forwarding of them to congress. On the 23d of August following, one of these committees met in the county of Washington, when some very intemperate resolutions were passed, and afterwards published in the Pittsburg Gazette. These contained a violent censure of the law; and declared that any person who had accepted, or might accept, an office under congress in order to carry it into effect, should be considered as inimical to the country; and they recommended to the citizens of Washington county to treat every person so accepting office with contempt, and absolutely to refuse all kinds of intercourse with such officers, and to withhold from them "all aid, support, and comfort." Not content with this proscription of those who might consider it their duty, as officers, to aid in the execution of this law, the meeting then proceeded to attack the government on topics entirely foreign to the objects of the meeting; evincing thus rather a determination to render that government generally odious, than merely a dislike of a particular law. This meeting deputed three of its members to meet delegates from the counties of Westmoreland, Fayette, and Alleghany, on the first Tuesday of the following September, for the purpose of petitioning congress on the subject of the excise, and other grievances. On the 7th of September, accordingly, a meeting took place at Pittsburg, at which there appeared persons in the character of delegates from the western counties. This meeting passed resolutions more comprehensive than any of the former, and fully as dangerous. They contained attacks not only on the excise, but also on the national bank, the salaries of officers, the public debt, and the administration itself. A petition to congress, and a remonstrance to the legislature of Pennsylvania, were prepared by this meeting, published, together with their other proceedings, in the Pittsburg Gazette, and afterwards presented to the respective bodies to whom they were addressed. These meetings were all composed of the most influential men in the several counties; and there can be no doubt that their injudicious and intemperate language, on these occasions, served to inflame and encourage the spirit of resistance among the people, already of a serious character. The effect was perceived immediately.

On the 6th of September, 1791, the opposition broke out into open violence. Robert Johnson, a collector of the revenues for the counties of Alleghany and Washington, was seized at a place on Pigeon Creek, in the latter county, by a body of armed men, who stripped him, cut off his hair, tarred and feathered him, deprived him of his horse and money, compelling him to travel, in that state, a considerable distance on foot. A complaint was immediately entered by Johnson, and the case was brought before the district court of Pennsylvania, out of which process issued against John Robertson, John Hamilton, and Thomas McComb, three of the persons engaged in the outrage. The deputy marshal, to whom the service of the process was committed, met with much opposition, and was threatened with personal violence in endeavouring to perform his duty. The reality of the danger was confirmed by General Neville, the inspector. The deputy marshal considered it, therefore, more safe to transmit the process by a private messenger, and under cover. The person who was thus sent, though ignorant of the contents of the papers, was seized by the parties, tarred and feathered, and, after having his horse and watch taken from him, was blindfolded and tied in the woods, in which situation he remained for about five hours. It was thus found that the ordinary course of civil justice was inefficient to crush the resistance of the distillers. Some more stringent means should be adopted. But at this time many things concurred in rendering it imprudent to proceed at once to extremities. No means had as yet been provided by congress by which the executive could come to the assistance of the judiciary, in the enforcement of the laws. The constitution had been in operation but a short time; the actual strength of the government was not known; it was, therefore, advisable not to put forth its energies unless with certainty of success. There were a number of alterations which the law required, which might have the effect of concessions to prejudice without yielding the principle. It was accordingly determined to postpone coercive measures till the laws had gone into more extensive operation, and congress had had the opportunity, by revising the system, to remove what was really objectionable, and to strengthen the means of its execution. It was hoped that this forbearance, together with time, would have the effect of mitigating the opposition.

This reluctance on the part of government to press matters, had only the effect of encouraging the discontented. The outrages soon became only more bold and violent. Another officer of the government, Mr. Wells, the collector for Westmoreland and Fayette counties, was ill-treated at Greensburg, and afterwards at Uniontown; and many private citizens, who had declared their determination to support the laws, were exposed to insult, and even personal violence. But the worst instance of these outrages was the fol-

lowing. In October, 1791, an unfortunate man of the name of Wilson, who was quite insane, fancying himself a collector of the revenue, or invested with some office in connection therewith, told a number of people that he was engaged in an important inquiry in regard to the excise, and that he was to ascertain and report to congress those who had not entered their stills. A few days after this declaration he was pursued by a party of men in disguise, taken out of his bed, and carried about five miles into the country, to a smith's shop. He was there stripped of his clothes, and, after having been inhumanly burnt in several places with hot irons, he was tarred and feathered. At day-light he was set at liberty — naked, wounded, and suffering — to find his way home as he best could. During the whole of the torture, the poor maniac is said to have behaved with all the heroism of a man suffering for a principle. What is more extraordinary is, that men of the best standing and consideration in the county were understood to have been actors in this cruel outrage. Not long after this, a person of the name of Rossberry was tarred and feathered for advocating the excise law. An armed band seized and carried off two persons who were witnesses in the case of Wilson. Many attempts against the person of the inspector, General Neville, were made, in order to force him into a resignation. On one occasion, a large body of armed men, disguised, awaited him in the town of Washington, where he was expected, and their schemes were only frustrated by his abandoning the visit. The act of 1791 came up for revision before the congress which assembled in October of the same year. By an act passed May 8, 1792 [1 Stat. 267], several material alterations were thereto made; the duties were reduced to so moderate a rate as to obviate any complaint on that score. The other changes were also favourable to distillers.

The effect of this was, at first, as favourable as could have been anticipated. In several districts where opposition had arisen it subsided, and hopes began to be entertained that the western counties would acquiesce in the peaceable execution of the law. This expectation was, however, soon disappointed, and a fresh agitation was started. The act of 1792 required that there should be an office for collection in every county. It was therefore supposed, on the part of the discontented, that if the establishment of these offices was prevented, a material point would be gained. A plan of intimidation was accordingly pursued, directed against those who might be disposed to allow their houses to be used for the obnoxious purpose. Threats of personal violence and of destruction of property were made, and in some cases actually executed. It became, therefore, in a short time, almost impossible to obtain suitable places for the revenue offices. After much difficulty, in August, 1792, General Neville obtained the house of one William Faulkner, a captain in the army, for an office of inspection in Washington county. Soon after this, Captain Faulkner was met by a large number of people, in the same neighbourhood where Johnson had been maltreated the preceding year. A knife was put at his throat, and the assailants threatened to scalp, tar and feather him, and to burn his house, unless he would promise to prevent its further use as an office. He was compelled to make the promise; and, in consequence, wrote a letter to the inspector, countermanding the permission to use his house.

Another means of resistance was then put into operation. Agreeably to a previous notification, a number of persons, styling themselves "A Meeting of Sundry Inhabitants of the Western Counties of Pennsylvania," met, and passed a set of resolutions not less objectionable than those of the former meetings. The preamble suggests that a tax on spirituous liquors is unjust in itself, and oppressive upon the poor; that internal taxes upon consumption must, in the end, destroy the liberties of every country in which they are introduced; that the law in question, from certain local circumstances which are specified, would bring immediate distress and ruin upon the western country; and concludes with the sentiment, that they think it their duty to persist in remonstrances to congress, and in every other legal measure that may obstruct the operation of the law.[2] The resolutions then proceed, first, to appoint a committee to prepare, and cause to be presented to congress, an address stating objections to the law, and praying for its repeal; secondly, to appoint committees of correspondence for Washington, Fayette, and Alleghany, charged to correspond with each other, and with such committee as should be appointed for the same purpose in the county of Westmoreland, or with any committees of a similar nature that might be appointed in other parts of the United States; and also, if found necessary. to call together either general meetings of the people in their respective counties, or conferences of the several committees; and, lastly, to declare that they will, in future, "consider those who hold offices for the collection of the duty as un-

2 Mr. Hamilton, then secretary of the treasury, in his report to the president, upon the insurrection, says of the resolutions of this meeting: "The idea of pursuing legal measures to obstruct the operation of a law needs little comment. Legal measures may be pursued to procure the repeal of a law, but to obstruct its operation presents a contradiction in terms. The operation, or, what is the same thing, the execution of a law, cannot be obstructed, after it has been constitutionally enacted, without illegality and crime. The expression quoted is one of those phrases which can be only used to conceal a disorderly and culpable intention under forms that may escape the hold of the law."

worthy their friendship, that they will have no intercourse or dealings with them, will withdraw from them every assistance; withhold all the comforts of life which depend upon those duties that, as men and fellow-citizens, we owe each other, and will, upon all occasions, treat them with contempt, earnestly recommending to the people at large to follow the same line of conduct towards them." The proceedings of this meeting, which placed the opposers of the law in a state of direct hostility to the government, were reported by the secretary of the treasury to the president. Impressed with the danger of permitting the continuance of such resistance, he issued a proclamation on the 15th of September, 1792. It earnestly admonished and exhorted "all persons whom it might concern to refrain and desist from all unlawful combinations and proceedings whatsoever, having for their object, or tending to obstruct the operations of the laws aforesaid; inasmuch as all lawful ways and means would be put in execution for bringing to justice the infractors thereof, and securing obedience thereto: and charged and required all courts, magistrates, and officers whom it might concern, according to the duties of their several offices, to exert the powers in them respectively vested by law; and thereby also enjoined and required all persons whomsoever, as they valued the welfare of their country, the just and due authority of government and the preservation of the public peace, to aid and assist therein according to law." It likewise directed that prosecutions should be instituted against the offenders in all cases where the law would support them, and the requisite evidence could be obtained.

In pursuance of instructions, the attorney general, Mr. Bradford, and the district attorney, Mr. Rawle, attended at a circuit court which was held at York in October, 1792, for the purpose of instituting prosecutions in proper cases. Much pains was taken to obtain evidence of the various outrages. For this purpose, the supervisor of the revenue was sent into the disaffected districts. His mission was, however, very unsuccessful. He obtained only evidence of those who composed the Pittsburg meeting, and of two of those engaged in the attack on Faulkner. The attorney general, however, being of opinion, that it was a very doubtful point whether the proceedings of the meeting at Pittsburg contained indictable matter, no prosecution was attempted against those who composed it. Indictments were presented and found against those supposed to have been engaged in the Faulkner riot, and prosecutions were commenced. But it appeared afterwards, upon satisfactory testimony, that there had been some mistake as to the persons accused, and the matter was dropped. The result of this business was injurious to the government. The violators of the law were encouraged by the hope of impunity; and the officers of the government became proportionately lax in their efforts. The outrages continued; and the efforts to prevent the establishment of offices of inspection were redoubled. In April, 1793, a party of armed men, in disguise, made an attack on the house of Wells, the collector of revenue, who resided in Fayette county. He was not, however, at home that night; and they, therefore, were obliged to content themselves with breaking open his house, threatening, terrifying, and abusing his family. Warrants were issued for apprehending some of the rioters on this occasion by the assistant judges of Fayette county, which were delivered to the sheriff of the county. The sheriff refused to serve them, for which he was afterwards indicted, so that this matter, also, fell to the ground. In the following June, the inspector, General Neville, was burnt in effigy in Alleghany county, at a place and on a day of public election, and in the presence of the magistrates and other public officers, without any interruption whatever. On the 22d of November, in the same year, another party of men, disguised and armed, went to the house of Wells. They broke into it, and demanded a surrender of his commission and official books. On his refusal, a pistol was put at his head, and he was compelled to comply under threats of death. Not content with this, the rioters, before they departed, ordered him, under pain of another visit and the destruction of his house, to publish his resignation within two weeks.

During this period, however, a spirit of compliance appeared to be gaining ground in some quarters. Several principal distillers, who had formerly held out, entered their stills, and others evinced a disposition to comply, though restrained by the fear of violence. But these favourable appearances did not continue long. In January, 1794, there were fresh outbreaks. William Richmond, who had given information against some of the rioters in the affair of Wilson, had his barn burnt, with all the grain and hay that it contained; and the same thing happened to Robert Shawhan, a distiller, who had been among the first to accede to the law, and who had always spoken favourably of it. James Kiddoe and William Coughran, who had entered their stills, were first threatened and then attacked. The grist-mill of the former was mutilated, and the still of the latter destroyed, and his saw and grist-mills rendered useless. They were also ordered to publish what they had suffered in the Pittsburg Gazette. A previous attack had been made upon Kiddoe, when his still was partially destroyed. June being the month for receiving the annual entries of stills, endeavours were made to open offices in Westmoreland and Washington counties, where it had hitherto been found impracticable. With much difficulty places were procured for the purpose. The office in Westmoreland was repeatedly

attacked in the night by armed men, who fired upon it: but it was defended with so much courage by Wells, the collector, and Regan, the owner of the house, as to maintain it for the remainder of the month. That in Washington, after repeated attempts, was suppressed. The first effort was confined to pulling down the sign of the office, and threats of future destruction. These were soon realized. About midnight, on the 6th of June, a number of persons armed, and painted black, broke into the house of John Lynn, where the office was kept. By promises of safety to himself and his house, they treacherously got him into their power, when they seized and tied him, threatening to hang him. They carried him to a retired part of the neighbouring woods, and there, after cutting off his hair, and tarring and feathering him, they compelled him to swear that he never would allow his house to be used again as an office, never again to have any agency in the excise, and never to disclose their names. After this they bound him naked to a tree, and left him in that situation till the morning, when he succeeded in extricating himself. Not content with this, the rioters came again, pulled down part of his house, and compelled him to become an exile from his own home. After this, many of the distillers who had at first entered their stills withdrew them, and refused payment of the duties.

In the congress of 1792–93, a bill for altering and amending the former laws on the subject was introduced, but was dropped in the hurry of the close of the session. On the 5th of June, 1794 [1 Stat. 378], another act, emendatory of the act of 1791, was passed. By it, the former law was extended to the Northwest Territory; the necessity of having an office in each county was dispensed with; the state courts were given jurisdiction over offences against the revenue laws in certain cases; and various other emenda tions and alterations were made. After the passage of this act, a plan was adopted, which was intended to give increased efficiency to the system. It was determined (1) to prosecute delinquents for non-compliance, in all cases where it could clearly be done; (2) to intercept the surplus produce of the distillers of the non-complying counties on its way to the markets; (3) to confine the purchase of spirits for the army to those in respect to which there had been an actual compliance with the law. It was hoped, by thus cutting off the trade of these counties, and prosecuting delinquents with rigour, that submission could be enforced. Here, again, the expectations of the government were disappointed. Process issued against a number of non-complying distillers; and indictments having been found at a circuit court holden at Philadelphia, in July, 1799, against Robert Smilie and John McCulloch, two of the rioters in the attack on Wells, the collector, in Fayette county, process issued against them also. Warned by the ill success of the previous attempts to serve process by deputy, the marshal of the district, Mr. Lenox, determined to go for that purpose in person. Before this intention of the marshal was known, a design to suppress the office of the inspector was manifested. It was currently reported that a party of four or five hundred men were to march to General Neville's house to destroy his papers, and effect the suppression. On the 4th of July, 1794, at a muster at Colonel Parker's, a paper, to which every one who opposed the excise was to put his name, was circulated among the militia men. Only one man refused to sign it, and he incurred the odium of the rest, and was threatened therefor. At this place violent and inflammatory speeches were made against the law and against congress. The success of the rioters in suppressing the collector's office in Washington county was referred to; it was urged in strong terms to the people to hold out, and not to submit to the law; and they were openly advised to take up arms and resist it. After the marshal's arrival, and when his purpose was learned by the insurgents, he also became an object of hatred; and a very large meeting was held to consider the means of opposing his mission. The people were collected by means of expresses sent over the country, and considerable numbers came armed. It was there resolved that the marshal should be seized, and brought before the meeting; but what was to be done thereupon was left uncertain. If any opposition was made, or they were fired upon, they were to burn and destroy everything that came in their way. A party, headed by a Captain Pearsol, was accordingly selected, who were ordered to intercept the marshal; and if any opposition was made, to return it. The remainder set out for General Neville's. The marshal had executed his trust without opposition, though under very discouraging circumstances, in Fayette county. But while in Alleghany county, being there accompanied by General Neville, on the 15th of July, he was met by the party sent to intercept him, then amounting to thirty or forty men, who fired on them, but without injury. This was but the beginning of greater outrages.

General Neville had received warnings for some time previous, that an attack was intended on his house. He had been met in the spring of the year by a number of disorderly persons, who, though they did him no personal injury, yet threatened him with vengeance in a very significant manner. He had obtained information of the proceedings of the muster at Colonel Parker's. Several other indications of a plan against him were manifested. Acting on these intimations, he had had his house prepared for resistance. The windows were filled up with thick plank, and the negroes abundantly supplied with arms and ammunition. These precautions were not idle. About day-break on the 16th, the party from the meeting before-mentioned, under the command of one John Holcroft,

counting about forty guns, appeared at the house of the inspector. On being asked what they wanted, and replying in a suspicious manner, they were fired upon from the house. They returned the fire; but being unexpectedly attacked by the negroes in the out-houses, they precipitately retired, with six of their number wounded and one killed. The inspector's family received no injury. Though thus far entirely successful, General Neville had every reason to suppose that the business would not terminate thus, and to anticipate a renewed and more dangerous attack. He accordingly made application to the judges, generals of militia, and sheriff of the county for protection. A reply to his application, on the part of these officers, informed him that the laws could not be executed, so as to afford him protection, owing to the too general combination of the people in that part of Pennsylvania, to oppose the revenue law; and expressed a fear, that should the posse comitatus be ordered out in support of the civil authority, very few could be found who were not of the party of the rioters. A detachment of eleven men, regulars, was obtained, however, from Fort Pitt, and command was taken by Major Kirkpatrick, a relative of General Neville. On the day following the attack, the rioters assembled again at Couche's Fort, a few miles from the residence of General Neville, to the number of five or six hundred men. Mortified at their defeat, and enraged at the number of wounded, they allowed their passions to swallow up all regard for consequences. A plan was concerted there to proceed at once to General Neville's, to compel the resignation of his office, and the delivery of his papers, and to seize the marshal. A committee of three, in imitation of the national commissioners that then attended the French armies, were elected to superintend the enterprise; and they appointed a certain James McFarlane,[3] formerly a lieutenant in the Pennsylvania line, and then a major in the militia, to command the party, subject to their supervision. The orders were to demand and obtain the inspector's commission and papers, and to offer no violence to his person or property, farther than was necessary for accomplishing their object. On the 17th, accordingly, they marched to the inspector's house. The horses were left under a guard in the woods; and the committee seated themselves on an eminence at some distance from the house. When McFarlane and the assailants approached the house, one David Hamilton was sent with a flag, by the committee, to demand of the inspector his papers. On answer being returned, that the inspector had left the house on the approach of the party, the flag was sent a second time, requiring the inspector to resign, and that six good, reputable citizens should be admitted to examine and seize the papers, promising that in that case no further injury should be done.[4] This was refused at once. Notice was given, by a third flag, for the women and children to withdraw. The attack then commenced.

In about a quarter of an hour the defenders of the house ceased firing, and a call was heard thence, which was mistaken by the assailants for a parley. Their leader, McFarlane, then stepped from behind a tree, where he had for greater safety posted himself, to order the firing to stop, when he was hit in the groin by a musket-ball from the house, and instantly killed. The firing then recommenced, and a message was sent to the committee to know whether the house should not be stormed. In the meantime the out-houses and the adjacent buildings were set fire to. The intensity of the heat, and the danger of an immediate communication of the conflagration to the house, compelled Major Kirkpatrick and his small party to come out and surrender themselves. The attack lasted for about an hour, during which the assailants had two killed and several wounded; and three of the soldiers were wounded. The privates were suffered to depart without injury, but Major Kirkpatrick was arrested, and ordered to give up his musket. He refused to do so, whereupon one presented a gun at his breast, and was about to fire, when he dropped upon his knees and asked quarter. The mansion was then set on fire, and it and the out-buildings were consumed, except a small out-house, which was preserved at the request of the negroes, as containing their bacon. While the house was burning, the rioters broke open the cellar, and drunk up the wine, and many things of value were supposed to be stolen therefrom. The marshal, with Colonel Presley Neville (the son of General Neville) and several others, were taken on their way to the house. They were arrested and put under guard. After a short time, all but the two former were permitted to escape. Colonel Neville begged to be permitted to go on, and engaged that all their demands should be complied with. He was refused, however, and was compelled to remain during the period of the attack in sight of the house; in painful uncertainty as to the fate of his father and family.

After the return of the people from the house, they carried with them Colonel Nev-

[3] McFarlane had served during the Revolution with reputation; and, according to Judge Brackenridge (Incidents, p. 18), was a man of good private character, and had acquired a handsome property by his industry after the conclusion of the war.

[4] This David Hamilton was a justice of the peace in Alleghany county. General Hamilton, in his report to the president, asserts that it was also demanded that the soldiers should march out and ground their arms. This is not in itself at all improbable, considering the lengths to which the rioters had already gone, and their present inflamed disposition. It is, however, not sufficiently supported by the evidence, and is expressly denied by Findley in his History of the Insurrection, though the latter cannot be implicitly relied on.

ille and the marshal, who were soon in great personal danger from the multitude, most of whom, from the liquors obtained from the inspector's house, were intoxicated. The marshal, after a long but fruitless struggle, was forced to promise, under threats of immediate death, to serve no process on the west of the mountains. The rioters also endeavoured to make him enter into an engagement not to return the process that he had served. The marshal firmly and decidedly refused, though at the risk of his life; alleging that this was out of his power, he having taken an oath of office to return them. This manly and courageous behaviour compelled respect from even the most violent, and he and Colonel Neville were suffered to depart without requiring them to give any further promises. After being thus dismissed they fell in with another party, almost all of whom were very much intoxicated. The marshal was taken again by these, and carried by them towards Couche's Fort, to which the party was returning, where both the peril and the insults to which he had been subjected were renewed and increased. Several of the party repeatedly presented their pieces at him, and were with difficulty restrained from shooting him by the more prudent of the party. He succeeded, however, at about one or two o'clock in the morning, in making his final escape. The insurgents, repenting of their lenity, sent, on the 18th, David Hamilton and John Black, two of their number, to Pittsburg, where the marshal then was, to require of him a surrender of the processes in his possession, intimating that his compliance would satisfy the people and add to his safety; and to demand of General Neville, in peremptory terms, the resignation of his office, threatening, in case of refusal, to attack the town and take it by force. The officers, of course, refused to comply. As it was ascertained that no protection could be expected from the magistrates or inhabitants of Pittsburg, it became necessary for the marshal and inspector to quit the place. As the usual routes were beset by the insurgents, they concluded to descend the Ohio, and proceed by a circuitous route to Philadelphia. They began their journey on the night of the 19th, and arrived at their destination in safety.

Before separating, after the attack on the inspector's, the insurgents appointed a meeting to be held on the 23d of July, at Mingo Creek Meeting House, in Washington county. At this meeting, which was composed of those who had been engaged in the attack, and a large number from the neighbouring counties, first appeared Brackenridge, Marshall, Bradford, and Parkinson, who afterwards became so prominent.[5] Bradford addressed the meeting in a tone of violent declamation. He declared his approbation of what had been done, and called upon those assembled to pledge themselves to support it. Brackenridge then followed in a temperate and ingenious speech, by which he managed to show them that they had committed acts of treason, and to persuade them against any precipitate action, without endangering his safety, and without appearing to be adverse to their cause. It was finally determined to postpone their final determination to a more general assemblage. The following call for another meeting was made, and published in the Pittsburg Gazette of the 26th July: "By a respectable number of citizens who met on Wednesday, the 23d instant, it is recommended to the townships of the four Western Pennsylvania counties, and the neighbouring counties of Virginia, to meet and choose representatives, to meet at Parkinson's Ferry, on the Monongahela, on the 14th of August next, to take into consideration the situation of the Western country."[6]

In order to ascertain the strength of the insurgents, and to discover whether there were any latent enemies yet remaining unsuspected, Bradford, who had now assumed the direction of affairs, planned and executed another enterprise. The mail between Pittsburg and Philadelphia was robbed, near Greensburgh, on the 26th of July, by a party sent for that purpose, and the Pittsburg and Washington packet taken out. This was taken to Canonsburg, a village about seven miles from Washington, by Parkinson. A convention was held by the leaders to open and consider the letters. Those from Washington were unobjectionable. But some of those from Pittsburg contained very severe animadversion on the conduct of the insurgents, and showed no friendly disposition on the part of the writers. Bradford and the convention at Canonsburg immediately issued circular letters, directed to the militia officers of the four counties, for a meeting to be held at Braddock's Field, on the Monongahela, on the 1st of August.[7] The objects which were contemplated, it is said, were to take a march to Pittsburg, to seize the magazine and military stores, and also to take the writers of the letters, and imprison them in Washington jail. The burning of the town was even spoken of.

In the meantime, the inhabitants of Pittsburg, by means of the post-boy, who had been sent back with the remainder of the mail, obtained information of the projected march of the insurgents. Opposition was impossible. It was therefore deemed prudent to remove the causes of objection. A town meeting was immediately held; and with their consent, and for their safety, the obnoxious persons, "Ed. Day. James Bryson, and Ab. Kirkpatrick," were formally banished. The town meeting then went on to profess great warmth for the cause, to promise the attendance of the inhabitants at Brad-

[5] See note 1 at end of case.

[6] See note 2 at end of case.

[7] See note 3 at end of case.

dock's Field, and to make arrangements to send delegates to the Parkinson's Ferry meeting. The number of people present at Braddock's Field, on the day appointed, is estimated to have been about seven thousand persons. Almost all these were fully armed and equipped. A very warlike disposition was manifested on the occasion by the majority of those present. There was a continued firing of guns; and the conversation of the militia men was anything but subdued. Bradford, who had assumed the title of major-general, reviewed the troops on the ground, and received tokens of the most infatuated submission. A committee was appointed at the rendezvous, who had resolved that General Gibson and Colonel Neville should be expelled, and authorized the Pittsburg committee to put this in execution. It was resolved, also, that the army, as it was called, should march to Pittsburg. The design of attacking the garrison was, however, abandoned. The people of Pittsburg were remarkably hospitable on the occasion. The army marched through the town very peaceably, and crossed the Monongahela. The well disposed then retired to their homes, but a number remained, who created some disturbances. Major Kirkpatrick's barn was burnt, and an attempt was made to set fire to his dwelling house, which was prevented by the interposition of the leaders.

A few days after this meeting, another attack was again made upon the residence of Wells, the collector of Fayette county. His house was burned, and he was compelled to resign his commission, and swear never to hold the office for the future. Threatening letters were sent into Westmoreland county, to excite the people to go against Webster, the collector of Bedford. Webster was a man extremely obnoxious, for other and better reasons than his holding an office under the excise law. He had been very oppressive to the poor in the discharge of his office, and had, in several instances at least, by the judgment of the inspector, acted illegally, though no redress was obtained. It was not difficult to get a party to go against him. The attack was made upon his house, but he offered not the slightest resistance. He brought out his commission and papers himself, tore them up and trod them under foot. No other violence was done him than insulting language.

The insurrection had now reached a point at which the temporizing policy of the government could be pursued no longer. The execution of the laws had at length been resisted by open force, and a determination to persevere in these measures was unequivocally avowed. The alternative of subduing this resistance, or of submitting to it, was presented to the government. The act of congress which provided for calling out the militia "to execute the laws of the Union, suppress insurrections, and repress invasions," required, as a prerequisite to the exercise of this power, "that an associate justice or judge of the district should certify that the laws of the United States were opposed, or their execution obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshal." In the same act, it was provided, "that if the militia of the state, where such combinations may happen, shall refuse, or be insufficient, to suppress the same, the president may employ the militia of other states." Affidavits of all the previous matters were laid before Judge Wilson, who granted the necessary certificate on August 4th, 1794.

The executive being now authorized to adopt such measures as the occasion required, the subject was seriously considered in the cabinet; and Governor Mifflin, of Pennsylvania, was also consulted respecting it. To avoid military coercion, if obedience to the laws could be produced by other means, was the universal desire. All concurred, therefore, in advising the appointment of commissioners on the part of the government, and also from the state, to warn the insurgents of their impending danger, and to convey a full pardon for past offences, on condition of future submission. But as regarded ulterior measures, in case of continued resistance, a difference of opinion existed. The act before mentioned, made it the duty of the president, before the employment of military force, to issue his proclamation, commanding the insurgents to disperse within a limited time. The secretary of state (and the governor of Pennsylvania concurred with him) was of opinion that the conciliatory mission should be unaccompanied by any measure that might bear the appearance of force. It was supposed by him that the militia could not serve; or if they did, the introduction of, as it were, foreign troops into the state, would have the effect of inflaming incurably the resentment of the insurgents.[8] The secretary of the treasury, the secretary of war, and the attorney-general, were of opinion that the president was bound by the most high and solemn obligations to enforce obedience to the laws, and they recommended the employment of a force that would render resistance impossible. The insurgents could, at the most, muster only about seven thousand men; if the government should raise an army of twelve thousand men, it would be amply sufficient to overawe and to crush opposition in the bud. The president adopted the latter of these opinions. Forbearance, he agreed, had been too long the policy of the government. It had been hitherto tried without success. It was more than probable that, if it were continued, the range of disaffection would be extended, and the disorders become incurable. Washington, therefore, determined at once to issue

[8] See, for correspondence, note 7 at end of case.

the proclamation that was to precede the employment of force,—which was done on the 7th of August.[9]

On the same day, a requisition was made on the governors of New Jersey, Pennsylvania, Maryland, and Virginia, for their several quotas of militia to compose an army of twelve thousand men, who were to be immediately organized, and prepared to march at a minute's warning.[10] While steps were being taken to bring this force into the field, a last attempt was made to render its employment unnecessary. James Ross, Jasper Yeates, and William Bradford, three distinguished citizens of Pennsylvania, were appointed commissioners, to bear to the insurgents a general amnesty for past offences on the sole condition of a future obedience.[11] As it was deemed advisable that the executive of the state should act in concert with that of the United States, Governor Mifflin also issued a proclamation, and appointed as commissioners, to act with those of the general government, Chief Justice McKean and General William Irvine. Meanwhile the insurgents omitted nothing to enlarge the circle of disaffection. Efforts were made to draw the adjacent counties of Virginia into their cause, and their spirit extended to Morgantown, in that state, at which place an inspector resided, who saved himself by flight, and protected himself by advertising that he had resigned his office. Similar excursions were made into the contiguous counties with success. Numbers were found to join them. The impression was general that the great body of the people were ready to take up arms against the government, and that the resistance commenced by them would spread through the Union, and terminate in a revolution.

On the day appointed, there was a tolerably large assemblage at Parkinson's Ferry. There were upwards of three hundred delegates present—three of whom were from Virginia. Among these were a number who had been engaged in the previous outrages, and threatening letters were sent to the more orderly. A liberty pole was placed in sight of the meeting, with the motto, "Liberty and no excise, and no asylum for cowards and traitors." Colonel Cook was appointed chairman, and Albert Gallatin, secretary. Bradford opened the meeting with a statement of the events that had taken place, and concluded by reading the letters which had been taken from the intercepted mail; with some inflammatory comments on them. The arrival of the commissioners, with powers for restoring order in the Western country, was then announced. Some satisfaction was expressed on the part of the better disposed, but it was determined nevertheless to go on with the business of the meeting. A series of resolutions, prepared by Bradford and Marshall, was then proposed. The first resolution, against taking citizens for trial out of the vicinage, met with no objections. The second, and most important, ran thus: "Resolved, That a standing committee be appointed, to consist of —— members from each county, to be denominated a 'committee of Public Safety,' whose duty it shall be to call forth the resources of the Western country, to repel any hostile attempts that may be made against the citizens, or the body of the people." This was nothing more nor less than an attempt to form a combination hostile to the state and to the United States. Mr. Gallatin had the courage to oppose this, and the skill to oppose it successfully. He objected to the word "hostility" as improper, as the coercion hitherto exercised had been by means of the judiciary. He moved to refer the resolution to a select committee. So great was the fear of the people among the delegates, that this was not seconded. After some delay, however, Marshall, the mover of the resolution, offered to withdraw it, on condition that a committee of sixty should be appointed, with power to call a field meeting of the people or their deputies. This was at once agreed to. The resolution was then modified so as to meet the views of all. The subsequent resolutions were agreed to without much difficulty, except the last. This was to support the laws of the United States, except the excise law. Mr. Gallatin succeeded in obtaining the omission of the "except." The resolutions were then committed for remodelling and passed the next day with ease. The committee of sixty was appointed to meet at Redstone Old Fort, and in the mean time a sub-committee of twelve members, was chosen to confer with the commissioners from the president.[12] On the 21st of August the commissioners on both sides met at Pittsburg.[13]

The conference was begun by the commissioners representing the government of the United States, who "expressed their concern at the events that had occasioned the meeting; but declared their intention to avoid any unnecessary observations upon them, as it was their business to endeavour to compose the disturbances which prevailed, and to restore the authority of the laws by measures wholly of a conciliatory nature." It was then stated that "formal resistance which had arisen to the laws of the United States, vio-

[9] See note 4 at end of case.

[10] This requisition was afterwards augmented to fifteen thousand men.

[11] See note 5 at end of case.

[12] This committee was John Kirkpatrick, George Smith, and John Powers, from Westmoreland county; David Bradford, James Marshall, and James Edgar, from Washington county; Edward Cook, Albert Gallatin, and James Lang, from Fayette county; Thomas Morton, John Lucas, H. H. Brackenridge, from Alleghany. William McKinley, William Sutherland, and Robert Stevenson, also acted with the others, as delegates from Ohio county, Va.

[13] See note 6 at end of case.

lated the great principle on which republican government is founded; that every such government must, at all hazards, enforce obedience to the general will." They then represented the obligation which lay on the president of the United States to enforce the execution of the law; the measures that he had taken for the purpose; his desire to avoid extremities, and the general nature of the powers that they had been entrusted with. They then requested to know whether the conferees could give any assurances of a disposition on the part of the people to submit to the law. The conferees then entered into a narrative of the causes of discontent which so generally prevailed. Many of these, they insisted, "had long existed, and some of them from the settlement of the country." They complained "of the decisions of the state courts, which discountenanced improvement, and gave the preference to paper titles; of the war which had so long vexed the frontiers, and of the manner in which that war had been conducted," adding, that they "had been unnecessarily harassed with militia duty;" that the general government had been unattentive to the execution of the treaty of 1783, respecting the western posts, and remiss in asserting the claim to the navigation of the Mississippi; that "the acts for raising a revenue on distilled spirits were unequal and oppressive, in consequence of their local circumstances; that congress had neglected their remonstrances and petitions, and that there was great hardship in being summoned to answer for penalties in the courts of the United States, at a distance from the vicinage." To this they added, as causes of irritation, the suspension of the settlement at Presqu'isle, and the engrossing of large quantities of land in the state by individuals; the killing of certain persons at General Neville's house, and the sending of soldiers from the garrison at Pittsburg to defend that house. The appointment of General Neville as inspector was also referred to as peculiarly offensive. The conferees said, that they were persuaded that the actors in the late disturbances had not originally intended to have gone so far as they had gone; but had been led into it "from the obstinacy of those who refused to do what was demanded of them;" and that if there were any prospect of redress, no people would be more ready to show themselves good citizens.

Great surprise was naturally felt by the commissioners at the nature and extent of these grievances; and it was intimated, that "if these were really the causes of discontent, no government would be able to satisfy them." They stated what was supposed to be the intentions and course of the government as regards the navigation of the Mississippi, and the other general grievances. The acts of congress, however, that were complained of, could be only reached through constitutional action in congress itself. The western counties were better represented in congress than they were, in point of population, entitled to be. Their petitions and remonstrances "had never been overlooked, nor their interest disregarded." The act complained of had passed by a considerable majority, among whom might be found the names of men who had always been considered as the warmest friends of that country. Several modifications had been introduced in the last session, one of which removed one of the chief grounds of objection, by giving to the state courts concurrent jurisdiction with those of the United States in suits for penalties under the act. It was then asked whether there was anything, within the power of the president, yet remaining to be done to make the execution of the act "convenient and agreeable to the people." The terms upon which submission would be considered as satisfactory, and the powers of the commissioners, were then submitted in writing. After some alterations, the conferees expressed their approbation of the proposals, and engaged to recommend them to the people. They added, that they were persuaded, that however they might be received, nothing further could be done on the part of the commissioners.

But whatever may have been the desires of the conferees, the responsive meetings called by them of their constituents soon made it apparent that by this process submission was not to be obtained. The tone of the disaffected was as violent as their proceedings were evasive; and at last, convinced that if the pending negotiations were continued on the same basis, the executive would be subjected to fresh humiliations, the federal commissioners required that the people of the several townships and districts should be severally called on, under every circumstance of solemnity, so to express their "opinion whether or not there was such a general submission that the laws could be carried peacefully into execution." Unfortunately for the success of this plan, about this time the rebellion spread to the east of the Alleghanies, and showed itself in the midland parts of Pennsylvania, and in Maryland. All who came from that part of the country, brought to the insurgents the most favourable accounts of the sympathy of the people; and brought, or pretended to bring messages, desiring the country to hold out. Various publications in the Pittsburg Gazette, both threatening and satirical, tended to prejudice the public mind against submission.[14] This feeling displayed itself very strongly in some places; and on one occasion, on the return of the commissioners, it broke out into open violence and insult against their persons. At Greensburg, the inn at which they stayed was attacked by a party of disorderly persons, who broke the windows and abused them violently. They were compelled to pass the night armed.

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[14] See note 7 at end of case.

The commissioners reported, on the 24th of September, the result of the county meetings to be, that in the returns made to them, there are no opinions certified that there is so general a submission, in any one of the counties, that an office of inspection could be safely established there; on the contrary, the report from Westmoreland county expressly stated that such a measure would not be safe. No returns whatsoever were received from Allegheny or Bedford counties, though it appeared that a majority in the former county were in favour of resistance. The number of signatures received in favour of submission was very insignificant when compared with the number of people, and though the commissioners still rested in the hope that a majority of the people at large was disposed to support the government throughout, yet in the face of the evidence produced before them, they felt that they had no other course but to return that "there was no probability that the act for raising revenue on distilled spirits could be enforced by the usual course of civil authority, and that some more competent force was necessary to cause the laws to be duly executed, and to insure to the officers and well-disposed citizens that protection which it is the duty of government to afford." [15] This last appeal having failed, it became the duty of the president to vindicate the authority of the government at once. He issued a third proclamation on the 25th of September, describing in energetic terms the obstinate and perverse spirit with which all the propositions of amnesty had been met; and declaring his fixed determination, in obedience to the high duty assigned to him by the constitution, to take care that the laws be faithfully executed by the president of the United States of America. The militia were to be put in motion immediately. The troops from New Jersey and Pennsylvania were directed to rendezvous at Bedford, and those of Maryland and Virginia at Cumberland, on the Potomac. The command of the expedition had been conferred on Governor Lee, of Virginia; and the governors of New Jersey and Pennsylvania commanded the militia of the several states, under him. The circumstances attending the calling out of the militia are thus concisely stated by Chief Justice Marshall (2 Life of Washington, 346):

"From the same causes, among which was disaffection to the particular service, the prospect of bringing the quota of troops required from Pennsylvania into the field, was at first unpromising. But the assembly, which had been summoned by the governor to meet on the 1st of September, expressed in strong terms its abhorrence of this daring attempt to resist the laws, and to subvert the government of the country; and a degree of ardour and unanimity was displayed by the people of other states which exceeded the hopes of the most sanguine friends of the administration. Some feeble attempts were, indeed, made to produce a disobedience to the requisition of the president, by declaring that the people would never be made the instruments of the secretary of the treasury, to shed the blood of their fellow-citizens; that the representatives of the people ought to be assembled before a civil war was commenced; and by avowing the extravagant opinion, that the president could not lawfully call forth the militia of any other state, until actual experiment had ascertained the insufficiency of that of Pennsylvania. But these insidious suggestions were silenced by the general sense of the nation, which loudly and strongly proclaimed that the government and laws must be supported. The officers displayed an unexampled activity; and intelligence from every quarter gave full assurance that, with respect to both numbers and time, the requisition of the president would be punctually observed. The governor of Pennsylvania compensated for the defects in the militia law of that state by his personal exertions. From some inadvertence, as was said, on the part of the brigade inspectors, the militia could not be drafted, and consequently the quota of Pennsylvania could be completed only by volunteers. The governor, who was endowed with a high degree of popular elocution, made a circuit through the lower counties of the state, and publicly addressed the militia at different places, where he had caused them to be assembled, on the crisis in the affairs of their country. So successful were these animating exhortations, that Pennsylvania was not behind her sister states in furnishing the quota required of her. The president in person visited each division of the army; but being confident that the force employed must look down all resistance, he left the secretary of the treasury to accompany it, and returned himself to Philadelphia, where the approaching session of congress required his presence. From Cumberland and Bedford the army marched in two divisions into the country of the insurgents. The greatness of the force prevented the effusion of blood. The disaffected did not venture to assemble in arms. Several of the leaders, who had refused to give assurances of future submission to the laws, were seized, and some of them detained for legal prosecution. But although no direct and open opposition was made, the spirit of insurrection was not subdued. A sour and malignant temper displayed itself, which indicated but too plainly that the disposition to resist had only sunk under the pressure of the great military force brought into the country, but would rise again should that force be withdrawn. It was, therefore, thought advisable to station, for the winter, a detachment, to be commanded by Major-

[15] See note 6 at end of case, where the report of the commissioners is given at large.

General Morgan, in the centre of the disaffected country." [16]

These judicious measures had the effect of totally checking opposition, and of enabling the good sense and love of order of the community to display itself.[17] Though many complaints and, perhaps, with reason, were made against the excesses of the soldiery, no further violations of the laws occurred. The excise was continued without opposition, and revenue collected under it till the year 1805, when it was repealed. After quiet had been thus restored and the civil authority was enabled to assert itself, the prosecutions of those concerned in the insurrection were resumed with vigour, and a number of arrests of those who took the most active part were made.

Indictments for high treason having been found against a number of these, a venire was issued in each case [18] for summoning a jury returnable to the April term, 1795; and to each writ the marshal returned a separate panel containing the names of thirty-six jurors from the city of Philadelphia, fifteen from the county of Delaware, nine from the county of Chester, and twelve from each county in which the treason was charged to have been committed, making seventy-two jurors on each panel, and one hundred and eight jurors summoned on the whole. The act of congress (1 Stat. 112, § 29) having directed "that any person who shall be accused and indicted of treason, shall have a copy of the indictment, and a list of the jury and witnesses to be produced on the trial for proving the said indictment, mentioning the names and places of abodes of such witnesses and jurors, delivered unto him at least three entire days before he shall be tried for the same," the attorney of the district had, in due time, delivered to the several prisoners copies of the indictment, of the panel of jurors, and of the list of witnesses; but he had omitted to deliver a copy of the caption of the indictment, and to specify the occupations, or the places of abode of the jurors and witnesses, otherwise then by mentioning the counties in which the jurors respectively resided.

On this state of facts, Mr. Lewis suggested the following exceptions, which, he said, were not so much designed for the existing cases, as to prevent the introduction of precedents, injurious to the rights and safety of posterity:

(1) That the marshal had returned a greater number of jurors than the law authorized, and that he had returned a several panel in each case, instead of one general panel to try all the issues at this court. By the act of congress (1 Story's Laws, p. 63, § 29 [1 Stat. 88]) it is declared, that "in all cases punishable with death, that trial shall be had in the county where the offence is committed, or where that cannot be done, without great inconvenience, twelve petit jurors at least shall be summoned from thence. And jurors in all cases to serve in the courts of the United States shall be designated by lot, or otherwise, in each state respectively according to the mode of forming juries therein now practised so far as the laws of the same shall render such designation practicable by the courts or marshals of the United States; and the jurors shall have the same qualifications as are requisite for jurors by the laws of the state of which they are citizens, to serve for the highest courts of law of such state, and shall be returned as there shall be occasion for them from such parts of the district from time to time as the court shall direct, so as shall be most favourable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burden the citizens of any part of the district with such services." By the act of Pennsylvania for the better regulation of juries (volume 2, p. 263, § 4, Dallas' Ed.) it is declared, "that every sheriff, or any officer, to whom the return of venire facias juratores, or other process for the trial of causes before the judges of oyer and terminer, general jail delivery, and nisi prius doth belong, shall, upon return thereof, unless in cases where a special jury shall be struck by rule of court, annex a panel to the said writ containing the Christian and surnames, additions, and places of abode of a competent number of jurors, the names of the same persons to be inserted in the panel annexed to every such writ, for the trial of all issues in civil and criminal causes at the said courts in each respective county, which number of jurors, in any county, shall not be less than forty-eight, nor more than sixty, without the direction of the judge or judges appointed to go to the circuit, and sit as judge or judges of oyer and terminer, general jail delivery, or nisi prius in such county, who are hereby empowered and required, if he or they see cause, by order, under his hand, or their hands, to direct a greater number, not to exceed eighty," &c. By the same act, (section 5,) it is further declared, "that the sheriff of the county of Philadelphia, or other county, where the supreme court of judicature shall be holden, or other officer to whom the return of the venire facias juratores, or other process for the trial of causes at bar before the justices of the supreme court, doth belong, shall, upon return thereof, unless in cas-

[16] In preparing the statement of facts very free use has been made of Mr. Hamilton's report to the president, of August 5, 1794. Of all his official reports, there is no one which more fully than this exhibits his unrivalled powers of statement and description; and in those instances where his abstract of the depositions taken chimes in with the evidence afterwards adduced, his narrative has been ipsa verba, adopted. For Mr. Hamilton's notes of the progress of the army, see 10 Sparks, Wash. 449.

[17] See note 8 at end of case.

[18] From this point the report in [U. S. v. Insurgents of Pennsylvania] 2 Dall. [2 U. S.] 335 et seq. is followed.

es where a special jury shall be struck by rule of court, annex a panel to the said writ, containing the Christian and surnames, additions and places of abode, of a competent number of jurors, the names of the same persons to be inserted in the panel annexed to every such writ, for the trial of all issues to be tried at the bar of the said court during the ensuing term, which number of jurors shall be not less than forty-eight, nor more than sixty," &c. The law of the state being thus made the rule for the federal courts, Mr. Lewis contended that in no case, could the marshal be authorized to return more than eighty jurors; that the power of extending the panel to that number does not rest in the circuit court, sitting in its ordinary character, as the act only vests it in the courts of oyer and terminer, general jail delivery and nisi prius; but, that, in the present instance, even that number, and without the order of the court, had been far exceeded, since twelve jurors had been summoned from each of the four counties, in which the charges were laid, and sixty had been summoned from other parts of the state, making in the whole one hundred and eight, which he considered an unnecessary, as well as an expensive and oppressive call on the citizens. He insisted that, as different charges were laid in the four counties, forty-eight jurors should have been summoned from them, and only the number necessary to complete the panel of sixty, or in case of a special order, the panel of eighty might be summoned from any other part of the state. In England, the power of summoning jurors is limited to forty-eight, unless by the special order of the justices of oyer and terminer and general jail delivery. Keyl, 16. The act of congress does not direct, that the twelve jurors to be brought from the county where the offence was committed, shall be over and beyond the sixty jurors, directed by the state law to be summoned; nor does it permit the marshal to summon the jurors whence he pleases, without the express order of the court. The return of several panels for the trial of each issue, Mr. Lewis deemed to be equally inconsistent with the terms and policy of the Pennsylvania law, which the law of congress had likewise adopted. Great inconveniency had been experienced from such a practice; and the state legislature, as a reformation in the system of jurisprudence that previously prevailed, expressly enacted, that the panel annexed to every writ of venire facias juratores, should be "for the trial of all issues to be tried at the bar of the said court, during the said term."

(2) That a copy of the caption of the indictments as well as a copy of the indictments themselves, had not been delivered to the respective prisoners. The caption is material, for it must state the judges before whom, the grand jury by whom, the time when, and the place where the indictment was presented. For, if the judges sit without a commission, or the commission has expired; if the grand jury was composed of a number less than twelve, or the members of it were not qualified according to law; if the indictment was found at a place where the court was not authorized to sit, or at a time when, in fact, it was not sitting, the prisoner is entitled to take advantage of the defect, and he cannot have the opportunity of doing so, unless he is furnished with the caption of his indictment. On the same principle Foster contends for the same privilege; and declares it to be founded on the constant practice, though the act only mentions a copy of the indictment. Fost. Crown Law, 229. And Blackstone, as well as Foster, shows that it is of importance that the prisoner should receive the copy before arraignment, "for then is his time to take exceptions to the indictment by way of plea or demurrer." 2 Hawk. P. C. c. 25, § 118. In reason, and in effect, the caption is part of the indictment. Whenever it becomes necessary to exemplify the indictment the caption must accompany it; and no inference drawn from the practice respecting indictments for other offences (where the caption is not supplied as it is said till the record is finally made up) can be applicable to the present question, since in no other case but treason is a delivery of the copy of the indictment prescribed as a preliminary to the trial. Nor is there any essential distinction between this court and the courts to which the cited authorities relate; for although the jurisdiction of the court is ascertained and known, the constitutionality of the commissions of the judges who compose it; the legality of the number and qualification of the grand jury who attend it; the place of its sessions &c., will still afford ample materials for investigation and just objection.

(3) The lists furnished to the respective prisoners, do not contain a sufficient specification of the addition and places of abode of the jurors and witnesses. By the act of congress (1 [Story's Laws] 63, § 28 [1 Stat. 88]), as well as the act of Pennsylvania (vol. 2, p. 263) the specification of the place of abode of the jurors, is prescribed; and the Pennsylvania act (which is adopted by the other) calls likewise for the addition of the jurors. It is true, that in the copy of the panel the county is mentioned, from which the jurors respectively are summoned; but as the sheriff could not in a case arising under the state jurisdiction, summon any citizens as jurors, who were not inhabitants of the proper county, the act, when it requires a specification of the place of abode, cannot surely be satisfied by mentioning the county. The express relation between the state and federal laws on the subject demands an analogous conclusion, in a case arising under the jurisdiction of the general government; and the general reasons for furnishing such information to prisoners, acquire great additional force, from a consideration of the distance

between the place of trial, and the place where the offence is charged to have been committed.

In answer to these exceptions, Mr. Bradford (the attorney general of the United States) and Mr. Rawle (the attorney of the district) premised, that they were also impressed with the propriety and necessity of establishing sound and permanent principles on this first discussion of the doctrine of treason, as it applied to the existing constitution of the United States. But they contended:

(1) That the exception to the number of jurors returned, and to the mode of returning separate panels, ought not to be allowed. They observed, that the leading question on this point, called for a decision, whether, when a federal court was referred by an act of congress to state regulations for its government, the state law, in its strict words, or in the practice under it, should furnish the rule? But, even from the context of the judicial act of congress, an intention cannot reasonably be inferred, to incorporate all the provisions of the Pennsylvania act relating to jurors, into the practice of the federal courts. The reference to the state laws, respects only the mode of designating the jury by lot, or otherwise, and the qualification of the jurors; it does not respect the number to be returned on the panel, which is still left, under the power of framing writs suited to the exigency of every case (vol. 1, p. 58), in the discretion of the court, to be prescribed by venire, or at common law. But the Pennsylvania act, without admitting such a distinction, must produce the greatest embarrassment, for it prescribes a different number of jurors to be returned to different courts, and there is nothing in the act of congress to determine which number shall be adopted here. The act of Pennsylvania however had obviously an economical object in view, when it limited the number of jurors to sixty, as a compensation was originally allowed for their attendance, though it has since been repealed (volume 2, Dall. Ed. p. 268), and the practice of the supreme court, it is believed changed in consequence of the repeal. But even taking the act of Pennsylvania as an indispensable rule, it is substantially complied with. The act of congress introduced a particular regulation for the trial of offenders, which required that twelve jurors should be taken from the county where the offence is charged to have been committed; and this is done. The act of Pennsylvania authorized sixty jurors to be summoned; and in addition to the twelve from the proper county, the marshal has accordingly summoned sixty from the state at large. To each venire there are no more than seventy-two jurors returned. The return of a separate panel in each case is, likewise, perfectly consistent with law, practice, and public conveniency. The indictments depending are all separate; none of them are joint. The exception, however, if it is at all available, goes to the venire, and not to the panel; for the latter is in strict conformity to the former. After the court has prescribed that twelve of the jurors shall be brought from the proper county, the marshal has a legal direction to bring the rest from any part of the district that he pleases. The court will not, and cannot, interfere with the exercise of that power, unless it becomes necessary, in order to obtain an impartial jury. There must be as many panels as there are counties, in which offences are charged to have been committed; and if twelve jurors are taken from the proper county for each case, there can be no legal ground to object that the same sixty, to complete the panel of seventy-two, are returned to all the cases. But the adverse doctrine would require the jurors to be brought from every county in which the offence is charged. Suppose, therefore, five counties involved, sixty jurors would, of course, be returned from them; and if the court (as it has been contended) cannot increase that number, then a pirate, or any other felon, charged with an offence committed out of those counties, could not be brought to trial at the same term.

(2) That it is not necessary, nor is it material, to furnish the prisoner with a copy of the caption, as well as of the indictment. The act of congress must be presumed to have been passed with a full knowledge of the state law; and by the state law, evinced and supported by a constant practice, nothing more than a copy of the indictment was required. [Respublica v. Molder] 1 Dall. [1 U. S.] 33. Sufficient appears on the indictment to show, what it is incumbent on the prosecutor to show. The case referred to in Fost. Crown Law, p. 229, was that of a special court, where a caption is undoubtedly necessary; and the distinction is expressly so taken. Id. Discourse I.; 2 Hawk. P. C. c. 25, § 126.

(PATTERSON, Circuit Justice. The cases of special courts, or of inferior courts, held by charter, &c., can furnish no analogy for this court, which is a court of original and permanent jurisdiction. The proceedings in the king's bench can alone be applicable.)

(3) That the addition of the jurors and witnesses, as to the place of abode, is sufficient; but if the court think otherwise, time will be allowed to amend it. The act of congress, however, does not require a specification of the occupation of the jurors and witnesses, but only of their names and places of abode; and it cannot be controlled by the provision of the state act, which is in that respect different; but must be deemed substantive and independent.

Before PATTERSON, Circuit Justice, and PETERS, District Judge.

PETERS, District Judge. I have considered the objections made to the panels, and do not conceive these objections relevant. Although, in ordinary cases, it would be well to accommodate our practice with that of

the state, yet the judiciary of the United States should not be fettered and controlled in its operations, by a strict adherence to state regulations and practice. But I see not, that in a liberal view and construction of the laws of the United States, on this subject, a rigid adherence to all the local and economical regulations of the state, is directed or necessary. It should seem, that the most pointed reference was had to the designation and qualification of jurors, and not to the exact numbers of which the panel should consist. The legislature of a state have in their consideration a variety of local arrangements, which cannot be adapted to the more expanded policy of the nation. It never could have been in the contemplation of congress, by any reference to state regulations, to defeat the operation of the national laws. Now, there are cases, which have been stated, in which some of the criminal laws of the United States may be rendered impracticable by an adherence to the rule of numbers prescribed as to jurors, in criminal cases, by the state law; and, especially, if there must be but one panel as has been contended. Yet, the most substantial requisites, to wit, the qualifications of jurors and mode of selection, may be adhered to. As to the clause in the law of the United States, directing that "the laws of the states (with great exceptions) shall be regarded as rules of decision, in trials at common law, in the courts of the United States," I do not think it applies to the case before us. All the arguments founded on the inconveniences to the defendants, if in this case particularly any such exist (of which I much doubt), weigh lightly, when set against the delays and obstructions which the objection would throw in the way of the execution of the laws of the nation.

PATTERSON, Circuit Justice. The objections that have been suggested on this occasion, are principally founded on the twenty-ninth section of the judicial act of congress, which refers the federal courts to the state laws, for certain regulations respecting juries. But the words of this reference are clearly restricted to the mode of designating the jury by lot, or otherwise; and to the qualifications which are requisite for jurors, according to the laws and practice of the respective states. Since, therefore, the act of congress does not itself fix the number of jurors, nor expressly adopt any state rule for the purpose, it is a necessary consequence, that the subject must depend on the common law; and by the common law, the court may direct any number of jurors to be summoned, on a consideration of all the circumstances under which the venire is issued. There are instances, indeed, where five juries have been summoned upon a trial for high treason, in order that after the allowance of the legal challenges, a competent number might still be insured. In the present instance, the precept requires the marshal to return at least forty-eight jurors; and he has not in my opinion been guilty of any excess in the exercise of that discretion for returning a greater number, with which he is legally invested. Neither is the mode of making his return justly exceptionable. As the act of congress directs that twelve jurors shall be summoned from the county in which the offence was committed, I cannot conceive any more proper, or more legal way of proceeding, than by issuing a venire in each case; and then there must of course be a separate panel returned, in conformity to every writ. Thus, likewise, the act of congress and the state act have been reconciled, and both put into operation; twelve jurors being returned in pursuance of the former, and sixty jurors being returned in pursuance of the latter law. With respect to the objection, that a copy of the caption of the indictment has not been furnished to the prisoners, it may be observed, that, although the practice of Pennsylvania has been different, yet the caption and the indictment seem naturally to form but one instrument; and copies of both should, therefore, be delivered under the provisions of the act of congress. There can be little inconveniency in adopting this rule; and it is calculated to avoid much difficulty and controversy. The objection, that the place of abode of the jurors and witnesses has not been sufficiently designated, in the lists furnished to the prisoners, is, likewise, in our opinion a valid one. The object of the law was to enable the party accused, to prepare for his defence, and to identify the jurors who were to try, and the witnesses who were to prove, the indictment against him. It is contrary to the spirit and intent of such a provision, that the whole range of the state, or of a county, should be allowed, as descriptive of a place of abode; and it is the duty of the judges so to mould the practice and construction of statutes, as to render them reasonable and just. With regard to the place, therefore, we think the townships in which the jurors and witnesses respectively reside, should be specified; but the act of congress does not require a specification of their occupations, and the niceties of the state act are not, in that respect, incorporated into the federal system.

In consequence of this decision, the trials were suspended, in order to give the attorney of the district the three days required by the act of congress for delivering to the prisoners amended copies of the caption and indictment, and of the lists of jurors and witnesses.

NOTE 1. Hugh H. Brackenridge was then a lawyer of considerable standing in Pittsburg, and afterwards became a judge of the supreme court of Pennsylvania. He was a man of some learning and much eccentricity, and was the author of several books, the best known of which was a humorous novel, called "Modern Chivalry, or the Adventures of Captain John Farrago and His Servant Teague O'Regan," which was very successful in its day. One act of magnanimity on his part ought to be recorded, to preserve his memory from oblivion. In 1805,

Judges Shippen, Yeates, and Smith, of the supreme court of Pennsylvania, being out of favour with the legislature, were impeached for an alleged maladministration of justice in the case of Com. v. Passmore [3 Yeates, 441]. The charge was, that they had illegally imprisoned the defendant in that case for a contempt, in publishing a libel on certain proceedings in that court, but the matter wore an entirely political aspect. Judge Brackenridge was not present when the decision was pronounced, and was of the same political creed as the dominant party in the house of representatives. He, however, at once wrote to the committee of impeachment, requesting them to join him with the other judges in the proceedings, as he entirely approved of their decision, and, if he had been present, would have concurred in it. He considered it but fair and right, that, sharing the obnoxious opinions of his brethren. he should also share their punishment. The committee refused to accede to this, and the other judges were afterwards acquitted. Colonel Marshall, an Irishman, was a man of respectability and wealth. He had been sheriff of Washington county, member of the legislature, and of the convention for ratifying the constitution of the United States, against which he voted. As his character had been that of a moderate, prudent, industrious man, the part he took in the insurrection surprised every one. David Bradford, a Marylander by birth, had been a deputy of the attorney-general of the state for Washington county, ever since its creation. At the time of the adoption of the constitution he was a zealous Federalist. He was a man of great timidity of character, and yet a great demagogue. Before the attack on the inspectors, he had avoided giving open sanction to their proceedings, yet had encouraged the rioters. But, after that time, he was compelled by their threats to declare himself in their favour. He had thus got unexpectedly involved in the insurrection, and finding it too late to recede, endeavoured to carry out the most violent measures in order to save himself. All the wild proceedings afterwards adopted are attributable to him. Benjamin Parkinson, a native of Pennsylvania, was also a Federalist, and had formerly supported General Neville. He had been reputed a good citizen, and a man of influence in his neighbourhood, and had been a justice of the peace. He was one of the committee of superintendence at the attack on General Neville's house.

NOTE 2. The intended character of the meeting, notwithstanding the cautious wording of the notice, was no secret. The following letter from Bradford to the inhabitants of Monongahela, will show the spirit of the leaders:

"August 6th, 1794.

"Gentlemen: I presume you have heard of the spirited opposition given to the excise law in this state. Matters have been so brought to a pass here, that all are under the necessity of bringing their minds to a final conclusion. This has been the question amongst us some days: 'Shall be disapprove of the conduct of those engaged against Neville, the excise-officer, or approve?' Or, in other words, 'Shall we suffer them to fall a sacrifice to a federal prosecution, or shall we support them?' On the result of this business we have fully deliberated, and have determined, with head, heart, hand and voice, that we will support the opposition to the excise law. The crisis has now come. Submission or opposition. We are determined on the opposition; we are determined to act agreeably to system; to form arrangements guided by reason, prudence, fortitude, spirited conduct. We have proposed a general meeting of four counties of Pennsylvania, and have invited our brethren in the neighbouring counties of Virginia to come forward, and join us in council and deliberation, on this important crisis, and conclude upon measures interesting to the western counties of Pennsylvania and Virginia. A notification of this kind may be seen in the Pittsburg paper. Parkinson Ferry is the place proposed as the most central, and the 14th of August the time. We solicit you, by all the ties that union of interests can suggest, to come forward to join with us in our deliberations. The cause is common to us all. We invite you to come, even should you differ with us in opinion. We wish you to hear our reasons influencing our conduct. Yours with esteem,

"David Bradford."

NOTE 3. The following is one of the circulars referred to in the text:

"Canonsburg, 28th July, 1794.

"Sir: Having been suspicious that the Pittsburg post would carry with him the sentiments of some of the people in the country respecting our present alarming situation; and the letters by the post being now in our possession by which certain secrets are discovered hostile to our interests, it is therefore now come to this crisis, that every citizen must express his sentiments, not by his words, but by his actions. You are thus called on, as a citizen of the western country, to render your personal service, with as many volunteers as you can raise, to rendezvous, at your usual place of meeting, on Wednesday next; and from thence you will march to the usual place of rendezvous at Braddock's Field, on the Monongahela, on Friday, the 1st day of August next, to be there at two o'clock in the afternoon, with arms and accoutrements in good order. If any volunteer should want arms or ammunition, bring them forward, and they shall be supplied as well as possible. Here, sir, you have an expedition proposed, in which you will have an opportunity of displaying your military talents, and of rendering service to your country. Four days provision will be wanted; let the men be thus supplied. We are, &c.,

"(Signed by) J. Canon,
"T. Bradford,
"B. Parkinson,
"and Others."

Though it is alleged that the opening of the letters, and the indignation felt at their contents, were the causes of the first calling out of the militia, it is more than probable that the whole plan was arranged beforehand, and that the letters were only seized in order to give a pretext of some kind for its execution. Bradford and his colleagues knew well enough beforehand what the letters would contain.

NOTE 4. This paper was as follows:

"Whereas, combinations to defeat the execution of the laws levying duties upon spirits distilled within the United States and upon stills, have from the time of the commencement of those laws existed in some of the western parts of Pennsylvania. And whereas, the said combinations, proceeding in a manner subversive equally of the just authority of government and of the rights of individuals, have hitherto effected their dangerous and criminal purpose, by the influence of certain irregular meetings, whose proceedings have tended to encourage and uphold the spirit of opposition, by misrepresentations of the laws calculated to render them obnoxious, by endeavours to deter those who might be so disposed from accepting offices under them, through fear of public resentment and injury to person and property, and to compel those who had accepted such offices by actual violence to surrender or forbear the execution of them, by circulating vindictive menaces against all those who should otherwise directly or indirectly aid in the execution of the said laws, or who, yielding to the dictates of conscience and to a sense of obligation, should themselves comply therewith, by actually injuring and destroying the property of persons who were understood to have so complied, by inflicting cruel and humiliating punishments upon private citizens for no other cause than that of appearing to be the friends

of the laws, by intercepting the public officers on the highways, abusing, assaulting and otherwise ill-treating them, by going to their houses in the night, gaining admittance by force, taking away their papers and committing other outrages, employing for their unwarrantable purposes the agency of armed banditti, disguised in such manner as for the most part to escape discovery. And whereas, the endeavours of the legislature to obviate objections to the said laws, by lowering the duties and by other alterations conducive to the convenience of those whom they immediately affect (though they have given satisfaction in other quarters), and the endeavours of the executive officers to conciliate a compliance with the laws, by explanations, by forbearance, and even by particular accommodations founded on the suggestion of local considerations, have been disappointed of their effect by the machinations of persons whose industry to excite resistance has increased with every appearance of a disposition among the people to relax in their opposition and to acquiesce in the laws, insomuch that many persons in the said western parts of Pennsylvania have at length been hardy enough to perpetrate acts which I am advised amount to treason, being overt acts of levying war against the United States, the said persons having on the sixteenth and seventeenth of July last, proceeded in arms (on the second day amounting to several hundreds) to the house of John Neville, inspector of the revenue for the Fourth survey of the district of Pennsylvania, having repeatedly attacked the said house with the persons therein, wounding some of them, having seized David Lennox, marshal of the district of Pennsylvania, who previous thereto had been fired upon, while in the execution of his duty, by a party of armed men, detaining him for some time prisoner, till, for the preservation of his life, and the obtaining of his liberty, he found it necessary to enter into stipulations to forbear the execution of certain official duties, touching processes issuing out of a court of the United States, and having finally obliged the said inspector of the revenue and the said marshal, from considerations of personal safety, to fly from that part of the country, in order by a circuitous route to proceed to the seat of government, avowing as the motives of these outrageous proceedings an intention to prevent by force of arms the execution of the said laws, to oblige the said inspector of the revenue to renounce his said office, to withstand by open violence the lawful authority of the government of the United States, and to compel thereby an alteration in the measures of the legislature, and a repeal of the laws aforesaid. And whereas, by a law of the United States, entitled, 'An act to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions,' it is enacted that whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by that act, the same being notified by an associate justice or the district judge, it shall be lawful for the president of the United States to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed. And if the militia of a state where such combinations may happen, shall refuse or be insufficient to suppress the same, it shall be lawful for the president, if the legislature of the United States shall not be in session, to call forth and employ such numbers of the militia of any other state or states, most convenient thereto, as may be necessary, and the use of the militia so to be called forth, may be continued, if necessary, until the expiration of thirty days after the commencement of the ensuing session: Provided always, that wherever it may be necessary in the judgment of the president to use the military force hereby directed to be called forth, the president shall forthwith and previous thereto, by proclamation, command such insurgents 'to disperse and retire peaceably to their respective abodes within a limited time.' And whereas, James Wilson, as associate justice, on the fourth instant, by writing under his hand, did, from evidence which had been laid before him, notify to me, 'that in the counties of Washington and Alleghany, in Pennsylvania, laws of the United States are opposed, and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshal of that district.' And whereas, it is in my judgment necessary, under the circumstances of the case, to take measures for calling forth the militia, in order to suppress the combinations aforesaid, and to cause the laws to be duly executed, and I have accordingly determined so to do, feeling the deepest regret for the occasion, but withal the most solemn conviction, that the essential interests of the Union demand it, that the very existence of government, and the fundamental principles of social order, are materially involved in the issue; and that the patriotism and firmness of all good citizens are seriously called upon, as occasion may require, to aid in the effectual suppression of so fatal a spirit. Wherefere, and in pursuance of the proviso above recited, I, George Washington, president of the United States, do hereby command all persons, being insurgents as aforesaid, and all others whom it may concern, on or before the first day of September next, to disperse and retire peaceably to their respective abodes. And I do moreover warn all persons whomsoever, against aiding, abetting, or comforting the perpetrators of the aforesaid treasonable acts, and do require all officers and other citizens, according to their respective duties and the laws of the land, to exert their utmost endeavours to prevent and suppress such dangerous proceedings.

"In testimony whereof, I have caused the seal of the United States of America to be affixed to these presents, and signed the same with my hand. Done at the city of Philadelphia the seventh day of August, one thousand seven hundred and ninety-four, and of the Independence of the United States of America the nineteenth.

"By the President:

"Geo. Washington. (L. S.)

"Edm. Randolph."

NOTE 5. The following are their instructions:

"To James Ross, Jasper Yeates, William Bradford—Gentlemen: The recent events in the neighbourhood of Pittsburg have called the attention of the president to the formation of some plan by which the insurrection may be suppressed. The intelligence which has been transmitted, having been laid before Judge Wilson, he has granted a certificate declaring that the opposition to the laws of the United States, in the counties of Washington and Alleghany, cannot be suppressed by the ordinary course of judicial proceedings, or the power of the marshal. A copy of that certificate is enclosed (No. 1). You or any one or more of you are, therefore, authorized and appointed forthwith, to proceed to the scene of the insurrection, and to confer with any bodies of men, or individuals, with whom you shall think proper to confer, in order to quiet and extinguish it. There is reason to believe that a collection of discontented individuals will be found at Mingo Creek on the fourteenth instant, and as the object of their assembling is undoubtedly to concert measures relative to this very subject, it is indispensably necessary that you should press thither with the utmost expedition. It is uncertain whether they will remain together for a long or short time—therefore the being on the ground first named for their meeting is necessary to prevent a miscarriage. These are the outlines of your communication: 1st. To state the se-

rious impressions which their conduct has created in the mind of the executive, and to dilate upon the dangers attending every government where laws are obstructed in their execution. 2d. To inform them that the evidence of the late transactions has been submitted to a judge of the supreme court, and that he has granted the above mentioned certificate, whence a power has arisen, to the president, to call out the militia to suppress the insurrection. (See the Act of May 2d, 1792.) 3d. To represent to them how painful an idea it is to exercise such a power, and that it is the earnest wish of the president, to render it unnecessary, by those endeavours which humanity, a love of peace and tranquility, and the happiness of his fellow citizens, dictate. 4th. You will then explain your appointment as commissioners, in a language and with sentiments most conciliatory, but reconcilable to the self-respect which this government ought to observe. 5th. Whether you are to proceed further, and in what manner, must depend upon your judgment and discretion, at the moment after an estimate of the characters with whom you are conversing, their views, their influence, &c. &c. 6th. Whensoever you shall come to the point at which it may be necessary to be explicit, you are to declare that, with respect to the excise law, the president is bound to consider it as much among the laws which he is to see executed as any other. That, as to the repeal of it, he cannot undertake to make any stipulation; that being a subject consigned by the constitution to the legislature, from whom alone a change of legislative measures can be obtained. That he is willing to grant amnesty and perpetual oblivion for every thing that is passed; and cannot doubt that any penalty to which the late transactions may have given birth, under the laws and within the jurisdiction of Pennsylvania, may be also wiped away—but upon the following conditions: That satisfactory assurances be given that the laws be no longer obstructed in their execution by any combinations, directly or indirectly, and that the offenders against whom process shall issue for a violation of, or an opposition to, the laws, shall not be protected from the free operation of the law. Nothing will be enforced concerning the duties of former years, if they will fairly comply for the present year. 7th. If they speak of the hardship of being drawn to the federal courts at a distance, to that no other reply can be made than this: That the inconvenience, whatsoever it may be, was the act of their own representatives, and is continued as being still their sense; that, however, on all occasions which will permit the state courts to be used without inconvenience to the United States, or danger of their being frustrated in the object of the suits and prosecutions, the state courts will be resorted to; but the choice of jurisdictions must always depend upon the discretion of the United States, and, therefore, nothing more specific can be said at present. 8th. Whensoever you shall choose to speak of the ulterior measures of the government, you will say, that orders have already issued for the proper militia to hold themselves in readiness, and that every thing is prepared for their movement, as will be seen by the proclamation (No. 3), and is known to yourselves from the communications of the government; but that these movements will be suspended until your return. 9th. These are said to be the outlines. You will fill them up and modify them so as most effectually to prevent, if possible, the last dreadful necessity which the president so much deprecates, and you may in particular assure any individuals of pardon who will expiate their offence by a compliance with the law. 10th. You will keep the executive minutely and constantly informed of all your proceedings, and will use expresses whensoever you think proper at the public expense. 11th. You will be allowed eight dollars per day and your expenses, and may employ a proper person to act as your clerk, who shall be paid whatsoever you may certify him to deserve. The sum of one thousand dollars is advanced to your account. 12th. William Bradford is empowered to add the name of Thos. Smith, or any other proper person, if either J. Ross or J. Yeates shall refuse or be unable to attend.

"Edm. Randolph, Secretary of State.
"August 5th, 1794."

NOTE 6. Although a full abstract of the proceedings of the committee is given in the text, yet the great importance of the report, and the fact of its being now almost inaccessible, have induced the editor, at some risk of tautology, to insert it here:

"The commissioners appointed to confer with the citizens in the western counties of Pennsylvania in order to induce them to submit peaceably to the laws, and to prevent the necessity of using coercion to enforce their execution, respectfully report to the president of the United States:

"That in pursuance of their instructions, they repaired to the western counties; and, on their arrival there, found that the spirit of disaffection had pervaded other parts of the Fourth survey of Pennsylvania, besides those counties declared to be in a state of insurrection; that all the offices of inspection established therein had lately been violently suppressed; and that a meeting of persons chosen by most of the townships, was assembled at Parkinson's Ferry, for the purpose of taking into consideration the situation of the western country. This assembly, composed of citizens coming from every part of the Fourth survey, would have furnished a favourable opportunity for a conference and mutual explanation; but as they met in the open fields, and were exposed to the impressions of a number of rash and violent men (some of them armed) who surrounded them, an immediate communication with the whole body would have been inconvenient and hazardous. The meeting was probably of that opinion also; for, soon after the appointment of commissioners was announced to them, they resolved that a committee, to consist of three persons from each county, should be appointed to meet any commissioners that might have been, or might be, appointed by the government; and that they should report the result of their conference to the standing committee, which was to be composed of one person from each township. As soon as this committee of conference were nominated, they agreed to meet at Pittsburg on the 20th of the same month. The underwritten accordingly repaired to that place, and were soon after joined by the Honourable Thomas McKean and William Irvine, Esqs, who had been appointed commissioners on the part of the executive of Pennsylvania. A full and free communication was immediately had with those gentlemen as to the powers delegated, and the measures proper to be pursued at the expected conference.

"On the day appointed, a sub-committee of the conferees waited on the commissioners, and arranged with them the time, place, and manner of conference. It was agreed that it should be had the next morning, at the house of John McMasters, in Pittsburg, and should be private. On the 21st, all the commissioners met the conferees at the place appointed. Of the latter there were present, John Kirkpatrick, George Smith, and John Powers, from Westmoreland county; David Bradford, James Marshall, and James Edgar, from Washington county; Edward Cook, Albert Gallatin, and James Lang, from Fayette county; Thomas Morton, John Lucas, H. H. Brackenridge, from Alleghany county; together with William McKinley, William Sutherland, and Robert Stevenson, who were inhabitants of Ohio county, in Virginia. The conference was begun by the underwritten, who expressed the concern they felt at the events which had occasioned that meeting; but declared their intention to avoid any unneces-

sary observations upon them, since it was their business to endeavour to compose the disturbances which prevailed, and to restore the authority of the laws, by measures wholly of a conciliatory nature. It was then stated, that the formal resistance which had lately been given to the laws of the United States, violated the great principle on which the republican government is founded; that every such government must, at all hazards, enforce obedience to the general will; and that so long as they admitted themselves to be a part of the nation, it was manifestly absurd to oppose the national authority. The underwritten then proceeded to state the obligations which lay on the president of the United States to cause the laws to be executed; the measures he had taken for that purpose; his desire to avoid the necessity of coercion; and the general nature of the powers he had vested in them; and, finally, requested to know whether the conferees could give any assurances of a disposition in the people to submit to the laws, or would recommend such submission to them. The commissioners on the part of the state of Pennsylvania then addressed the conferees on the subject of the late disturbances in that country; forcibly represented the mischievous consequences of such conduct; explained the nature of their mission; and declared they were ready to promise, in behalf of the executive authority of the state, a full pardon and indemnity, for all that was past, on condition of an entire submission to the laws.

"On the part of the conferees, a narrative was given of those causes of discontent and uneasiness which very generally prevailed in the minds of the people in the western counties, and which had discovered themselves in the late transactions. Many of these, they said, had long existed, and some of them from the settlement of that country. Among other causes of discontent, they complained of the decisions of the state courts, which discountenanced improvement-titles and gave the preference to paper-titles; of the war which had so long vexed the frontiers, and of the manner in which that war had been conducted. They complained that they had been continually harassed by militia duty, in being called out by the state government to repel incursions, &c.; that the general government had been inattentive to the execution of the treaty of peace respecting the western posts, and remiss in asserting the claim to the navigation of the Mississippi; that the acts for raising a revenue on distilled spirits were unequal and oppressive, in consequence of their local circumstances; that congress had neglected their remonstrances and petitions; and that there was great hardship in being summoned to answer for penalties in the courts of the United States at a distance from the vicinage. They also mentioned the suspension of the settlement at Presqu'isle, the engrossing of large quantities of land in the state by individuals, the killing of certain persons at General Neville's house, and the sending of soldiers from the garrison at Pittsburg to defend his house, as causes of irritation among the people. To these they added the appointment of General Neville, as inspector of the survey, whose former popularity had made his acceptance of that office particularly offensive. They said, they were persuaded that the persons who were the actors in the late disturbances, had not originally intended to have gone so far as they had gone; but were led to it from the obstinacy of those who refused to do what was demanded of them; that the forcible opposition which had been made to the law was owing to the pressure of the grievance; but if there was any prospect of redress, no people would be more ready to show themselves good citizens.

"The commissioners expressed their surprise at the extent of these complaints, and intimated, that if all these matters were really causes of uneasiness and dissatisfaction in the minds of the people, it would be impossible for any government to satisfy them. But as some of these complaints were of a nature more serious than others, though they could not speak officially, they stated what was generally understood as to the conduct, measures, and expectations of government respecting the Mississippi navigation; the treaty of peace; the suspension of the settlement at Presqu'isle, &c.; that as to the acts of congress, which had been forcibly opposed, if it were proper they should be repealed, congress alone could do it; but that while they were laws, they must be carried into execution; that the petitions of the western counties had not been neglected, nor their interests overlooked; that in fact the local interests of those counties were better represented than those of any other part of the state; they having no less than three gentlemen in the house of representatives, when it appeared by the census that their numbers would not entitle them to two; that the acts in question had been often under the consideration of congress; that they had always been supported by a considerable majority, in which they would find the names of several gentlemen, considered, in those counties, as the firmest friends of their country; that although the general interests of the Union did not admit of a repeal, modifications had been made in the law, and some favourable alterations, in consequence of their representations; and that at the last session the state courts had been vested with a jurisdiction over offences against those acts, which would enable the president to remove one of their principal complaints; that the convenience of the people had been and would always be consulted by the government; and the conferees were desired to say, if there was anything in the power of the executive that yet remained to be done to make the execution of the acts convenient and agreeable to the people.

"One of the conferees then inquired, whether the president could not suspend the execution of the excise acts, until the meeting of congress; but he was interrupted by others, who declared that they considered such a measure as impracticable. The commissioners expressed the same opinion; and the conversation then became more particular, respecting the powers the commissioners possessed; the propriety and necessity of the conferees expressing their sense upon the proposals to be made, and of their calling the standing committee together before the 1st of September. But as it was agreed that the propositions and answers should be reduced to writing, the result is contained in the documents annexed, and it appears unnecessary to detail the conference further. The underwritten accordingly presented to the conferees a letter, of which a copy, marked No. 1, is annexed; and the following day they received an answer from them, in which they declare that they are satisfied that the executive had in its proposals gone as far as could be expected; that in their opinion it was the interest of the country to accede to the law, and that they would endeavour to conciliate not only the committee, to whom they were to report, but the public mind in general to their sense of the subject. A copy of this letter also is annexed, No. 2. The underwritten then proceeded to state in writing what assurances of submission would be deemed full and satisfactory, and to detail more particularly the engagements they had power to make. This detail was submitted to the inspection of a sub-committee of the conferees, who candidly suggested such alterations as appeared to them necessary to render the proposals acceptable. From a desire to accommodate, most of the alterations suggested by those gentlemen were adopted; and though some of them were rejected, the reasons given appeared to be satisfactory, and no further objections remained. A copy of this detail is marked No. 3. The conferees, on the following day, explicitly approved of the detail thus settled, engaged to recommend the proposals to the people, and added, that however it might be re-

ceived, they were persuaded nothing more could be done by the commissioners or them to bring the business to an accommodation. No. 4 is a copy of their letter. So far as this letter respects the gentlemen from Ohio county, in Virginia, a reply was made and some arrangements entered into with them, the nature and extent of which appear by the correspondence, copies of which are annexed, numbered 5, 6, 7, and 8.

"The hopes excited by the favourable issue of this conference, were not realized by a correspondent conduct in the citizens, who composed what was called 'the standing committee.' They assembled at Brownsville (Redstone Old Fort) on the 28th August, and broke up on the 29th, and on the following day a letter was received from Edward Cook, their chairman, announcing that difficulties had arisen, and that a new committee of conference was appointed; and, although the resolve which is annexed was passed, it did not appear that the assurances of submission which had been demanded, had been given. Copies of this letter and resolve are marked No. 9 and 10. The underwritten were informed by several of the members of that meeting, as well as other citizens who were present at it, that the report of the committee of conference and the proposals of the commissioners were unfavourably received; that rebellion and hostile resistance against the United States were publicly recommended by some of the members; and that so excessive a spirit prevailed, that it was not thought prudent or safe to urge a compliance with the terms and preliminaries prescribed by the underwritten, or the commissioners from the governor of Pennsylvania. All that could be obtained was the resolve already mentioned, the question upon it being decided by ballot; by which means each member had an opportunity of concealing his opinion, and of sheltering himself from the resentment of those from whom violence was apprehended. But notwithstanding this caution, the opinion was so far from being unanimous, that out of fifty-seven votes there were twenty three nays, leaving a majority of only eleven; and the underwritten have been repeatedly assured, by different members of that meeting, that if the question had been publicly put, it would have been carried in the negative by a considerable majority. With a view of counteracting the arts and influence of the violent, the underwritten, on the 27th August, addressed a letter to the late conferees, authorizing them to assure the friends of order, who might be disposed to exert themselves to restore the authority of the laws, that they might rely on the protection of government, and that measures would be taken to suppress and punish the violence of those individuals who might dissent from the general sentiment. This letter (a copy of which is marked No. 11) was delivered to one of the conferees going to Brownsville; but he afterwards informed the underwritten, that the gentlemen to whom it was addressed, did not 'think it prudent to make any use of it, as the temper which prevailed was such that it would probably have done more harm than good.' The conduct of the meeting at Brownsville, notwithstanding the thin veil thrown over it by the resolve already mentioned, was said to be considered by many, and especially by the violent party, as a rejection of the terms. It was certainly a partial rejection of those proposed by the underwritten, and a total one of the preliminaries prescribed by the state commissioners, who had required assurances from the members of that meeting only, and not from the people themselves.

"Having, therefore, no longer any hopes of an universal or even general submission, it was deemed necessary, by a solemn appeal to the people, to ascertain as clearly as possible the determination of every individual; to encourage and oblige the friends of order to declare themselves; to recall as many of the disaffected as possible to their duty, by assurances of pardon dependent on their individual conduct; and to learn with certainty what opposition government might expect if military coercion should be finally unavoidable. To secure these advantages, the underwritten were of opinion, that the assurances of submission required of the people ought not only to be publicly given, but ought also to be reduced to writing; and that the state of each county should be certified by those who were to superintend the meetings at which the disposition of the people was to be ascertained. On the first instant, nine of the gentlemen appointed by the meeting at Brownsville, assembled at Pittsburg, and in the afternoon requested a conference with the commissioners, which was agreed to. They produced the resolves by which they were appointed, and entered into some explanation of the nature of their visit; but being desired to communicate in writing they withdrew, and soon after sent a letter addressed to the commissioners of the United States, and of the state of Pennsylvania; to which an answer was immediately written. Copies of these letters are annexed, Nos. 12 and 13. As no part of their letter, although addressed to the commissioners from Pennsylvania, related to the preliminaries prescribed by them, they made no answer in writing; but in a conference held the next morning with those nine gentlemen, they verbally declared to them their entire concurrence in the sentiments contained in the letter from the underwritten; and they expressed at some length their surprise and regret at the conduct of the meeting at Brownsville. The conferees declared themselves satisfied with the answer they had received; avowed an entire conviction of the necessity and propriety of an early submission, in the manner proposed; and offered immediately to enter into the detail for settling the time, place, and manner of taking the sense of the people. A copy of their letter, which also expresses these sentiments, is annexed, No. 14.

"It was accordingly agreed between the commissioners on the one part, and these gentlemen on the other, that the people should assemble for the purpose of expressing their determination, and giving the assurances required, on the 11th inst.; and the mode of ascertaining the public sentiments of the citizens resident in the Fourth survey of Pennsylvania, was clearly and definitely prescribed by the unanimous consent of all who were present at the conference. It was evident, that circumstances might arise to prevent the real disposition of the citizens from being fully ascertained at these meetings, and that even arts might be used to procure such an expression of the public mind, that while it held up an appearance of submission, might be in reality a false and delusive representation of it. It was therefore necessary that persons of character, from every township or district (who might be able from their own knowledge or the comparison of all circumstances, justly to appreciate the public opinion) should assemble and jointly certify their opinion whether there was such a general submission in their respective counties, or not, that the laws could be peaceably carried into execution. For the same purpose it was agreed to be proper that the number of those who openly refused, as well as of those who promised to submit, in their respective townships or districts, should be reported to the commissioners. A copy of this agreement, marked No. 15, is annexed. It appears that meetings were held in the several counties, in pursuance of this agreement; but the underwritten, with extreme regret, find themselves obliged to report, that in the returns made to them no opinions are certified that there is so general a submission in any one of the counties that an office of inspection can be immediately and safely established therein; on the contrary, the report of those who superintended the meeting in Westmoreland, states their opinion to be that such a measure would not be safe. From Alleghany county no report whatever has been received, and although it is understood that a very great ma-

jority of those assembled in the Pittsburg district, actually subscribed the declarations required, yet there is no reason to believe that there was a favourable issue in any other district. Information has been received that great violence prevailed in one of them, and that in another the majority declared their determination not to submit to the laws of the United States. From Washington county a general return was duly transmitted to one of the commissioners at Uniontown, signed by twenty-eight of the superintendents of the meeting: they do not, however, state the number of the yeas and nays on the question for submission; they decline giving any opinion whether there is such a general submission that an office of inspection may be established therein, but certify their opinion and belief, 'that a large majority of the inhabitants will acquiesce and submit to the said law, under a hope and firm belief that the congress of the United States will repeal the law.' The report from the superintendents in Westmoreland county is equally defective, in not stating the numbers as required; but it certifies their opinion that as ill disposed, lawless persons could suddenly assemble and offer violence, it would not be safe immediately to establish an office of inspection in that county. The county of Fayette rejected the mode of ascertaining the sense of the people, which had been settled between the underwritten and the last committee of conference, at Pittsburg. The standing committee of that county directed those qualified by the laws of the state for voting at elections, to assemble in their election districts and vote by ballot, whether they would accede to the proposals made by the commissioners of the United States, on the 22d of August, or not. The superintendents of these election districts report, that five hundred and sixty of the people thus convened, had voted for submission, and that one hundred and sixty-one had voted against it; —that no judge or member of their committee had attended from the Fourth district of the county, to report the state of the votes there, and that they are of opinion that a great majority of the citizens who did not attend, are disposed to behave peaceably and with due submission to the laws. But it is proper to mention, that credible and certain information has been received, that in the Fourth district of that county (composed of the townships of Tyrone and Bullskin), of which the standing committee have given no account, six-sevenths of those who voted, were for resistance. Copies of the reports stated, are annexed, and numbered 16, 17, 18. From that part of Bedford county, which is comprehended within the Fourth survey of Pennsylvania, no report or returns have been sent forward, nor has any information been received that the citizens assembled there for the purpose of declaring their opinions upon questions proposed.

"The written assurances of submission which have been received by the commissioners, are not numerous, nor were they given by all those who expressed a willingness to obey the laws. In Fayette county, a different plan being pursued, no written assurances were given in the manner required. In the three other counties, which from the census taken under the laws of the state, appear to contain above eleven thousand taxable inhabitants (in which none under the age of twenty-one are included), the names subscribed to the papers received, barely exceed two thousand seven hundred, and of these a very considerable part have not been subscribed in the mode agreed on; being either signed at a different day,—unattested by any person,—or willfully varied from the settled form. From credible information received, it appears to the underwritten that in some townships the majority, and in one of them the whole of the persons assembled, publicly declared themselves for resistance; in some, although the sense of the majority was not known, yet the party for resistance was sufficiently strong to prevent any declarations of submission being openly made; and in others, the majority were intimidated or opposed by a violent minority. But notwithstanding these circumstances, the underwritten firmly believe that there is a considerable majority of the inhabitants of the Fourth survey, who are now disposed to submit to the execution of the laws: at the same time, they conceive it their duty explicitly to declare their opinion, that such is the state of things in that survey, that there is no probability that the act for raising a revenue on distilled spirits and stills, can at present be enforced by the usual course of civil authority, and that some more competent force is necessary to cause the laws to be duly executed, and to insure to the officers and well disposed citizens that protection which it is the duty of government to afford. This opinion is founded on the facts already stated; and it is confirmed by that which is entertained by many intelligent and influential persons, officers of justice and others, resident in the western counties, who have lately informed one of the commissioners, that whatever assurances might be given, it was in their judgment absolutely necessary that the civil authority should be aided by a military force, in order to secure a due execution of the laws.

James Ross.
"J. Yeates.
"Wm. Bradford.

"Philadelphia, Sept. 24, 1794."

The documents referred to in the aforegoing report:

(No. 1.)

From the commissioners on the part of the Union, to the committee of conference, assembled at Pittsburg:

"Pittsburg, August 24, 1794.

"Gentlemen: Having had a conference with you on the important subject that calls us into this part of Pennsylvania, we shall now state to you in writing, agreeably to your request, the nature and object of our mission hither. Considering this as a crisis infinitely interesting to our fellow citizens who have authorized you to confer with us, we shall explain ourselves to you with that frankness and sincerity, which the solemnity of the occasion demands. You well know that the president of the United States is charged with the execution of the laws. Obedience to the national will being indispensable in a republican government, the people of the United States have strictly enjoined it as his duty 'to see that the laws are faithfully executed,' and when the ordinary authorities of the government are incompetent for that end, he is bound to exert those high powers with which the nation has invested him for so extraordinary an occasion. It is but too evident that the insurrections which have lately prevailed in some of these western counties have suppressed the usual exercise of the civil authority; and it has been formally notified to the president, by one of the associate judges, in the manner the law prescribes, 'that in the counties of Washington and Alleghany, in Pennsylvania, laws of the United States are opposed, and the execution thereof obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or the powers vested in the marshal of that district.' He, therefore, perceives, with the deepest regret, the necessity to which he may be reduced, of calling forth the national force in order to support the national authority, and to cause the laws to be executed; but he has determined, previously to address himself to the patriotism and reason of the people of the western counties, and to try the moderation of government, in hopes that he may not be compelled to resort to its strength. But, we must not conceal it from you, that it is also his fixed determination, if these hopes should be disappointed, to employ the force, and if it be necessary, the whole force, of the Union, to secure the execution of the laws. He has, therefore, author-

ized us to repair hither, and by free conferences and the powers vested in us, to endeavour to put an end to the present disturbances, and to the opposition to the execution of the laws, in a manner that may be finally satisfactory to all our fellow citizens. We hope that this moderation in the government will not be misconstrued by the citizens to whom we are sent. The president, who feels a paternal solicitude for their welfare, wishes to prevent the calamities that are impending over them, to state to them clearly the inevitable consequences of further resistance, to recall them to their duty, and to prove to the whole world, that if military coercion must be employed, it is their choice and not his. The powers vested in us, will enable us so to arrange the execution of the acts for raising a revenue on distilled spirits and stills, that little inconvenience will arise therefrom to the people, to prevent as far as is consistent with the public interests the commencing prosecutions under those acts at a distance from the places where the delinquents reside, to suspend prosecutions for the late offences against the United States, and, even, to engage for a general pardon and oblivion of them.

"But, gentlemen, we explicitly declare to you, that the exercise of these powers must be preceded by full and satisfactory assurances of a sincere determination in the people to obey the laws of the United States, and their eventual operation must depend upon a correspondent acquiescence in the execution of the acts which have been opposed. We have not, and coming from the executive, you well know that we cannot have any authority to suspend the laws, or to offer the most distant hopes, that the acts, the execution of which has been obstructed, will be repealed. On the contrary, we are free to declare to you our private opinions, that the national councils, while they consult the general interests of the republic, and endeavour to conciliate every part by local accommodations to citizens who respect the laws, will sternly refuse every indulgence to men who accompany their requests with threats, and resist by force the public authority. Upon these principles, we are ready to enter with you into the detail necessary for the exercise of our powers, to learn what local accommodations are yet wanting to render the execution of the laws convenient to the people, to concert with you measures for restoring harmony and order, and for burying the past in oblivion; and to unite our endeavours with yours to secure the peace and happiness of our common country. It is necessary, however, to apprise you thus early, that at present, we do not consider ourselves as authorized to enter into any conferences on this subject, after the first of September ensuing. We therefore hope the business will be so conducted that some definitive answer may be given to us before that day. We cannot believe that in so great a crisis, any attempts to temporize and procrastinate will be made by those who sincerely love their country, and wish to secure its tranquility. We also declare to you, that no indulgence will be given to any future offence against the United States, and that they who shall hereafter directly or indirectly oppose the execution of the laws, must abide the consequences of their conduct.

James Ross.
"J. Yeates.
"Wm. Bradford."

(No. 2.)

The following is the answer of the committee:

"Pittsburg, Aug. 22, 1794.

"Gentlemen: Having in our conference, at considerable length, stated to you the grounds of that discontent which exists in the minds of the people of this country, and which has lately shown itself in acts of opposition to the excise law, you will consider us as waiving any question with regard to the nature of those acts, whether reasonable, or amounting only to riot and breach of the peace; of course as waiving the question of the constitutional power of the president to call upon the force of the Union to suppress them. It is our object, as it is yours, to compose the disturbance. We are satisfied that in substance, you have gone as far as we could expect the executive to go. It only remains to ascertain your propositions more in detail, and to say, what arrangements it may be in your power to make with regard to convenience in collecting the revenue under the excise laws, how far it may be consistent with the public interest to prevent commencing prosecutions under those laws at a distance from the places where the delinquents reside, on what condition or circumstance prosecutions for the late violations of the laws shall be suspended; that is to say, whether on the individual keeping the peace, or on its being kept by the country in general, and also with regard to the general amnesty, whether the claiming the benefit of it by an individual shall depend on his own future conduct or that of the whole community. We have already stated to you in conference that we are empowered to give you no definitive answer with regard to the sense of the people on the great question of acceding to the law; but that in our opinion, it is the interest of the country to accede; and that we shall make this report to the committee to whom we are to report, and state to them the reasons of our opinion, that so far as they may appear to have weight they may be regarded by them. It will be our endeavour to conciliate, not only them, but the public mind in general to our sense on this subject: for this purpose we hope to be assisted by you in giving all that extent and precision, clearness and certainty to your propositions as may satisfy the understandings and engage the acquiescence of the people. It is to be understood that in acceding to the law, no inference is to be drawn, or construction made, that we will relinquish a constitutional opposition; but that we will invariably undeviatingly and constantly pursue every legal means and measure of obtaining a repeal of the law in question. As we are disposed with you to have the sense of the people taken on the subject of our conference as speedily as may be, with that view we have resolved to call the committee to whom our report is to be made, at an earlier day than had been appointed, to wit, to meet on Thursday the 28th inst., but have not thought ourselves justifiable in changing the place, to wit, at Redstone (Old Fort) on the Monongahela.

"By order of the committee,

"Edward Cook, Chairman.

"To the Commissioners on the Part of the Union."

(No. 3.)

"The commissioners appointed by the president of the United States, to confer with the citizens in the western parts of Pennsylvania, having been assured by the committee of conference, of their determination to approve the proposals made, and to recommend to the general committee appointed by the meeting at Parkinson's Ferry, a submission to the acts of congress, do now proceed to declare what assurances of submission will be deemed full and satisfactory, and to detail the engagements which they have power to make: (1) It is expected and required by the said commissioners, that the citizens composing the said general committee, do on or before the first day of September, explicitly declare their determination to submit to the laws of the United States, and that they will not directly or indirectly oppose the execution of the acts for raising a revenue on distilled spirits and stills. (2) That they do explicitly recommend a perfect and entire acquiescence under the execution of the said acts. (3) That they do, in like manner, recommend that no violence, injuries, or threats, be offered to the person, or against the property of any officer of the United States, or citizens com-

plying with the laws, and do declare their determination to support (as far as the laws require) the civil authority, in affording the protection due to all officers and citizens. (4) That measures be taken to ascertain by meetings in election districts, or otherwise, the determination of the citizens in the Fourth survey of Pennsylvania, to submit to the said laws; and that satisfactory assurances be given to the said commissioners that the people have so determined to submit, on or before the 14th of September next.

"The said commissioners, if a full and perfect compliance with the above requisition shall take place, have power to promise and engage in the manner following, to wit: (1) No prosecution for any treason, or other indictable offence against the United States, committed in the Fourth survey of Pennsylvania before this day, shall be commenced or proceeded on until the tenth of July next. (2) If there shall be a general and sincere acquiescence in the execution of the said laws until the said tenth day of July next, a general pardon and oblivion of all such offences shall be granted: excepting therefrom, nevertheless, every person who shall, in the meantime, wilfully obstruct, or attempt to obstruct the execution of any of the laws of the United States, or be in anywise aiding or abetting therein. (3) Congress having, by an act passed on the fifth day of June last, authorized the state courts to take cognizance of offences against the said acts for raising a revenue upon distilled spirits and stills, the president has determined that he will direct suits against such delinquents to be prosecuted therein; if, upon experiment, it be found that local prejudices, or other causes, do not obstruct the faithful administration of justice. But it is to be understood, that of this he must be the judge, and that he does not mean by this determination to impair any power vested in the executive of the United States. (4) Certain beneficial arrangements for adjusting delinquencies and prosecutions for penalties now depending, shall be made and communicated by the officers appointed to carry the said acts into execution

"Given under our hands at Pittsburg, this 22d day of August, 1794.

"James Ross.
"J. Yeates.
"Wm. Bradford.

"To the Committee of Conference."

(No. 4.)

"Pittsburg, Aug. 23, 1794.

"Gentlemen: We presume it has been understood by you that the conference on our part consists of members not only from the counties of Pennsylvania west of the Alleghany mountains, but also from Ohio county in Virginia, and your propositions made in general by your first letter being addressed to this conference, the Ohio county was considered as included; yet in your propositions made in detail by your last, you confine them to the survey within Pennsylvania. We would request an explanation on this particular. We have only farther to say, we shall make a faithful report of your propositions, which we approve of, and will recommend to the people; and however they may be received, we are persuaded nothing more could have been done by you or us to bring this business to an accommodation.

"Signed by order of the commiittee,
"Edward Cook, Chairman.

"To the Commissioners on the Part of the Union."

To which the following answer was returned:

(No. 5.)

"Pittsburg, August 23, 1794.

"Gentlemen: Having received assurances of your approbation of the propositions made by us, and of your determination to recommend them to the people, we have nothing further to add, except to reply to that part of your letter which relates to the gentlemen from Ohio county. The whole tenor of our letter of the 21st instant shows that we had come among you in consequence of the disturbances which had prevailed in the western parts of Pennsylvania; to prevent the actual employment of military coercion there, as contemplated in the president's proclamation; and that the late offences referred to, were the insurrections which had prevailed in some of these western counties. We therefore cannot extend our propositions. In addition to this, we are well assured that the people of Ohio county have not, generally, authorized these gentlemen to represent them, and we cannot at present undertake to make any definite arrangement with them. We are, however, willing to converse with these gentlemen on this subject; and we have no doubt, that on satisfactory proofs of their determination to support the laws of their country, and of an entire submission to them by those from whom they come being given, the president will, upon our recommendation, extend a similar pardon to any late offences committed against the United States, if such there be committed. We are willing, on receiving such assurances from them, to recommend such application accordingly.

"James Ross.
"J. Yeates.
"Wm. Bradford.

"To the Committee of Conference."

The following communication was made to the commissioners by the person said to have been sent from Ohio county, in Virginia (in this and the following papers the spelling of the originals is preserved):

(No. 6.)

"Pittsburg, August 23, 1794.

"Gentlemen: We have seen by your letter of this day, that you have been well assured, that the people of Ohio county did not generally authorize us to represent them. All we have to say on that subject is, that we were authorized fuly and generally by such persons as met on that accasion. Wheather any of the inhabstance were dissatisfied with our being appointed for that purpose, or wheather there were any who did not wish an appointment to take place at all, we know not; but we pretent to have no other desire than that of representing such of the citizens of Ohio county as sent us here. Waving hower the mear personal subject, we think it a duty we owe our fellow-citizens, to wish (and we know it to have been the opinion of the whole committee of conference) that no distinction should be made between offences committed upon the same occasion, arising from the same source, and perpetrated at the same time, wheather they happenid in Pennsylvanah or in Virginia; and we therefore hope you will conceive it, upon full examenation, to be part of your present pacific mission, to satisfy the minds of the people of Virginia as well as thouse of Pennsylvana; and that you will give assurances that the same proofs which you require from the people of Pennsylvana, of their determination to submit to the laws, shall be deemed sufficient, when given by the people of Ohio county to enduce you to recommend to the president to extend a similar pardon to any offences committed there against the United States; and that whatever objects you may have to consider us in the same point of view with the other members of the committee of conference, you will not require different conditions from, or propose different terms to the citizens of the too states, &c. We have the honour to be with respect, gentlemen, your most obedient and very humble servants, Robt. Stephenson.

"William Sutherland.
"Wm. McKinley.

"To the Commissioners for the United States."

(No. 7.)

"Gentlemen: Having conversed with you on the subject of your letter of this date, we declare to you, that if the same declarations and assurances are made by you, which it is required should be made by the citizens to be assembled at Redstone, and if satisfactory assurances are also given to us of a sincere determination of those individuals in Ohio county who sent you hither, to submit to the laws for raising a revenue on distilled spirits and stills, on or before the 14th September next, in such case we will recommend to the president of the United States, your petition, requesting that a pardon may be granted for any indictable offence against the United States, committed in Ohio county since the 15th day of July last, and before the present day, on the same terms offered to the inhabitants of the fourth survey of Pennsylvania. But as certain bonds have been lately taken by force from Zaccheus Biggs, collector of the said revenue in Ohio county, it is to be clearly understood, that said pardon shall not extend to prevent any civil remedy against those who have destroyed the said bonds, or are parties to them.

"Given under our hands, August 23, 1794.

"James Ross.

"J. Yeates.

"Wm. Bradford.

"To Messrs. Robert Stephenson, William Sutherland, and William McKinley."

To which the following reply was made:

(No. 8.)

"Pittsburg, 23 Aug. 1794.

"Gentl.: Having Concderd your Letter of this Deate since the Departur of the speache Comatie delegated from Westmoreland Washington Featt & Alegunie countis in Pensilvenea & Conidering our Selves a Justifyable repentation of those inhabtents of Ohio County by Whowe we were Deligated & a part of that speachell Comitee to whom your proposals wear mead and Accepted yesterday & the day posding, and relying on the faith alrdy pledged by you and Accepted by the Speachell Comatee we dclen entering any further on this Bussens untell we Consult our Constaituents & the Cometee of Safety. We are Gentl. with Esteem your most Obed. Humble Servt.,

"Robert Stephenson.

"William Sutherland.

"Wm. McKinly."

(No. 9.)

"Brownsville, August 29, 1794.

"Gentlemen: Difficulties having arisen with us, we have thought it necessary to appoint a committee to confer with you, in order to procure, if possible, some further time, in order that the people may have leasure to reflect upon their true situation. I am, gentlemen, Your most obedient humble servant, Edward Cook.

"P. S. Inclosed you have a copy of the resolution on that subject.

"The Hon. the Commissioners of the United States."

(No. 10.)

At a meeting of the standing committee of the western counties, held at Brownsville (Redstone Old Fort), on the 28th and 29th August, 1794, the report of the committee appointed to confer with the commissioners of government, being taken into consideration, the following resolutions were adopted, to wit:

"Resolved: That in the opinion of this Committee, it is the interest of the people of this country to accede to the proposals made by the Commissioners on the part of the United States.

"Resolved: That a copy of the foregoing resolution be transmitted to the said Commissioners.

"Edw. Cook, Chairman.

"A true copy: Albert Gallatin."

The following letter was delivered to Hugh H. Brackenridge, just before his departure to Redstone (Old Fort), directed, "To Messrs. Kirkpatrick, Smith, Powers, D. Bradford, Marshall, Edgar, Cook, Gallatin, Lang, Morton, Lucas, and Brackenridge, Late Conferees."

(No. 11.)

"Pittsburg, August 27, 1794.

"Gentlemen: Since your departure from Pittsburg, we have transmitted information of our proceedings to the secretary of state; and it being evident from them, that the satisfactory proofs of a sincere submission to the laws cannot be obtained before the 1st September, we may undertake to assure you that the movement of the militia will be suspended until further information is received from us. We also authorize you to assure the friends of order, who may be disposed to exert themselves to restore the authority of the laws, that they may rely upon all the protection the Government can give; and that every measure necessary to suppress and punish the violence of ill disposed individuals, who may dissent from the general sentiment (if there shall be any such), will be promptly taken in the manner the laws direct. We are, gentlemen, your most humble servants,

"James Ross.

"J. Yeates.

"Wm. Bradford."

(No. 12.)

"Pittsburg, Sept. 1, 1794.

"Gentlemen: The committee appointed by the committee of safety, at Redstone, the 28th August last, to confer with the commissioners of the United States and state of Pennsylvania, and agreeable to the resolutions of said committee, do request: 1st. That the said commissioners give an assurance on the part of the general government, to an indemnity to all persons as to the arrearage of excise, that have not entered their stills to this date. 2d. Will the commissioners aforesaid give to the eleventh day of October next, to take the sense of the people at large of the four counties west of Pennsylvania, and that part of Bedford west of the Alleghany Mountains, and the Ohio county in Virginia, whether they will accede to the resolution of the said commissioners, as stated at large in the conference with the committee of conference met at Pittsburg, the 21st day of August last?

"By order of the Committee.

"John McClelland.

"The Honourable the Commissioners on the Part of the United States and of the State of Pennsylvania."

(No. 13.)

"Pittsburg, September 1st, 1794.

"Gentlemen: We have received your letter of this date; and as time presses have determined to give it an immediate answer, although we shall be prevented thereby, from making so full and correct a reply, as the importance of the subject requires. In our correspondence with the late committee of conference, we detailed those assurances of submission to the laws, which would have been deemed full and satisfactory, and which were necessary to the exercise of the powers vested in us. This detail was minutely settled in a conference with a sub-committee of that body. From a desire on our part to accommodate and to render the proposals as unexceptionable as possible, they were altered and modified at their request, till being superior to all exception, they received the unanimous approbation of those gentlemen. The detail thus settled required from the standing committee assurances of their explicit determination to submit to the laws of the United States; that they would not directly or indirectly oppose the execution of the acts for raising a revenue upon distilled spirits and upon stills; and that they would support, as far as

the laws require, the civil authority, in affording the protection due to all officers and other citizens. These assurances have not been given. On the contrary, we learn, with emotions difficult to be repressed, that in the meeting of the committee, at Redstone, resistance to the laws and open rebellion against the United States were publicly advocated, and that two-fifths of that body, representing twenty-three townships, totally disapprove the proposals, and preferred the convulsions of a civil contest to the indulgence offered them by their country. Even the members composing the majority, although, by a secret and undistinguishing vote, they expressed an opinion, that it was the interest of the people to accede to the proposals, did not themselves accede to them, nor give the assurances, nor make the recommendations explicitly required of them. They have adjourned without day, and the terms are broken on their part. We had reason for requiring these declarations and recommendations from that body. They were a representation (in fact) of the different townships of the western counties—they were a body in whom the people had chosen to place confidence—there were among them men, whose advice and example have had influence in misleading the people, and it was proper they should be instrumental in recalling them to their duty: and an avowed determination to support the civil authority in protecting the officers, would have assisted in repressing the violence of turbulent individuals. Our expectations have been unfortunately disappointed: the terms required have not been acceded to. You have been sent hither to demand new terms; and it is now necessary for us to decide, whether we will return home, or enter into other arrangements.

"Upon reflection, we are satisfied that the president of the United States, while he demands satisfactory proofs that there will be in future a perfect submission to the laws, does not wish the great body of the people should be finally concluded by the conduct or proceedings of that committee: and if the people themselves will make the declarations required of the standing committee, and give satisfactory proofs of a general and sincere determination to obey the laws, the benefits offered may still be obtained by those individuals, who shall explicitly avow their submission as hereinafter mentioned. It is difficult to decide in what manner the said declarations and determinations of the people to submit peaceably should be taken and ascertained. We have thought much on this subject, and are fully satisfied, that a decision by ballot will be wholly unsatisfactory, and that it will be easy to produce by that means an apparent but delusive unanimity. It is, therefore, necessary that the determination of every individual be publicly announced. In a crisis, and on a question like this, it is dishonourable to temporize. Every man ought to declare himself openly, and give his assurances of submission in a manner that cannot be questioned hereafter. If a civil contest must finally take place, the government ought to know not only the numbers, but the names of the faithful citizens, who may otherwise be in danger of being confounded with the guilty. It, therefore, remains with you to say, whether you will recommend such a mode of procedure, and will immediately arrange with us the manner in which the sense of the people may be publicly taken, and written assurances of submission obtained, within the time already limited. We desire an explicit and speedy answer in writing

"You request us 'to give assurances, on the part of the United States, that an indemnity shall be granted, as to the arrears of excise, to all persons that have not entered their stills to this date.' If it were proper to remit all arrears of duty, we cannot conceive why those who have entered their stills, should not receive a similar indulgence with those who have refused to do so; nor why you demand peculiar favours for the opposers of the acts, while you abandon those who have complied to the strictness of the laws. We have gone on that subject as far as we think advisable. The clause was introduced at the request of the late committee of conference; and even the style of expressing it was settled with them. We, therefore, have nothing more to add to that subject. You require also that time be given until the 11th day of October, in order to ascertain the sense of the people. That is wholly inadmissible. On the day of the conference, the time allowed was deemed sufficiently long; and we are sorry to perceive, that delay only tends to produce an indisposition to decide. There are strong reasons, obvious to a reflecting mind, against prolonging the time a single hour. Nothing is required but a declaration of that duty which every man owes to his country, and every man before this day must have made up his mind on the subject. Six weeks have already elapsed since the ordinary exercise of civil authority has been forcibly suppressed, the officers of government expelled, and the persons and property of well disposed citizens exposed to the outrages of popular violence. The protection which is due to peaceable citizens—the respect which every government owes itself—and the great interests of the United States demand that the authority of the laws be quickly restored. To this we may add, that the militia (which by late orders from the president have been increased to 15,000 men, including 1500 riflemen from Virginia, under the command of Maj.-Gen. Morgan) have received orders to assemble, and we cannot undertake to promise that their march will be long suspended. All possible means to inform, to conciliate, and to recall our fellow citizens to their duty, have been used. If their infatuation still continues, we regret, but are persuaded that further moderation and forbearance will increase it.

"If the whole country shall declare its determination peaceably to submit, the hopes of the executive will be fulfilled: but if a part of the inhabitants of the survey shall persist in their unjustifiable resistance to the lawful authority of the United States, it is not the intention of the government to confound the innocent with the guilty. You may, therefore, assure the friends of order and the laws, that they may rely upon promptly receiving all the protection the government can give, and that effectual measures will be taken to suppress and punish the violence of those individuals who may endeavour to obstruct the execution of the laws, and to involve their country in a scene of calamity, the extent and seriousness of which it is impossible to calculate. It is easy to perceive from the whole scope of this letter, that no part of it is addressed to the gentlemen of Ohio county, in Virginia. James Ross.

"J. Yeates.

"Wm. Bradford.

"To Robert Dickey, John Probst, John Nesbitt, John Marshel, David Philips, John M'Cleland, George Wallace, and Samuel Wilson."

(No. 14.)

"Pittsburg, Sept. 2, 1794.

"Gentlemen: We have received your letter of yesterday, and, after having duly considered its contents, we are all of opinion that it is the interest and duty of the people in the western counties of Pennsylvania, to submit to the execution of the laws of the United States, and of the state of Pennsylvania, upon the principles and terms stated by the commissioners; and we will heartily recommend this measure to them. We are also ready to enter into the detail with you of fixing and ascertaining the time, place, and manner of collecting the sense of the people upon this very momentous subject.

"Signed by the unanimous order of the committee. John McCleland.

"To the Commissioners of the United States and of the State of Pennsylvania."

(No. 15.)

"At a conference between the commissioners from the United States and the state of Pennsylvania, on the one part, and Messrs. Probst, Dickey, Nesbit, Marshel, Philips, McCleland, Wallace, and Wilson, conferees appointed by the standing committee, at Brownsville (Redstone Old Fort), on the 28th and 29th days of August, 1794, it was agreed that the assurances required from the citizens in the Fourth survey of Pennsylvania, should be given in writing, and their sense ascertained in the following manner:

"That the citizens of the said survey (Alleghany county excepted), of the age of eighteen years and upwards, be required to assemble on Thursday, the 11th instant, in their respective townships, at the usual place for holding township meetings; and that between the hours of twelve and seven in the afternoon of the same day, any two or more members of the meeting who assembled at Parkinson's Ferry, on the 14th ultimo, resident in the township, or a justice of the peace of said township, do openly propose to the people assembled the following questions: 'Do you now engage to submit to the laws of the United States, and that you will not hereafter, directly or indirectly, oppose the execution of the acts for raising a revenue upon distilled spirits and stills? And you do also undertake to support, as far as the laws require, the civil authority, in affording the protection due to all officers and other citizens? Yea or nay.' That the said citizens resident in Alleghany county, shall meet in their respective election districts on the said day, and proceed in the same manner as if they were assembled in townships. That a minute of the number of the yeas and nays be made immediately after ascertaining the same. That a written or printed declaration of such engagement be signed by all those who vote in the affirmative, of the following tenor, to wit: 'I do solemnly* promise henceforth* to submit to the laws of the United States; that I will not directly nor indirectly oppose the execution of the acts for raising a revenue on distilled spirits and stills, and that I will support, as far as the law requires, the civil authority in affording the protection due to all officers and other citizens.' This shall be signed in the presence of the said members or justices, attested by him or them, and lodged in his or their hands. That the said persons so proposing the question stated as aforesaid, do assemble at the respective county court-houses on the 13th instant, and do ascertain and make report of the number of those who voted in the affirmative, in the respective townships or districts, and of the number of those who voted in the negative; together with their opinion, whether there be such a general submission of the people in their respective counties, that an office of inspection may be immediately and safely established therein. That the said report, opinion and written or printed declarations be transmitted to the commissioners, or any one of them, at Uniontown, on or before the 16th instant.

"If the said assurances shall be bona fide given in the manner prescribed, the commissioners on the part of the United States do promise and engage in manner following, to wit:

"1. No prosecution for any treason or other indictable offence against the United States, committed within the Fourth survey of Pennsylvania, before the 22d day of August last, shall be commenced or prosecuted before the 10th day of July next, against any person who shall within the time limited subscribe such assurance and engagement as aforesaid, and perform the same.

"2. On the said 10th day of July next there shall be granted a general pardon and oblivion of all the said offences, excluding therefrom, nevertheless, every person who shall refuse or neglect to subscribe to such assurance and engagement in manner aforesaid, or shall after such subscription violate the same, or wilfully obstruct, or attempt to obstruct, the execution of the said acts, or be aiding or abetting therein.

"3. Congress having by an act passed on the 5th day of June last, authorized the state courts to take cognizance of offences against the said acts for raising a revenue upon distilled spirits and stills, the president has determined that he will direct suits against such delinquents to be prosecuted therein, if upon experiment it be found that local prejudices or other causes do not obstruct the faithful administration of justice; but it is to be understood, that of this he must be the judge, and that he does not mean by this determination to impair any power vested in the executive of the United States.

"4. Certain beneficial arrangements for adjusting delinquencies and prosecutions for penalties now depending, shall be made and communicated by the officers appointed to carry the said acts into execution. James Ross.

"J. Yeates.

"Wm. Bradford.

"Signed in behalf of the committee representing the Fourth survey of Pennsylvania, unanimously by the members present: John Probst, Robert Dickey, John Nesbitt, David Philips, John Marshel, Samuel Wilson, George Wallace, John McClelland. Pittsburg, September 2, 1794.

"We the underwritten, do also promise, in behalf of the state of Pennsylvania, that in case the assurances now proposed, shall be bona fide given and performed, until the 10th day of July next, an act of free and general pardon and oblivion of all treasons, insurrections, arsons, riots, and other offences inferior to riots, committed, counselled or suffered, by any person or persons within the four western counties of Pennsylvania, since the 14th day of July last past, so far as the same concerns the said state or the government thereof, shall be then granted; excluding therefrom every person who shall refuse or neglect to subscribe such assurance, or who shall after such subscription wilfully violate or obstruct the laws of the state or of the United States. Thomas McKean.

"William Irvine."

(No. 16.)

"We, the subscribers, members of the committee who met at Parkeson's Ferry, on the 14th August last, and justices of the peace of the different townships in Washington county, met this 13th day of September, 1794, do find ourselves under great embarrassment to express our sentiments and opinions whether there be such a general submission of the people as that an office of inspection may be immediately and safely established in this county: yet we are free to declare, that no opposition shall arise from us the undersigned to the excise law, or to any officer appointed under it, and we believe and are of opinion, that a large majority of the inhabitants of the respective townships in this county will acquiesce and submit to the said laws, under a hope and firm belief that the congress of the United States will repeal said law.

"Given under our hands, at Washington Court House, the 13th of September, 1794.

"David Bradford, and 27 Others."

(No. 17.)

"We the subscribers, judges of a general election held in the several townships of the county, for the purpose of ascertaining certain assurances required of the citizens by the commissioners on the part of the government, and agreed to on the part of the delegates, having met this day and taken into consideration the returns from said township, (true copies of which have been returned to one of the commissioners,) and finding that some gave only general assurances of

*Objections having been made to the words "solemnly" and "henceforth," the commissioners by a publication in the Pittsburg Gazette, declared their consent to their being struck out.

their submission and disposition for peace, without individually signing the same, and others in number according to the returns by them respectively made,—do certify, that in our opinion, as ill-disposed lawless persons could suddenly assemble and offer violence, it would not be safe in immediately establishing an office of inspection therein.

"Given under our hands at the court house at Greensburgh, this thirteenth day of September, in the year of our Lord one thousand seven hundred and ninety-four. James McLean.

"Ebenezer Brady.
"Clements Burleigh.
"Hugh Martin.
"John Denniston.
"Chr. Finley.
"John Kirkpatrick.
"John Young.
"James Caldwell.
"Jas. Irwin.
"James Brady.
"John Anderson.
"John Findley.
"Jeremiah Muray.
"George Ament."

(No. 18.)

"Union Town, Sept. 16, 1794.

"We, the subscribers, having according to resolutions of the committee of townships, for the county of Fayette, acted as judges, on the 11th instant, at the meetings of the people of the said county respectively convened at the places in the First, Second, and Third election districts, where the general elections are usually held (no judge or member of the committee attending from the Fourth and last district, which consists of the townships of Tyrone and Bullskin), do hereby certify, that five hundred and sixty of the people thus convened on the day aforesaid, did then and there declare their determination to submit to the laws of the United States in the manner expressed by the commissioners on the part of the Union, in their letter dated the 22d day of August last; the total number of those who attended on that occasion, being only seven hundred and twenty-one, that is to say, something less than one-third of the number of citizens of the said three districts. And we do further certify, that from our previous knowledge of the disposition of the general body of the people, and from the anxiety since discovered by many (who, either from not having had notice, or from not having understood the importance of the question, did not attend) to give similar assurances of submission, we are of opinion that the majority of those citizens who did not attend are disposed to behave peaceably and with due submission to the laws.

"Albert Gallatin
"William Roberts.
"George Dieuth.
"James White.
"John Jackson.
"Andrew Rabb.
"Thomas Patterson."

NOTE 7. The following squib appeared in this paper on the 23rd of August. It was generally attributed to Brackenridge, though he denies it in his "Incidents," in a rather lame way. It had a great deal of influence at the time:

An Indian Treaty.

"Speeches intended to be spoken at a treaty now holding with the Six United Nations of White Indians, settled on the heads of the Ohio, at the town of Pittsburg, on the 20th of August, 1794, by the commissioners sent from Philadelphia for the purpose:

"Captain Blanket, an Indian chief, spoke as follows: 'Brothers: We welcome you to the old council fire at this place. It is a lucky spot of ground for holding Indian treaties. No good has attended your treaties at Beaver Creek, Muskingum, &c. As the proffer of this treaty has originated with your great council at Philadelphia, we therefore expect you have good terms to offer. But you know, brothers, that it has ever been a custom to pay Indians well for coming to treaties; and you may be assured that unless we are well paid or fully satisfied, your attempts of any kind, will not have the least effect. However, we doubt not but the pay is provided; and that you have a sufficiency of blankets and breech-clouts, powder and lead; and that the wagons are close at hand. You know, brothers, that our neighbors the British over the lakes, pay their Indians well; that they have inexhaustible stores of blankets and ammunition, and that if they were offering us a treaty they would not hesitate a moment to satisfy all our demands.'

"Captain Whisky spoke next: 'Brothers: My friend Captain Blanket has indulged himself in a little drollery about blankets &c., but I must speak to the point. I am told, that the people of your great council call us a parcel of drunken ragamuffins; because we indulge ourselves with a little of our homespun whisky, and that we ought to pay well for this extraordinary luxury. What would they think if the same was said of them for drinking beer and cider? Surely the saying will apply with equal force in both cases. We say that our whisky shall not be saddled with an unequal tax. You say it shall; and to enforce the collection of three or four thousand dollars per annum, of nett proceeds, you will send an army of 12,950 men, or double that number if necessary. This is a new fashioned kind of economy indeed. It is a pity that this army had not been employed long ago, in assisting your old warrior, General Wayne, or chastising the British about the lakes. However, I presume it is the present policy, to guard against offending a nation with a king at their head. But remember, brothers, if we have not a king at our head, we have that powerful monarch Captain Whisky to command us. By the power of his influence, and a love to his person, we are impelled to every great and heroic act. You know, brothers, that Captain Whisky has been a great warrior in all nations and in all armies. He is a descendant of that nation called Ireland; and to use his own phrase, he has peopled three-fourths of this western world with his own hand. We the Six United Nations of White Indians, are principally his legitimate offspring; and those who are not, have all imbibed his principles and passions,—that is, a love of whisky; and will, therefore, fight for our bottle till the last gasp. Brothers, you must not think to frighten us with fine arranged lists of infantry, cavalry and artillery, composed of your water-melon armies from the Jersey shore; they would cut a much better figure in warring with the crabs and oysters about the capes of Delaware. It is a common thing for Indians to fight your best armies, at a proportion of one to five; therefore, we would not hesitate to attack this army at the rate of one to ten. Our nations can upon emergency, produce 20,000 warriors; you may then calculate what your army ought to be. But I must not forget that I am making an Indian speech: I must therefore give you a smack of my national tongue—Tongath Getchie—Tongath Getchie, very strong man me Captain Whisky.'

"Captain Alliance next took the floor: 'Brothers: My friend Captain Whisky has made some fine flourishes about the power of his all conquering monarch, Whisky: and of the intrepidity of the sons of St. Patrick, in defence of their beloved bottle. But we will suppose when matters are brought to the test, that, if we should find ourselves unequal to the task of repelling this tremendous army, or that the great council will still persevere in their determination of imposing unequal and oppressive duties upon our whisky, who knows but some evil spirit might prompt us to a separation from the Union, and call for the alliance of some more

friendly nation. You know that the great nation of Kentucky have already suggested the idea to us. They are at present Mississippi mad, and we are Whisky mad; it is, therefore, hard to tell what may be the issue of such united madness. It appears as if the Kentuckians were disposed to bow the knee to the Spanish monarch, or kiss the Pope's a—e, and wear a crucifix rather than be deprived of their darling Mississippi; and we might be desperate enough rather than submit to an odious excise, or unequal taxes, to invite Prince William Henry, or some other royal pup, to take us by the hand, provided he would guarantee equal taxation and exempt our whisky. This would be a pleasing overture to the royal family of England; they would eagerly embrace the favourable moment, to add again to their curtailed dominions in America, to accommodate some of their numerous brood with kingdoms and principalities. We would soon find that great warrior of the lakes, Sinicoe, flying to our relief, and employing those numerous legions of white and yellow savages, for a very different purpose to what they have now in view. If the Kentuckians should also take it into their heads to withhold supplies from your good old warrior Wayne, who is very often near starving in the wilderness, his army must be immediately annihilated, and your great council might forever bid adieu to their territory west of the mountains. This may seem very improbable indeed; but as great wonders have happened in Europe within the course of three years past.'

"Captain Pacificus then rose, and concluded the business of the day: 'Brothers: My friend Alliance has made some very alarming observations; and I confess they have considerable weight with me. A desperate people may be drove to desperate resources; but as I am of a peaceable disposition, I shall readily concur in every reasonable proposition which may have a tendency to restore tranquility, and secure our Union upon the true principles of equality and justice. It is now time to know the true object of your mission; if you are the messengers of peace, and come to offer us a treaty, why attempt to deliver it at the point of the bayonet! If you are only come to grant pardon for past offences, you need not have fatigued yourself with such extraordinary dispatch on the journey; we have not yet begged your pardon; we are not yet at the gallows or the guillotine, for you will have to catch us before you bring us there. But as I am rather more of a counsellor than a warrior, I am more disposed to lay hold of the chain than the tomahawk; I shall therefore propose, that a total suspension of all hostilities, and the cause thereof, shall immediately take place on both sides, until the next meeting of our great national council. If your powers are not competent to this agreement, we expect as you are old counsellors, and peaceable men, that you will at last report and recommend it to our good old father who sits at the helm. We know it was his duty to make proclamation, &c. &c., but we expect everything that can result from his prudence, humanity and benevolence towards his fellow creatures.' "

A belt, on which is inscribed, "Plenty of whisky without excise."

Soon after this, one John Gaston received the ensuing letter, which he had published in the same paper, the printer not daring to refuse it:

"To John Gasson—Sir: You will please to have printed in the Pittsburg paper, this week, or you may abide by the consequences. Poor Tom takes this opportunity to inform his friends throughout the country, that he is obliged to take up his commission once more, though disagreeable to his inclination. I thought, when I laid down my commission before, that we had got the country so well united, that there would have been no more need for me in that line; but my friends see more need for me than ever. They chose a set of men whom they thought they could confide in, but find themselves much mistaken; for the majority of them have proved traitors. Four or five big men from below have scared a good many; but few are killed yet. But I hope none of those are any that ever pretended to be a friend to Poor Tom; so I would have all my friends to keep up their spirits, and stand to their integrity, their rights, and liberty, and you will find Poor Tom be your friend. This is a fair warning; traitors, take care, for my hammer is up and my ladle is hot. I cannot travel the country for nothing. From your old friend, Tom, the Tinker."

"Tom-the-Tinker" was a nom-de-guerre of John Holcroft, who, it may be remembered, was a leader in the first attack on General Neville's house. He was a very prominent man among the insurgents, and acquired a good deal of notoriety at the time from the threatening letters that he wrote with the above signature.

"A Proclamation.

"Whereas from a hope that the combinations against the constitution and laws of the United States in certain of the western counties of Pennsylvania would yield to time and reflection, I thought it sufficient in the first instance rather to take measures for calling forth the militia, than immediately to embody them; but the moment is now come, when the overtures of forgiveness with no other condition, than a submission to law have been only partially accepted; when every form of conciliation not inconsistent with the being of government has been adopted without effect; when the well disposed in those counties are unable by their influence and example to reclaim the wicked from their fury, and are compelled to associate in their own defence; when the proper lenity has been misinterpreted into an apprehension that the citizens will march with reluctance; when the opportunity of examining the serious consequences of a treasonable opposition has been employed in propagating principles of anarchy, endeavouring through emissaries to alienate the friends of order from its support, and inviting its enemies to perpetrate similar acts of insurrection; when it is manifest, that violence would continue to be exercised upon every attempt to enforce the laws; when, therefore, government is set at defiance, the contest being whether a small portion of the United States shall dictate to the whole Union, and at the expense of those who desire peace, indulge a desperate ambition.

"Now, therefore, I, George Washington, president of the United States, in obedience to that high and irresistible duty consigned to me by the constitution, 'to take care that the laws be faithfully executed,' deploring that the American name should be sullied by the outrages of citizens on their own government; commiserating such as remain obstinate from delusion, but resolved in perfect reliance on that gracious Providence which so signally displays its goodness towards this country, to reduce the refractory to a due subordination to the law; do hereby declare and make known, that with a satisfaction, which can be equalled only by the merits of the militia, summoned into service from the states of New Jersey, Pennsylvania, Maryland and Virginia, I have received intelligence of their patriotic alacrity in obeying the call of the present, though painful, yet commanding necessity; that a force, which, according to every reasonable expectation is adequate to the exigency, is already in motion to the scene of disaffection: that those who have confided, or shall confide in the protection of government, shall meet full succour under the standard, and from the arms of the United States: that those who having offended against the law have since entitled themselves to indemnity, will be treated with the most liberal good faith, if they shall not have forfeited their claim by any subsequent conduct, and that instructions are given accordingly. And I do moreover exhort all individuals and bodies of men, to contemplate with abhorrence the measures leading directly or indi-

rectly to those crimes which produce this military coercion; to check in their respective spheres the efforts of misguided or designing men to substitute their misrepresentations in the place of truth, and their discontents in the place of stable government; and so call to mind that as the people of the United States have been permitted under the Divine favour in perfect freedom after solemn deliberation, and in an enlightened age, to elect their own government; so will their gratitude for this inestimable blessing be best distinguished by firm exertions to maintain the constitution and the laws. And lastly, I again warn all persons whomsoever, and wheresoever, not to abet, aid or comfort the insurgents aforesaid, as they will answer the country at their peril; and I do also require all officers and other citizens according to their several duties, as far as may be in their power to bring under the cognizance of the law all offenders in the premises.

"In witness whereof, I have caused the seal of the United States of America to be affixed to these presents, and signed the same with my hand. Done at the city of Philadelphia the twenty-fifth day of September, one thousand seven hundred and ninety-four, and of the independence of the United States of America the nineteenth. Geo. Washington. [L. S.]

"By the President: Edm. Randolph.

"(True copy. George Taylor.)"

This proclamation was preceded by the following correspondence between the president and the governor of Pennsylvania. The letters under the name of Governor Mifflin are understood to have emanated from Mr. Dallas, the then secretary of the commonwealth.

Communication from Governor Mifflin to the president of the United States, on the insurrection in the western counties of Pennsylvania:

"Sir: The important subject, which led to our conference on Saturday last, and the interesting discussion that then took place, having since engaged my whole attention, I am prepared, in compliance with your request, to state with candour the measures which, in my opinion, ought to be pursued by the commonwealth of Pennsylvania. The circumstances of the case evidently require a firm and energetic conduct on our part, as well as on the part of the general government; but as they do not preclude the exercise of a prudent and humane policy, I enjoy a sincere gratification in recollecting the sentiment of regret, with which you contemplated the possible necessity of an appeal to arms: for I confess that, and in manifesting a zealous disposition to secure obedience to the constitution and laws of our country, I too shall ever prefer the instruments of conciliation to those of coercion; and never, but in the last resort, countenance a dereliction of judiciary authority, for the exertion of military force. Under the influence of this general sentiment, I shall proceed, sir, to deliver my opinion relatively to the recent riots in the county of Alleghany, recapitulating, in the first place, the actual state of the information which I have received. It appears, then, that the marshal of the district having, without molestation, served certain process, that issued from a federal court, on various citizens who reside in the county of Fayette, thought it proper to prosecute a similar duty in the county of Alleghany, with the assistance, and in the company of General Neville, the inspector of the excise for the western district of Pennsylvania: that while thus accompanied he suffered some insults, and encountered some opposition: that considerable bodies of armed men having, at several times, demanded the surrender of General Neville's commission and papers, attacked, and ultimately, destroyed his house: that these rioters (of whom a few were killed, and many wounded) having taken the marshal and other prisoners, released that officer, in consideration of a promise, that he would serve no more processes on the western side of the Alleghany Mountains: that, under the apprehension of violence, General Neville, before his house was destroyed, applied to the judges of Alleghany county for the protection of his property, but the judges on the 17th day of July, the day on which his house was destroyed, declared that they could not, in the present circumstances, afford the protection that was requested, though they offered to institute prosecutions against the offenders; and that General Neville and the marshal, menaced with further outrage by the rioters, had been under the necessity of withdrawing from the country. To this outline of the actual information respecting the riots, the stoppage of the mail may be added, as matter of aggravation; and the proposed convention of the inhabitants of the neighbouring counties of Pennsylvania and Virginia, as matter of alarm.

"Whatever constructions may be given, on the part of the United States, to the facts that have been recited, I cannot hesitate to declare on the part of Pennsylvania, that the incompetency of the judiciary department of her government, to vindicate the violated laws, has not at this period been made sufficiently apparent, and that the military power of the government ought not to be employed until its judiciary authority, after a fair experiment, has proved incompetent to enforce obedience, or to punish infractions of the law. The law having established a tribunal and prescribed the mode for investigating every charge, has likewise attached to every offence its proper punishment. If an opponent of the excise system refuses or omits to perform the duty which that system prescribes to him, in common with his fellow citizens, his refusal or omission exposes him to the penalty of the law; but the payment of the penalty expiates the legal offence. If a riot is committed in the course of a resistance to the execution of any law, the rioters expose themselves to the prosecution and punishment, but the sufferance of their sentence extinguishes their crime. In either instance, however, if the strength and audacity of a lawless combination shall baffle and destroy the efforts of the judiciary authority to recover a penalty, or to inflict a punishment, that authority may constitutionally claim the auxiliary intervention of a military power; but still the intervention cannot commence until the impotency of the judicial authority has been proved by experiment, nor continue a moment longer than the occasion for which it was expressly required. That the laws of the Union are the laws of the state, is a constitutional axiom that will never be controverted; that the authority of the state ought to be exerted in maintaining the authority of the Union, is a patriotic position which I have uniformly inculcated. But in executing the laws or maintaining the authority of the Union, the government of Pennsylvania can only employ the same means by which the more peculiarly municipal laws and authority of the state are executed and maintained. Till the riot was committed no offence had occurred which required the aid of the state government. When it was committed, it became the duty of the state government to prosecute the offenders, as for a breach of the public peace and the laws of the commonwealth, and if the measures shall be precisely what would have been pursued, had the riot been unconnected with the system of federal policy, all, I presume, will be done which good faith and justice can require. Had the riot been unconnected with the system of federal policy, the vindication of our laws would be left to the ordinary course of justice; and only in the last resort, at the requisition, and as an auxiliary of the civil authority, would the military force of the state be called forth. Experience furnishes the strongest inducements, to my mind, for persevering in this lenient course. Riots have heretofore been committed in opposition to the laws of Pennsylvania, but the rioters have

invariably been punished by our courts of justice. In opposition to the laws of the United States, in opposition to the very laws now opposed, and in the very counties supposed to be combined in the present opposition, riots have likewise formerly occurred; but in every instance, supported by legal proof, the offenders have been indicted, convicted, and punished before the tribunals of the state. This result does not announce a defect of jurisdiction, a want of judicial power, or disposition to punish infractions of the law, a necessity for an appeal from the political to the physical strength of the nation.

"But another principle of policy deserves some consideration. In a free country it must be expedient to convince the citizens of the necessity that shall, at any time, induce the government to employ the coercive authority with which it is invested. To convince them that it is necessary to call forth the military power for the purpose of executing the laws, it must be shown that the judicial power has in vain attempted to punish those who violate them; and, therefore, thinking as I do, that the incompetency of the judicial power of Pennsylvania has not yet been sufficiently ascertained, I remarked, in the course of our late conference, that I did not think it would be an easy task to embody the militia on the present occasion. The citizens of Pennsylvania (however a part of them may, for a while, be deluded,) are the friends of law and order, but when the inhabitants of one district shall be required to take arms against the inhabitants of another, their general character does not authorize me to promise a passive obedience to the mandates of government. I believe, that as freemen they would inquire into the cause and nature of the service proposed to them; and, I believe, that their alacrity in performing as well as in accepting it, would essentially depend on their opinion of its justice and necessity. Upon great political emergencies, the effect of every measure should be deliberately weighed. If it shall be doubted whether saying that the judiciary power is yet untried, is enough to deter us from the immediate use of military force, an anticipation of the probable consequences of that awful appeal will enable us perhaps satisfactorily to remove or overlook the doubt. Will not the resort to force inflame and cement the existing opposition? Will it not associate, in a common resistance, those who have hitherto peaceably, as well as those who have riotously expressed their abhorrence of the excise? Will it not collect and combine every latent principle of discontent arising from the supposed oppressive operations of the federal judiciary, the obstruction of the western navigation, and a variety of other local sources? May not the magnitude of the opposition, on the part of the ill disposed, or the dissatisfaction at a premature resort to arms on the part of the well disposed citizens of this state, eventually involve the necessity of employing the militia of other states? And the accumulation of discontent which the jealousy engendered by that movement may produce, who can calculate, or who will be able to avert? Nor, in this view of the subject, ought we to omit paying some regard to the ground for suspecting that the British government has already, insidiously and unjustly, attempted to seduce the citizens on our western frontier from their duty; and we know, that in a moment of desperation or disgust men may be led to accept that as an asylum, which, under different impressions, they would shun as a snare. It will not, I am persuaded, sir, be presumed, from the expression of these sentiments, that I am insensible to the indignation which the late outrages ought to excite in the mind of a magistrate, entrusted with the execution of the laws. My object at present is to demonstrate, that on the principles of policy, as well as of law, it would be improper in me to employ the military power of the state while its judiciary authority is competent to punish the offenders. But should the judiciary authority prove insufficient, be assured of the most vigorous co-operation of the whole force which the constitution and laws of the state entrust to me, for the purpose of compelling a due obedience to the government; and, in that unfortunate event, convinced that every other expedient has been resorted to in vain, the public opinion will sanctify our measures, and every honest citizen will willingly lend his aid to strengthen and promote them.

"The steps which under my instructions were taken, as soon as the intelligence respecting the riots was received, will clearly, indeed, manifest the sense that I entertain upon the subject. To every judge, justice, sheriff, brigade inspector, in short to every public officer residing in the western counties, a letter was addressed expressing my indignation and regret, and requiring an exertion of their influence and authority to suppress the tumults and punish the offenders. The attorney general of the state was, likewise, desired to investigate the circumstances of the riot, to ascertain the names of the rioters, and to institute the regular process of the law, for bringing the leaders to justice. In addition to these preliminary measures, I propose issuing a proclamation, in order to declare (as far as I can declare them) the sentiments of the government; to announce a determination to prosecute and punish the offenders; and to exhort the citizens at large to pursue a peaceable and patriotic conduct: I propose engaging three respectable citizens to act as commissioners for addressing those who have embarked in the present combination, upon the lawless nature, and ruinous tendency of their proceedings; for inculcating the necessity of an immediate return to the duty which they owe to their country; and for promising (as far as the state is concerned) a forgiveness of their past transgressions, upon receiving a satisfactory assurance that, in future they will submit to the laws; and I propose, if all these expedients should be abortive, to convene the legislature, that the ultimate means of subduing the spirit of insurrection, and of restoring tranquility and order, may be prescribed by their wisdom and authority.

"You will perceive, sir, that, throughout my observations, I have cautiously avoided any reference to the nature of the evidence, from which the facts that relate to the riots are collected, or to the conduct which the government of the United States may pursue on this important occasion. I have hitherto, indeed, only spoken as the executive magistrate of Pennsylvania, charged with a general superintendence and care that the laws of the commonwealth be faithfully executed, leaving it as I ought implicitly to your judgment, to choose on such evidence as you approve, the measures for discharging the analogous trust which is confided to you in relation to the laws of the Union. But, before I conclude, it is proper, under the impression of my federal obligations, to add a full and unequivocal assurance, that whatever requisition you may make, whatever duty you may impose, in pursuance of your constitutional and legal powers, will on my part be promptly undertaken, and faithfully discharged. I have the honour to be, with perfect respect, sir, your excellency's most obedient humble servant, Thomas Mifflin.

"(True copy. George Taylor, Jr.)

"Philadelphia, 5th August, 1794.

"To the President of the United States."

Communication from the secretary of state to Governor Mifflin, in answer to his of 5th August to the president of the United States:

"Department of State, August 7, 1794.

"Sir: The president of the United States has directed me to acknowledge the receipt of your letter of the 5th instant, and to communicate to you the following reply. In re-

questing an interview with you on the subject of the recent disturbances in the western part of Pennsylvania, the president, besides the desire of manifesting a respectful attention to the chief magistrate of a state immediately affected, was influenced by the hope, that a free conference, guided by a united and comprehensive view of the constitutions of the United States and of Pennsylvania, and of the respective institutions, authorities, rights, and duties of the two governments, would have assisted him in forming more precise ideas of the nature of the co-operation, which could be established between them, and a better judgment of the plan which it might be advisable for him to pursue in the execution of his trust in so important and delicate a conjuncture. This having been his object, it is matter of some regret, that the course which has been suggested by you as proper to be pursued, seems to have contemplated Pennsylvania in a light too separate and unconnected. The propriety of that course, in most, if not in all respects, would be susceptible of little question; if there were no federal government, federal laws, federal judiciary, or federal officers; if important laws of the United States, by a series of violent, as well as of artful expedients, had not been frustrated in their execution for more than three years; if officers immediately charged with that execution, after suffering much and repeated insult, abuse, personal ill treatment, and the destruction of property, had not been compelled for safety to fly the places of their residence, and the scenes of their official duties; if the service of the processes of a court of the United States, had not been resisted, the marshal of the district made and detained for some time prisoner, and compelled for safety also to abandon the performance of his duty, and return by a circuitous route to the seat of government; if, in fine, a judge of the United States had not in due form of law notified to the president, 'that in the counties of Washington and Alleghany, in Pennsylvania, laws of the United States are opposed, and the execution thereof obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshal of that district.' It is true, your excellency has remarked that in the plan suggested, you have only spoken as the executive magistrate of Pennsylvania, charged with a general superintendence and care, that the laws of the commonwealth be fully executed, leaving it implicitly to the judgment of the president to choose, on such evidence as he approves, the measures for discharging the analogous trust, which is confided to him in relation to the laws of the Union. But it is impossible not to think that the current of the observations in your letter, especially as to the consequences which may result from the employment of coercive measures previous to the preliminary course which is indicated in it, may be construed to imply a virtual disapprobation of that plan of conduct on the part of the general government in the actual stage of its affairs, which you acknowledge would be proper on the part of the government of Pennsylvania if arrived at a similar stage. Let it be assumed here (to be more particularly shown hereafter) that the government of the United States is now at that point, where it is admitted, if the government of Pennsylvania was, the employment of force, by its authority, would be justifiable; and let the following extracts be consulted for the truth of the inference which has been just expressed: 'Will not the resort to force inflame and cement the existing opposition? Will it not associate in a common resistance those who have hitherto peaceably, as well as those who have riotously, expressed their abhorrence of the excise? Will it not collect and combine every latent principle of discontent, arising from the supposed oppressive operations of the federal judiciary, the obstruction of the western navigation and a variety of other local sources? May not the magnitude of the opposition on the part of the ill disposed, or the dissatisfaction of a premature resort to arms on the part of the well disposed citizens of the state, eventually involve the necessity of employing the militia of other states? And the accumulation of discontent which the jealousy engendered by that movement may produce who can calculate, or who will be able to avert?'

"These important questions naturally give birth to the following serious reflections. The issue of human affairs is in the hand of Providence. Those entrusted with them in society have no other sure guide than the sincere and faithful discharge of their duty, according to the best of their judgment. In emergencies great and difficult, not to act with an energy proportioned to their magnitude and pressure, is as dangerous as any other conceivable course. In the present case, not to exert the means which the laws prescribe for effectuating their own execution, would be to sacrifice those laws, and with them the constitution, the government, the principles of social order, and the bulwarks of private right and security. What worse can happen from the exertion of those means? If, as cannot be doubted, the great body of the citizens of the United States are attached to the constitution, which they have established for the management of their common concerns; if they are resolved to support their own authority in that of the constitutional laws, against disorderly and violent combinations of comparatively small portions of the community; if they are determined to protect each other in the enjoyment of security to person and property; if they are decided to preserve the character of republican government, by evincing that it has adequate resources for maintaining the public order; if they are persuaded that their safety and their welfare are materially connected with the preservation of the Union, and consequently of a government adequate to its exigencies; in fine, if they are disposed to continue that state of respectability and prosperity which is now deservedly the admiration of mankind,—the enterprise to be accomplished, should a resort to force prove inevitable, though disagreeable and painful, cannot be arduous or alarming. If, in addition to these dispositions in the community at large, the officers of the governments of the respective states, feeling it to be not only a patriotic, but a constitutional duty (inculcated by the oath enjoined upon all the officers of a state, legislative, executive and judicial) to support in their several stations, the constitution of the United States, shall be disposed as occasion may require (a thing as little to be doubted as the former), with sincerity and good faith, to co-operate with the government of the United States to second with all their influence and weight its legal and necessary measures by a real and substantial concert; then the enterprise to be accomplished can hardly ever be deemed difficult.

"But if, contrary to the anticipations which are entertained of these favourable dispositions, the great body of the people should be found indifferent to the preservation of the government of the Union, or insensible to the necessity of vigorous exertions to repel the danger which threatens their most important interests; or if an unwillingness to encounter partial inconveniences should interfere with the discharge of what they owe to their permanent welfare; or if, either yielding to the suggestions of particular prejudices, or misled by the arts which may be employed to infuse jealousy and discontent, they should suffer their zeal for the support of public order to be relaxed by an unfavourable opinion of the merits and tendency of the measures, which may be adopted; if, above all, it were possible that any of the state governments should, instead of prompting the exertions of the citizens, assist directly or indirectly in damping their ardour, by giving a wrong bias to their

judgment, or by disseminating dissatisfaction with the proceedings of the general government, or should counteract the success of those proceedings by any sinister influence whatever—then indeed, no one can calculate, or may be able to avert, the fatal evils with which such a state of things would be pregnant; then, indeed, the foundations of our political happiness may be deeply shaken, if not altogether overturned. The president, however, can suppose none of these things. He cherishes an unqualified confidence in the virtue and good sense of the people, in the integrity and patriotism of the officers of the state governments, and he counts absolutely on the same affectionate support which he has experienced upon all former occasions, and which he is conscious that the goodness of his intentions now, not less than heretofore, merits. It has been promised to show more particularly hereafter, that the government of the United States is now at that point, where it is confessed, if the state government was, the employment of force on its part, would be justifiable. This promise remains to be fulfilled.

"The facts already noted, establish the conclusion, but to render it palpable, it will be of use to apply them to the positions which your excellency has been pleased to lay down. You admit that, as the offences committed respect the state, the military power of the government ought to be employed, where its judiciary authority, after a fair experiment, had proved incompetent to enforce obedience or to punish infractions of the law, that if the strength and audacity of a lawless combination shall baffle and destroy the efforts of the judiciary authority, to recover a penalty or inflict a punishment, that authority may constitutionally claim the auxiliary intervention of the military power,—that in the last resort, at the requisition, and as an auxiliary of the civil authority, the military force of the state would be called forth. And you declare, that the circumstances of the case evidently require a firm and energetic conduct on the part both of state and general government. For more than three years, as already observed, certain laws of the United States have been obstructed in their execution by disorderly combinations. Not only officers, whose immediate duty it was to carry them into effect, have suffered violent personal outrage and injury, and destruction of property, at different times, but similar persecution has been extended to orivate citizens, who have aided, countenanced, or only complied with the laws. The violences committed have been so frequent and such in their degree as to have been matter of general notoriety and alarm, and it may be added, that they have been abundantly within the knowledge and under the notice of the judges and marshals of Pennsylvania, of superior as well as of inferior jurisdiction. If, in particular instances, they have been punished by the exertions of the magistrates, it is at least certain that their effects have been in the main ineffectual. The spirit has continued, and, with some intervals of relaxation, has been progressive, manifesting itself in reiterated excesses. The judiciary authority of the United States has also, prior to the attempt which preceded the late crisis, made some fruitless efforts under a former marshal; an officer sent to execute process was deterred from it by the manifest danger of proceeding. These particulars serve to explain the extent, obstinacy, and inveteracy of the evil.

"But the facts which immediately decide the complexion of the existing crisis are these: Numerous delinquencies existed with regard to a compliance with the laws laying duties on spirits distilled within the United States and upon stills. An armed banditti, in disguise, had recently gone to the house of an officer of the revenue in the night, attacked it, broken open the doors, and by menaces of instant death enforced by pistols presented at him, and compelled a surrender of his commission and books of office; cotemporary acts of violence had been perpetrated in other quarters; processes issued out of a court of the United States to recover the penalties incident to non-compliance with the laws, and to bring to punishment the violent infractors of them, in the above-mentioned case, against two of whom indictments had been found. The marshal of the district went in person to execute these processes. In the course of his duty he was actually fired upon on the high road by a body of armed men. Shortly after other bodies of armed men (in the last instance amounting to several hundred persons) repeatedly attacked the house of the inspector of the revenue with the declared intention of compelling him to renounce his office, and of obstructing the execution of the laws. One of these bodies of armed men made prisoner of the marshal of the district, put him in jeopardy of his life, and did not release him till for safety and to obtain his liberty, he engaged to forbear the further execution of the processes with which he was charged. In consequence of further requisitions and menaces of the insurgents, the marshal, together with the inspector of the revenue, has been since under the necessity of flying secretly, and by a circuitous route, from the scene of these transactions towards the seat of government. An associate justice, pursuant to the provisions of the laws for that purpose, has, in the manner already stated, officially notified the president of the existence of combinations in two of the counties of this state to obstruct the execution of the laws, too powerful to be suppressed by the judiciary authority, or by the powers of the marshal. Thus, then, is it unequivocally and in due form ascertained, in reference to the government of the United States, that the judiciary authority, after a fair and full experiment, has proved incompetent to enforce obedience to or to punish infractions of the laws; that the strength and audacity of certain lawless combinations have baffled and destroyed the efforts of the judiciary authority to recover penalties or inflict punishment, and that this authority, by a regular notification of this state of things, has, in the last resort, as an auxiliary of the civil authority, claimed the intervention of the military power of the United States. It results from these facts that the case exists, when, according to the positions advanced by your excellency in reference to the state government, the military power may, with due regard to all the requisite cautions, be rightfully interposed. And that the interposition of this power is called for, not only by principles of a firm and energetic conduct, on the part of the general government, but by the indispensable duty which the constitution and the laws prescribe to the executive of the United States.

"In this conclusion, your excellency's discernment on mature reflection, cannot, it is presumed, fail to acquiesce, nor can it refuse its concurrence in the opinion which the president entertains, that he may reasonably expect, when called for, the zealous co-operation of the militia of Pennsylvania, that as citizens, friends to law and order, they may comply with the call without any thing that can properly be denominated 'a passive obedience to the mandates of government,' and that as freemen, judging rightly of the cause and nature of the service proposed to them, they will feel themselves under the most sacred of obligations to accept and to perform it with alacrity. The theory of our political institutions knows no difference between the obligations of our citizens in such a case, whether it relate to the government of the Union or of a state; and it is hoped and confided, that a difference will be as little known to their affections or opinions. Your excellency, it is also presumed, will as little doubt, on the like mature reflection, that in such a case the president could not, without an abdication of the undoubted rights and authorities of the United States and of his duty, postpone the measures, for which the laws of the United States provide, to a previous experiment of the plan which is delineated in your letter. The people of the United States have

established a government for the management of their general interests. They have instituted executive organs for administering that government; and their representatives have established the rules by which those organs are to act. When their authority and that of their government is attacked, by lawless combinations of the citizens of part of a state, they could never be expected to approve that the care of vindicating their authority, of enforcing their laws, should be transferred from the officers of their own government to those of a state; and this to wait the issue of a process so undeterminate in its duration, as that which it is proposed to pursue; comprehending a further and full experiment of the judiciary authority of the state, a proclamation 'to declare the sentiments of its government, announce a determination to prosecute and punish offenders, and to exhort the citizens at large to pursue a peaceable and patriotic conduct'; the sending of commissioners 'to address those who have embarked in the present combinations upon the lawless nature and ruinous tendency of their proceedings, to inculcate the necessity of an immediate return to the duty which they owe their country, and to promise, as far as the state is concerned, foregiveness of their past transactions upon receiving a satisfactory assurance that in future they will submit to the laws'; and finally, a call of the legislature of Pennsylvania, 'that the ultimate means of subduing the spirit of insurrection, and of restoring tranquility and order, may be prescribed by their wisdom and authority.' If there were no other objection to a transfer of this kind, the very important difference which is supposed to exist in the nature and consequences of the offences that have been committed in the contemplation of the laws of the United States, and of those of Pennsylvania, would alone be a very serious obstacle. The paramount considerations, which forbid an acquiescence in this course of proceeding, render it unnecessary to discuss the probability of its success; else it might have been proper to test the considerations, which have been mentioned as a ground of hope, by the inquiry what was the precise extent of the success of past experiment; and especially whether the execution of the revenue laws of Pennsylvania within the scene in question was truly and effectually accomplished by them, or whether they did not rather terminate in a tacit compromise, by which appearances only were saved.

"You are already, sir, advised that the president, yielding to the impressions which have been stated, has determined to take measures for calling forth the militia, and that these measures contemplate the assembling a body of between twelve and thirteen thousand men from Pennsylvania, and the neighbouring states of Virginia, Maryland and New Jersey. The recourse thus early to the militia of the neighbouring states proceeds from a probability of the insufficiency of that of Pennsylvania alone, to accomplish the object; your excellency having in your conference with the president confirmed the conclusion, which was deducible from the known local and other circumstances of the state, by the frank and express declaration which you made of your conviction of that insufficiency, in reference to the number which could be expected to be drawn forth for the purpose. But while the president has conceived himself to be under an indispensable obligation to prepare for that eventual resort, he has still consulted the sentiment of regret which he expressed to you, at the possible necessity of an appeal to arms; and to avert it, if practicable, as well as to manifest his attention to the principle, that 'a firm and energetic conduct does not preclude the exercise of a prudent and humane policy,' he has (as you have been also advised) concluded upon the measure of sending himself commissioners to the discontented counties, to make one more experiment of a conciliatory appeal to the reason, virtue and patriotism of their inhabitants, and has also signified to you how agreeable would be to him your co-operation in the same expedient, which you have been pleased to afford. It can scarcely be requisite to add, that there is nothing he has more at heart, than that the issue of this experiment, by establishing the authority of the laws, may preclude the always calamitous necessity of an appeal to arms. It would plant a thorn in the remainder of his path through life, to have been obliged to employ force against fellow-citizens, for giving solidity and permanency to blessings which it has been his greatest happiness to cooperate with them in procuring for a much loved country. The president receives with much pleasure the assurance you have repeated to him, that whatever requisition he may make, whatever duty he may impose, in pursuance of his constitutional and legal powers, will on your part be promptly undertaken and faithfully discharged; and acknowledging, as an earnest of this and even more, the measures of co-operation which you are pursuing, he assures you in return, that he relies fully on the most cordial aid and support from you in every way, which the constitution of the United States and of Pennsylvania shall authorize and present or future exigencies may require. And he requests that you will construe, with a reference to this assurance of his confidence, whatever remarks may have been made in the course of this reply to your letter; if it shall have happened that any of them have erred, through a misconception of the sentiments and views which you may have meant to communicate. With perfect respect, I have the honour to be, sir, your most obedient servant, Edm. Randolph, Secretary of State.

"(True copy. Geo. Taylor, Jr.)

"August 7th, 1794.

"His Excellency, Governor Mifflin."

Communication from Governor Mifflin to the president of the United States in answer to the secretary of state's, of 7th August:

"Sir: The secretary of state has transmitted to me, in a letter dated the 7th of August (but only received yesterday) your reply to my letter of the 5th instant. For a variety of reasons, it might be desirable at this time, to avoid an extension of our correspondence upon the subject to which those letters particularly relate; but the nature of the remarks contained in your reply, and the sincerity of my desire to merit, on the clearest principles, the confidence which you are pleased to repose in me, will justify, even under the present circumstances of the case, an attempt to explain any ambiguity, and to remove any prejudice, that may have arisen, either from an inaccurate expression, or an accidental misconception, of the sentiments and views which I meant to communicate. That the course which I have suggested as proper to be pursued, in relation to the recent disturbances in the western parts of Pennsylvania, contemplates the state in a light too separate and unconnected, is a position that I certainly did not intend to sanction in any degree that could wound your mind with a sentiment of regret. In submitting the construction of the facts, which must regulate the operation of the general government, implicitly to your judgment; in cautiously avoiding any reference to the nature of the evidence from which those facts are collected, or to the conduct which the government of the United States might pursue; in declaring that I spoke only as the executive magistrate of the state charged with the general superintendence and care, that its laws be faithfully executed; and, above all, in giving a full and unequivocal assurance, that whatever requisition you may make, whatever duty you may impose, in pursuance of your constitutional and legal powers, would, on my part, be promptly undertaken, and faithfully discharged; I thought that I had manifested the strongest sense of my federal obligations; and that, so far from regarding the state in a sep-

arate and unconnected light, I had expressly recognized the subjection of her individual authority to the national jurisdiction of the Union. It is true, however, sir, that I have only spoken as the executive magistrate of the state; but, in that character, it is a high gratification to find, that, according to your opinion, likewise, 'the propriety of the course which I suggested, would in most if not in all respects, be susceptible of little question.' Permit me then, to ask, in what other character could I have spoken, or what other language did the occasion require to be employed? If the co-operation of the government of Pennsylvania was the object of our conference, your constitutional requisition as the executive of the Union, and my official compliance as the executive of the state, would indubitably ensure it; but, if a preliminary, a separate, an unconnected conduct was expected to be pursued by the executive magistrate of Pennsylvania, his separate and unconnected power and discretion must furnish the rule of proceeding; and by that rule, agreeably to the admission which I have cited, 'the propriety of my course would in most, if not in all respects, be susceptible of little question.' It must, therefore, in justice be remembered, that a principal point in our conference, related to the expediency of my adopting, independent of the general government, a preliminary measure (as it was then termed) under the authority of an act of the legislature of Pennsylvania, which was passed on the 22d of September, 1783, and which the attorney general of the United States thought to be in force, but which had, in fact, been repealed, on the 11th of April, 1793.

"Upon the strictest idea of co-operative measures, however, I do not conceive, sir, that any other plan could have been suggested consistently with the powers of the executive magistrate of Pennsylvania, or with a reasonable attention, on my part, to a systematic and energetic course of proceeding. The complicated nature of the outrage which was committed upon the public peace, gave a jurisdiction to both governments; but in the mode of prosecuting, or in the degree of punishing the offenders, the circumstance could not, I apprehend, alter or enlarge the powers of either. The state (as I observed in my last letter) could only exert itself in executing the laws or maintaining the authority of the Union, by the same means which she employed to execute and maintain her more peculiarly municipal laws and authority; and hence I inferred, and still venture to infer, that if the course which I have suggested is the same that would have been pursued, had the riot been unconnected with the system of federal policy, its propriety cannot be rendered questionable, merely by taking into our view (what I never have ceased to contemplate) the existence of a federal government, federal laws, federal judiciary and federal officers. But would it have been thought more consonant with the principle of co-operation, had I issued orders for an immediate, a separate, and an unconnected call of the militia, under the special authority which was supposed to be given by a law, or under the general authority which may be presumed to result from the constitution? Let it be considered, that you had already determined to exercise your legal powers in drafting a competent force of the militia; and it will be allowed, that if I had undertaken, not only to comply promptly with your requisition, but to embody a distinct corps for the same service, a useless expense would have been incurred by the state, an unnecessary burthen would have been imposed on the citizens; and embarrassment and confusion would probably have been introduced instead of system and co-operation. Regarding it in this point of light, indeed, it may be natural to think, that in the judiciary, as well as the military department, the subject should be left entirely to the management either of the state or of the general government; for 'the very important difference which is supposed to exist in the nature and consequences of the offences that have been committed, in the contemplation of the laws of the United States, and of those of Pennsylvania,' must otherwise destroy that uniformity in the distinction of crimes, and the apportionment of punishments, which has always been deemed essential to a due administration of justice.

"But let me not, sir, be again misunderstood: I do not mean by these observations to intimate an opinion or to express a wish, that 'the care of vindicating the authority, or of enforcing the laws of the Union should be transferred from the offices of the general government to those of the state;' nor, after expressly avowing that I had cautiously avoided any reference to the conduct which the government of the United States might pursue on this important occasion, did I think an opportunity could be found to infer that I was desirous of imposing a suspension of your proceedings, for the purpose of waiving the issue of the process which I designed to pursue. If indeed, 'the government of the United States was at that point, where it was admitted, if the government of Pennsylvania was, the employment of force by its authority would be justifiable,' I am persuaded, that, on mature consideration, you will do more credit to my candour than to suppose that I meant to condemn, or to prevent the adoption of those measures on the part of the general government which, in the same circumstances, I should have approved and promoted on the part of Pennsylvania. The extracts that are introduced into the letter of the secretary of state, in order to support that inference, can only be justly applied to the case which was immediately in contemplation, the case of the state of Pennsylvania, whose judiciary authority had not then, in my opinion, been sufficiently tried. They ought not surely be applied to a case which I had cautiously excluded from my view, the case of the United States, whose judiciary authority had, in your opinion, proved inadequate to the execution of the laws, and the preservation of order. And if they shall be thus limited to their proper object, the justice and force of the argument which flows from them, can never be successfully controverted or denied. While you, sir, were treading in the plain path designated by a positive law; with no other care than to preserve the forms which the legislature had prescribed; and relieved from a weight of responsibility by the legal operation of a judge's certificate; I was called upon to act, not in conformity to a positive law, but in compliance with the duty which is supposed to result from the nature and constitution of the executive office. The legislature had prescribed no forms to regulate my course; no certificate to inform my judgment; every step must be dictated by my own discretion, and every error of construction or conduct would be charged on my own character. Hence, arose an essential difference in our official situations; and, I am confident, that on this ground alone, you will perceive a sufficient motive for my considering the objection, in point of law, to forbear the use of military force, till the judiciary authority has been tried, as well as the probable effects, in point of policy, which that awful appeal might produce. For, sir, it is certain, that at the time of our conference, there was no satisfactory evidence of the incompetency of the judicial authority of Pennsylvania to vindicate the violated laws: I, therefore, could not, as executive magistrate, proceed upon a military plan; but actuated by the genuine spirit of co-operation, not by a desire to sully the dignity or to alienate the powers of the general government, I still hoped and expected to be able on this, as on former occasions, to support the laws of the Union, to punish the violators of them, by an exertion of the civil authority of the state gov-

ernment, the state judiciary and the state officers. This hope prompted the conciliatory course, which I determined to pursue, and which, so far as respects the appointment of commissioners, you have been pleased to incorporate with your plan. And if, after all, the purposes of justice could be attained, obedience to the laws could be restored, and the horrors of a civil war could be averted by the auxiliary intervention of the state government, I am persuaded you will join me in thinking that the idea of placing the state in a separate and unconnected point of view, and the idea of making a transfer of the powers of the general government, are not sufficiently clear or cogent to supersede such momentous considerations.

"Having thus, generally, explained the principles contained in my letter of the 5th instant, permit me (without adverting to the material change that has since occurred in the state of our information relatively to the riots; and which is calculated to produce a corresponding change of sentiments and conduct) to remark, that many of the facts that are mentioned by the secretary of state, in order to show that the judiciary authority of the Union, after a fair and full experiment, had proved incompetent to enforce obedience, or to punish infractions of the laws, were, before that communication, totally unknown to me. But still, if it shall not be deemed a deviation from the restriction that I have determined to impose upon my correspondence, I would offer some doubts which in that respect occurred to my mind on the evidence as it appeared at the time of our conference. When I found that the marshal had, without molestation, executed his office in the county of Fayette; that he was never insulted or opposed, till he acted in company with General Neville; and that the virulence of the rioters was directly manifested against the person and property of the latter gentleman, and only incidentally against the person of the former, I thought there was ground yet to suppose (and as long as it was reasonable, I wished to suppose) that a spirit of opposition to the officers employed under the excise law, and not a spirit of opposition to the officers employed in the administration of justice, was the immediate source of the outrages which we deprecate. It is true that these sources of opposition are equally reprehensible; and that their effects are alike unlawful; but on a question respecting the power of the judiciary authority to enforce obedience, or to punish infractions of the law, it seemed to be material to discriminate between the cases alluded to, and to ascertain with precision the motives and the object of the rioters. Again: As the associate judge had not, at that time, issued his certificate, it was proper to scrutinize, with strict attention, the nature of the evidence on which an act of government was to be founded. The constitution of the Union, as well as of the state, had cautiously provided even in the case of an individual, that 'no warrant should issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' And a much higher degree of caution might reasonably be exercised in a case that involved a numerous body of citizens in the imputation of treason, or felony, and required a substitution of the military for the judicial instruments of coercion. The only affidavits that I recollect to have appeared at the time of our conference, were those containing the hearsay of Col. Mentges, and the vague narrative of the post rider. The letters that had been received from a variety of respectable citizens, not being written under the sanction of an oath or affirmation, could not acquire the legal force and validity of evidence from a mere authentication of the signatures of the respective writers. Under such circumstances, doubts arose, not whether the means which the laws prescribe for effectuating their own execution, should be exerted, but whether the existence of a specific case, to which specific means of redress were appropriated by the laws, had been legally established; not whether the laws, the constitution, the government, the principles of social order, and the bulwarks of private right and security should be sacrificed; but whether the plan proposed, was the best calculated to preserve those inestimable blessings. And, recollecting a declaration, which was made in your presence, 'that it would not be enough for a military force to disperse the insurgents, and to restore matters to the situation in which they were, two or three weeks before the riots were committed, but that the force must be continued for the purpose of protecting the officers of the revenue and securing a perfect acquiescence in the obnoxious law,' I confess, sir, the motives to caution and deliberation strike my mind with accumulated force. I hope, however, that it will never seriously be contended, that a military force ought now to be raised with any view but to suppress the rioters; or that if raised with that view, it ought to be employed for any other. The dispersion of the insurgents is, indeed, obviously the sole object for which the act of congress has authorized the use of military force on occasions like the present; for with a generous and laudable precaution, it expressly provides that even before that force may be called forth, a proclamation shall be issued, commanding the insurgents to disperse, and retire peaceably to their respective abodes, within a limited time.

"But the force of these topics I again refer implicitly to your decision; convinced, sir, that the goodness of your intentions, now, not less than heretofore, merits an affectionate support from every description of your fellow-citizens. For my own part, I derive a confidence from the heartfelt integrity of my views, the sincerity of my professions, which renders me invulnerable by any insinuation of practising a sinister or deceitful policy. I pretend not to infallibility in the exercise of my private judgment, or in the discharge of my public functions; but in the ardour of my attachment, and in the fidelity of my services to our common country, I feel no limitations. And your excellency, therefore, may justly be assured, that in every way which the constitution of the United States, and of Pennsylvania, shall authorize and present, or future exigencies may require, you will receive my most cordial aid and support. I am with perfect respect, sir, your excellency's most obedient humble servant,

"Thomas Mifflin.

"Philadelphia, August 12, 1794.

"To the President of the United States."

Communication from the secretary of state to Governor Mifflin, in answer to his of 12th August to the president of the United States:

"Philadelphia, August 30, 1794.

"Sir: I am directed by the president to acknowledge the receipt on the 17th of your excellency's letter dated the 12th instant. The president feels with you the force of the motives which render undesirable an extension of correspondence on the subject in question. But the case being truly one of great importance and delicacy, these motives must yield, in a degree, to the propriety and utility of giving precision to every part of the transaction, and guarding effectually against ultimate misapprehension. To this end it is deemed advisable, in the first place, to state some facts which either do not appear, or are conceived not to have assumed an accurate shape in your excellency's letter. They are these:

"(1) You were informed at the conference that all the information which had been received had been laid before an associate justice, in order that he might consider and determine whether such a case as is contemplated by the second section of the act, which provides for calling forth the militia to execute the laws of

the Union, suppress insurrections, and repel invasions, had occurred; that is, whether combinations existed too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshal by that act; in which case, the president is authorized to call forth the militia to suppress the combinations and to cause the laws to be duly executed.

"(2) The idea of a preliminary proceeding by you was pointed to an eventual co-operation with the executive of the United States, in such plan as upon mature deliberation should be deemed advisable in conformity with the laws of the Union. The inquiry was particularly directed towards the possibility of some previous accessory step in relation to the militia, to expedite the calling them forth if an acceleration should be judged expedient and proper, and if any delay on the score of evidence should attend the notification from a judge, which the laws make the condition of the power of the president to require the aid of the militia, and turned more especially upon the point, whether the law of Pennsylvania of the 22d of September, 1783, was or was not still in force. The question emphatically was: Has the executive of Pennsylvania power to put the militia in motion, previous to a requisition from the president under the laws of the Union, if it shall be thought advisable so to do? Indeed it seems to be admitted by one part of your letter, that the preliminary measure contemplated did turn on this question, and with a particular eye to the authority and existence of the act just mentioned.

"(3) The information contained in the papers read at the conference, besides the violence offered to the marshal while in company with the inspector of the revenue, established, that the marshal had been afterwards made prisoner by the insurgents, put in jeopardy of his life, had been obliged to obtain safety and liberty by a promise guaranteed by Colonel Presley Neville, that he would serve no other process on the west side of the Alleghany Mountains; that, in addition to this, a deputation of the insurgents had gone to Pittsburg to demand of the marshal a surrender of the processes in his possession, under the intimation that it would satisfy the people and add to his safety, which necessarily implied that he would be in danger of further violence without such a surrender. That under the influence of this menace he had found it necessary to seek security by taking secretly and in the night a circuitous route.

"This recapitulation is not made to invalidate the explanation offered in your last letter of the view of the subject, which you assert to have led to the suggestions contained in your first, and of the sense which you wish to be received as that of the observations accompanying those suggestions. It is intended solely to manifest, that it was natural for the president to regard your communication of the 5th instant in the light under which it is presented in the reply to it. For, having informed you that the matter was before an associate justice, with a view to the law of the United States which has been mentioned, and having pointed what was said respecting a preliminary proceeding on your part to a call of the militia under the authority of a state law, by anticipation of a requisition from the general government, and in co-operation with an eventual plan to be founded upon the laws of the Union. It was not natural to expect, that you would have presented a plan of conduct entirely on the basis of the state government, even to the extent of resorting to the legislature of Pennsylvania after its judiciary had proved incompetent, 'to prescribe by their wisdom and authority the means of subduing the spirit of insurrection and of restoring tranquility and order;' a plan which, being incompatible with the course marked out in the laws of the United States, evidently could not have been acceded to without a suspension, for a long and indefinite period, of the movements of the federal executive in pursuance of those laws. The repugnancy and incompatibility of the two modes of proceeding at the same time cannot, it is presumed, be made a question. Was it extraordinary, then, that the plan suggested should have been unexpected, and that it should even have been thought liable to the observation of having contemplated Pennsylvania in a light too separate and unconnected?

"The propriety of the remark, that 'it was impossible not to think that the current of the observations in your letter might be construed to imply a virtual disapprobation of that plan of conduct on the part of the general government, in the actual state of its affairs, which you acknowledged would be proper on the part of the government of Pennsylvania, if arrived at a similar stage,' must be referred to the general tenor and complexion of those observations, and to the inference they were naturally calculated to inculcate. If this inference was, that under the known circumstances of the case, the employment of force to suppress the insurrection was improper, without a long train of preparatory expedients; and if, in fact, the government of the United States (which has not been controverted) was at that point, where it was admitted that the government of Pennsylvania being arrived, the resort to force on its part would be proper—the impression which was made could not have been effaced by the consideration, that the forms of referring what concerned the government of the Union to the judgment of its own executive, were carefully observed. There was no difficulty in reconciling the intimation of an opinion unfavourable to a particular course of proceeding, with an explicit reference of the subject, officially speaking, to the judgment of the officer charged by the constitution to decide, and with a sincere recognition of the subjection of the individual authority of the state to the national jurisdiction of the Union.

"The disavowal by your excellency of an intention to sanction the inference which was drawn, renders what has been said a mere explanation of the cause of that inference, and of the impression which it, at first, made. It would be foreign to the object of this letter, to discuss the various observations which have been adduced to obviate a misapprehension of your views, and to maintain the propriety of the course pursued in your first communication. It is far more pleasing to the president to understand you in the sense you desire, and to conclude, that no opinion has been indicated by you inconsistent with that which he has entertained of the state of things, and of his duty in relation to it. And he remarks with satisfaction the effect which subsequent information is supposed calculated to produce, favouring an approximation of sentiments. But there are a few miscellaneous points, which, more effectually to prevent misconception anywhere, seem to demand a cursory notice.

"You observe, that the president had already determined to exercise his legal powers in drafting a competent force of the militia. At the point of time to which you are understood to refer, namely, that of the conference, the president had no legal power to call forth the militia. No judge had yet pronounced, that a case justifying the exercise of that power existed. You must be sensible, sir, that all idea of your calling out the militia by your authority was referred to a state of things antecedent to the lawful capacity of the president to do it by his own authority; and when he had once determined upon the call pursuant to his legal powers, it were absurd to have proposed to you a separate and unconnected call. How, too, it might be asked, could such a determination, if it had been made and was known to you, have comported with the plan suggested in your letter, which presupposes that the employment of

force had not already been determined upon? This passage of your letter is, therefore, construed to mean only, that the president had manifested an opinion predicated upon the event of such a notification from a judge as the law prescribes, that the nature of the case was such as would probably require the employment of force. You will, also, it is believed, recollect that he had not at the time finally determined upon anything, and that the conference ended with referring the whole subject to further consideration.

"You say, that if you had undertaken not only to comply promptly with the president's requisition, but to embody a distinct corps for the same service, a useless expense would have been incurred by the state, an unnecessary burthen would have been imposed on the citizens, and embarrassment and confusion would probably have been introduced instead of system and co-operation. But both were never expected. Your embodying the militia independent of a requisition from the president was never thought of, except as a preliminary and auxiliary step. Had it taken place when the requisition came, the corps embodied would have been ready towards a compliance with it, and no one of the inconveniences suggested could possibly have arisen. You say, in another place, that you 'was called upon to act, not in conformity to a positive law, but in compliance with the duty which is supposed to result from the nature and constitution of the executive office.' It is conceived that it would have been more correct to have said, 'you was called upon to be consulted whether you had power in the given case to call forth the militia without a previous requisition from the general government.' The supposition that you might possess this power was referred to a law of Pennsylvania, which appeared, on examination, to have been repealed. A gentleman who accompanied you, thought that the power, after a due notification of the incompetency of the judiciary, might be deduced from the nature and constitution of the executive office.

"It has appeared to your excellency fit and expedient to animadvert upon the nature of the evidence produced at the conference, and to express some doubts which had occurred to your mind concerning it. As the laws of the United States have referred the evidence in such cases to the judgment of a district judge or associate justice; and foreseeing that circumstances so peculiar might arise as to render rules relating to the ordinary and peaceable state of society inapplicable, have forborne to prescribe any; leaving it to the understanding and conscience of the judge, upon his responsibility, to pronounce what kind and degree of evidence should suffice. The president would not sanction a discussion of the standard or measure by which evidence in those cases ought to be governed. He would restrain himself by the reflection, that this appertains to the province of another, and that he might rely, as a guide, upon the decision which should be made by the proper organ of the laws for that purpose. But it may be no deviation from this rule to notice to you, that the facts stated in the beginning of this letter, under the third head, appear to have been overlooked in your survey of the evidence, while they seem to be far from immaterial to a just estimate of it. You remark, that 'when you found that the marshal had, without molestation, executed his office in the county of Fayette; that he was never insulted or opposed until he acted in company with General Neville; and that the virulence of the rioters was directly manifested against the person and property of the latter gentleman, and only incidentally against the person of the former; you thought there was ground yet to suppose that a spirit of opposition to the officers employed under the excise law, and not a spirit of opposition to the officers employed in the administration of justice, was the immediate source of the outrages which are deprecated.' It is natural to inquire how this supposition could consist with the additional facts which appeared by the same evidence, namely, that the marshal, having been afterwards made prisoner by the rioters, had been compelled, for obtaining safety and liberty, to promise to execute no more processes within the discontented scene; and that subsequently again to this, in consequence of a deputation of the rioters deliberately sent to demand a surrender of the processes in his possession, enforced by a threat, he had found it necessary to seek security in withdrawing by a secret and circuitous route. Did not these circumstances unequivocally denote, that officers employed in the administration of justice were as much objects of opposition as those employed in the execution of the particular laws, and that the rioters were at least consistent in their plan? It must needs be that these facts escaped your excellency's attention: else they are too material to have been omitted in your review of the evidence, and too conclusive not to have set aside the supposition which you entertained, and which seems to have had so great a share in your general view of the subject.

"There remains only one point on which your excellency will be longer detained,—a point, indeed, of great importance, and consequently demands serious and careful reflection. It is the opinion you so emphatically express, that the mere dispersion of the insurgents is the sole object for which the militia can be lawfully called out, or kept in service after they may have been called out. The president reserves to the last moment the consideration and decision of this point. But there are arguments weighing heavily against the opinion you have expressed which, in the mean time, are offered to your candid consideration. The constitution of the United States (article 1, § 8) empowers congress 'to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions,' evidently from the wording and distribution of the sentence contemplating the execution of the laws of the Union as a thing distinct from the suppression of insurrections. The act of May 2d, 1792, for carrying this provision of the constitution into effect, adopts for its title the very words of the constitution, being 'An act to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions,' continuing the constitutional distinction. The first section of the act provides for the cases of invasion and of insurrection, confining the latter to the case of insurrection against the government of a state. The second section provides for the case of the execution of the laws being obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals. The words are these: 'Whenever the laws of the United States shall be opposed, or the execution thereof obstructed in any state by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, the same being notified to the president of the United States by an associate justice or the district judge, it shall be lawful for the president of the United States to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed.' Then follows a provision for calling forth the militia of other states. The terms of this section appear to contemplate and describe something that may be less than insurrection. 'The combinations' mentioned may, indeed, amount to insurrections, but it is conceivable that they may stop at associations not to comply with the law, supported by riots, assassinations and murders, and by a general spirit in a part of the community which may baffle the ordinary judiciary means with no other aid than the posse comitatus, and may even require the stationing of military force for a time to awe the spirit of riot, and countenance the magistrates and officers in the execution of their duty. And the objects for which the mili-

tia are to be called are expressly, not only to suppress these combinations (whether amounting to insurrections or not), but to cause the laws to be duly executed.

"It is, therefore, plainly contrary to the manifest general intent of the constitution, and of this act, and to the positive and express terms of the 2d section of the act, to say that the militia called forth are not to be continued in service for the purpose of causing the laws to be duly executed, and, of course, until they are so executed. What is the main and ultimate object of calling forth the militia? 'To cause the laws to be duly executed.' Which are the laws to be executed? Those which are opposed and obstructed in their execution by the combinations described in the present case, the laws laying duties upon spirits distilled within the United States, and upon stills, and, incidentally, those which uphold the judiciary functions. When are the laws executed? Clearly when the opposition is subdued; when penalties for disobedience can be enforced; when a compliance is effectuated. Would the mere dispersion of insurgents, and their retiring to their respective homes, do this? Would it satisfy either member of the provision, the suppression of the combinations, or the execution of the laws? Might not the former notwithstanding the dispersion, continue in full rigour, ready at any moment to break out into new acts of resistance to the laws? Are the militia to be kept perpetually marching and countermarching towards the insurgents while they are embodied, and from them when they have separated and retired? Suppose the insurgents hardy enough to wait the experiment of a battle, are vanquished, and then disperse and retire home: are the militia immediately to retire also, to give them an opportunity to reassemble, recruit, and prepare for another battle? And is this to go on and be repeated without limit? Such a construction of the law, if true, were certainly a very unfortunate one, rendering its provisions essentially nugatory, and leading to endless expense and as endless disappointment. It could hardly be advisable to vex the militia by marching them to a distant point where they might scarcely be arrived before it would be legally necessary for them to return, not in consequence of having effected their object, of having 'caused the laws to be executed,' but in consequence of the mere stratagem of a deceitful dispersion and retiring. Thus far the spirit as well as the positive letter of the law, combats the construction which you have adopted. It remains to see if there be any other part of it which compels to a renunciation both of the letter and spirit of the antecedent provisions. The part which seems to be relied upon for this effect is the third section, which, by way of proviso, enjoins, 'that whenever it may be necessary, in the judgment of the president, to use the military force by that act directed to be called forth, he shall forthwith, and previous thereto, by proclamation, command the insurgents to disperse, and retire peaceably to their respective abodes within a limited time.' But, does this affirm, does it even necessarily imply, that the militia, after the dispersion and retiring, are not to be used for the purpose for which they are authorized to be called forth; that is, 'to cause the laws to be duly executed,' to countenance by their presence, and in case of further resistance to protect and support by their strength, the respective civil officers in the execution of their several duties, whether for bringing delinquents to punishment, or otherwise for giving effect to the laws? May not the injunction of this section be regarded as a merely humane and prudent precaution, to distinguish previous to the actual application of force a hasty tumult from a deliberate insurrection; to give an opportunity for those who may be accidentally or inadvertently mingled in a tumult or disorderly rising, to separate and withdraw from those who are designedly and deliberately actors? to prevent, if possible, bloodshed in a conflict of arms, and if this cannot be done, to render the necessity of it palpable by a premonition to the insurgents to disperse and go home? And are not all these objects compatible with the further employment of the militia for the ulterior purpose of causing the laws to be executed, in the way which has been mentioned? If they present a rational end for the proviso, without defeating the main design of the antecedent provision, it is clear they ought to limit the sense of the former, and exclude a construction which must make the principal provision nugatory. Do not the rules of law and reason unite in declaring that the different parts of a statute shall be so construed as if possible to consist with each other; that a proviso ought not to be understood, or allowed to operate, in a sense tending to defeat the principal clause; and that an implication (if, indeed, there be any such implication as is supposed in the present case) ought not to overrule an express provision, especially at the sacrifice of the manifest general intent of a law, which, in the present case, undoubtedly is, that the militia shall be called forth 'to cause the laws to be duly executed?'

"Though not very material to the merit of the argument, it may be remarked, that the proviso which forms the third section contemplates merely the case of insurrection. If the combinations described in the second section may be less than insurrection, then the proviso is not commensurate with the whole case contained in the second section, which would be an additional circumstance to prove that it cannot work an effect which shall be a substitute for the main purpose of the first section. I have the honour to be, with perfect respect, sir, your excellency's most obedient servant,

"Edm. Randolph.

"(True copy. Geo. Taylor, Jun.)"

Mr. Randolph's personal opinion, however, was adverse to calling out the militia, differing in this respect from the president and the rest of the cabinet; and the following letter was addressed by him to the president immediately after the conference with Governor Mifflin.

Edmund Randolph to the president:

"Philadelphia, 5th August, 1794.

"Sir: The late events in the neighbourhood of Pittsburg appeared, on the first intelligence of them, to be extensive in their relations. But subsequent reflection, and the conference with the governor of Pennsylvania, have multiplied them in my mind tenfold. Indeed, sir, the moment is big with a crisis which would convulse the eldest government, and if it should burst on ours its extent and dominion can be but faintly conjectured. At our first consultation, in your presence, the indignation which we all felt, at the outrages committed, created a desire that the information received should be laid before an associate justice, or the district judge: to be considered under the act of May 2, 1792. This step was urged by the necessity of understanding, without delay, all the means vested in the president for suppressing the progress of the mischief. A caution, however, was prescribed to the attorney general, who submitted the documents to the judge, not to express the most distant wish of the president that the certificate should be granted. The certificate has been granted, and although the testimony is not, in my judgment, yet in sufficient legal form to become the groundwork of such an act, and a judge ought not à priori to decide that the marshal is incompetent to suppress the combinations by the posse comitatus, yet the certificate, if it be minute enough, is conclusive, that, 'in the counties of Washington and Alleghany, in Pennsylvania, laws of the United States are opposed, and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshal of that district.' But the certificate specifies no particular law which has been opposed. This defect I remarked to Judge Wilson, from whom the cer-

tificate came, and observed, that the design of the law being that a judge should point out to the executive, where the judiciary stood in need of military aid, it was frustrated if military force should be applied to laws which the judge might not contemplate. He did not yield to my reasoning, and therefore I presume that the objection will not be received against the validity of the certificate.

"Upon the supposition of its being valid, a power arises to the president to call forth the militia of Pennsylvania, and eventually the militia of other states which may be convenient. But as the law does not compel the president to array the militia in consequence of the certificate, and renders it lawful only for him so to do; the grand inquiry is, whether it be expedient to exercise this power at this time. On many occasions have I contended that, whensoever military coercion is to be resorted to in support of law, the militia are the true, proper and only instruments which ought to be employed. But a calm survey of the situation of the United States has presented these dangers and these objections, and banishes every idea of calling them into immediate action: (1) A radical and universal dissatisfaction with the exercise pervades the four transmontane counties of Pennsylvania, having more than sixty-three thousand souls in the whole, and more than fifteen thousand white males above the age of sixteen. The counties on the eastern side of the mountains, and some other populous counties, are infected by similar prejudices, inferior in degree, and dormant, but not extinguished. (2) Several counties in Virginia, having a strong militia, participate in these feelings. (3) The insurgents themselves numerous, are more closely united by like dangers, with friends and kindred scattered abroad in different places, who will enter into all the apprehensions, and combine in all the precautions of safety adopted by them. (4) As soon, too, as any event of eclat shall occur, around which persons discontented on other principles, whether of aversion to the government or disgust with any measures of the administration, may rally, they will make a common cause. (5) The governor of Pennsylvania has declared his opinion to be, that the militia which can be drawn forth will be unequal to the task. (6) If the militia of other states are to be called forth, it is not a decided thing that many of them may not refuse. And if they comply, is nothing to be apprehended from a strong cement growing between all the militia of Pennsylvania, when they perceive that another militia is to be introduced into the bosom of their country? The experiment is at least untried. (7) The expense of a military expedition will be very great; and with a devouring Indian war, the commencement of a navy, the sum to be expended for obtaining a peace with Algiers, the destruction of our mercantile capital by British depredations, the uncertainty of war or peace with Great Britain, the impatience of the people under increased taxes, the punctual support of our credit; it behoves those who manage our fiscal matters to be sure of their pecuniary resources, when so great a field of new and unexpected expense is to be opened. (8) Is there any appropriation of money which can be immediately devoted to this use? If not, how can money be drawn? It is said that appropriations are to the war department generally, but it may deserve inquiry whether they were not made upon particular statements of a kind of service essentially distinct from the one proposed. (9) If the intelligence of the overtures of the British to the western counties be true, and the inhabitants should be driven to accept their aid, the supplies of the western army, the western army itself may be destroyed; the reunion of that country to the United States will be impracticable: and we must be engaged in a British war. If the intelligence be probable only, how difficult will it be to reconcile the world to believe that we have been consistent in our conduct; when, after running the hazard of mortally offending the French by the punctilious observance of neutrality; after deprecating the wrath of the English by every possible act of government; after the request of the suspension of the settlement at Presque Isle, which has in some measure been founded on the possibility of Great Britain being roused to arms by it; we pursue measures which threaten collision with Great Britain and which are mixed with the blood of our fellow-citizens! (10) If miscarriage should befal the United States in the beginning, what may not be the consequence? And if this should not happen, is it possible to foresee what may be the effect of ten, twenty, or thirty thousand of our citizens being drawn into the field against as many more? There is another enemy in the heart of the southern states who would not sleep with such an opportunity of advantage. (11) It is a fact well known that the parties in the United States are highly inflamed against each other; and that there is but one character which keeps both in awe. As soon as the sword shall be drawn, who will be able to restrain them?

"On this subject the souls of some good men bleed: they have often asked themselves why they are always so jealous of military power, whenever it has been proposed to be exercised under the form of a succour to the civil authority? How has it happened that with a temper not addicted to suspicion, nor unfriendly to those who propose military force, they do not court the shining reputation which is acquired by being always ready for strong measures? This is the reason: that they are confident that they know the ultimate sense of the people: that the will of the people must force its way in the government; that, notwithstanding the indignation which may be raised against the insurgents, yet if measures unnecessarily harsh, disproportionably harsh, and without a previous trial of everything which law or the spirit of conciliation can do, be executed, that indignation will give way and the people will be estranged from the administration which made the experiment. There is a second reason: one motive assigned in argument, for calling forth the militia, has been, that a government can never be said to be established until some signal display has manifested its power of military coercion. This maxim, if indulged, would heap curses upon the government. The strength of a government is the affection of the people; and while that is maintained, every invader, every insurgent, will as certainly count upon the fear of its strength as if it had with one army of citizens mown down another. Let the parties in the United States be ever kindled into action, sentiments like these will produce a flame which will not terminate in a common revolution. Knowing, sir, as I do, the motives which govern you in office, I was certain that you would be anxious to mitigate, as far as you thought it practicable, the military course which has been recommended. You have accordingly suspended the force of the preceding observations, by determining not to call forth the militia immediately to action, and to send commissioners who may explain and adjust, if possible, the present discontents.

"The next question then is, whether the militia shall be directed to hold themselves in readiness, or shall not be summoned at all? It has been supposed by some gentlemen that when reconciliation is offered with one hand, terror should be borne in the other, and that a full amnesty and oblivion shall not be granted unless the excise laws be complied with in the fullest manner. With a language such as this the overtures of peace will be considered delusive by the insurgents and the most of the world. It will be said and believed that the design of sending commissioners was only to gloss over hostility, to endeavour to divide, to sound the strength of the insurgents, to discover the most culpable persons to be marked out

for punishment, to temporize until congress can be prevailed upon to order further force, or the western army may be at leisure from the savages to be turned upon the insurgents, and many other suspicions will be entertained which cannot be here enumerated. When congress talked of some high-handed steps against Great Britain, they were disapproved as counteracting Mr. Jay's mission, because it could not be expected she would be dragooned. Human nature will, to a certain point, show itself to be the same, even among the Alleghany Mountains. The mission will, I fear, fail; though it would be to me the most grateful occurrence in life to find my prediction falsified. If it does fail, and in consequence of the disappointment, the militia should be required to act, then will return that fatal train of events, which I have stated above, to be suspended for the present. What would be the inconvenience of delay? The result of the mission would be known in four weeks, and the president would be master of his measures without any previous commitment. Four weeks could not render the insurgents more formidable; that space of time might render them less so, by affording room for reflection; and the government will have a sufficient season remaining to action. Until every peaceable attempt shall be exhausted, it is not clear to me that as soon as the call is made, and the proclamation issued, the militia may not enter into some combination, which will satisfy the insurgents that they need fear nothing from them, and spread those combinations among the militia.

"My opinion, therefore, is that the commissioners will be furnished with enough on the score of terror, when they announce that the president is in possession of the certificate of the judge. It will confirm the humanity of the mission; and, notwithstanding some men might pay encomiums on decision, vigour of nerves, &c. &c., if the militia were summoned to be held in readiness, the majority would conceive the merit of the mission incomplete if this were to be done. It will not, however, be supposed that I mean that these outrages are to pass without animadversion. No, sir. That the authority of government is to be maintained is not less my position than that of others. But I prefer the accomplishment of this by every experiment of moderation in the first instance. The steps, therefore, which I would recommend are: (1) A serious proclamation, stating the mischief, declaring the power possessed by the executive, and announcing that it is withheld from motives of humanity and a wish for conciliation. (2) Commissioners, properly instructed to the same objects. (3) If they fail in their mission, let the offenders be prosecuted according to law. (4) If the judiciary authority is, after this, withstood, let the militia be called out.

"These appear to me to be the only means for producing unanimity in the people; and without their unanimity government may be mortified and defeated. If the president shall determine to operate with the militia, it will be necessary to submit some animadversions upon the interpretation of the law. For it ought closely to be considered, whether, if the combinations should disperse, the execution of processes is not to be left to the marshal and his posse. But these will be deferred until orders shall be discussed for the militia to march. I have the honour, sir, to be, with the highest respect and sincerest attachment, your most obedient servant,

"Edmund Randolph."

As the text shows, however, Gen. Washington, concurring with the majority of his cabinet, determined at once to put the militia in motion. The objects of the expedition cannot be better stated than in the language of the instructions from the secretary of the treasury to Governor Lee.

"Bedford, 20th October, 1794.

"Sir: I have it in special instruction from the president of the United States, now at this place, to convey to you on this behalf, the following instructions for the general direction of your conduct, in the command of the militia army, with which you are charged. The objects for which the militia have been called forth, are: (1) To suppress the combinations which exist in some of the western counties of Pennsylvania, in opposition to the laws, laying duties upon spirits distilled within the United States, and upon stills. (2) To cause the laws to be executed. These objects are to be effected in two ways: (1) By military force. (2) By judiciary process and other civil proceedings. The objects of the military force are twofold: (1) To overcome any armed opposition which may exist. (2) To countenance and support the civil officers in the means of executing the laws.

"With a view to the first of these two objects, you will proceed as speedily as may be, with the army under your command, into the insurgent counties, to attack, and as far as shall be in your power subdue all persons whom you may find in arms, in opposition to the laws above mentioned. You will march your army in two columns, from the places where they are now assembled, by the most convenient routes, having regard to the nature of the roads, the convenience of supply, and the facility of cooperation and union; and bearing in mind that you ought to act until the contrary shall be fully developed, on the general principle of having to contend with the whole force of the counties of Fayette, Westmoreland, Washington and Alleghany, and of that part of Bedford which lies westward of the town of Bedford, and that you are to put as little as possible to hazard. The approximation, therefore, of your columns is to be sought, and the subdivision of them, so as to place the parts out of mutual supporting distance, to be avoided, as far as local circumstances will permit. Parkinson's Ferry appears to be a proper point, towards which to direct the march of the columns for the purpose of ulterior measures. When arrived within the insurgent country, if an armed opposition appear, it may be proper to publish a proclamation, inviting all good citizens, friends of the constitution and laws, to join the standard of the United States. If no armed opposition exist, it may still be proper to publish a proclamation, exhorting to a peaceable and dutiful demeanour, and giving assurances of performing with good faith and liberality, whatsoever may have been promised by the commissioners to those who have complied with the conditions prescribed by them, and who have not forfeited their title by subsequent misconduct. Of those persons in arms, if any, whom you may make prisoners; leaders, including all persons in command, are to be delivered to the civil magistrate; the rest to be disarmed, admonished and sent home, (except such as may have been particularly violent, and also influential,) causing their own recognizances for their good behaviour to be taken, in the cases in which it may be deemed expedient.

"With a view to the second point, namely, the countenance and support of the civil officers in the execution of their respective duties; for bringing offenders and delinquents to justice; for seizing the stills of delinquent distillers, as far as the same shall be deemed eligible by the supervisor of the revenue or chief officer of inspection; and also for conveying to places of safe custody such persons who may be apprehended and not admitted to bail. The objects of judiciary process and other civil proceedings will be: (1) To bring offenders to justice. (2) To enforce penalties on delinquent distillers by suit. (3) To enforce the penalty of forfeiture on the same persons by the seizure of their stills and spirits. The better to effect these purposes, the judge of the district, Richard Peters, Esquire, and the attorney of the district, William Rawle, Esquire, accompany

the army. You are aware that the judge cannot be controlled in his functions. But I count on his disposition to co-operate in such a general plan as shall appear to you consistent with the policy of the case. But your method of giving a direction to legal proceedings, according to your general plan, will be by instruction to the district attorney. He ought particularly to be instructed, (with due regard to time and circumstances). First. To procure to be arrested all influential actors in riots and unlawful assemblies, relating to the insurrection, and combinations to resist the laws; or having for object to abet that insurrection and those combinations; and who shall not have complied with the terms offered by the commissioners, or manifested their repentance in some other way, which you may deem satisfactory. Secondly. To cause process to issue for enforcing penalties on delinquent distillers. Third. To cause offenders who may be arrested, to be conveyed to jails, where there will be no danger of rescue; those for misdemeanour, to the jails of New York and Lancaster; those for capital offences, to the jail of Philadelphia, as more secure than the others. Fourth. To prosecute indictable offences in the courts of the United States; those for penalties on delinquents, under the laws before mentioned, in the courts of Pennsylvania. As a guide in the case, the district attorney has with him a list of the persons who have availed themselves of the offers of the commissioners, on the day appointed. The seizure of stills is of the province of the supervisor and other officers of inspection. It is difficult to chalk out a precise line concerning it. There are opposite considerations, which will require to be nicely balanced, and which must be judged of by those officers on the spot. It may be found useful to confine the seizure of stills of the most leading and refractory distillers. It may be advisable to extend them far in the most refractory county.

"When the insurrection is subdued, and the requisite means have been put in execution to secure obedience to the laws, so as to render it proper for the army to retire, (an event which you will accelerate as much as shall be consistent with the object,) you will endeavour to make an arrangement for detaching such a force as you may deem adequate, to be stationed within the disaffected country, in such manner as best to afford protection to well disposed citizens, and to the officers of the revenue, and to repress by their presence the spirit of riot and opposition to the laws. But, before you withdraw the army, you will promise, on behalf of the president, a general pardon to all such as shall not have been arrested with such exceptions as you shall deem proper. The promise must be so guarded as not to affect pecuniary claims under the revenue laws. In this measure, it is advisable, there should be co-operation with the governor of Pennsylvania. On the return of the army, you will adopt some convenient and certain arrangements for restoring to the public magazines the arms, accoutrements, military stores, tents and other articles of camp equipage, and entrenching tools, which have been furnished and shall not have been consumed or lost. You are to exert yourself by all possible means, to preserve discipline among the troops, particularly a scrupulous regard to the rights of persons and property, and a respect for the authority of the civil magistrates, taking especial care to inculcate, and cause to be observed this principle, that the duties of the army are confined to the attacking and subduing of armed opponents of the laws, and to the supporting and aiding of the civil officers in the execution of their functions. It has been settled that the governor of Pennsylvania will be second, the governor of New Jersey third, in command; and that the troops of the several states in line, on the march and upon detachment, are to be posted according to the rule which prevailed in the army during the late war, namely, in moving towards the seaboard, the most southern troops will take the right; in moving westward, the most northern will take the right. These general instructions, however, are to be considered as liable to such alterations and deviations in the detail, as from local and other causes may be found necessary, the better to effect the main object upon the general principles which have been indicated. With great respect, I have the honour to be, sir, your obedient servant,

"(Signed) Alexander Hamilton."

"Truly copied from the original. B. Dandridge, Secretary to the President of the United States."

NOTE 8. The proceedings adopted by the state of Pennsylvania, appear by the following report of Mr. Dallas, then secretary of the commonwealth, made to the legislature which convened after the quelling of the insurrection:

"In compliance with the request of the committee 'appointed to inquire into the causes of the militia not turning out promptly on the late requisition of the president of the United States, to suppress an insurrection in the western counties of this state,' the secretary of the commonwealth has the honour to furnish copies of all official papers and documents relative to the expedition, and in explanation thereof, he respectfully reports, that from time to time, as the intelligence of the rise and progress of the riots in the county of Alleghany was received, the subject was contemplated by the governor in all the aspects which its nature and importance could present: (1) He viewed it as immediately requiring the animadversions of the judicial power; (2) as affecting the rights and jurisdictions of the federal government; (3) as claiming a prudent interposition of the executive authority, for averting the evils of a civil war; (4) as involving the interesting question, whether our existing militia system was competent to enforce obedience to the laws; and (5) as eventually creating a necessity for the personal exertions of the executive magistrate, lest the commonwealth should suffer an irreparable injury.

"1. That, accordingly, to stimulate the public officers to an exemplary discharge of their duty, the governor directed a circular letter, dated the 25th day of July, 1794, (the day succeeding the receipt of the intelligence of the riots,) to be addressed to the president and judges of the courts of common pleas; to every justice of the peace; to all the sheriffs; and, to each brigade inspector of the four western counties. This letter, having stated the daring and cruel outrage that had been committed in the county of Alleghany by a lawless body of armed men, 'requests, in the most earnest manner, that those to whom it was addressed would exert all their influence and authority to suppress, within their jurisdiction, so pernicious and unwarrantable a spirit—that they would ascertain, with all possible dispatch, the circumstances of the offence—and that they would pursue, with the utmost vigilance, the lawful steps for bringing the offenders to justice.' It declared that every honest citizen must feel himself personally mortified at the conduct of the rioters, which (particularly if it passed with impunity) was calculated to fix an indelible stigma on the honour and reputation of the state; and it assured all the public officers of the governor's warmest support and approbation in the prosecution of every lawful measure which their better knowledge of the facts and of other local circumstances might suggest on the occasion. Presuming, from the state of intelligence at that time, that a draft from the militia might readily be made and would be sufficient to overawe the riotous disposition of the malcontents, in pursuance of the governor's instructions a letter of the same date was also

written to Major-General Gibson declaring a disposition 'to employ all the energy of the government to bring the offenders to an early and exemplary justice,' and intimating that 'if the civil authority can be supported by the assistance of the militia, the exercise of General Gibson's discretion for that purpose, upon the request of the magistrates, must be highly agreeable to the governor.' The attorney-general was likewise desired 'to ascertain, with legal formality, the circumstances of the offence and the names of the offenders, as the governor would be anxious to enforce every instrument that could be employed effectually, to subdue the lawless spirit of the rioters and to bring them to punishment.'

"2. That the riots having been committed in the course of a lawless opposition to the execution of certain acts of congress, were not only deemed offences against the state, but also against the Union. Hence a conference between the president and the governor was thought advisable, in order to avoid a collision of jurisdiction, and to settle the general principles and form of proceeding as far as the state was concerned. That conference gave rise to the correspondence which was laid before the legislature at the opening of the last session, and from which it appears that the governor's conduct was influenced by the following considerations: First. In regard to his character as an executive magistrate, no positive law existed under the authority of the state, defining the exigency that would justify an appeal from the judicial to the military power, or regulating and prescribing the evidence that should prove the occurrence of that exigency. Whatever, therefore, might eventually be the obligation resulting from the constitutional injunction to 'take care that the laws be faithfully executed,' it was thought that not only the non-execution of the laws and the incompetency of the courts of justice to punish offenders, should first be authoritatively declared by the judicial magistrates, but that the act of interposing the aid of the military power should likewise be founded upon their requisition. At the time of the conference alluded to, the judicial magistrates of Pennsylvania had not made any such authoritative declaration and requisition; the governor, therefore, did not then think it justifiable, upon principle, to sanction the interposition of the militia in any other manner than that suggested in the above-mentioned letter to General Gibson; and a variety of arguments, in point of policy and conveniency, occurred to fortify his opinion. But the determination of the general government to pursue the most vigorous measures for suppressing the insurrection and punishing the insurgents, seemed to preclude the state government from any choice upon the subject The constitution of the United States imposes upon the president (as the constitution of the state imposes upon the governor) the same general trust to 'take care that the laws be faithfully executed;' and an act of congress has defined the exigency that would justify an appeal from the judicial to the military power of the Union, as well as the evidence to prove the occurrence of that exigency. When, therefore, a judicial magistrate of the general government had declared the incompetency of the officers of justice to execute the laws, and the president had declared his determination to enforce obedience by the aid of the military power, it was thought that the governor, paying a reasonable attention to a systematic and efficient course of proceeding, ought to forbear issuing any order for an immediate, a separate and an unconnected call of the militia. But, second, in regard to his character as an officer responsible, in certain cases, to the federal government, it was observed that all the purposes of dispatch and energy would as readily be attained by obeying the call of the president, as by acting upon the governor's original authority. Hence, a full and unequivocal assurance was given that whatever requisition the president might make, whatever duty he might impose, in pursuance of his constitutional and legal powers, would, on the part of the governor, be promptly undertaken and faithfully discharged.

"3. That, with a view to the reputation and stability of the republican system, as well as from a consideration of the actual state of our foreign and domestic affairs, it was thought expedient not only to try the full effect of judicial animadversion, but likewise to make a solemn and liberal appeal to the good sense and virtue of the people before the hazard of a civil war should be encountered. On the part of the state, therefore (and a similar measure was adopted on the part of the general government), commissioners were appointed for the purpose of addressing the inhabitants of the western counties in general, and especially those who had been engaged in the riots, upon the lawless nature and dangerous tendency of such proceedings. The commissioners were instructed, particularly, 'to exert themselves in developing the folly of a riotous opposition to those governments and laws which were made by the spontaneous authority of the people, and which, by the same legitimate authority, may, in a peaceable and orderly course, be amended or repealed—in explaining how incompatible it is with the principles of a republican government, how dangerous it is in point of precedent, that a minority should attempt to control the majority, or a part undertake to prescribe to the whole; in demonstrating the painful but indispensable obligation imposed upon the officers of the government, to employ the public force for the purpose of subduing and punishing the offenders, and in exhorting the deluded rioters to return to that duty, a longer deviation from which must be destructive of their happiness, as well as injurious to the reputation and prosperity of their country.' The commissioners were earnestly requested to promote the views of the general government, on the same occasion, and, should their exertions produce a satisfactory assurance of future submission to the laws, they were authorized, as far as the state of Pennsylvania was concerned, 'to promise an act of pardon and oblivion for the past.' To obtain, likewise, the aid of the legislative wisdom and authority on this emergency, as well for devising the means of conciliation, as for strengthening, in the last resort, the instruments of coercion, the government summoned an extraordinary meeting of the general assembly.

"4. That as the accounts from the scene of insurrection soon evinced the incompetency of the judicial power to execute its functions, and it was necessary to prepare, at all events, to maintain the authority of government, the president, while the commissioners were employed in their pacific mission, issued his requisition, dated the 7th (but received on the 8th) of August, 1794, 'for organizing and holding in readiness to march at a moment's warning, a corps of the militia of Pennsylvania, amounting to 5,200 commissioned officers, non-commissioned officers and privates.' Accordingly, on the 8th of August, as soon as the plan for organizing the corps could be formed, the governor, in conformity to the mode prescribed by law, transmitted his general orders to the adjutant-general, 'for calling into actual service, and holding in readiness to march at a moment's warning, the part of the militia specified in the roll, which designated the quota of the several counties, by the classes most convenient to the citizens, and best adapted to a prompt compliance with the president's requisition, the part so called not exceeding four classes of the militia of the respective brigades,' agreeably to the restrictions contained in the seventeenth section of the militia act. These general orders were immediately transmitted by express to the respective brigade inspectors. The period limit-

ed by the president's proclamation, for the dispersion of the insurgents, expiring on the 1st of September, the governor repeatedly expressed the greatest solicitude that the corps, thus directed to be drafted and organized, should be in readiness to march on that day; and, in pursuance of his instructions, the adjutant-general addressed another circular letter to the brigade inspectors, dated the 27th of August, in which they were entreated to make an immediate report of the progress that had been made in executing the preceding general orders. This opportunity was likewise taken to convey the governor's ideas of the importance of the service to the brigade inspectors, and the militia in general; for it was represented to them that 'the eyes of their fellow citizens throughout the Union, as well as in Pennsylvania, were fixed upon their conduct: that they must be sensible, therefore, that the slightest appearance of a want of zeal, or energy, to embark in support of the violated authority of the laws, would produce that reproach and disgrace which it was the duty of the public officers if possible to prevent,—and which it would be their misfortune, more than any other part of the community, to encounter,—and that the occasion was interesting to every man who felt his obligations to society and was desirous to preserve from the fury of anarchy, as well as from the encroachments of despotism, the independence of a freeman.' The 1st of September having arrived, the recent intelligence from the commissioners placed the success of conciliatory measures in a very doubtful point of view. The want of information, respecting the progress which had been made in preparing the militia to march, became, therefore, more and more painful; and the receipts of the following returns seemed to extinguish every hope of seasonably complying with the president's requisition, by means of the ordinary process of the law. First. The inspector of the city of Philadelphia brigade, almost daily, called at the secretary's office, with representations of the embarrassment which he experienced in complying with the requisition, and repeatedly expressed his doubt of success, in consequence of the defects in the existing militia law. Second. A return was received from the county of Philadelphia, dated the 29th day of August, 1794, stating inconveniences in complying with the requisition on account of the effects of the exoneration laws formerly passed, and a general disapprobation of the militia law; and concluding with a declaration that there is 'very little prospect of commanding the quota of the county.' Third. A return was received from the county of Bucks, dated the 5th of September, 1794, stating that 'the pay of the militia is so universally objected to, that there is no hope of completing the quota of the county, upon the present terms of service.' This county did not send its quota into the field. Fourth. A return was received from the county of Montgomery, dated the 3d September, 1794, stating that 'agreeably to the orders of the 8th of August, 1794, for drafting 332 militia, officers included, the said corps is held in readiness to march at a moment's warning.' The first part of this return, however, states such difficulties as greatly diminish the probability of success in obtaining an actual organization of the corps; nor did this county send its quota into the field. Fifth. A return was received from the county of Chester, dated the 28th of August, 1794, stating that some officers had actually resigned, and others wished to resign, and concluding with this remark: 'The west and north-west parts of this county seem to dislike the service they are now ordered upon; and in a great number of other quarters are people who, as they say, are principled against taking up arms on any occasion; so that, I believe, unless the law is rigorously executed, it will be with great difficulty I shall make up our quota, but be assured no exertions shall be wanting,' &c. Sixth. A return was received from the county of Delaware, dated the 6th September, 1794, stating a variety of difficulties that left little hope of procuring, by regular drafts, the quota of this county. Seventh. A return was received from the county of Dauphin, dated the 29th August, 1794, stating that drafts had been made, and orders given to hold the quota of this county in readiness to march; but concluding with this remark: 'According to the information I have received from several parts of the county, it appears that the militia are not willing to march to quell the insurrection in the western parts of Pennsylvania: they say that they are ready to march according to the former orders, against a foreign enemy, but not against the citizens of their own state; so that, from circumstances, I have great reason to believe they will not turn out on the last call.' Eighth. A return was received from York county, dated the 6th of September, 1794, stating that 'too great a delay has taken place in drafting the quota of militia required by the orders of the 8th of August last, not so much from backwardness in the militia of this county to step forward on the present important occasion, as from the unprepared state of the brigade inspector to make a draft, through the former negligence or non-compliance of some regiments with the militia law, particularly with respect to classing the men.' The brigade inspector adds, that he expects the required quota to be in readiness in the course of the ensuing week, but concludes his report with a declaration that 'the law as it stands, he is sorry to say, holds forth no encouragement but rather appears calculated to have a contrary tendency.' Ninth. A return was received from Franklin county, dated the 4th September, 1794, stating that notwithstanding the urgent measures taken to draft and organize the quota of this county, 'seven captains had made no returns, and the number returned who are willing to hold themselves in readiness to march, does not amount to more than twenty-nine privates, and they are without arms and equipments,' &c. The brigade inspector concludes his report with a declaration 'that he has reason to believe that few of those who are returned, as holding themselves in readiness to march, will march when the orders are given.' Tenth. A return was received from Northampton county, dated the 14th September, 1794, stating that all the attempts to have the quota of this county completed, had proved unsuccessful. The brigade inspector observes 'that until now he has not been able to procure particular returns, of which the enclosed general, though the incomplete one, is composed; and he is apprehensive, that even those men in the same, except the volunteers (of which denomination the men in the fifth regiment chiefly consist) will not march.' With a view to show the disposition of the people of Northampton county generally, the brigade inspector annexed to his report the copy of a letter from the lieutenant-colonel of the first regiment, and asserts 'that the same spirit prevails in almost every regiment; consequently, under the present militia system, he fears the quota of his brigade will not be completed.' The letter referred to contains the following language: 'I have received in writing of some of the captains, and others by word, on the 5th of September, 1794, who inform me that the first class of all, and every company, were met on purpose to turn out to do militia duty; but as the matter is that they are called to fight against their own fellow-subjects and brethren at Fort Pitt, on account of the excise law, which people in that part are very much against, and will not submit to be under the same, which makes much disturbance and disunion in our United States —they are not willing to turn out. But whenever called upon to fight against the enemy or others whatever, they were then willing to do

duty as the matter may require.' This county did not send its quota into the field.

"5. That the intelligence which was received from the commissioners, continuing to render the success of government, without the use of coercive measures, more and more doubtful, the season for military operations passing rapidly away, and an ultimate requisition for the march of the militia being hourly expected, the governor did not hesitate to conclude, from the documents above stated, as well as from other general sources of information, that a strict adherence to the forms of the existing militia system would not enable him to furnish that prompt and efficient aid to enforce obedience to the laws, which he conceived all the principles of duty, policy and honour, claimed from the government of Pennsylvania. It would not, indeed, have been consistent with his ideas of the executive authority, with his official character, or perhaps with his personal security, to deviate from those forms, until their inefficacy was fairly ascertained; but after the experiment was made, he thought himself justifiable in resorting to any means within the spirit of the law, lest the commonwealth should suffer an irreparable injury. Considering, therefore, that the nineteenth section of the militia act declares 'that it shall be lawful for any person called to do a tour of duty, to find a sufficient substitute,' the governor determined, on the spirit of that provision, to invite the citizens to supply the deficiency in the regular drafts by a voluntary enrollment as substitutes. Accordingly, he successively convened the officers of the militia in the city of Philadelphia, and the several counties, and publicly addressed them on the state of the insurrection, and the necessity of an immediate patriotic exertion. The determination to pursue this measure was communicated to the general assembly, in the governor's message of the 2d of September (F. I.); and it received a legislative sanction by the act that was passed on the 19th of the same month (G. I.). The necessity of undertaking it, appeared not only from the general state of the militia under the requisition to prepare for marching, but from the urgent terms of the call for the immediate march of the troops. On the 9th of September that call was communicated to the governor (H. I.). It stated 'that the last intelligence from the western counties leaves the issue of measures for an amicable accommodation so very doubtful, and the season for military operations is wearing away so fast, that the president, with great reluctance, finds himself under the necessity of putting in motion, without further delay, all the militia which had been called for.' It requested, 'that the governor would immediately cause the quota of this state to assemble.' And it concluded with declaring that 'the president, in making this final call, entertains a full confidence, that Pennsylvania will, upon an occasion which so immediately affects herself, as well as the general interests, display such zeal and energy as shall maintain unsullied her character for discernment, love of order and true patriotism; and that the part she shall act is of peculiar consequence to the welfare and reputation of the whole Union.' On the 16th of September another letter was transmitted from the war department, representing that 'every moment brings fresh proofs of a spirit excessively disseminated; fatal to the principles of good order; that disagreeable symptoms had appeared in the two most western counties of Maryland, &c.; that everything was done to push forward the Jersey militia to Carlisle, &c.; that it is of the highest moment that the spreadings of so mischievous a spirit should be checked by every practicable effort; and that the president is convinced that the governor will omit nothing that can contribute to this desirable end.' The next day brought a repetition of the solicitude of the general government for the march of the troops. The letter states that 'it becomes every moment more and more urgent, that the junction between the Pennsylvania and Maryland militia at Carlisle, should be accelerated; and to this end, that the corps should march successively as fast as they can be made ready; that Governor Howell, of New Jersey, was in motion with the van of the militia of that state; that if the cavalry and infantry of Philadelphia could be hastened onward, it would be particularly desirable; and that the artillery corps should be taken under their care, with all the pieces of artillery ready.' On the 20th of September the result of the meetings of the people in the western counties as far as the 13th, to give the stipulated test of their submission to the government, was announced to the governor in a letter from the war department; according to which 'it was become the more indispensable and urgent to press forward the forces destined to act against the insurgents, with all possible activity and energy, for the advanced season left no time to spare: it was extremely important to afford speedy protection to the well disposed, and to prevent the preparation and accumulation of greater means of resistance, and the extension of combinations to abet the insurrection.' It is proper here to recollect, that while these interesting and urgent communications were received from the general government, the reports of the brigade inspectors (dated nearly at the same period) were calculated to excite the most painful apprehensions of disappointment and defeat in every attempt to embody our quota of the militia. Under such inauspicious circumstances, therefore, the governor commenced his tour through the counties; but the scene quickly changed. For, according to the representation contained in his last address to the legislature, 'as soon as the situation of our country was truly described and understood, the daring and cruel career of the malcontents, the subversion of the judicial authority, the failure of every conciliatory effort, and the resulting necessity of an appeal to arms, produced, in perfect unison with the governor's anticipation, one common sentiment of resentment, one common determination to defend the peace and order of society, against the machinations of licentiousness and anarchy.' Still, however, the critical season of the year, with respect to commercial and agricultural pursuits, and the limited period for assembling the troops, made it impracticable to complete the quota of the state: a circumstance which adds to the proofs that demonstrate the necessity of the governor's personal exertions."

Case No. 15,444.

UNITED STATES v. The IRMA.

[12 Int. Rev. Rec. 42.]

District Court, S. D. New York. 1870.

VIOLATION OF REVENUE LAWS — OMISSIONS FROM MANIFEST.

[Libel of information for violation of the customs laws by importing goods not entered on the manifest, sustained as to the vessel and dismissed as to the master. Following The Queen, Case No. 16,107.]

[This was a libel against the bark Irma and John Cummins her master.]

William Stanley, Assist. U. S. Dist. Atty.

Ethan Allen, for master and claimant of vessel.

BLATCHFORD, District Judge. This case is very much like that of U. S. v. The Queen [Case No. 16,107], just decided. The informa-

tion was filed on the 18th day of July, 1869, by the district attorney, on behalf of the United States, against the bark Irma, and John Cummins, her master. It avers that on the 29th day of June, 1869, the collector of customs for the port and collection district of the city of New York seized on waters navigable from the sea by vessels of ten or more tons burthen, within this district, the bark Irma, being within this district, for a forfeiture incurred under the revenue laws, and that the United States bring suit in that behalf against the vessel and her master in a cause civil and maritime of forfeiture for breach of the revenue laws of the United States.

The information sets forth that on the 23d of June, 1869, certain merchandise, which is specified, was imported and brought into the United States in the same vessel from Sagua la Grande, Cuba, a foreign place, and was on that day found in the said vessel, then being within the port of New York and within this district, and was not included in the manifest; and that the value of such goods not included in such manifest is $7,828, contrary to the 24th section of the act of March 2, 1799 (1 Stat. 646), and to the 25th section of the act of July 18, 1866 (14 Stat. 184); that thereby the master of the vessel forfeited and became liable to pay to the United States the said sum of $7,828, the value of said merchandise; that the premises are within the admiralty and maritime jurisdiction of this court; and that the vessel became holden for the penalties so incurred by the master, and liable to be seized and proceeded against summarily in this court for recovery of the same, according to the provisions of the 8th section of the said act of July 18, 1866. The information prays for a decree for the forfeiture against the master and against the vessel for $7,828 as a lien thereon, and that the vessel may be condemned and sold to satisfy the lien.

The owner of the vessel answers the information, and says that he is a subject of Great Britain and a resident of New Brunswick, and not a citizen of or resident in the United States. * * * He denies the statements of the information and excepts to it for the same reasons, and no other, contained in the answer of the owner of the vessel in the case against the Queen.

The answer of the master denies all the statements of the information, and excepts to it for the same reasons contained in the answer of the master in the case against the Queen. The case was tried, as respected both the vessel and the master, before the court without a jury as an instance cause in admiralty. The violation of law set forth in the information was clearly proved, and, for the reasons given in the decision against the Queen, the information must be dismissed as to the master with costs, and a decree must be entered against the vessel for the $7,828, with costs.

Case No. 15,445.

UNITED STATES v. IRWIN.

[5 McLean, 178;[1] 4 Am. Law J. (N. S.) 214; 9 West. Law J. 145.]

Circuit Court, D. Ohio. Oct. Term, 1851.

FORGERY OF "PUBLIC SECURITIES" — MILITARY LAND WARRANTS — CONSTRUCTION OF STATUTES.

1. The 14th section of the act of congress of the 30th of April, 1790 [1 Stat. 115], providing that the forgery of, or the uttering and publishing of, any forged "certificate, indent, or other public security," shall be punished by death, is repealed by the 17th section of the crimes act, of the 3d of March, 1825 [4 Stat. 119], which enumerates as the subjects of forgery, an "indent, certificate of public stock, or debt, or treasury note, or other public security of the United States, or any letters patent," &c., and declares that the punishment, on conviction, shall be fine and imprisonment.

2. A posterior statute, inconsistent with and repugnant to the provisions of a prior one, operates as a repeal of the old statute, without any express words to that effect.

[Cited in U. S. v. Fisher, 109 U. S. 145, 3 Sup. Ct. 156.]

[Cited in State v. Otis, 42 N. H. 73.]

3. A military land warrant is neither an indent nor a public security of the United States, within the meaning of the act of congress of 1825.

4. Words and phrases used in statutes, must be understood in the sense intended by the lawmaker, where that can be ascertained with reasonable certainty.

[Cited in U. S. v. Mattock, Case No. 15,744.]

[Cited in Buffham v. City of Racine, 26 Wis. 453; Cortesy v. Territory N. M., 32 Pac. 506.]

5. If general words in a statute follow an enumeration of particular cases, they are held to apply only to cases of the same kind as those expressly mentioned.

[Cited in Semple v. Bank of British Columbia, Case No. 12,659; U. S. v. Gibson, 47 Fed. 834; U. S. v. Fisher, 109 U. S. 145, 3 Sup. Ct. 156.]

[Cited in Adkison v. Hardwick (Colo. Sup.) 21 Pac. 908; Board of Education v. City of Detroit, 30 Mich. 509; City of St. Louis v. Laughlin, 49 Mo. 560.]

6. The forgery of a land warrant, not being embraced, either expressly or by fair implication, in any act of congress, there is consequently no jurisdiction to punish; and a motion to quash an indictment for such forgery will be sustained.

[This was an indictment by the United States against James Irwin upon the charge of forgery.]

S. Mason, U. S. Dist. Atty.

H. Stanbery and S. W. Andrews, for defendant.

LEAVITT, District Judge. This motion is urged on the ground that the instrument or paper alleged to have been forged, is not embraced, either expressly or by fair construction, in any act of congress, defining and punishing the crime of forgery. If this position is sustainable, it is quite clear this motion must prevail. This court has no common law jurisdiction of crimes, and therefore no power to adjudge any act criminal,

[1] [Reported by Hon. John McLean, Circuit Justice.]

not declared to be so, by statutory enactment.

This indictment contains four counts. The first charges the forgery of a military land warrant, averring it to be "a public security of the United States." The second charges the forgery of such warrant, with the averment, that it is "a certificate of a right to locate one hundred and sixty acres of the lands of the United States." The third and fourth counts charge the uttering and publishing of the instrument, as described respectively in the first and second counts.

It is insisted, in the first place, in opposition to the motion, that the charges set forth in the several counts of the indictment, are within the provisions of the 14th section of the act of congress of the 30th of April, 1790 (1 Stat. 115). This section provides for, and punishes the forgery of any "certificate, indent, or other public security," or the uttering and publishing any such forged instrument; and affixes to any of these crimes, the penalty of death. There can be no doubt, that if this section is now in force, the forgery alleged in the indictment, and the uttering and publishing the forged instrument set forth, are within its terms. The term certificate, as used in that section, is sufficiently comprehensive to embrace the land warrant described in the several counts. This instrument is substantially a certificate, emanating from the proper officer of the government, setting forth that the person named therein, is entitled, on the ground of military service, to locate one hundred and sixty acres of the lands of the United States, subject to entry at private sale.

But it is contended that the section referred to, is impliedly repealed by the 17th section of the crimes act of the 3d of March, 1825 (4 Stat. 119). And this presents the first question for the decision of the court in the consideration of the pending motion. The act of 1825 contains no clause, expressly repealing any part of the act of 1790. There is a provision in the 26th section of the former act, to the effect that all prior laws inconsistent with its enactments, are repealed. This, however, is only declaratory of the principle long since settled, that a posterior statute inconsistent with, and repugnant to, the provisions of a prior one, operates as a virtual repeal of the old law. The only inquiry arising here, is whether, under the operation of this rule, the 14th section of the act of 1790 is abrogated or superseded by the act of 1825. By the terms of the 14th section of the old law, the instruments or papers of which forgery may be committed are, a "certificate, indent, or other public security." By the 17th section of the later act, the specification is extended, and embraces any "indent, certificate of public stock, or debt, treasury note, or other public security of the United States, issued or granted by the president of the United States, or any bill, check, draft for money," &c.

A comparison of these two sections seems to warrant the conclusion, that it was the intention of congress, in the enactment of the latter, to repeal the former. There are several considerations clearly sustaining this inference. In the first place, it may be noticed, that the act of 1825 contains in its enumeration of instruments of which forgery may be predicated, the term "indent," precisely as used in the act of 1790, and without the semblance of reason that it was intended to be understood in any different sense. Now, if it was the intention of the law-making power, in the passage of the act of 1825, merely to add to, and enlarge the specifications of the old law, with the design that both should co-exist, it is not easy to perceive why the term "indent" should have been inserted in the last law. There is certainly no foundation for the inference, that congress intended the forgery of this instrument should be punishable under two different statutes, in force at the same time. The same remarks apply, with equal force, in relation to the terms, "other public security." These words occur in the act of 1790, and are also found in that of 1825. It is clear, too, that the use of the term "certificate," as it appears in the two acts, is pregnant with meaning as to the intention of congress in the later enactment. In the old law, the word is used in its most unlimited sense, and fairly embraces any instrument which, by the most liberal interpretation, could be called a certificate. In the act of 1825, the same term is used, but with additions deemed necessary to the clearness and precision demanded in all statutes defining and punishing crimes. Unlike the term "indent," which had a specific meaning, and could extend only to a single instrument known to the government, the term "certificate" would include a numerous class of public papers; and its use, without any restrictive additions, would leave an almost unlimited scope for judicial construction. It was, doubtless, from considerations of this kind, that congress, in the act of 1825, carefully restricted the term to a "certificate of the public stock or debt;" intending by the very full specification which follows of the instruments which were to be the subjects of forgery, to embrace all for which provision was deemed necessary.

There is still another consideration, showing very conclusively, the intention of the legislature to supersede the section of the act of 1790, referred to, and that the two sections under review cannot stand together. By the section of the former law, under which, it is argued, this indictment may be sustained, the penalty, on conviction of the crime of forgery, is death. By the act of 1825, the milder punishment of fine and imprisonment is substituted. While it is conceded that the latter statute abrogates the death penalty provided for by the old law, it is insisted that this change does not operate,

as a repeal of that part of the section which defines the crime. It is doubtless a common exercise of legislative power and discretion, to increase or lessen the punishment of a crime provided for, and defined by a previous statute. But, where that object alone is contemplated, it is usual to provide simply for such a change of penalty, without any attempt to change or interfere with the body of the statute. And this is effected by a clear and intelligible declaration of the purpose of the legislature, which leaves no doubt as to the object intended. In the case now under consideration, we find the provisions of the former law materially changed in other respects than the change of penalty. All the instruments, the forgery of which is punished by the old law, are enumerated in the new, with many additions. This fact, in connection with the change in the penalty, points clearly to the conclusion, that the act of 1825 was designed as a full substitution for that of 1790, and by fair implication, repeals it.

It is claimed, however, in the argument, that if the act of 1790 is not in force, the forgery charged in the indictment is punishable under the act of 1825. To the examination of this point, the attention of the court will now be directed. The substance and character of the instrument alleged to have been forged, have been already noticed. It is, in brief, a certificate that the person named in it, is entitled to locate 160 acres of the public lands. Is this instrument within the terms and scope of the act of 1825, defining and punishing the crime of forgery? The enumeration of instruments, the forgery of which is provided for by that law, and within which, it is argued, a land warrant may be included, embraces an indent, certificate of public stock or debt, treasury note, or other public security, &c. Is a land warrant an indent? It is insisted in the argument, that this term, in its general and comprehensive sense, signifies any contract or obligation in writing, and that a land warrant may, by fair construction, be embraced within its scope. It is true, the word "indent" is used by English lexicographers, in the sense contended for; but it is clear, it was not used in that sense, either in the act of 1790 or 1825. Referring to Webster's Dictionary—certainly the highest authority on questions of this kind—we have an intelligible clue to the meaning of the word, as used and understood in this country, by our statesmen and legislators. It is defined to be a certificate issued by the government, at the close of the Revolutionary war, to the public creditors. It is clear, a land warrant is not within this definition. And recognizing the soundness of the rule, that terms and phrases employed in statutes must be understood in the sense intended by the law-maker, where that can be ascertained with reasonable certainty, the conclusion follows, that the instrument set out in this indictment is not an indent.

But it is strenuously urged, that a land warrant is included in the more comprehensive language of the statute, namely, "other public security of the United States." In one sense, doubtless, any paper emanating from the government, creating on its part an obligation to perform an act, and a corresponding right in behalf of an individual, may be regarded as a "public security." But, in the opinion of the court, it would be in violation of every safe principle of construction, to give to it this far-reaching import. The term, "public security," as used in the legislation of congress, and in its popular acceptation, has a fixed and determinate meaning. It is simply a certificate, or instrument issued by the proper officer, under the authority of law, evidencing the pecuniary indebtment or liability of the government to the holder. Standing by itself, and without any light thrown upon it by its collocation, and association with other terms used, this must be viewed as the utmost extent of its signification; especially, when occurring in a penal statute requiring, by a long sanctioned principle, great strictness of construction.

If, however, there was room to doubt the correctness of this conclusion, the sense in which these terms were intended to be used, in the statute under consideration, is quite obvious from their connection with those immediately preceding them. A class of instruments, the forgery of which is made punishable, all referring exclusively to evidence of pecuniary indebtment, or obligation, are grouped together, followed by the comprehensive words, "or other public security." The words which immediately precede these, are, an "indent, certificate of public stock, or debt, or treasury note." Now it is a well settled rule of construction, that "where general words follow an enumeration of particular cases, such general words are held to apply only to cases of the same kind as those which are expressly mentioned." Smith's Com. § 740. It would certainly violate the rule, to give to the words "public security" a meaning so expansive as to embrace anything not kindred to the instruments immediately preceding them, in reference to which those words are comprehensively used. And that they were intended in this restrictive sense, and not as general words, covering any possible omissions in the specifications contained in the whole section, is obvious from the fact, that they are followed by an enumeration of many other instruments, the forgery of which is provided for. In any other view of this section, the object of the legislature in setting forth, with such studied particularity, what were intended to be subjects of forgery, would be wholly defeated, and a boundless field opened for judicial construction.

Upon the whole, the court is led satisfactorily to the conclusion, that, in reference to the paper described in the indictment, there is an omission in the legislation of congress,

which cannot be supplied by any just exercise of judicial discretion. If the law does not declare the forgery of a land warrant to be a crime, this court cannot hold it to be so. It possesses no legislative power; and the exercise of such a power, under the name of judicial construction, would be nothing less than usurpation. It is required by the theory of our government, and is essential to the preservation of the rights of the citizen, that the apportionment of power to the co-ordinate branches named in the constitution, should be rigidly observed in each. And it is better that crime should go sometimes unpunished, than that this cardinal principle should be violated.

The pending motion is not based on any technical exception to the frame and structure of the indictment. In such cases, courts reluctantly exercise the power of quashing an indictment, and will not do so, unless the defects alleged are palpable, and cannot be remedied by a liberal and enlightened application of acknowledged principles of law. But the present motion goes to the jurisdiction of this court. And as there is a defect of power to punish in the event of a trial and conviction, its plain duty is, in this incipient stage of the proceeding, to quash the indictment, and thus relieve the accused party, however guilty in fact, from the jeopardy in which he is placed.

Case No. 15,446.

UNITED STATES v. The ISAAC HAMMETT.

[2 Pittsb. Rep. 358; 4 West. Law Month. 486; 10 Pittsb. Leg. J. 97; 4 Leg. & Ins. Rep. 170.]

District Court, W. D. Pennsylvania. Oct., 1862.

ADMIRALTY JURISDICTION—PARTNERSHIP ACCOUNTS—FORFEITURES—WAR OF REBELLION—CONFISCATION OF ENEMY'S PROPERTY.

1. Partnership accounts cannot be settled in a court of admiralty.

2. Nor in a case of forfeiture, can a claim for alleged balances due by a part owner or copartner be entertained.

3. The sentence of confiscation, if rendered, rises superior to all liens and equities.

4. The rebellious states of the Union are public enemies, and no claim of a citizen or subject of an enemy's country can be received.

5. Every resident of a hostile place or country is regarded in such court as a citizen or subject.

6. His property, when libelled at the suit of the government, is condemned, without his being heard, as that of an enemy.

In admiralty.

Kirkpatrick & Mellon, for claimants.

Mr. Carnahan, U. S. Dist. Atty.

McCANDLESS, District Judge. This is a libel upon information of the United States district attorney, and a seizure by the marshal, of the steamboat Isaac Hammett, three-sixteenths of which is the property of Victor Wilson, a citizen and inhabitant of the state of Mississippi. The other interests in the boat are held by William Dunshee and others, citizens of Pennsylvania, who have intervened, and, in behalf of themselves and Wilson, have put in an answer, claiming the boat as partnership assets, and that Wilson is largely indebted, as well to creditors as themselves. The firm is styled the "Mississippi Coal Company," with extensive works on the Monongahela river, and engaged in mining and shipping coal to Vicksburg, in the state of Mississippi, and to towns and cities on the coast of Louisiana. Affidavits were also filed declaring the loyalty of Wilson, and it was urged that he could not visit Pennsylvania, or answer in person, owing to the hostilities existing between the two sections of the Union.

To this answer, the counsel for the government demurred, which presents two questions for the consideration of the court:

First. As to the partnership claims. We cannot settle partnership accounts in a court of admiralty; that belongs to another forum; nor can we, in a case of forfeiture, entertain a claim for alleged balances due by a part owner or copartner. The sentence of confiscation, if rendered, rises superior to all liens and equities.

The other question raised by the demurrer is whether we can hear a part owner, who is a citizen and resident of a state in rebellion against the government. This point has been decided by my Brother Cadwalader at Philadelphia, and the decision affirmed by Judge Gier, since the argument of this case. The rebellious states of the Union are treated as public enemies, and it is held that "no claim of any citizen or subject of an enemy's country can be received, and every resident of a hostile place or country, is regarded in such court as a citizen or subject." His property, "when libelled, at the suit of the captors or their government, is condemned, without his being heard, as that of an enemy." Such being the law, we must decree a confiscation of the vessel, to the extent of three-sixteenths owned by Victor Wilson. Fortunately for the parties, there is a saving clause in the act of congress, conferring upon the secretary of the treasury full power to relieve the party, when a proper case is presented for his action. The loyalty of Victor Wilson is established to the satisfaction of this court, and we think the proceedings here call for the interposition of the secretary.

Decree of confiscation as to the three-sixteenths owned by Victor Wilson. The residue released.

Case No. 15,447.

UNITED STATES v. The ISLA DE CUBA.

[2 Cliff. 295.] [1]

Circuit Court, D. Massachusetts. May Term, 1864.[2]

CIRCUMSTANTIAL EVIDENCE—LIBEL OF FORFEITURE—VESSEL ENGAGING IN SLAVE TRADE—DECLARATIONS OF MASTER.

1. Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony upon the ground that any particular circumstance is irrelevant or of an inconclusive nature and tendency, are not favored, for the reason that the force and effect of circumstantial facts usually, and almost necessarily, depend upon their connection with each other or with the direct proofs in the case.

2. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof.

3. Separate examination of circumstantial facts is indispensable in order to ascertain whether the facts themselves are fully proved, but the final determination of the issue or matter in controversy, cannot safely be placed entirely upon that examination.

4. In this case, which was a libel of information against a vessel for engaging in the slave-trade, the truth or falsity of the charge depends, not only upon a view of the circumstances attending the fitting, equipping, and loading of the vessel, but also of the circumstances of the voyage, and both of these must be weighed in connection with the declarations of the master, which are clearly admissible, and are by law to be regarded as direct evidence in cases of this description.

5. Declarations of the master of a vessel engaged in an illegal traffic, as to his suspicions that the purpose of the voyage was not legal, are not mere opinions, but rather admissions; and where he occupies to the vessel the double relation of owner and master, are clearly admissible in evidence.

[Appeal from the district court of the United States for the district of Massachusetts.]

This was a libel of information filed in the court below against the bark Isla De Cuba, her tackle, apparel, and furniture, as well as her cargo, claiming a forfeiture of the whole, for an alleged violation of the laws of the United States prohibiting the slave-trade. 1 Stat. 347; 3 Stat. 450. The libel was filed in the district court on the 18th of October, 1858. It was charged that on the 1st of September previous, certain persons at the port of New York fitted out and equipped the bark, and otherwise prepared her for the purpose of procuring certain negroes or persons of color from a foreign country to be transported to a certain place, unknown, then and there to be held and sold as slaves; and that the said persons caused the bark so fitted out to sail from the port of New York, with the intent to employ the vessel for the purpose aforesaid, and in the aforesaid slave-trade. Monition was duly issued, and on the 10th of November, 1858, George M. Rea appeared and filed a claim to the vessel, her tackle, apparel, and furniture, by virtue of a mortgage executed to him by G. J. De La Figaniere, to secure originally, the sum of $8,000, and that there was still due, together with interest, the sum of $6,571.40. The attorney of J. S. Correa also filed a claim for the cargo of the vessel, stating therein that his principal was the true and bona fide owner of the same, and prayed that a decree of restitution might be entered in his favor. The vessel and cargo were both sold in the court below, and the proceeds paid into the registry. The district court sustained the libel, and entered a deeree of condemnation and forfeiture, both against vessel and cargo [Case No. 15,449]; whereupon the claimants appealed to this court.

C. L. Woodbury, for the United States, cited The Merino, 9 Wheat. [22 U. S.] 398; The Malek Addel, 2 How. [43 U. S.] 233; The St. Jago De Cuba, 9 Wheat. [22 U. S.] 411; The Venus, 8 Cranch [12 U. S.] 253; Ten Hogsheads of Rum [Case No. 13,830]; The Estrella, 4 Wheat. [17 U. S.] 306; The Robert Edwards, 6 Wheat. [19 U. S.] 190. In cases in rem, where forfeiture is claimed for an offence committed, the courts of the United States hold that claimants should be strictly held to rebut conclusively all the prima facie case made out. The Josefa Segunda, 5 Wheat. [18 U. S.] 354; U. S. v. The Catherine [Case No. 14,755]; Taylor v. U. S., 3 How. [44 U. S.] 197. When the burden is thus changed, the defence must be brought clear of any reasonable doubt. The Short Staple [Case No. 12,813]; Ten Hogsheads of Rum [supra]. See, also, Marcy v. Marcy, 6 Metc. [Mass.] 360; American Fur Co. v. U. S., 2 Pet. [27 U. S.] 363; U. S. v. Gooding, 12 Wheat [25 U. S.] 468.

Sohier & Welch and Charles N. Black, for appellants.

The United States must make out the charge beyond a reasonable doubt. The Emily & Caroline, 9 Wheat [22 U. S.] 381. So far as the fitting of the vessel is concerned, it must be shown to be inconsistent with any hypothesis of innocence. See The Catherine [supra]. As to the master's declarations, see U. S. v. Gooding, 12 Wheat. [25 U. S.] 460; 1 Greenl. Ev. 114. Transportation of any kind of goods to Africa is not a crime independent of the intent with which it is done. U. S. v. Libby [Case No. 15,597]. See Locke v. U. S., 7 Cranch [11 U. S.] 339.

CLIFFORD, Circuit Justice. The present register shows that the Isla De Cuba was built in New York in the year 1849, but the record of the case does not show who was the builder or the original owner. The claimants' proofs show that one G. J. De La Figaniere, purporting to act as sole owner, on the 10th of November, 1857, mortgaged the vessel to one George M. Rea, to secure the sum of $8,000, and they offer proofs tending to show

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[2] [Affirming Case No. 15,449.]

that the sum mentioned in the claim for the vessel yet remains due and unpaid.

The libellants' proofs, however, show that one Jonathan Dobson, on the 6th of August, 1858, chartered the vessel to J. S. Correa for a voyage from the port of New York to the west coast of Africa and back, and that on the following day he took out a register in his own name, in which he made oath that he was the only owner of the vessel. He was also the master, and the oath signed by him in that capacity, and the manifest which he presented to the collector, represent the intended voyage as one from the port of New York to Loango, which is on the west coast of Africa. The theory of the claimants is that J. S. Correa freighted the vessel, and the proofs show that the business was transacted in his name

The vessel sailed from the port of New York on the 10th of August, 1858, with three passengers and a supercargo on board, in addition to the master and crew. The United States charge that she was fitted out and sailed from the port of departure to engage in the slave-trade, and they insist that the proofs fully establish the fact that such was the intent of her fitment, equipment, and voyage. The counsel of the claimants deny the entire proposition, and insist that the decree of the district court was erroneous, and should be reversed. The owner of the vessel presents no claim, and the proofs afford no explanation of the fact which is consistent with the theory of the claimants. The charter-party represents the voyage as one from the port of New York to port or ports on the west coast of Africa between Cape De Verde on the north, and Cape Lopez on the south, and yet the bill of lading and the manifest extend the limits on the coast, to a point five degrees farther south, which of itself is a circumstance of suspicion. The ownership of the cargo and the existence of the mortgage as a subsisting lien upon the vessel, are not satisfactorily established, and the failure to advance further proofs upon those topics is well calculated to create distrust as to the bona fides of the respective claims; but it is not necessary to place the decision of the cause upon any of those grounds, because I am of the opinion that the fitment of the vessel, the circumstances of the voyage, and the declarations and conduct of the master and those on board, afford the most conclusive evidence that every charge in the libel is true, beyond every reasonable doubt. A statement of conclusions is perhaps sufficient and all that is desirable to the parties; but in view of the whole case, it seems expedient to enter briefly into the details of the evidence, although the question is purely one of fact. A suspicion arises from the manner in which the cargo was stowed. The evidence shows that the ground tier of casks was carefully arranged according to sizes, so as to present on the top a uniform surface like a deck; and there were four tiers of boards, constituting a platform, placed on the barrels, two fore and aft, and two athwart ship, which had the effect to convert the whole length and breadth of the hold of the ship into a substantial deck, where negroes might conveniently be carried on the voyage. The documents show that the casks under that platform contained about twenty-two thousand gallons of fresh water, and the mate testified that the master informed him that ninety of the casks containing the water, were cleared as oil casks. The platform of boards was cut through in one place, as if to form a hatchway to get at the casks containing the water. The cargo on the return of the vessel was found to contain more than seventy barrels of rice, although it appears that twelve barrels had been sold at Fayal, in the course of the voyage. When the vessel sailed she had on board only a small quantity of beans shipped by the passengers, but an additional quantity of ten or eleven sacks was purchased at Saint Michael's, and taken on board at that port, where the vessel stopped for a short time. The vessel also had on board fifty boxes of herring, and fifty boxes of codfish, and most or all kinds of provisions usually found in a vessel engaged in a slave voyage. Four large boilers were also found on board in boxes, with all the necessary apparatus for cooking, and the cargo also included some ten dozen pails or buckets, and seventeen crates of crockery, embracing every variety which would be necessary and convenient, in supplying and serving the negroes with food and water. Muskets, swords, and cutlasses were also found on board, packed in boxes and stowed as cargo, and another box containing a considerable quantity of iron rods fitted for grating, and such as might conveniently be used to surround the main hatch, was also found on board. None of these boxes are on the manifest, nor does it appear by what means or under what pretence, they were shipped and stowed as cargo. The owners, shippers, or consignors of the cargo on board a vessel bound to a foreign place, are required by law, before a clearance shall be granted, to deliver to the collector manifests of the cargo, and verify the same by oath or affirmation. The requirement is also, that such manifests shall specify the kinds and quantities of the articles, and the value of the total quantity of each kind. The oath or affirmation required is, that such manifest contains a full, just, and true account of all articles laden on board such vessel, and that the values of the articles are truly stated, according to their actual cost at the port and time of exportation. 3 Stat. 542. The circumstances indicate that the boxes, as well as other articles hereafter to be mentioned, were shipped and cleared through fraud and perjury. The freight was taken on board at different places, the vessel moving from one wharf to another for that purpose as many as three or four times, which, of course, afforded unusual fa-

cilities for shipping articles of a suspicious character, without attracting the attention of the revenue officers or the public. Four boxes of medicines, in addition to the usual medicine-chest for the ship's company, were also found on board, containing all or nearly all the ingredients usually found in vessels fitted out for the slave-trade and engaged in that traffic. The medicine-chest was well supplied, and no satisfactory explanation is given why this large additional quantity was shipped, nor of the fact that none of the boxes are placed on the manifest. Two principal suggestions are put forth as explanations to obviate or rebut the inference drawn by the United States, from the shipment of the various articles mentioned, and the circumstances under which the shipment was made. All these articles, it is said in the first place, are sometimes if not frequently found in vessels engaged in lawful trade along that coast; and secondly, that the facts themselves as proved are of an inconclusive nature and tendency, and really ought to be considered as irrelevant. Such articles, it may well be admitted, are not infrequently shipped for lawful commerce in that trade, but it is scarcely to be conceived that such a fitment, without more, was ever made under similar circumstances and coincidences. The bark had a small cargo of merchandise other than the articles already mentioned; but the great weight of the evidence, while it clearly authorizes the theory that as a whole it was suitable for the illegal purpose charged in the libel, also fully warrants the conclusion, that as a lawful commercial adventure to that coast, it was insufficient in quantity, and very unwisely selected, because a considerable portion of the articles was either unsalable, or was in undue proportion to the rest of the cargo. Fresh water is not an article shipped for sale, and the iron rods for grating were much better suited to surround the main hatch, and thus convert the hold of the ship into a close prison, than for any known lawful purpose connected with such a voyage. Boilers and medicines may doubtless be sold in those markets; but if intended for that purpose, some explanation ought to be given why the boxes containing the articles were not placed on the manifest, as it fully appears that they are articles usually selected as cargo for that trade. The first explanation of the claimants, therefore, is not satisfactory; and the second is no better, and in point of fact is entitled to less consideration. Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry, or the failure of direct proof, objections to testimony, upon the ground that any particular circumstance is irrelevant or of an inconclusive nature and tendency, are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other or with the direct proofs in the case. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof. Castle v. Bullard, 23 How. [64 U. S.] 187. The separate examination of circumstantial facts is indispensable, in order to ascertain whether the facts themselves are fully proved; but the final determination of the issue or matter in controversy, cannot safely be placed entirely upon that examination. Whether matters of fact are submitted to courts or jurors, they should be determined upon the whole evidence given; and in this case the truth or falsity of the charge depends, not only upon a view of the circumstances attending the fitting, equipping, and loading of the vessel, but also of the circumstances of the voyage, and both must be weighed in connection with the declarations of the master, which are clearly admissible, and are, by law, to be regarded as direct evidence in cases of this description. U. S. v. Gooding, 12 Wheat. [25 U. S.] 460. The witnesses speak of the number of the passengers as four; and if J. S. Correa, sometimes mentioned as supercargo, be regarded as such, then the witnesses are correct. Three were Portuguese, and one was a Spaniard. The mate testifies that the vessel arrived at Fayal on September 2, 1858; and it was while the vessel was lying there in the stream that the twelve barrels of rice were sold. While there, also, another passenger came on board, Jacob M. Smalley, who is an important witness for the United States. The master and passengers went ashore once or twice. The attention of the mate was called by the master to the fact that the documents of the supposed supercargo showed, that there were twenty-two thousand gallons of fresh water in the hold of the vessel, and he (the mate) was requested to examine and ascertain if such was the fact. Accordingly he made the examination, and found the fact to be as represented, or that some of the casks at least contained fresh water, and he so informed the master. Notwithstanding this discovery, the vessel proceeded on her voyage to the port of Saint Michael's, but the suspicions of the master were greatly aroused as to the character and intent of the voyage. They arrived at Saint Michael's on the 12th of the same month, and while there the passengers from the port of departure, purchased the sacks of beans, which were added to the cargo. Twenty-seven bales of the dry goods were there discharged, and converted into money. A conversation there took place between the master and the mate in regard to the character of the voyage, in which the former told the latter that he suspected that the voyage was an illegal one, and in that view of the matter the latter substantially concurred. Smalley's testimony shows that the passage from Fayal to Saint Michael's was accomplished in twenty-four hours. During that time he had various conversations with the master, which in substance

and effect show that the master felt himself in danger from the four foreigners on board as passengers, and so deep were his convictions, in that behalf, that he cautioned the witness not to drink any of the wine at dinner, unless he, the witness, first saw him, the master, drink from the same vessel, assigning as a reason for his fears, that they had attempted to poison him at Fayal while the vessel lay there, and expressing the opinion that they intended to use poison to accomplish their purpose. Precautions were taken by the master to guard against assassination or violence from that quarter; and to that end the witness states that he, the master, requested the mate to have his axe in readiness for use, and also requested the cabin-boy to sleep with a hatchet under his pillow; and so strongly were his fears aroused as to the danger, that he requested the witness to remain awake while he, the master, slept, and agreed himself to remain awake while the witness slept. The testimony shows that the bark remained at Saint Michael's for the period of ten days, and that while there, he gave up the command to the mate, under the sanction of the American consul, and left the vessel. When he gave up the command, he cautioned the mate to keep all of the papers out of the way of those passengers, assigning as a reason for the caution, that he suspected that the vessel was engaged in an illegal voyage. The statement of the mate is that when the master surrendered the command to him, he gave him an order to sail for New York, as he, the master, considered the voyage illegal. The objection is made that these declarations are not admissible, but it should be remembered that he was not only master of the vessel, but her sole owner. His opinions, it is said, are not admissible, but the declarations of a person occupying the double relation of master of the vessel and sole owner are clearly competent, and it is as declarations or admissions, and not as opinions, that the evidence is in the case, and in that point of view it is admissible. Having surrendered the command, he left the vessel, and the mate became the acting master. Three days afterwards he called these passengers and all hands forward, and told them he was going to take the vessel to the United States, because he considered that the voyage to the coast of Africa was a voyage for slaves. The passengers at once began to cry, and one of them said he thought the late master had told him where the vessel was going, and all about the voyage. The witness told them he did know all about the voyage, and in effect gave them to understand that it was on that account that he was about to return. They begged him to run into Flores, and put them ashore, but he refused, saying that he was quite near enough to land, and that he would not go any nearer. But he offered them a boat of four or five tons, which they accepted. The vessel was then about one hundred and twenty miles from Flores, and they left in the boat, taking one or two bales of goods, two or three barrels of rice, some fish, and other provisions, and five or six trunks which contained their baggage. Before they left, however, J. S. Correa, the present claimant, made a bill of sale to the mate of all the cargo left on board. His claim is that the voyage was a legal one, and that he was the bona fide owner of all the cargo; and yet upon being informed by the mate that he was going to take the vessel to the United States as a slaver, he voluntarily parts with all his property, except the small parcels before mentioned, and in the open sea, when the ship was in no danger, leaves her deck and takes his chances to reach the shore in an open boat of four or five tons. The parties have a right to set up such a defence and urge it upon the consideration of the court, but they can hardly expect the court to adopt any such improbable theory. Nothing need be added respecting the declarations of the master, except to remark, that the testimony is full to the effect that he repeatedly said that the voyage was an illegal one, and was for the purpose of procuring slaves, or words to that effect; and on one occasion he showed his letter of instructions to the witness Smalley, which, if the contents are correctly given, showed to a demonstration that such was the fact.

In view of the whole case, I am of the opinion that the whole charge as laid in the libel is proved beyond any reasonable doubt. The decree of the district court is, therefore, affirmed with costs.

[Subsequently a petition was filed to open a decree of distribution, which was denied in Case No. 15,448.]

Case No. 15,448.

UNITED STATES v. The ISLA DE CUBA.

[2 Cliff. 458.] [1]

Circuit Court, D. Massachusetts. May Term, 1865.

SLAVE TRADE — CONDEMNATION OF VESSEL — DISTRIBUTION OF PROCEEDS—INFORMERS.

A master of a vessel, while in a foreign port, becoming convinced that it was the intention of certain persons on board to employ her in the slave-trade, brought the vessel to a port in the United States. When he arrived at the port for which he had sailed, he was towed into the harbor by a steamer, the master of which, learning from some person or persons on the vessel that she had been intended for the slave-trade, went, immediately upon landing, to the United States district attorney, gave information of the intended slaver, and made a sworn statement thereupon. The master of the vessel, on the following day, also gave the intelligence to the attorney, having, on the day previous, presented the ship's papers at the custom-house, and made known the facts to the revenue officers. After the decree of distribution awarding the prosecutor's moiety to the captain of the intended slaving vessel, and after the payment of the moiety in conformi-

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

ty to the decree, upon petition by the master of the steamer to open and set aside the decree of distribution, it was *held*, that the award had been properly made under the act of the 20th of April, 1818 [3 Stat. 450], and that this being the case, it was not necessary to decide whether it was competent for the court to open the decree and take jurisdiction of the second petitioner's claim.

[Cited in U. S. v. Simons, 7 Fed. 712; The City of Mexico, 32 Fed. 106.]

This was a petition to open a decree of distribution, in a case of forfeiture of a vessel and cargo which had been equipped and prepared for the purpose of procuring negroes, and persons of color from a foreign country, to be held and disposed of as slaves. The decree of condemnation and forfeiture was entered September term, 1864, in this district. [Case No. 15,447.] The statement of the petitioner was, that he was the prosecutor in the case, and as such, was entitled to a moiety of the forfeiture, but that he was prevented by circumstances detailed in his petition, from presenting his claim prior to the decree of the district court [Id. 15,449], where the prosecution was commenced. The decree of distribution awarded the moiety claimed by the petitioner, to the master of the vessel, Levi W. Turner, who brought the vessel into the port of Boston from the port of Saint Michael. The petitioner prayed to set aside the decree of distribution, to the end that he might have an opportunity to present his proofs to the court, and show that he was the only person entitled to a moiety of the forfeiture. Notice was served both upon the district attorney at the time of this petition, and upon his predecessor in office at the time of the commencement of the proceedings against the vessel, and up to the final decree of distribution. No claim was ever filed by the petitioner in this case, or in the court below, until after the appeal was made, but the claim was filed in the district court, three days after the allowance of the appeal to this court. Nothing of the kind, however, appeared in the transcript of the record, nor was the attention of this court drawn to the matter until after the decree of distribution was made. The decree of the district court was in all things affirmed. Considerable delay ensued because the proceeds of the sale of the vessel had not been sent up with the transcript of the record, so that the decree of distribution was not made until the term previous to this one. The petition of Levi W. Turner was filed by the district attorney who filed the libel of information, and prosecuted the suit, but the matter was not adjudicated, until it had been referred to his successor in office, who reported that the facts stated in the record were true. The petitioner in this case complained that the matter was adjudicated before he was heard, but it appeared that the person who filed his petition in the court below was not a member of the bar, and no appearance was ever entered in the petitioner's behalf, until after the decree of distribution was entered and the money paid over to the parties therein named.

C. T. Russel and H. A. Scudder, for petitioner.

R. H. Dana, for the United States.

CLIFFORD, Circuit Justice. Two principal objections are taken to the claim of the petitioner by the district attorney.

It is insisted that he was not the prosecutor within the meaning of the act of congress, and consequently, that he has no claim upon the merits of his petition; and also, that it is not now competent for the court to open the decree and take jurisdiction of the petitioner's claim.

The proofs show that the bark sailed from New York on the 12th of August, 1858, bound on a voyage to Loango on the coast of Africa. Her master at that time was Jonathan S. Dodson, and Levi W. Turner was the mate. She arrived at Fayal on the 2d of September of the same year, and remained there in the stream some eight or ten days. During the voyage the suspicions of the master had been aroused that certain Portuguese or Spanish passengers intended to control the voyage, and that the real purpose of it was to engage in the slave-trade. Accordingly he directed the mate to examine the casks in the lower hold, and see what they contained. The supercargo's documents showed that there were twenty-two thousand gallons of fresh water on board; and upon an examination of the casks which had been shipped as oil casks, enough was ascertained to warrant the conclusion that the statement of the documents was true. Without entering into details, suffice it to say that the cargo was made up of such articles as are usually found in vessels clandestinely intended for that traffic, and was of a character fully to justify the suspicions of the master. They arrived at Saint Michael on the 12th of September, and remained there till the 22d of the same month. While there, they discharged twenty-seven bales of dry goods, and the passengers took on board ten bags of beans; and it was during the time the vessel lay there that the master communicated his suspicions to the mate. He was to receive pay at that port, and he told the mate that when he got his money, he should leave the ship, give him a letter, and order him home with the vessel, and distinctly informed him that he suspected it was an illegal voyage. The record also shows that the mate was appointed master with the approval of the consul, and that the master, who was sick, left the vessel. His directions were that the mate should return to New York, and he advised him to keep all his papers out of the way, so that they might not be stolen by the passengers. The vessel sailed from Saint Michael on the 22d of September, Levi W. Turner, master, and when three days out, he called all hands, and

stated to them that he suspected that the voyage was illegal, and that he was going to return to the United States, as advised by the former master. Some of the passengers shed tears, and wanted him to run into Flores, and put them ashore. They offered him $1,000 if he would do so, but he declined, saying that he would not go any nearer the land than he was. Willing to be rid of them, however, he offered them a boat of four or five tons; and they left in her, taking with them their trunks, one or two bales of goods, and some provisions. Considering them dangerous, he allowed them to leave, and, perhaps, it is not going too far to say that the circumstances afforded some justification for his course, as they had small arms aboard, such as muskets, swords, and cutlasses, and plenty of means to bribe the crew, if any had been wicked enough to listen to such overtures.

Faithful to his duty, the master brought the vessel to the United States, and, finding it more convenient, he sailed for this port. The petitioner in this case towed the vessel into the harbor, and in the course of his employment learned from the seamen that the voyage was regarded as an illegal one. He had no knowledge upon the subject, or means of knowledge, except what he derived from the crew. Beyond doubt he performed his duty in towing the vessel into the harbor properly, and when that was done, he at once repaired to the office of the district attorney and communicated the facts which he had learned on board the vessel, but he had none of the papers belonging to the vessel, and no personal knowledge upon the subject. Instead of going immediately to the office of the district attorney, the master, as was his duty, went to the custom-house and presented his papers there, and made known the circumstances to the proper revenue officers. On the following day he called upon the district attorney, and, through the proper officer of the customs, the papers were placed in his hands. The statement of the petitioner is, that the district attorney, when he called on him after leaving the vessel at her anchorage, took down in writing the facts stated by him, and caused him to make oath to the same, and that the district attorney thereupon commenced proceedings against the bark and her cargo. Recurring to the libel, however, it will be seen that it is in the usual form, and is signed only by the district attorney. But that is of little importance, as it appears that the master was ever after recognized by the government as the prosecutor, and is in fact the person who furnished all the evidence to sustain the libel of information.

By the act of congress of April 20, 1818, one moiety of such a forfeiture is granted to the use of the United States, and the other to the use of the person or persons who shall sue for such forfeiture, and prosecute the same to effect. 3 Stat. 451. Take the facts as stated, and it is not possible to say that the petitioner sued for the forfeiture or prosecuted the same to effect. Even if the moiety was given to an informer, and not to the prosecutor, strong doubts are entertained whether the petitioner would justly be entitled to the claim in preference to the master. He had no knowledge upon the subject, except what he had derived on board the vessel, and all of that which was reliable emanated from the master. Suppose one of the crew, while the master was going to the custom-house, had left the vessel and first communicated the fact to the district attorney, would he have been entitled to claim the moiety? I think not, even if the law gave it to an informer, as his conduct, in the case supposed, would be a fraud upon the master, and consequently would not be upheld by the courts. But whether so or not, it is clear in this case, and in my judgment, beyond all doubt, that the master was the person and the only person, who could properly make the claim.

Entertaining no doubt upon the subject, I do not find it necessary to consider the other question.

The prayer of the petition is denied.

Case No. 15,449.

UNITED STATES v. The ISLA DE CUBA.

[2 Spr. 26.] [1]

District Court, D. Massachusetts. March, 1860.[2]

SLAVE TRADE—FORFEITURE OF VESSEL.

Circumstances which justify the forfeiture of a vessel under the act of 1818, c. 91 [3 Stat. 450], for being engaged in the slave-trade.

This was an information against the bark for having been fitted out, and caused to be sent to procure negroes from one foreign country to be transported to another foreign country, there to be held or otherwise disposed of. The libel was brought under the act of 1818, c. 91 (3 Stat. 450). George W. Ray claimed as mortgagee, and I. S. Correa as owner of the cargo. There was no appearance for the owner of the bark. The government contended that the law of informations in the instance courts differed absolutely from the law of criminal trials; that there was no presumption of innocence constantly recurring, and that a prima facie case was all that was required in a proceeding in rem to make a presumption in favor of the seizure; that the burden of proof then shifted to the defendant, who must by plenary proof establish the innocence of the rem.

C. L. Woodbury, Dist. Atty., and J. P. Woodbury, for the United States.

Sohier & Welch, for claimants.

[1] [Reported by John Lathrop, Esq., and here reprinted by permission.]

[2] [Affirmed in Case No. 15,447.]

SPRAGUE, District Judge, reviewed all the evidence in the case, and declared the vessel forfeited. The decision was based on the facts that the master left the vessel, and gave her up to his mate, his instructions to him at the time; that he was at the time owner, and his not appearing at this trial to claim her, while the mortgagee and owner of the cargo did appear; the expressions and acts of Correa, when he was told by the mate that he was going to take the ship to New York, because the vessel was engaged in the slave-trade; the fact of her being mortgaged for $6,000, and appraised at $3,000; the fact of Dobson, the owner, allowing Ray to charter her to Correa, and take her beyond his reach, and his want of interest in her destination, cargo, or passengers, and want of diligence in protecting his property from any illegal voyage, and the inconsistencies between the charter-party and manifest, the vessel by the latter being bound to a port five degrees outside of the limits of the former; that the cargo also indicated her purpose,—fifteen thousand gallons of water, over which were placed boards five or six feet deep, forming a deck or platform, upon which slaves could be seated, rice, fifteen barrels of salt, two of vinegar, a box of iron rods, muskets and cutlasses,—all adapted to this kind of trade. These, the court said, required explanation; and the explanation offered as to the water casks, that they were taken out to be filled with palm-oil and returned, is contradicted, or rendered of no force, by the testimony of Salem and Boston merchants, that there is no such custom, and the government show that there is no palm-oil at Loango, the place mentioned in the manifest. And if the boards were used as dunnage, the space is unnecessarily large, as all the goods carried out would not cover half the space. The box of iron rods, not on the manifest, was described as being instrumentalities by which the hold could be made a prison of without excluding the air, and not such things as would be used in any fair commerical enterprise. The medicine boxes were also admirably adapted to the slave trade. Some boilers were also found on board, well suited to prepare food for large numbers, and implements for taking it out. Two crates of mugs, for which there is no trade at the destined ports, were well adapted to slaves as a cargo. Though a small cargo, yet it required three different berths in New York to load at. These things remained unexplained, and some of them at least were inconsistent with an innocent voyage.

The judge thought the evidence conclusive, and was entirely satisfied, both from the testimony of the government and the failure of the claimants to explain it, that the decree, as above, should be entered.

[Upon an appeal to the circuit court, the decree of this court was affirmed, with costs. Case No. 15,447. For a subsequent proceeding, see Id. 15,448.]

Case No. 15,450.

UNITED STATES v. ISMENARD et al.

[1 Cranch, C. C. 150.] [1]

Circuit Court, District of Columbia. Dec. Term, 1803.

NUISANCES—GAMING HOUSES—JOINT INDICTMENT.

1. A public gaming-house is a public nuisance at common law.

[Followed in U. S. v. Mickle, Case No. 15,763. Cited in U. S. v. Holly, Id. 15,381; U. S. v. Milburn, Id. 15,767.]

[Cited in People v. Sponsler, 1 Dak. 289, 46 N. W. 460.]

2. Upon a joint indictment the judgment must be several.

[Cited in U. S. v. Holly, Case No. 15,381.]

Indictment [against John F. Ismenard, John Ismenard, and Robert Smith] for keeping a public gaming-house. 1st count, common nuisance; 2d, under the act of assembly of Maryland, 1797, c. 110, prohibiting faro-tables, and other gambling devices, to be kept by tavern-keepers and retailers of wine and spirits.

Mr. Mason, for the District, cited 1 Hawk. P. C. 360, 362, that a public gaming-house is a common nuisance.

E. B. Caldwell and P. B. Key, contended that playing at cards or dice is not malum in se; nor in itself an offence at common law. 11 Coke, 87b. And that a public gaming-house is no offence at common law unless it become disorderly, so as to disturb the neighbors. 4 Bl. Comm. 167, 171.

But THE COURT (nem. con.) instructed the jury that a public gaming-house is a common nuisance. The verdict having been rendered against the defendants upon the first count only, and the indictment being joint, it became a question whether the judgment should be joint or several; and the following authorities were cited: Jones v. Com., 1 Call, 555; Godfrey's Case, 11 Coke, 42; 2 Hawk. P. C. bk. 2, p. 633, c. 48, §§ 10, 17, 18; Esp. N. P. 420; 2 Hawk. P. C. p. 342, c. 25, § 89.

THE COURT imposed the fines severally: namely, on J. F. Ismenard, $133⅓, on John Ismenard, $50, on Robert Smith, $25; and required each of them to give security in five hundred dollars for his good behavior for one year.

Case No. 15,451.

UNITED STATES v. IVY.

[Hempst. 562.] [2]

Circuit Court. D. Arkansas. Dec., 1847.

FEDERAL COURTS—JURISDICTION OF OFFENCES IN INDIAN COUNTRY.

1. The circuit court of the United States had no jurisdiction to punish offences committed in the Indian country west of Arkansas, anterior to the 17th of June, 1844.

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Samuel H. Hempstead, Esq.]

2. Cases of U. S. v. Alberty [Case No. 14,426], and U. S. v. Starr [Id. 16,379], cited and confirmed.

[This was a writ of habeas corpus sued out in behalf of Joseph Ivy, who was held for trial on a charge of murder.]

S. H. Hempstead, U. S. Dist. Atty.

E. H. English, for defendant.

Before JOHNSON, District Judge.

OPINION OF THE COURT. On hearing this case and carefully examining the evidence, it appears clearly that the defendant has been committed for trial in the circuit court, charged with the murder of Larkin Eckles, a white man, in the Cherokee Nation, west of Arkansas, on the 7th September, 1840. The offence having been perpetrated in the Indian country anterior to its annexation to the district of Arkansas, by the act of congress of the 17th of June, 1844 (10 Laws, 583 [5 Stat. 680]), the circuit court of the United States has no jurisdiction to try the defendant, as has been heretofore expressly decided in U. S. v. Alberty [Case No. 14,426], and U. S. v. Starr [Id. 16,379], the doctrine of which cases is deemed to be entirely correct, and decisive of the present question, and consequently the defendant must be discharged from further imprisonment. Discharged accordingly.

Case No. 15,452.

UNITED STATES v. JACK.

[1 Cranch, C. C. 44.] [1]

Circuit Court, District of Columbia. Dec. Term, 1801.

CIRCUIT COURT DISTRICT COLUMBIA—JURISDICTION.

This court has not jurisdiction of larceny by a slave.

Indictment [against negro Jack, a slave] for theft. Plea to the jurisdiction, it being a case cognizable only by a justice of the peace, by the act of assembly of Maryland.

THE COURT decided that they had not jurisdiction, and ordered the slave to be delivered to a constable to be carried before a justice of the peace.

Case No. 15,453.

UNITED STATES v. JACKSON.

[4 Cranch, C. C. 483.] [1]

Circuit Court, District of Columbia. Nov. Term, 1834.

CRUELTY TO ANIMALS.

Public cruelty to a cow, and beating her to death in or near a public street in Washington, is an indictable offence at common law, as a public nuisance.

The indictment averred that the defendant [Daniel Jackson], "unlawfully, wantonly, and cruelly, in the public street in the city of Washington, in the same county, and in a public place in the city of Washington in said county, and near the public streets of said city, and dwellings of the citizens thereof, and in view of the said streets and dwellings and said citizens, in said county, did cruelly with clubs and stones, beat, strike, and grievously wound and kill a certain cow, then and there being, the property of a certain Charles A. Howe, of the value of twenty dollars, to the terror and disturbance of the said citizens, and to the common nuisance of the citizens of said county, to the evil example of all others, and against the peace and government of the United States."

Mr. Morfit, for defendant, moved the court to quash the indictment. The Maryland act of 1809 (chapter 138, § 4) shows that at common law, cruelty to brutes was not punishable. The Virginia cases are founded upon the peculiar qualities of slavery. 3 Chit. Cr. Law, 1087; 4 Bl. Comm. 19.

THE COURT (THRUSTON, Circuit Judge, absent) refused to quash the indictment.

Upon the trial, the defendant's counsel contended that it was necessary to prove that the cow died of that beating.

But THE COURT refused to give the instruction; and, at the prayer of the attorney of the United States, instructed the jury that the gist of the offence was the public cruelty to the common nuisance, and it was not necessary for the United States to prove that the cow died of the beating.

Case No. 15,454.

UNITED STATES v. JACKSON.

[4 Cranch, C. C. 577.] [1]

Circuit Court, District of Columbia. March Term, 1835.

COMPETENCY OF WITNESSES—FORGERY.

The person, to the prejudice of whose right a forgery is averred to be, is a competent witness to prove the forgery. So, also, is the person whose receipt is averred to be forged.

Indictment [against William Jackson] for forging a bill and receipt of Polkinhorn & Campbell against Major William T. Barry, of eight dollars and fifty cents, for a trunk, by altering the amount, which was originally $6.50 to $8.50. The deposition of Major Barry had been taken by consent, provided he could be a competent witness, and was now produced by Mr. Key for the United States.

Mr. Brent, for the defendant, objected that he was interested; and cited the case of U. S. v. Anderson, in this court, in November term, 1834 [Case No. 14,452], and the cases there cited.

THE COURT (nem. con.) decided, that Major Barry was a competent witness, and his deposition was read.

[1] [Reported by Hon. William Cranch, Chief Judge.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

Mr. Key then offered Messrs. Polkinhorn and Campbell.

Mr. Brent objected.

But THE COURT overruled the objection, and they were examined.

The indictment charged the forgery to be to the prejudice of the right of the said W. T. Barry, and with intent to defraud him, under the eleventh section of the penitentiary act of 1831 [4 Stat. 449].

Case No. 15,455.

UNITED STATES v. JACKSON.

[1 Hughes, 531.] [1]

Circuit Court, E. D. Virginia. April 13, 1875.

INTERNAL REVENUE—RETAILING LIQUORS—SPECIAL TAX.

Selling an occasional drink of spirits, out of a bottle, not in a bar-room, where no intention of defrauding the national revenues is apparent, is not "carrying on the business of a retail liquor dealer" without having paid the special tax, in contemplation of section 3242 of the Revised Statutes of the United States.

[Cited in U. S. v. Rennecke, 28 Fed. 848.]

The indictment was for violating section 3242 of the Revised Statutes, which declared (in 1875) that "every person who carries on the business of . . . a retail liquor dealer . . . without having paid the special tax as required by law, shall, for every such offence, be fined not less than one thousand dollars, nor more than five thousand dollars, and be imprisoned not less than six months, nor more than two years." Section 3244 declares that "every person who sells, or offers for sale, foreign or domestic spirits or wines. in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors."

The proof before the jury was, that [Josiah] Jackson had no license; that a detective, sent by a revenue officer, had gone to his grocery on one occasion and called for a half pint of whisky and received it and paid for it, the revenue officer looking through the window and seeing the occurrence; that this same witness (whose veracity was impeached by a half dozen witnesses for the defence) had bought a small quantity of whisky on another occasion; that two other witnesses had on separate occasions bought drinks at the establishment, it having been poured out of a bottle into glasses for them; and that on these two occasions a woman had sold the liquor and not the accused. The defence proved by eight or ten witnesses, who all lived near the accused and had known him intimately for many years, that he was a man of excellent character, that he had not carried on the business of liquor dealer in their whole acquaintance with him; that they had on some occasions inquired for liquor at his grocery and could never get it; that he was a member of the church in good standing. These witnesses nearly all concurred in saying that they knew the general character for veracity of the witness who had testified that he had bought whisky of Jackson himself, and that from that general reputation they would not believe said witness on oath. Most of these witnesses also proved that Jackson's wife had died two years before, and that no woman had since assisted him in his grocery.

HUGHES, District Judge. The court charges the jury that two acts were necessary to make up the offence under trial. First. Carrying on the business of retailing liquor in less quantities than five gallons, and, second, doing this without having paid the special tax required by law of retail liquor dealers. The statute, from the severity of the punishment imposed (this was before the amendment fixing a much lighter penalty), evidently did not intend to punish the offence of selling an occasional drink or bottle of liquor, an offence, the suppression of which it seemed to leave to the police or the local tribunes; but it contemplated the larger offence, really prejudicial to the revenues of the government, of carrying on the business of retailing liquor without the payment of the proper tax. This latter offence is a legitimate subject for the cognizance of a United States court; the other offence, which is one merely against the good order of society, is not within the legitimate objects of the jurisdiction of the national tribunals of justice. If they took cognizance of such offences they would interfere in affairs properly belonging to the cognizance of the local courts and police.

It is for the jury to decide how many sales, and what preparation and appointments of a bar-room are necessary, in each case, to constitute the offence of carrying on the business of retailing liquor; but the court is clear in instructing them that a few instances of selling liquor in small quantity by persons having no bar-rooms, and none of the usual appliances of retail liquor dealers, with no intention apparent of defrauding the national revenue, do not constitute a carrying on the business of retail liquor dealing, within the meaning and objects of section 3242 of the Revision.

I find that in the Western district of North Carolina, the United States circuit court there has established a standing order in accordance with these views in the following words: "No warrant shall be issued by a United States commissioner against a person charged with retailing distilled spirits or tobacco, unless the affidavit of information shall expressly state that such person has violated the revenue laws by frequently selling such articles."

The jury brought in a verdict of not guilty.

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

Case No. 15,456.

UNITED STATES v. JACKSON et al.

[3 Hughes, 231.] [1]

Circuit Court, E. D. Virginia. April 3, 1878.[2]

PLEADING ON OFFICIAL BONDS — REVENUE COLLECTOR.

On demurrer to a declaration on an official bond of a collector of taxes: *Held*, that where the bond does not identify the district in which the officer is to act, nor the date of his commission, nor the sort of taxes which the officer was to collect, nor the date of the act of congress under which the bond was given, and the condition of the bond is that the officer shall faithfully execute and discharge all the duties of "said office,"—in such case the declaration is demurrable and defective.

On defendant Lewis McKenzie's demurrer to the declaration.

BY THE COURT. This suit is brought by the United States against George W. Jackson and his sureties, upon a penal bond given May 29, 1866, for fifty thousand dollars. The condition set out in the bond is in the following words, viz.: Whereas the president of the United States hath, pursuant to law, appointed the said George W. Jackson collector of taxes, under an act entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes;" now, therefore, if the said George W. Jackson shall truly and faithfully execute and discharge all the duties of said office, and shall justly and faithfully account for and pay over to the United States in compliance with the orders and regulations of the secretary of the treasury all public moneys which may come into his hands or possession, etc., then the obligation to be void, etc.

It will be observed that the words "for the 8th collection district of Virginia," which should have followed after the words "collector of taxes," are omitted. So also are omitted the following words or their equivalent, which should have been inserted after those describing the act of congress under which the bond is taken: "And, in due form of law, caused to be issued to him as such a commission, bearing date the —— day of May, A. D. 1866." Indeed, all words are omitted which should have been employed to identify the sort of taxes which Jackson was to collect; the district in which he was to collect them and exercise the office of collector of taxes; and the commission under which he was to act, its date, and either its general purport or precise terms. The date of the act of congress referred to in the bond is not given. There is nothing to show whether Jackson was to collect taxes in a district yielding millions of dollars of revenue per annum, or in a district yielding next to no revenue at all. There is nothing to show that he was to be collector of taxes for any particular district; but, on the contrary, on the principle, expressio unius est exclusio alterius, the bond, in mentioning Jackson generally as a collector of taxes, would seem to exclude the inference that he was to be a collector for a particular district, so as to render inadmissible any evidence showing default as collector in any particular district. A reference in the bond to the commission might have identified the district for which he was collector; but even that is wanting.

There can be no office created by the president of the United States, except by authority of some express act of congress. There can be no general collection of taxes under the authority, and no general collection of taxes under the appointment of the president of the United States, because there is no law authorizing such a service or such an officer. All authority to act, and every office exercised under the government of the United States, must have the sanction of express law. Even if this were not strictly so, it is difficult to conceive of an office except as limited by some territorial jurisdiction. We cannot imagine a sheriff except as sheriff of some particular county or town, or of a marshal except as a marshal of some particular district. The designation of the district is an essential part of the style of such an office as this. As neither Jackson himself nor his securities can be bound to the United States except by authority of some express act of congress, let us see whether any act applicable to their bond exists. There may be many other acts, but there is at least one act of congress whose title corresponds with that in this bond, which is the act bearing that title, approved July 1, 1862 [12 Stat. 432]. If we assume that the act meant to be described by the words in the bond was an act of congress, that the government intended to be spoken of in the title of the act given in the bond was the government of the United States, and that the date of the act intended to be referred to in the bond was that of the 1st of July, 1862, and turn to the act entitled "An act to provide internal revenue to support the government to pay interest on the public debt," etc., approved July 1st, 1862, we shall find that that act nowhere authorizes the appointment of collectors of taxes generally, but only authorizes (in section 2) their appointment "for each collection district." The words "collector of taxes" generally, used in the bond, described an officer not known to the law, and the bond is void both from uncertainty of description, rendering it impracticable to prove a default by admissible evidence, and as describing an officer not known to the law of the United States, and therefore not capable of making default to the United States. The demurrer of the defendant Lewis McKenzie is therefore sustained.

[A writ of error was sued out from the supreme court where the judgment of this court was affirmed. 104 U. S. 41.]

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

[2] [Affirmed in 104 U. S. 41.]

Case No. 15,457.

UNITED STATES v. JACKSON.

[2 N. Y. Leg. Obs. 3.]

Circuit Court, S. D. New York. 1843.

COURTS—JURISDICTION.

[The United States courts have no authority to try persons for crimes committed within a foreign territory, although upon the seas where the tide ebbs and flows.]

Indictment for grand larceny on the high seas.

The prisoner was indicted under the act of congress, passed 30th April, 1790, § 16 [1 Stat. 116], for a grand larceny, and charged by the indictment with being a mariner, and on the 8th day of July, 1841, on board of a certain American vessel, being a brig called the Petersburgh, on the high seas, and out of the jurisdiction of any particular state, and within the jurisdiction of the United States, of taking and carrying away 57 silver coins called Mexican mill dollars, the personal goods of some person or persons to the jurors unknown, with intent to steal and purloin the same. The second count was the same as the first, and charged that the vessel belonged in whole or in part to a certain person or persons, then and still being a citizen or citizens of the United States.

The trial came on before a jury, and the district attorney introduced the depositions of several witnesses taken de bene esse in the cause on the part of the United States, from which depositions it appeared that the Petersburgh was an American vessel, and that she was at the port of Vera Cruz in the month of July, 1841, where she took in a cargo and sailed for the port of New-York, and arrived there in the month of August following. The cargo consisted of sundry articles, and among the rest was 51,000 Mexican dollars in bags of $1,000 each, which were stowed in the hold, and afterwards in the run. The master proved that one of these bags had been cut open when he arrived at the city of New-York, and $57 missing. One of the sailors testified that the vessel had cleared at the custom-house at Vera Cruz, about 27th June, 1841; that she dropped out from the quay and cast anchor in the seas, and within the jurisdiction of this court, and that after lying there some time the captain ordered the cargo to be shifted; that the prisoner and the witness went below and moved the specie; that while in the hold, in moving the specie, he saw the prisoner stoop down, and heard the silver jingle. In a day or two after he informed the captain, who went to the prisoner's chest in the forecastle, searched it, and found about $40 in silver, which he supposed had been stolen. The prisoner was put to his duty, came home in the vessel, and when the vessel was unloaded at Brooklyn, the bag was discovered to have been cut open and again sewed up. The prisoner offered no proof as to the offence or in exculpation of his guilt.

Nash and Noble, for the prisoner, asked the court to charge the jury, that the prisoner must be acquitted on the ground that it did not appear that the robbery had been committed on the high seas, according to the averments in the indictment, and insisted that the prisoner could not be convicted, unless this fact appeared affirmatively in the proofs; that the act of congress had not given jurisdiction to this court to try the offence, unless it had been committed on the high seas, and out of the jurisdiction of any particular state, and within the admiralty and maritime jurisdiction of the United States; that the United States courts possessed no criminal jurisdiction of offences, unless brought within the words of the constitution, or the statutes or acts of congress; that the courts of the United States had no criminal common law jurisdiction, and they referred to the case of Hudson and Goodwin v. U. S., 7 Cranch [11 U. S.] 32; 1 Kent, Comm. 355; U. S. v. Wiltzburger, 5 Wheat. [18 U. S.] 97. The learned counsel insisted that the harbor of Vera Cruz was not on the high seas; that the locus in quo was not within the admiralty jurisdiction of the United States, but within the Mexican territory.

Mr. Hoffman, Dist. Atty., contra.

It was proved that the vessel was within the admiralty and maritime jurisdiction of the United States, inasmuch as the vessel was anchored where the tide ebbed and flowed. The prisoner had taken the money, and brought the same away from Vera Cruz to a place clearly upon the high sea, and brought it into the state of New-York. The offender in such a case would be liable for the larceny both in the state where he took the property and in the state where he brought it, as the stealing of the property would be one continuous taking and act.

Nash & Noble, in reply.

Where a man stole money at Utica, brought it to New-York, entered on board of a ship and sailed to Philadelphia, and was there arrested with the money stolen, he could not be indicted and convicted for stealing the property and carrying it away on the high seas, within the meaning of the act of congress.

Before THOMPSON, Circuit Justice, and BETTS, District Judge.

THOMPSON, Circuit Justice (charging jury). 1st. That it did not distinctly appear from the evidence where the vessel was situated at the time the money was stolen; that the prisoner was guilty of taking the money there could be no doubt; that if the money was stolen while the vessel was on the high seas, the jury must convict the prisoner; but if it was stolen while the vessel was in the harbor of Vera Cruz, and within the Mexican territory, that the prisoner, though morally

guilty of the grand larceny, yet he could not be punished by this court, as it had no jurisdiction in the matter, and he must be accordingly acquitted. That the act of 1790 did not authorize the United States courts to try persons for crimes committed within a foreign territory, although upon the seas where the tide ebbs and flows; that the high seas were, properly speaking, within the territory of no state or country, but wherever there was a local jurisdiction, it appears to have been excepted from the jurisdiction of the United States courts on the seas, as respects that territory.

The jury retired, and were unable to agree upon their verdict, whereupon the district attorney entered a nolle prosequi.

Case No. 15,458.

UNITED STATES v. JACKSON.

[4 N. Y. Leg. Obs. 450.]

District Court, S. D. New York. Nov. 30, 1841.

SHIPPING — PUBLIC REGULATIONS — INSPECTION — LICENSE — FERRYBOAT.

1. Congress has power to regulate the build and equipment of vessels within the United States, whether or not they are engaged in commerce with foreign nations or among the several states.

2. The act of congress of July 7, 1838 [5 Stat. 304], embraces vessels of all descriptions propelled wholly or in part by steam. Sections 8 and 9 of the act do not limit its operation to vessels engaged at sea, or on the Great Lakes.

3. A steamboat owned by citizens of this state, and exclusively employed as a ferryboat on waters within the limits of the state, is bound to take out a license and have inspection under the act.

4. The steamboat in this case condemned to pay a penalty of $500, for running over a ferry without previous inspection and license.

[This was an action of debt, for a penalty, against Daniel Jackson.]

F. F. Marbury, for the United States.

W. C. Noyes, for defendant.

BETTS, District Judge. The United States prosecute an action of debt against the defendant as owner or master of a steamboat, demanding a penalty of $500, under the provisions of the act of congress entitled "An act to provide for the better security of the lives of passengers on board vessels propelled in whole or in part by steam," approved July 7, 1838. The declaration alleges that the defendant, being master or owner of a steamboat named the Daniel Jackson, duly licenced, at this port, used and employed her on the East river, on the navigable waters of the United States, in the transportation of goods, wares, and merchandize, and passengers, between the city of New York and the village of Williamsburgh, in the county of Kings; but utterly failed, neglected, and refused to have her inspected, from December 1, 1839, to January 1, 1840, as required by the said act, or to deliver to the collector a certificate of such inspection within twelve months from the date of said act, &c.

The defendant pleaded that, during the period in the declaration mentioned, he was a citizen and actual resident of the state of New York, and that the said steamboat was an ordinary ferryboat, used and employed by him to keep up and maintain a ferry, licenced by and under the authority of the city of New York, between that city and Williamsburgh, in the county of Kings; and that the said steamboat was never used or employed for any other purpose whatsoever, or on any other waters than the East river, lying exclusively within the limits of the state of New York. To this special plea the plaintiffs demurred.

The steamboat had been duly licenced under the existing laws by the owner. The sixth section of the act makes it the duty of the owners of steamboats to have the hulls inspected once in every twelve months, and the boilers and machinery once in every six months, and to deliver to the collectors of the port a certificate of such inspections; and on failure, to forfeit the licence and be subject to $500 penalty.

The questions raised under the demurrer are, whether the provisions of the act apply to this vessel, which is owned and navigated wholly within this state, and employed only as a ferryboat; and, if the act has that extent, whether congress had constitutional power to pass and enforce it.

The opinion of the court will be directed to these inquiries: 1. Are the provisions of the act restricted to steam vessels engaged in the transportation of freight and passengers at sea, or on the Lakes Champlain, Ontario, Erie, Huron, Superior, and Michigan? 2. If the act is not so limited, does it embrace any vessels other than those subject to be enrolled and licenced under the laws then in force? 3. Has congress power to legislate over vessels exclusively employed within a state and on its waters, and especially over ferryboats?

Although these inquiries involve legal propositions of considerable importance, I apprehend they may be satisfactorily answered, without any elaborate examination or discussion. It appears to me most manifest, upon the face of the statute, that congress did not mean this new legislation to be limited to any particular class of steam vessels, or to those employed in any particular localities. The first section makes it the duty of all owners of steamboats to take out new licences. The second section forbids the owner of any steamboat, to transport merchandize or passengers in or upon the bays, lakes, rivers or other navigable waters of the United States, without obtaining the licence re-

quired by the act. The third section requires the appointment of inspectors, on the application of the masters or owners of any steamboat, &c., &c., and the fourth and fifth sections direct inspections and certificates in respect to any steamboat, &c., &c. The sixth section makes it the duty of owners and masters of steamboats to cause such inspections to be made, &c. The seventh section regulates the management of any steamboat, as to discharge of her steam, &c. The ninth section enacts, that iron rods or chains shall be employed and used in the navigation of all steamboats, instead of wheel or tiller ropes. The tenth section makes it the duty of the master or owner of every steamboat running in the night to carry signal lights: and the twelfth section subjects to criminal prosecution for manslaughter, any captain, pilot, &c., employed on board any steamboat, by whose negligence or misconduct life is lost, &c.

The rule of construction contended for by the defendant, that general words of a statute are to be controlled by subsequent restraining ones, is not to be questioned; but, to have that effect, the restraining words or clause must have evident relation to the whole subject matter; otherwise they are to be understood as supplementary, or exceptive to the main provisions. In view of these principles of construction, the provisions of sections 8 and 9 are, in my opinion, not to be regarded as restricting the general operation of the act; but as providing additional regulations in respect to steam vessels employed at sea and on the Great Lakes. Every steam vessel engaged in the transportation of merchandize or passengers, at sea or on the lakes named, must be supplied with particular boats or yawls, and fire engines and apparatus. It seems to me plain, upon the language of these sections, that the intention of congress was, to compel that class of vessels, besides conforming to the general requirements of the statute, furthermore to equip themselves in reference to the dangers of the navigation they pursue, and which might be regarded as more imminent to them, remote from aid and succor, than to vessels employed on inland waters; and it is to be remarked, when this special purpose is satisfied, the ninth section, with only the break of a semicolon in the clause, drops the limitation of "every steamboat so employed," and, taking up again the general phraseology before used, directs that "iron rods or chains shall be used in the navigation of all steamboats, instead of wheel or tiller ropes, under a penalty of $300." In suits heretofore brought in this court to enforce that penalty, against boats navigating Long Island Sound and the North river, it has been held that they fell within the provisions of the clause, and that it was not to be construed as having relation only to the boats particularly referred to in sections 8 and 9. U. S. v. Stone [Case No. 16,407]. I think it follows, plainly, from the analysis given of the statute, that congress contemplated a system of regulations to govern every description of steam vessels; and I adhere to the former opinion expressed, that every steamboat, wherever employed, is liable to the penalties of the act on disobeying it; unless it be shewn that congress had no power to establish these regulations, or has, by implication, limited them to particular vessels.

2. It was earnestly insisted that the first and second sections of the act distinctly indicate the intent of congress, to bring under its provisions only those steam vessels which at the time were subject to be enrolled and licenced by the existing laws; and these, it is contended, can be no other than vessels engaged in the coasting trade or foreign commerce; and accordingly the general terms, "all and every," used in different parts of the act, must be so qualified. Although this point is substantially involved in the first, and must be disposed of under the principle governing that, yet, perhaps, it demands a special consideration. The reference to existing registry and licence laws, is supposed to adopt the provisions of those acts as criteria of the description and employ of steamboats made subject to the regulation of the present statute, and thus indirectly to establish a restriction or qualification to the general operation of the act. The second section obviates the question made under the first, whether the statute was designed to operate prospectively, or must be limited to boats at the time actually licenced; because it interdicts the employment of boats, after the succeeding October, without having first obtained a licence, &c. The new licence, therefore, required by the first section, must be understood to be that particular document pointed out by this statute, and not merely a reissue or renewal of one existing at the time. But a construction restrained to the strictest meaning of the words would not aid the defendant; because, by the pleadings, it stands admitted that this steamboat had before taken out a licence under the laws of the United States. The argument, however, is, that the boat is no way compromitted by taking a previous licence; as there was no obligation on her part to seek it, and no authority in law in the collector to grant one. The position is undoubtedly correct, that the defendant cannot be made liable to the penalties of the statute because of a step by him or the custom house, not exacted nor authorized by the existing laws. But I do not accede to the proposition of the defendant, that the act of 1838 must be interpreted in subordination to the laws then in force, in respect to the enrolment and licencing of vessels, so that no vessel can fall within its provision unless she was previously obliged to be licenced or enrolled. And it is to be remarked, in this connection, that there is manifestly a misapprehension of the effect

and object of our registry and licence laws. Those laws, up to this period, had never been imperative or mandatory in this respect. They imposed penalties and disabilities on vessels not documented according to their provisions. Such vessels might, without those papers, be rendered in a degree useless in the general business of navigation and trade; but it was no condition to their employment, or to a right of property in them, that they should possess any of those documents. Livingston v. Van Ingen [9 Johns. 507]; 17 Johns. 488. An examination of the legislation of congress on this subject shows, that the laws were not framed with a view to coerce shipowners to register and licence their vessels, but rather to secure American bottoms special advantages, when their nationality was evidenced by proper ship papers; with, perhaps, the further purpose of securing them a right of navigation within the states, independent of state legislation. [Gibbons v. Ogden] 9 Wheat. [22 U. S.] 203; 5 Cow. 562. The numerous acts passed from the First congress to this time, proffer privilege and inducements to sail and steam vessels taking the documents, and visit with disabilities and penalties those who fail to conform to the laws,—without, however, placing them under obligation to do so. Acts Sept. 1, 1789, c. 11 [1 Stat. 55]; Sept. 29, 1789, c. 22 [Id. 94]; December 31, 1792, c. 146 [2 Bior. & D. Laws, 313; 1 Stat. 287, c. 1]; February 18, 1793, c. 153 [2 Bior. & D. Laws, 332; 1 Stat. 305, c. 8]; March 3, 1803, c. 331 [3 Bior. & D. Laws, 534; 2 Stat. 209, c. 18]; March 7, 1794, c. 5 [1 Stat. 342]; Feb. 25, 1804, c. 370 [3 Bior. & D. Laws, 574; 2 Stat. 259, c. 17]; March 27, 1804, c. 405 [3 Bior. & D. Laws, 618; 2 Stat. 296, c. 52]; March 3, 1813 [2 Stat. 809]; March, 1825, c. 101 [4 Stat. 129]; March 3, 1831, c. 576, 4 Stat. 492], and April 4, 1840, c. 6 [5 Stat. 370]. Still, if the interpretation of these statutes should be that an obligation on owners to comply with them must be implied, this act of July 7, 1838, will be found the first which positively enjoins their taking out a licence, and enforces a direct and heavy penalty for omitting to comply. This distinction would be sufficient to show that congress did not intend to make the last act subordinate to, or merely concurrent with, the former ones. Independent of that consideration, the subject matter and the terms of the enactments plainly evince that congress, in the act of 1838, meant to establish a new and independent system, entire and perfect in itself, both as to its objects and the particulars upon which it was to operate. The reference to antecedent acts need not be understood as doing more than adopt the methods there prescribed, in making enrolments and taking out licences. The first section directs "a new enrolment under the existing laws," and "to take out a new licence under such conditions as are now imposed by law." The second section prohibits the use of steam vessels, without having first obtained "a licence under the existing laws, and without having complied with the conditions imposed by this act." All these directions are satisfied by pursuing, in obtaining the papers, the manner and form fixed by former acts. This is a familiar mode of legislation, and the obvious meaning of the language would seem to look to antecedent acts only for a description of ship's papers, and the method of procuring them; and it would be a forced construction to hold that congress intended, in that way, to limit this act to the kind of vessels which could obtain licences under previous laws. On this branch of the defence, I am accordingly of opinion that the steamboat in question falls within the requirements of the act, irrespective of her right or liability to enrolment or licence under former laws.

3. The last general topic touches the competency of congress to pass a law which would compel this boat to take out a licence. The positions urged by the defendant are (1) that congress has no power to legislate over vessels owned exclusively within a state, and navigating only the waters within such state; and (2) that to enforce the act against this boat would be to regulate a ferry,—a matter not within the constitutional authority of congress.

(1) The "East River," as it is termed, is an arm of the sea connecting Long Island Sound and the Bay of New York. It has no property of a river. Its waters are all supplied by the sea, its source and outlet being both in the ocean. To all purposes, this strait comes within the description of navigable waters of the United States. 3 Kent, Comm. 412. The admiralty law embraces it, and it moreover comprises the transit to and from the navy yard, and a haven for the commercial and national marine of the United States. The jurisdiction of the general government embraces all tide waters navigable from the sea. [Gibbons v. Ogden] 9 Wheat. [22 U. S.] 203; 3 Cow. 747; [Peyroux v. Howard] 7 Pet. [32 U. S.] 324; [City of New York v. Miln] 11 Pet. [36 U. S.] 125; [U. S. v. Coombs] 12 Pet. [37 U. S.] 76. Jurisdiction over a place ordinarily includes, as an incident, jurisdiction over persons and things therein. 1 Kent, Comm. 430. Without, however, looking to the admiralty power of congress, or its authority resulting from the locality of these waters, I am satisfied, full power to legislate over the subject in question is found in the authority to regulate commerce given by the constitution. Article 1, § 8. The supreme court has considered most deliberately the force and extent of this grant of power, and, as applicable to the point under consideration, it must be regarded as settled, on the highest judicial authority, that the power to regulate commerce includes, and is in fact, a power to regulate navigation. Gibbons v.

Ogden, 9 Wheat. [22 U. S.] 1, 203; 1 Kent, Comm. 436. It comprehends navigation within the states as well as abroad, and is plenary and absolute within its acknowledged limits. Id.; 3 Cow. 747; 1 Wend. 560; Nelson v. Blackbird Creek Co., 3 Pet. [28 U. S.] 245. The case of Gibbons v. Ogden [supra] fortifies that exposition of the constitutional provision, by illustrations and exceptions meeting every case of practical importance which has since arisen, and demonstrates that the great doctrine of that power comprehends navigation of every character effected by wind, steam or other method of propulsion, and engaged in the transportation of merchandize or passengers. City of New York v. Miln, 11 Pet. [36 U. S.] 102; Brown v. State of Maryland, 12 Wheat. [25 U. S.] 419; The Wilson v. U. S. [Case No. 17,846]. Chief Justice Marshall, in his circuit, discussed the subject at large, and held that the power of controlling navigation is incidental to the power to regulate commerce; and that thereby the power over the vessel becomes co-extensive with that over her cargo, or objects of importation. The Wilson v. U. S. [supra.] It is not supposed that the power of congress to establish navigation laws can be called in question at this day. These laws, during the whole period of the government, have been enforced as a cardinal part of national polity. Such laws, in their nature, have relation to the capacity and structure of vessels, as well as to the business or places in which they may be engaged. Navigation laws, under our system, will accordingly embrace vessels running, in fact, wholly over state waters,—because it may be the interest and option of owners to keep vessels of all classes employed where they reside, although of dimensions and equipment fitting them for sea voyages; and it is not to be assumed that a vessel falls under or stands exempt from the operation of navigation laws, because of the particular business she pursues, or the places of her employment.

It is urged that congress can exercise no regulation over navigation, except when it is immediately connected with, and incidental to commerce with foreign nations, or among the several states; and that, consequently, no other vessels are subject to the authority of congress in this behalf, than such as are shown to be employed in such commerce. This position is sustained by no authority. The power of congress is not limited to controlling exports and imports—to the cargoes of vessels; but it equally extends to and governs intercourse itself. Commerce, in the sense of the constitution, is not trade only; and navigation, as the instrument and incident of commerce, is so in relation to intercourse as well as trade. The power to enact navigation laws imports a power to give those laws their essential vitality and effect. A primary ingredient in the system is, that it acts directly upon vessels, fixing the mode of their construction—their muniments of ownership and national character—the quality and number of officers and crew to be supplied for their navigation and such other equipments as may be appropriate to the service in which they are engaged; and, perhaps, in addition, subjecting them to inspection and condemnation when not seaworthy or safely equipped. Such laws necessarily control and regulate the vessel, irrespective of her employment. She becomes subject to the regulation before being put in motion, or receiving a crew or cargo; because the power to regulate navigation or intercourse, may be exercised in limiting it or inhibiting it entirely. Restrictions and interdictions, partial or total, are regulations of intercourse equally with rules which allow and govern it in its prosecution. 2 Story, Const. §§ 1057, 1058, 1060, 1062. I am accordingly of opinion that the act of 1838 is valid, and operative in respect to vessels therein designated, without regard to their employment as coasting or sea-going vessels, or in carrying on trade or traffic with foreign nations or among the several states.

(2) Does then her actual occupation as a ferry-boat exempt this vessel from the operation of the act? No one will contend that congress has power to regulate ferries. This is matter of municipal provision, and rests exclusively with the states. [Gibbons v. Ogden] 9 Wheat. [22 U. S.] 1; [City of New York v. Miln] 11 Pet. [36 U. S.] 102. To regulate a ferry imports a power over territory and persons, to grant a franchise, to impose contributions and lay restrictions. Congress exercises no such powers directly within the states. Yet, in the exercise of constitutional powers, congress may, by its laws, incidentally or indirectly interfere with and effect a ferry grant equally with other subjects of state legislation. [Gibbons v. Ogden] 9 Wheat. [22 U. S.] 1; [Brown v. U. S.] 12 Wheat. [25 U. S.] 419; [City of New York v. Miln] 11 Pet. [36 U. S.] 102. The grant of a ferry between New York and Albany or intermediate places, with exclusive right to run particular boats on it, or carry all description of merchandize or persons, would be countervailed and abrogated by a licence or importation under the revenue laws of the United States. [Gibbons v. Ogden] 9 Wheat. [22 U. S.] 1; [Brown v. U. S.] 12 Wheat. [25 U. S.] 419; [City of New York v. Miln] 11 Pet. [36 U. S.] 102; 3 Cow. 747. So would any ferry grant, I apprehend, by enactments in respect to the establishments of ports, the transportation of the mail, &c., &c.; the rule being that legislation by congress over subjects within its constitutional power is necessarily absolute and exclusive, superceding and controlling all state regulations directly or incidentally in conflict with it. If then this statute acts upon the business of ferrying, it is indirectly, and because proprietors of ferries seek to employ on them boats subject to

the regulation of the general government. Congress neither assumes to regulate ferries or prescribe regulations peculiar to ferries. A law governing the structure and outfit of steam vessels has no necessary application to ferries, and affects them only when such boats are put in their service. Boats used upon a ferry constitute no part of a ferry franchise. A grant of a ferry by the state to be served by steamboats alone, would not connect the boats with the grant, so as to impart the privileges of a franchise in respect to them. I am accordingly of opinion that the exception to the constitutionality of the act, on the ground that it applies to vessels employed on ferries, cannot be maintained. There can be no good reason for supposing that congress intended to have steamboats employed on ferries excused from a compliance with this law. The act proposes, by means of careful inspection of the hulls and machinery of steamboats, to preserve the lives of passengers transported in them. Where are the dangers from disasters to steamboats so extensive and fearful, as on the great thoroughfares where thousands of persons are constantly within the perils of that mode of navigation? It is not to be inferred that these precautionary provisions were established to protect the comparative few, at that day, navigating the ocean or Great Lakes in steam vessels; and that congress was unmindful of the imminent and calamitous perils to which vast multitudes are hourly exposed on board steamboats making their passages between our populous towns, and from one edge to the other of rivers and harbors. Neither is it to be implied that ferry boats are exempt from the act, because of the dimensions of the boats, or the short distances they run. Ferries often extend over many miles, and boats of great capacity and strength are employed upon them. This boat and many others employed on ferries across the harbor of New York, are of strength and dimensions sufficient to carry large freights or perform voyages from or to distant ports. It is notorious that they are often employed, even in winter, for the relief of ships going out or coming in from sea, on occasions where great strength in the boat and her machinery are indispensable. And it was manifestly this domestic service of steamboats, in harbors or on rivers, which was best known to congress when this law was enacted; and it is to be presumed they designed to aid, by force of this law, in rendering it more secure to life and property.

On the whole case, I am of opinion, congress has the constitutional power to require steamboats to be licenced or inspected, without regard to the business they follow or the places they run between, and that boats wholly engaged on ferries within a state, and owned in such state, are subject to the law. I accordingly pronounce against this vessel, and condemn her to pay the penalty of $500 demanded, with costs of suit.

Case No. 15,459.

UNITED STATES v. JACKSON.

[3 Sawy. 59.] [1]

Circuit Court, D. California. 1874.

CHINAMEN—CIVIL RIGHTS—INDICTMENT.

Where the indictment avowed that one Ah Koo was deprived of a right secured to him by the sixteenth section of the act of congress of May 31, 1870 [16 Stat. 140], in this, that there was exacted from him the sum of four dollars, by the defendant, who was then and there collector of taxes in Trinity county, under color of a certain law of the state of California, which this indictment particularly sets forth, but the indictment contained no averment that Ah Koo was a foreign miner and within the provisions of the state law, *held* bad on demurrer.

[This was an indictment against John Jackson, upon the charge of illegally depriving one Ah Koo of rights secured to him by the act of congress of May 31, 1870. The case is now heard on a demurrer to the indictment.]

Mr. Latimer, U. S. Atty., and W. H. L. Barnes, for United States.

Jo Hamilton, Cal. Atty. Gen., J. D. Hambleton, and George Gordon, for defendant.

Before SAWYER, Circuit Judge, and HOFFMAN, District Judge.

HOFFMAN, District Judge. The questions raised by the demurrer are two: First, as to the sufficiency of the indictment; and second, as to the constitutionality of the act of congress under which it is based.

The indictment avers, in substance, that one Ah Koo was deprived of a right secured to him by the sixteenth section of an act of congress of 1870 in this, that there was exacted from him four dollars by the defendant, who was then and there a duly elected collector of taxes in Trinity county, under color of a certain law of the state of California, which the indictment particularly sets forth.

The indictment contains no averment that Ah Koo was a foreign miner, and within the provisions of the state law. If this averment be unnecessary, no proof of that fact need be given on the trial, and the act of congress would then be held to apply to a case of illegal extortion by a tax collector from any person, though such exaction might be wholly unauthorized by the law under which the officer pretended to act.

We are satisfied that it was not the design of congress to prevent or to punish such abuse of authority by state officers. The object of the act was, not to prevent illegal exactions, but to forbid the execution of state laws, which, by the act itself, are made void. The district attorney, himself, seems to recognize the necessity of showing that the tax was levied by the officer under the authority of state law; for he avers him to have been duly elected tax collector. Nor

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

does he contend that if any other person, not a tax collector, had levied a similar contribution from a Chinaman, the offense would come within the provisions of the act of congress.

It would seem, necessarily, to follow, that the person from whom the tax was exacted must have been a person from whom, under the provisions of the state law, the officer was authorized to exact it. The statute requires that a party shall be subjected to a deprivation of right secured by the statute under color of some law, statute, order or custom; but if this exaction, although made by a tax collector, has been levied upon a person not within the provisions of the state law, the exaction cannot be said to have been made "under color of law," any more than a similar exaction from a Chinese miner, made by a person wholly unauthorized, and under the pretense of being a tax collector.

Again: The constitutionality of the section of the act of congress in question must be sustained, if at all, under the second clause of the fourteenth amendment, which provides that no state shall deny to any person the equal protection of the laws; for the first clause relates exclusively to the privileges and immunities of citizens of the United States. If, therefore, the person on whom this tax was levied was not a foreign miner and not subject to the tax, by the terms of the state law, he has the same remedy for the illegal extortion as would be possessed by any citizen. He has, therefore, equally with any other citizen, the protection of the law. It is only when, being a foreign miner, a tax is levied upon him as such, which tax white citizens are not subjected to, that he could be said to be deprived of the equal protection of the law.

We are, therefore, of opinion that the indictment should contain an averment that he was a foreign miner, with such other averments as are necessary to bring him within the operation of the state law, and subject him to its provisions.

The demurrer, on this point, is sustained.

On the second point it is also contended the sixteenth and seventeenth sections of the act of 1870, are unconstitutional and in excess of the powers conferred upon congress by the fourteenth amendment.

The duty of declaring an act of congress void, for unconstitutionality, is one of the most delicate and responsible which the courts are called upon to discharge. It is only in the clearest cases, and in those admitting of no other decision, the supreme court of the United States has declared laws of congress to be unconstitutional. It is said by Mr. Justice Swayne, in a recent case, that only three instances of the kind occurred since the organization of the government. In some of the states the subordinate courts decline to pass upon the constitutionality of state laws under state constitutions, but remit the question to the highest judicial tribunal for its determination.

We see no reason why the same rules should not be observed by the subordinate tribunals of the United States courts.

It is further to be considered that the law in question was passed almost immediately after the adoption of the amendment, and, in the supposed exercise of the powers conferred by it, by a congress to a very large extent composed of the men who had framed the amendment, submitted it to the states, and urged its adoption. A law passed by them, in pursuance of the power conferred by the amendment, may, therefore, be regarded as a legislative construction and interpretation of its provisions; and such contemporaneous legislative interpretations have been always considered to afford much light as to the intention of the fathers in framing the original constitution, and as guides to courts in the interpretations of its provisions.

For these reasons, even if our opinion were less clear as to the constitutionality of this law, we should feel it our duty to sustain the law, and to remit the question to the supreme court for final determination.

UNITED STATES v. JACKSON. See Cases Nos. 7,149 and 14,820.

UNITED STATES (JACOB v.). See Case No. 7,157.

Case No. 15,460.

UNITED STATES v. JACOBI.

[1 Flip. 108; 14 Int. Rev. Rec. 45–62; 3 Chi. Leg. News, 345; 4 Am. Law T. Rep. U. S. Cts. 148; 1 Leg. Op. 161; 6 Am. Law Rev. 183.] [1]

District Court, W. D. Tennessee. May, 1871.

CONTEMPT—INDICTMENT—REMOVAL OF PRISONER.

1. Within the meaning of section 33, of the judiciary act [1 Stat. 91], contempt is a crime against the United States.

[Cited in Re Manning, 44 Fed. 276.]

2. Any willful contempt, which the United States courts may deal with, may be regularly prosecuted by indictment. Contempt of court is a specific criminal offense. It is punished sometimes by indictment, and sometimes in a summary proceeding.

[Cited in U. S. v. Brawner, 7 Fed. 88; Re Litchfield, 13 Fed. 868.]

3. No warrant for the removal of the accused can in any case be issued until he has been arrested and imprisoned. If he offer satisfactory bail, it is his right, under section 33 of the judiciary act, to be discharged on bail. Semble, that the proper practice is to apply for warrant of arrest to the officer designated by the statutes to grant such in other crimes.

[Cited in U. S. v. Haskins, Case No. 15,322; U. S. v. Rogers, 23 Fed. 661; Re Dana, 68 Fed. 890.]

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[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 6 Am. Law Rev. 183, contains only a partial report.]

H. E. Hudson, U. S. Dist. Atty., for the United States.

The records do not show who represented defendant.

WITHEY, District Judge. There has been presented to me, while discharging the duties of district judge of West Tennessee, a certified copy of the record of proceedings had in the United States circuit court of the Eastern district of Arkansas, and a writ of attachment therein against Theodore Jacobi in a case of willful contempt for disobeying the subpœna of that court issued in a civil suit. I am asked to issue a warrant to arrest and remove Jacobi to the Eastern district of Arkansas, he now being in this district.

This application is based on section 33 of the judiciary act of 1789 (1 Stat. 91; Brightly's Dig. U. S. 90. § 1), which provides that "for any crime or offense against the United States, the offender * * * may be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offense. And if such commitment of the offender * * * shall be in a district other than that in which the offender is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshall of the same district to execute, a warrant for the removal of the offender * * * to the district in which the trial is to be had."

Is a willful contempt of a court of the United States "any crime or offense against the United States," within the meaning of section 33 of the judiciary act? If not, Jacobi cannot, within the language of that section, "be arrested and imprisoned or bailed * * * for trial before such court of the United States, as by this act has cognizance of the offense," nor can the judge of this district issue a warrant for his removal to another district, even if Jacobi had been here imprisoned by a committing magistrate.

That a willful contempt is an offense at common law, within no limited or restricted sense, but in the general sense of crime, cannot be successfully questioned. In the 4th volume of Blackstone (page 279, entitled "Summary Convictions"), contempt is treated as a crime. The author says: "We are next * * * to take into consideration the proceedings in the courts of criminal jurisdiction in order to the punishment of offenses." He treats of these proceedings as of two kinds, "summary and regular." Under summary proceedings are ranked attachments for contempt of court. At page 286, it is said "the process of attachment for these and like contempts must necessarily be as ancient as the laws themselves. For laws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory. A power, therefore, in the supreme courts of justice to suppress such contempt by an immediate attachment of the offender, results from the first principles of judicial establishment and must be an inseparable attendant upon every superior tribunal."

Again, at page 124, it is said: "Contempts against the king's palaces or courts of justice have always been looked upon as high misprisions." Misprisions, according to the English common law, are all such high offenses as are under the degree of capital, but nearly bordering thereon. 4 Bl. Comm. 119. See, also, on the subject of contempts being crimes and prosecuted as crimes, Crosby's Case, 3 Wils. 188; Williamson's Case, in 26 Pa. St. 18, 19; U. S. v. Duane [Case No. 14,997]; Mullee's Case [Id. 9,911].

But as there are no common law offenses against the United States; in other words, as no crimes against the United States exist by force of the common law, the legislative authority of congress must first make the doing or omission of an act, a crime. It would seem from this that the power of the federal courts to deal with contempts, in the absence of any statutory authority of congress, would exist merely as a means to enforce obedience to lawful mandates of the courts in a jurisdiction; being exercised, not however, as a crime against the United States, but as the courts of chancery in England, prior to the introduction of sequestrations in the several stages of a cause, enforced their decrees by process, in the nature of contempt; acting only in personam and not in rem. 4 Bl. Comm. 287, 288.

That the courts of the United States could deal with contempt without any act of congress authorizing it, as an incident of their establishment, was distinctly held in Ex parte Kearny, 7 Wheat. [20 U. S.] 38, and U. S. v. Hudson, 7 Cranch [11 U. S.] 32.

What is to be the construction of the 17th section of the judiciary act, in which act is section 33 already given, in view of the fact that when the judiciary act was passed, contempt was recognized as a common law offense? Section 17 reads: "All the said courts of the United States shall have power * * * to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority, in any cause or hearing before the same." 1 Stat. 83; 1 Brightly's Dig. U. S. 189, § 1. It will be found on examining the criminal statutes passed by congress that it is seldom that a crime is declared to be such in terms. On the contrary, very many of the statutes under which persons are constantly tried for crimes against the United States, simply impose fine or imprisonment, or both in the discretion of the court, for the particular act. This is precisely what congress has done by the 17th section of the judiciary act, viz.: given the courts the power to punish by fine or imprisonment, at their discretion, all contempts of authority. It is a general and sound rule of criminal law, that whenever the legislative power has declared an act or omission of an act to be

punishable by fine or imprisonment, that act done or omitted willfully is a crime, and may be punished by indictment.

"A crime," says Bouv. Law Dict. 384, "is an act committed or omitted in violation of a public law, either forbidding or commanding it." The United States courts are authorized to issue subpœnas for witnesses, enjoin parties, etc. If the witness disobeys such lawful command, or if a party disobeys an injunction lawfully issued, in either case he has violated the law of congress which confers such authority on the court. Congress has said, for any such disobedience the party may be punished by the court whose authority has been set at naught in any cause or hearing before it, by fine or imprisonment, at its discretion.

The effect of the legislation by congress on the subject is, that witnesses and parties shall obey the commands of the court lawfully made, and, if they disobey, they shall be punished by fine or imprisonment. Hence, I hold that section 17 makes contempt of court a crime against the United States. Now, that it is within section 33 a crime for which the party may be arrested and imprisoned, or bailed, I do not doubt. The fact that the mode of trial in contempt cases is summary, by attachment, etc., and therefore peculiar or different from trials for most other crimes, is not at all significant of whether contempt is a crime or offense within the meaning of section 33 of the judiciary act. This section was clearly designed to embrace, as its language does, "any crime or offense against the United States," and for which the offender may be "arrested and imprisoned, or bailed, * * * for trial before such court of the United States as by this act has cognizance of the offense."

Although the ordinary process of arrest in these cases is by attachment, and the mode of trial summary, I do not doubt that the offender may be prosecuted without attachment and without interrogatories in the summary way, viz.: by warrant of arrest on complaint, in the ordinary and regular mode of proceeding against offenders as prescribed by section 33. He may be arrested, and when brought before the officer, and an examination is had, may be committed or bailed, and may be thereafter prosecuted through the form of a criminal information or indictment, as in the case of other misdemeanors.

In Hollingsworth v. Duane [Case No. 6,616], it is remarked, in reference to contempts to inferior jurisdictions, that for all contempts not committed in the presence of the court and punished instanter—in which cases only can such courts punish summarily for contempt—there is no other mode of punishment than by indictment. The supreme court of Pennsylvania, in Williamson's Case, supra, say: "It must be remembered that contempt of court is a specific criminal offense. It is punished sometimes by indictment, and sometimes in a summary proceeding, as it was in this case. In either mode of trial the adjudication against the offender is a conviction."

I do not doubt, as I have said, that any willful contempt, which the United States courts may deal with at all, may be regularly prosecuted by indictment, and that under either mode of proceeding section 33 is ample to authorize the arrest of Jacobi and his removal.

To some extent, I remark, the practice in some districts has been, in contempt cases where the offender had absconded from the district in which his disobedience occurred, to proceed, under section 33, for a crime against the United States. I see no other way to reach an offender thus situated, and it requires no strained construction to say that section 33 is ample to cover all such cases. But while I hold willful contempt of a federal court to be an offense against the United States, and that the offender may be proceeded against by arrest and be imprisoned, if not bailed, I am at the same time of opinion that no warrant for the removal of the accused can in any case be issued until the accused has been arrested and imprisoned. If the accused offers satisfactory bail, it is his right, under section 33, to be discharged on bail. The section says: "And upon all arrests in criminal cases bail shall be admitted, except when the punishment may be death."

My opinion is, also, that the certified copy of the proceedings of contempt and of the attachment are sufficient to justify, not only the United States in making the necessary complaint, but to authorize the issuance of a warrant of arrest by the proper officer, precisely as a certified copy of an indictment would be in any other case of crime. If the accused does not avail himself of his right to give bail to appear and answer before the circuit court of Arkansas at a time to be fixed by the examining magistrate or commissioner, the papers afford sufficient evidence to authorize his imprisonment. When committed, the judge of the district would be authorized to issue a warrant to remove. My views on this subject are to some extent expressed in the case of U. S. v. Shepard [Case No. 16,273]. In that case, I say, after referring to the clause of section 33 of the judiciary act, in reference to the removal of offenders: "By consulting the previous portion of this section in connection with the clause I have read, it will appear that the warrant of removal is authorized only where the offender has been first arrested and committed for want of bail. In a bailable case the statute does not seem to contemplate or warrant removing a person from one district to another in the summary way pursued in this case. He is first to be taken before the proper officer, who is to examine as to the crime alleged against the accused." "If there is not probable cause of his guilt, he is entitled to be discharged; whereas, if there

be found reasonable cause for holding the accused to answer, upon tendering sufficient bail he is entitled to his discharge from arrest. Only on failure to give bail in a bailable case can he be committed." See, also, Mr. Justice Miller's opinion in Re Bailey [Case No. 730]. That learned judge says: "The section which I have quoted (section 33) * * * does not, in express terms, say that a person charged with an offense against the laws of the United States must have an examination in the district where he is arrested, though the offense be committed in another state. It does not in so many words say that he shall undergo an examination at all. The language is that he may be arrested and imprisoned or bailed. But this is to be done according to the usual mode of proceedings against such offenders in the state where he is arrested." "It would be a waste of time to show that an imprisonment or order for bail is never made in any state without previous examination. Nor would any well-informed lawyer hesitate to hold that the act of congress in question was not intended to authorize imprisonment without such preliminary examination by the committing magistrate as should satisfy him that there was enough evidence of the prisoner's guilt to justify a reference of the case to a grand jury of the proper district."

What I have said of the sufficiency of the evidence afforded by a certified copy of the papers in this application on the party being brought up for examination, concerning the charge, is intended, of course, as saying that, in my opinion, they would afford prima facie evidence of the truth of the charge, and, in the absence of other evidence, justify holding the party to answer.

As this application is for a warrant to arrest and remove as the first step, it must be denied. When the proceedings indicated as necessary to precede a warrant to remove have been had, and should the delinquent be imprisoned, an application to me while discharging the duties of the district judge of West Tennessee for such warrant will be successful.

UNITED STATES v. JACOBSON. See Case No. 15,461.

Case No. 15,461.

UNITED STATES v. JACOBSON.

[Brun. Col. Cas. 410;[1] 2 N. Y. City H. Rec. 131.]

Circuit Court, D. New York. 1817.

CRIMINAL LAW—INDICTMENT FOR DESTROYING VESSEL.

The master may be indicted for wilfully destroying a vessel with intent to defraud her underwriters, though the owner be on board and consent to or command the destruction of the vessel.

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

The prisoner was indicted under two sections of the United States statute (volume 7, p. 126), for sinking the ship Aristides, on a voyage from New Orleans to New York, on the 17th day of June last. The indictment contained thirteen counts, five of which were framed under the first, and eight under the second section. In these last counts the offense was laid as having been committed with an intent to defraud the American Insurance Company of six thousand dollars, the amount of the insurance on the vessel.

Dist. Atty. Fisk and Hoffman & Griffin, for the prosecution.

Mr. Wells, D. B. Ogden, and Mr. Price, for the prisoner.

His honor the judge stated to the jury in his charge that they could not be called together to discharge a more solemn and important duty. From the patience manifested by them throughout this tedious trial he had no doubt they would do their duty on this occasion to the prisoner at the bar and to themselves. At this late hour, so fatigued as the jury must be, his honor said that he should not minutely detail the testimony, nor even refer to more of the prominent facts than his duty required.

The prisoner was indicted under two sections of an act of congress of 1804 [2 Stat. 290], under the first section as belonging to and being on board, not as owner but as captain, of the ship Aristides, on a voyage from New Orleans to New York, and wilfully and corruptly destroying that ship, or procuring her to be destroyed, she being the property of some citizen or citizens of the United States. The charge against the prisoner under the second section of the statute is that he was the owner in part or whole of the same vessel, and destroyed her on the high seas with an intent to defraud the American Insurance Company, which had underwritten a policy of insurance on the vessel to the amount of six thousand dollars.

The first question for the determination of the jury naturally arising is, whether this vessel was wilfully destroyed; and the second, whether the prisoner at the bar was the author of such destruction. The rule of law referred to by the counsel for the prosecution, that if the prisoner at the bar were aiding, abetting, and assisting in the perpetration of the offense, he is equally guilty with his coadjutor, is undoubtedly correct. It has been objected by the counsel for the prisoner that the evidence in this case is merely circumstantial. The rule in this court, even in capital cases, is that should the circumstances of a case be sufficient to convince the mind, and remove every rational doubt, the jury is bound to place as much reliance on such circumstances as on direct and positive proof; for facts and circumstances cannot lie. And if in this case the jury should believe, from all the facts and circumstances, that this prisoner was instrumental in the destruction of

this vessel, either solely or in conjunction with others, however painful, it would be an imperious duty to convict him.

A very important circumstance in this cause urged by the counsel for the prosecution is the want of cargo on board this vessel. Should the jury believe this, a strong motive is furnished for the perpetration of the offense charged against the prisoner; and we have a right to interpret this circumstance against him. Had there in truth been a cargo on board, the proof thereof would have been highly important to the prisoner on this occasion; and in the absence of all proof on that subject the jury have a right to infer strongly against him, should they think it was in his power, had such proof existed, to have produced it. Might not the bill or bills of lading of this cargo at least have been produced? If a set were not put on board, or had they been lost, might not another set have been procured at New Orleans? Still the judge said that he did not intend to instruct the jury that the want of a cargo on board this ship was alone conclusive.

It had, in the second place, been strongly urged by the counsel on behalf of the prosecution that the manner in which this vessel was lost, without any apparent reason for such loss, independent of the fraudulent destruction and the conduct of the prisoner immediately preceding the time she was sunk, furnish conclusive evidence that he was either the author, solely or concerned with others, in such destruction. And it is said that all the circumstances attending that transaction show that this vessel might have been run on shore and the freight saved. It had been with much reluctance that the court had proceeded even thus far in the testimony. His honor was aware that in a case involving such a vast variety of facts, a case in which everything had been said that could be, and every argument urged on both sides by counsel of the first eminence in the country, the jury had long since made up their opinion.

His honor concluded his charge by saying that he forbore giving any opinion on the merits of this cause; but would leave it with the jury on two grounds: (1) Should the jury believe from all the facts and circumstances in the case that there was no cargo on board this vessel; and (2) that with proper exertions she might have been brought on or near the shore by the prisoner, and those under his command—the jury might find him guilty.

The course which the counsel for the prosecution advised with regard to acquitting the prisoner on one set of the counts in the indictment, should he be found guilty on the other, should be pursued by the jury; for he could not be convicted on the indictment generally.

The jury retired at about half after three o'clock in the morning, and a short time before five returned a verdict against the prisoner, on the five counts under the first section of the statute, and acquitted him on the remaining part of the indictment. They recommended him to mercy.

On the 13th day of September, instant, at eleven o'clock in the forenoon, the prisoner was brought to the bar in the presence of a vast number of spectators to receive sentence. The counsel for the prisoner moved the court in arrest of judgment, and the court assigned the time for arguing the motion at one o'clock on the same day.

At this time the counsel for the prisoner in support of this motion assumed the following grounds:—

1. The court has no jurisdiction in this case. The third article of the constitution of the United States, establishing the supreme court of the United States, and providing for the establishment of such inferior courts as congress shall, from time to time, ordain and establish, does not authorize congress to pass a law assigning any justice of that court to hold a circuit or any other inferior court. By the second section of the second article of the constitution the president of the United States, with the advice and consent of the senate, is vested with the power of appointing judges of the supreme court, and all other officers of the United States whose appointments are not therein otherwise provided for, and which shall be appointed by law. The congress having established this court (this court is established by an act of congress of 1802 [2 Stat. 156], dividing the United States into districts, and assigning the justices of the supreme court in their respective districts to hold such circuit courts; 1 Gord. Dig. tit. "Judiciary," p. 264), the judges thereof should have been commissioned by the president in the same manner as the justices of the supreme court.

2. The prisoner had been convicted by the jury on the first five counts in the indictment, charging him as not being the owner of the vessel. The owner, as appeared from the evidence, was on board, and the prisoner acted either in concert with him or under his immediate directions. As the object of the second section of the act was to prevent the practice of frauds upon underwriters, so the object of the first section was to prevent frauds against the owner. But here no fraud had been practiced against the owner because he was on board, and most probably aided in the destruction. The prisoner, therefore, is not guilty of any offense under the act of congress. The counsel in support of this ground mentioned to the court a decision of the supreme court of this state in the case of Philip Spencer, indicted for arson, in burning a mill, under the fifth section of the "act declaring the punishment of certain crimes," wherein it appeared in evidence that the prisoner burnt a mill in concert with the owner for the purpose of defrauding the insurers of the property. On the conviction from the court below being brought into the supreme court, it was decided that the prisoner, having concurred with the owner in the destruction of

the property, had been improperly convicted of arson.

Griffin argued in answer to the first objection relied on by the opposite counsel that the jurisdiction of this court in its present organization had been too long settled to be questioned. The supreme court of the United States had acquiesced in the act of congress, assigning the duties of this court to be performed by the justices of the supreme court. The counsel in support of this branch of his argument cited [Stuart v. Laird] 1 Cranch [5 U. S.] 308.

In answer to the second objection urged the counsel contended that the first section of the statute was general, and was intended by the legislature to embrace every description of persons belonging to the vessel (except the owner) who shall, on the high seas, wilfully and corruptly destroy any vessel. The offense whereof the prisoner is charged comes within the words of the statute, and it is immaterial whether the owner was on board aiding, abetting, and assisting in such destruction or not. Should the construction prevail, for which the opposite counsel contend, then the owner of a vessel to defraud the insurers may combine with the captain and crew, or either of them, and be present, commanding, aiding, and assisting in the destruction of the vessel, and such captain and crew would escape with impunity. This could never have been the intention of the legislature; it would be affording encouragement to the most glaring frauds.

Hoffman said he did not intend to enter into an argument on the construction of this statute, but he would barely suggest if the court had any doubt on the subject that perhaps the better course would be to have the case submitted by his honor the judge to the justices of the supreme court of the United States for their opinion.

His honor said he was fearful if this course should be adopted that much aid would not be derived from the justices of the supreme court. That body would hardly be inclined to interfere or give an opinion in a cause not regularly before them for adjudication. He was inclined to the opinion that the offense of which the prisoner is charged came within the statute. The object of destroying this vessel was to defraud the underwriters, and such object was known to the prisoner. If he either destroyed this vessel, or aided, abetted, and assisted in such destruction, though with the concurrence of the owner, the act was wilful and corrupt, and is embraced within the statute. Had no fraud or mischief been meditated against the underwriters or others by the owner, who intended no injury to any other person but himself, then the destruction of this vessel by the captain, in concert with the owner, would not have been corrupt. In this case as the verdict stands the prisoner was not the owner of this vessel; she was the property of a citizen of the United States, and was destroyed by the prisoner with the intent of defrauding the underwriters on the ship and cargo to a large amount. The principal part of this insurance was on a cargo which was not on board, and that known to the prisoner. This vessel was therefore wilfully and corruptly destroyed, and no command or concurrence of the owner under such circumstances could justify the prisoner.

On the other ground of objection relating to the jurisdiction, the judge said that his private opinion was decidedly in favor of the objection. The act of congress directing the justices of the supreme court of the United States to hold circuit courts was unconstitutional, and not binding on the judges. The supreme court was created by the constitution, and its powers and duties were therein defined. The legislature, therefore, could neither add to the one nor to the other. This precaution was highly proper, as it respected the appellate court of the federal judiciary. If, besides the duties prescribed for it by the constitution, the legislature were at liberty to add to them such others, not only in their own court but in courts with which they had no connection, there would be an end of that independence which should ever exist between co-ordinate branches of the same government; and so long as such power shall continue to be exercised, and be acquiesced in, the supreme court will be kept in a state of dependence on the legislature, which could never have been contemplated by those who framed the constitution. It is a fact that the labor of holding circuit courts has become much more burdensome to the judges of the supreme court than the discharge of their regular, appropriate, and constitutional functions in the court for which they are commissioned. It may be added, for so the fact is, that the business of the supreme court is much impeded by the attention of the judges to their circuit duties, to the very great inconvenience and heavy expense of the suitors therein. Congress have a right to ordain and establish, from time to time, such inferior courts as they may think fit; but they have no power to commission the judges of such courts, nor to appoint any judge by law. If they thought proper, therefore, that a circuit court should consist of a district and another judge, such other judge should have been appointed, as well as the district judge, on the nomination of the president, and by and with the consent of the senate. He should have been commissioned during good behavior, and have received a compensation for his services. But no commissions have ever been granted to the justices of the supreme court constituting them judges of the circuit court, nor have they taken any oath of office as such; and instead of receiving a compensation for these heavy and expensive duties, their salaries as justices of the supreme court have been greatly diminished by them. The inconvenience of the system as it respects the administration

of justice may also tend to show that the constitution in this respect has not been pursued. It could never have been intended that the judges of a court, whose principal duties are of an appellate nature, should ever form a constituent part of those inferior tribunals whose decisions they were to revise. The disadvantages of such a system in practice can hardly be estimated, except by those who have had some experience in them. It is certainly desirable that judges of an appellate court should form no opinion in an inferior tribunal; and when sitting separately on questions which are to come before them in a court of appeals, or otherwise, the benefit of consultation, so important to a suitor, and of a judgment resulting from such consultation, without any previous bias, will be in a great measure lost. So very inconsistent are these duties that if the president had been left, as he ought to have been, to nominate and commission a judge of the circuit court, it would hardly have occurred to him to offer such commission to a judge of the supreme court; and if he had, and it had been accepted, such judge must certainly have resigned the one which he before held.

It will be seen, also, by the constitution, that the judges of the supreme court have not only a very limited original jurisdiction, but little or none of a criminal nature; and yet the most extensive criminal cognizance, extending even to the capital offenses, is given to them as members of the circuit courts. Now, if congress cannot extend the original jurisdiction of the supreme court beyond the bounds limited by the constitution, and so that court has decided, it is not seen how they can extend the jurisdiction of the several judges of that court to cases over which the court itself has neither original nor appellate jurisdiction; or how, because the constitution and their commissions have made them judges of the supreme court, congress can, without their consent, make them judges of an inferior court. One thing is certain, that if congress can make them discharge the duties of one inferior court, they can throw into their hands the business of every inferior tribunal that may be established; and, indeed, it is not long since that a bill passed both houses of congress assigning, in certain cases, the duties of the district courts to the judges of the supreme court. The president, Mr. Madison, returned the bill with objections, and it did not pass. These objections are not now before me, but as far as they are recollected, they would apply as well to the act under consideration as to the one for which they were made. But it is unnecessary to pursue this inquiry further; for although this be my own opinion, which I have thought it my duty to express, it will be remembered that this question came before the supreme court in 1803, when the judges, waiving any opinion on the constitutionality of this act, were pleased to consider the practice of a few years under it as precluding all argument on the subject. Whether, if the question shall ever come before that court, it will consider such acquiescence as putting at rest this great constitutional question I cannot say, as it has never received a decision on its merits. It is not yet too late, in my opinion, to review the one which has taken place; but until that be done in its proper place, this court is bound by it, and must suppose, whatever its opinion may be, that it has a right to hold jurisdiction of this case, and to pronounce judgment on the present verdict.

Hereupon the judge, in a discourse of some length, wherein he expatiated on the enormity of the offense of which the prisoner had been convicted, and recommended to him to spend the time allotted to him in this life in preparing for that which was to come, proceeded to pronounce the awful sentence of death; and assigned the time for his execution on the first Friday in March next, between the hours of eleven in the forenoon and one in the afternoon of that day.

Case No. 15,462.

UNITED STATES v. JACOBY.

[12 Blatchf. 491.] [1]

Circuit Court, S. D. New York. April 5, 1875.

CRIMINAL LAW—FELONIES—VIOLATION OF INTERNAL REVENUE LAWS—INDICTMENTS.

1. In an indictment founded on section 3397 of the Revised Statutes, which creates offences in respect to cigars, it is not necessary to aver, in the indictment, an intent to defraud the United States.

2. Although section 3397 designates as felonies some of the offences specified in it, and omits to designate others as felonies, offences of each class, which arise out of one and the same transaction, may, under section 1024 of the Revised Statutes, be charged in one indictment, in different counts.

[Cited in U. S. v. Lancaster, 44 Fed. 894.]

3. The offence created by section 3397, of affixing to a box containing cigars a stamp in the similitude or likeness of a customs stamp required to be used by the laws of the United States, may be committed by affixing to a box containing domestic cigars, not imported, and subject only to an internal revenue tax, and on which such tax has been duly paid, a stamp in the similitude or likeness of a customs stamp required to be used, by section 2804 of the Revised Statutes, on a box of imported cigars.

This was an indictment [against Louis Jacoby] founded on section 3397 of the Revised Statutes, which provides as follows: "Whenever any cigars are removed from any manufactory, or place where cigars are made, without being packed in boxes, as required by the provisions of this chapter, or without the proper stamp thereon, denoting the tax, or without burning into each box, with a branding iron, the number of cigars contained therein, the name of the manufacturer,

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

and the number of the district and the state, or without properly affixing thereon and cancelling the stamp denoting the tax on the same, or are sold or offered for sale not properly boxed and stamped, they shall be forfeited to the United States. And every person who commits any of the above-described offences, shall be fined for each such offence not less than one hundred dollars nor more than one thousand dollars, and imprisoned not less than six months nor more than two years. And every person who packs cigars in any box bearing a false or fraudulent or counterfeit stamp, or who affixes to any box containing cigars a stamp in the similitude or likeness of any stamp required to be used by the laws of the United States, whether the same be a customs or internal revenue stamp; or who buys, receives or has in his possession any cigars on which the tax to which they are liable has not been paid, or who removes or causes to be removed from any box, any stamp denoting the tax on cigars, with intent to use the same, or who uses or permits any other person to use any stamp so removed, or who receives, buys, sells, gives away or has in his possession any stamp so removed, or who makes any other fraudulent use of any stamp intended for cigars, or who removes from the place of manufacture any cigars not properly boxed and stamped, as required by law, shall be deemed guilty of a felony, and shall be fined not less than one hundred dollars nor more than one thousand dollars, and imprisoned not less than six months nor more than three years." A motion was made to quash the indictment, on the ground that it did not aver any intent to defraud the United States. It was held, that such averment was not necessary. Section 1024 of the Revised Statutes provides as follows: "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offences, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment, in separate counts; and, if two or more indictments are found in such cases, the court may order them to be consolidated." It was held, that, under section 1024, several of the offences created by section 3397, arising out of one and the same transaction, might be charged in one indictment, in different counts, although some of such offences were declared by section 3397 to be felonies, while others of them were not so designated by that section.

One of the offences charged in the indictment was that of affixing to a box containing cigars a stamp in the similitude or likeness of a customs stamp required to be used by the laws of the United States. Evidence was given that the defendant had affixed to a box containing cigars, a stamp in the similitude or likeness of a customs stamp required to be used, by section 2804 of the Revised Statutes, on a box of imported cigars; but it further appeared, that the cigars in the box to which the defendant had affixed such stamp, were domestic cigars, not imported, and were subject only to an internal revenue tax, and that such tax had been duly paid. It was held, that the offence charged had been committed.

Ambrose H. Purdy, Asst. U. S. Dist. Atty.

Morrison, Lauterbach & Spingarn, for defendant.

THE COURT ruled (BENEDICT, District Judge) that the general language of section 3397 would cover such a case, while, to exclude such a case, the word "thereon," or similar words, must be interpolated after the words "to be used;" that, if such word should be interpolated, it would be necessary to prove, in addition to the act of affixing the described stamp to a box containing cigars, the further fact, that the cigars were of foreign or of domestic manufacture, according to the character of the stamp affixed, when such fact was not made material by any words in the statute; that such a construction would lead to compelling proof that the stamp affixed was a counterfeit of the stamp required to be placed upon the particular box of cigars which formed the subject of the charge, and thus evasions of the law would be rendered easy; and that the prevention of the use or circulation of stamps in the similitude or likeness of customs stamps required to be used by the laws of the United States, was a legitimate object of a statute of the United States, and it was no objection to such a statute, that an indirect effect of it would be to prevent the sale of domestic cigars as foreign made cigars, which had paid a duty.

Case No. 15,463.

UNITED STATES ex rel. ROBERTS v. JAILER.

[2 Abb. (N. S.) 265.] [1]

Circuit Court, D. Kentucky. Oct. Term, 1867.

HABEAS CORPUS—POWERS OF DEPUTY MARSHAL—ARREST—HOMICIDE.

1. Where the return to a writ of habeas corpus showed that the petitioner was held in custody under a commitment regular on its face, and made by a competent court, for an act charged as an offense against the state law, but the petitioner alleged that he was really held for an act done under authority of the United States, the court, in view of the case involving a question between the state and the national government, adjourned the hearing and required the petitioner's counsel to give notice of the adjourned day to the state district-attorney for the county.

2. Reasons recommending this practice,—explained.

3. Upon a habeas corpus issued under section 7 of the act of March 2, 1833 (4 Stat. 634),

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

whether the petitioner, is held under state or federal process is immaterial. If he is confined "for an act done in pursuance of the law of the United States or of a process of any judge or court thereof," he is entitled to a discharge.

[Cited in Ex parte Thompson, Case No. 13,934; Re Bull, Id. 2,119; U. S. v. McClay, Id. 15,660; State of Georgia v. Bolton, 11 Fed. 218; Re Neagle, 39 Fed. 850, 135 U. S. 74, 10 Sup. Ct. 672.]

4. A United States marshal has power to appoint a special bailiff to execute a particular process. So *held*, where the appointment in question was made within a state, the laws of which conferred that power upon sheriffs.

[Cited in Re Crittenden, Case No. 3,393; The E. W. Gorgas, Id. 4,585.]

5. The duty and proper mode of proceeding, by a marshal or sheriff, or deputy of either, in making an arrest under a warrant,—explained.

6. The rule is now settled that the habeas corpus act of March 2, 1833, gives relief to one in state custody, not only when he is held under a law of the state which seeks expressly to punish him for executing a law or process of the United States, but also, when he is in such custody under a general law of the state which applies to all persons equally, where it appears he is justified for the act done because it was done in pursuance of a law of the United States.

[Cited in U. S. v. McClay, Case No. 15,660.]

7. Where an officer, lawfully engaged in the attempt to execute process commanding an arrest, is resisted by the party to be arrested, in such manner that he is obliged to take the life of the latter in self-defense, he is justified by his process in so doing.

[Cited in U. S. v. Fullhart, 47 Fed. 805.]

[Cited in State v. McNally, 87 Mo. 658.]

Hearing upon a writ of habeas corpus.

Benjamin H. Bristow, U. S. Atty., for petitioner.

L. H. Noble, opposed.

BALLARD, District Judge. Upon November 9 last, a petition was presented to this court on behalf of James Roberts, setting forth, in substance, that he was confined in the jail of Fayette county, for some alleged offense against the laws of the state of Kentucky, but in fact, for an act done in pursuance of a law of the United States, and of a process of a judge thereof, and praying for a writ of habeas corpus, to be directed to the jailer of Fayette county. The writ was issued, returnable forthwith. Within a reasonable time after the service of the writ, the jailer of Fayette county produced in court the prisoner, together with his return, in which he stated, in substance, that he held the prisoner by virtue of an order of commitment made by the Mercer circuit court.

On behalf of the prisoner, it was conceded that this commitment to prison was entirely regular on its face; that the order of commitment was made by a court of competent jurisdiction, and on account of an alleged offense against the laws of Kentucky; but it was insisted, and offered to be proven in his behalf, that though he was imprisoned for an alleged offense against the state of Kentucky, his imprisonment was really for an act done under the authority of the United States.

Although all the parties were before the court which the writ and the form of proceedings contemplated, and although it appeared that the prisoner was probably entitled to his discharge, I did not think it proper, in view of the importance of the case—involving, as it does, the grave question of a conflict of jurisdiction between the state and national courts—to make a final disposition of it. I therefore continued the further hearing of the case until November 30, and required the district-attorney, who appeared for the petitioner, to give written notice of the time, place, and nature of such hearing to the commonwealth's attorney for the county of Mercer, that being the county in which the offense with which the prisoner is charged is alleged to have been committed.

I do not find that this practice has been adopted in like cases in any other court of the United States. In all the cases which I have examined, the court has proceeded to a final hearing and decision on the return of the writ, without notice to any state officer other than the person to whom the writ was directed. I cannot but think, however, that the practice which this court has here adopted is better adapted to guard against abuse of the federal process, and to secure that full and impartial hearing which is essential to the due administration of justice. It is certainly a delicate matter for this court, although acting within the undoubted scope of its jurisdiction, to take from a state officer a person committed to him by a state court, charged with an offense against state laws. The great respect I have for state authority, the appreciation I have of the importance of a faithful enforcement of the criminal laws of the state, and the reluctance I feel to exercise any authority which may interfere with the regular administration of justice by the courts of the state, have induced me to adopt a practice, which, whilst it substantially protects the liberty of the citizen, in case he shows himself entitled to such protection, at the same time manifests no undue disposition to interfere with state authority, and tends to secure that full hearing which I think should, if possible, always be had when the question to be decided relates to a conflict of jurisdiction between the national and state courts. I have no disposition to shrink from the performance of any duty enjoined on me by the constitution and laws of the United States; but I will not and cannot interfere with the administration of the state laws, except when my duty is plain and my path clear.

On the day designated in the order, the learned attorney for the commonwealth in the fifth circuit, which includes the county of Mercer, appeared, and both he and the prisoner produced evidence.

By the attorney for the commonwealth it was shown, that on November 6, 1867, a

warrant, purporting to be founded on the oath of N. C. Cull, was issued by the presiding judge of Mercer county, for the arrest of the relator, charging him with the crime of murder; that on November 7, the same judge committed the relator to the jail of Mercer county, there to be safely kept until the 9th, when he was to be delivered to the sheriff, to be brought before him for examination; that on November 8, the relator was, by order of the circuit court for Mercer, transferred to the jail of Fayette county, the jail of Mercer county being ascertained to be insecure; that before this order of transfer was made, the grand jury impanneled in the circuit court for Mercer county had investigated the charge against the prisoner, and had agreed to return an indictment; and that they did, on November 14, return into court an indictment charging him with the crime of murdering one J. J. Cull.

On behalf of the prisoner, it was shown, that on October 16, 1867, a process, purporting to be founded on information given under oath, was issued by a commissioner of the United States, commanding the arrest of Joshua J. Cull, charging him with certain crimes under the internal revenue laws; that the process was immediately placed in the hands of a deputy marshal, who failed to execute it because he could not find the accused, though he visited his residence and made diligent search for him; that the process was then placed in the hands of another deputy, who likewise failed to execute it, though he also made diligent effort; that this deputy reported to the marshal that, in his opinion, the process could not be executed without the observance of unusual effort and secrecy, and that he had been credibly informed by the wife of the accused, and perhaps others, that the accused would forcibly resist its execution; that the marshal, on October 30, by writing on the back of the warrant, appointed A. W. Fogle special bailiff, and placed said warrant in his hands for execution, informing him at the same time of the necessity of observing proper secrecy, as the accused was endeavoring to evade arrest, and enjoined him to take with him assistance, as the accused would, if found, probably resist arrest.

It was also shown, that Cull knew the marshal of the United States had a process for his arrest; that on November 4, the deputy required the relator to assist him in the execution of said process; that in the evening of the same day the two proceeded to the residence of Cull, arriving there about eleven o'clock at night; that the deputy, Fogle, sent the relator to the back door of the house and went himself to the front door; that this precaution was adopted to prevent the escape of the accused; that the deputy knocked loudly at the front door several times before he received any response; that in reply to inquiries from within, "Who in the hell's there?"—"What in the hell do you want?" he said, "Mr. Cull, I want to see you; I have business with you;" that in reply to the further inquiry, "Who are you?" he said he was an officer, and must and would see him; that after a few moments of silence, which the deputy understood Cull was employing in the preparation to open the door, he heard a noise at the back door, and his assistant, the relator, crying loudly, "Don't shoot! don't shoot!" that he immediately ran to the corner of the house, and saw Roberts coming toward him still crying "Don't shoot! don't shoot!" that Cull was advancing on Roberts, and fired twice in close succession at him near the back door; that Roberts continued to retire and Cull to advance; and that Cull, after having advanced fifteen or twenty steps from the back door, and after Roberts had retreated so as to be near the bailiff, again fired twice, but whether at Roberts or the deputy does not appear; that Roberts fired instantly at Cull once, and he and the deputy then retired and returned to Harrodsburg, a distance of ten miles, by separate roads, and that the deputy did not know till next morning that Cull was killed, or that Roberts was not killed. It appears from other evidence that this shot by Roberts proved fatal; that Cull was killed, and that when his body was found he held in his right hand, clenched tightly, a pistol, commonly known as a "revolver," of which four barrels were empty, and two loaded.

I attach no importance to the testimony of Mrs. Cull, who says she did not hear the person who knocked at the front door say he was an officer; nor to the testimony of Mrs. Funk, who says she was standing in her front door, about seventy-five yards from Cull's, and that she did not hear the remark; because the former was too much frightened at the time, and immediately afterwards, to remember what occurred, and the latter was too far off to hear what was said. This lady, however, did hear a voice which was not familiar to her, crying "Don't shoot! don't shoot!" She also heard what she took to be one shot near Cull's back door, and she saw two shots fired as the parties approached the front of the house, which she thought proceeded from the parties nearest the front.

I have stated thus minutely all the material facts proven, in order that the basis of my opinion and decision may fully appear. It is hardly necessary to say, that the writ issued in this case was not issued under section 14 of the judiciary act of 1789 (1 Stat. 81). This statute authorizes the judges of the United States to issue writs of habeas corpus only in behalf of persons who "are in custody under or by color of authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." To a writ issued under this statute, unless it issue simply to bring the party into court to testify, a return, showing that he is held under state

authority to answer to an offense against state laws, would be conclusive, and would oust this court of all authority to proceed further. The writ was here issued under and by virtue of the authority conferred by section 7 of the act of March 2, 1833 (4 Stat. 634).

This section provides "that either of the justices of the supreme court, or a judge of any district court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined, on or by any authority or law, for any act done or omitted to be done in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof, anything in any act of congress to the contrary notwithstanding." It matters not that the person is in confinement under the authority of a state, or of a law of the state. If he is confined "for an act done in pursuance of a law of the United States, or of a process of any judge or court thereof," he is entitled, under this statute, to his writ of habeas corpus, and to his discharge.

But the learned attorney for the commonwealth, frankly admitting that he is surprised at the extent to which he finds, on examination, the courts of the United States have exercised their authority under this act, still insists that the relator, in this instance, should not be discharged, because:—

First. He questions whether there was any authority in the marshal of the United States to appoint a bailiff; and he maintains that, if there was not such authority, there would be no pretense for the assertion that the relator was imprisoned for an act done in pursuance of a law of the United States, or of a process of a judge or court of the same.

I say the learned attorney only questioned the authority of the marshal to appoint a bailiff. He did not seem to have much confidence in the force of the objection, nor did he very earnestly insist upon it. In my opinion, there is not the slightest ground to doubt that the marshal does possess this authority.

The authority to appoint a special bailiff to execute a particular process, is recognized by all the authorities as appertaining to the sheriff. Wat. Sher. 35; Toml. Law Dict. tit. "Bailiff"; Hunt v. Burrel, 5 Johns. 137; Sergeant of Court of Appeals v. George, 5 Litt. [Ky.] 199.

There are several acts of congress which expressly recognize this authority as belonging to the marshal It has been exercised by the marshal of this district without question, as far as I know, since the establishment of the court; and such, I understand, is the common practice throughout the United States. Conk. Pr. 338. But what is entirely conclusive of the question, section 7 of the act of congress approved July 29, 1861 (12 Stat. 282), provides, "that the marshals of the several districts of the United States . . . shall have the same powers, in executing the laws of the United States, as sheriffs . . . in the several states have by law in executing the laws of the respective states"; and the laws of this state expressly provide, that "a sheriff may, by writing, empower any person to execute an original or mesne process." 2 Rev. St. 340.

The learned attorney insists, secondly—that the bailiff did not, in this case, proceed properly; that he ought to have informed Cull that he had a warrant for his arrest; and that, as Cull was not so informed, he had the right to attack and drive off the bailiff and his assistant, and they are not justified for resisting him.

I have already said, that Cull knew there was a process in the hands of the marshal for his arrest; and I think he had reasonable ground to believe, and did believe, when the person that knocked at the front door announced that he was an officer, and wanted to see him on business, that this person had process for his arrest. The witness, Mrs. Funk, says, that when the buggy, with two gentlemen in it, passed her door, she immediately suspected, from the unusual hour of the night, that they were officers, who had come to arrest Mr. Cull; that she therefore remained at her door watching the buggy till it stopped near Cull's house; and then, her suspicions being confirmed, she remained at the door until after the shooting, as hereinbefore detailed.

Ordinarily, "it is the duty of one seeking to arrest another, to make his purpose known, unless, what will probably answer instead of any express announcement, the circumstances are such as to render the purpose obvious." 1 Bish. Cr. Proc. § 615; Rex v. Davis, 7 Car. & P. 785.

Indeed, it has been expressly laid down, even in respect to an arrest by a private person without warrant, that where the circumstances are such as to make the intention to apprehend plain to the mind of him who is to be apprehended, he need not be told this, and the arrest will be legal, and the resistance of the arrested person illegal, the same as if the purpose had been in words announced. 1 Bish. Cr. Proc. § 615; citing Rex v. Howarth, 1 Moody, 207; Rex v. Payne, Id. 378; Pew's Case, Cro. Car. 183, 537, 538; 9 Coke, 65 b. The foregoing relates particularly to the duty of a person about to make an arrest when in the actual, visible presence of the party to be apprehended; but when not in this position, the authorities state, "it is his duty to proceed with secrecy to find him out, and actually arrest the party, not only in order to secure him, but also to subject him and all other persons to the consequences of escape or rescue." Chit. Cr. Law, 47, 48; 1 Bish. Cr. Proc. § 663. The bailiff, then, according to these authorities, proceeded with entire regularity. It was the duty of Cull to respond to the

knock at the door by opening it, especially when informed that the person knocking was an officer. If he then did not recognize the person as an officer, he had a right, if the person either arrested or announced that he would arrest him, to demand his warrant.

I suppose, that in all cases where an arrest is made by virtue of a warrant, the warrant being demanded, should be produced, but it is to be considered that the arrest, the explanations, and the reading of the warrant, when demanded, "are obviously successive steps. They cannot all occur at the same instant of time." In the case of a known officer the explanation must follow the arrest, and the exhibition and perusal of the warrant must come after the authority of the officer has been acknowledged and his power over his prisoner acquiesced in. Com. v. Cooley, 6 Gray, 350, 356, 357; State v. Townsend, 5 Har. [Del.] 487, 488; Arnold v. Steeves, 10 Wend. 514.

If the officer is not known as such, he should show his authority or warrant before making the arrest. Here it is probable that Cull knew, or had good reason to believe, the person knocking at his door was an officer having a warrant for his arrest; but whether he did or not, that person really had such warrant, and Cull, so far from demanding it, gave him no opportunity to show or read it, but endeavored to escape by his back door, and there making, immediately, without asking any explanation, a violent, and what was intended to be a deadly assault on the assistant of the bailiff stationed there. If Cull had accomplished his purpose, if he had killed Roberts, there is no doubt he would have been guilty of murder, for, though he, perhaps, did not know Roberts, or that he was an officer, he was in fact one, or in the attitude of one, and the law furnished Cull not the slightest excuse for deliberately arming himself and commencing a deadly assault without demanding any explanation.

The learned attorney for the commonwealth suggests, that, in the present disordered condition of things, in that portion of this state in which Cull resided, Cull had a right to suppose that Fogle and his assistant were robbers, "regulators," or "jayhawkers," and not officers; and therefore he might be excused for firing upon them without demanding any explanation. But, wretched as I have reason to believe is the state of society in certain portions of this state, insecure as I know both life and property are, I am not willing to admit that our condition is so bad, or that we have so far degenerated into a state of barbarism, that any court or jury will hold that one may lawfully kill another person, who simply knocks at his door in the night and announces that he is an officer and wishes to see him, and that too, without asking any explanation. I say I cannot admit this, but whatever juries might do in the case supposed, under their unlimited power to acquit, sitting here as a judge, sworn to expound the law as I find it in the authorities, I confess myself astonished to hear it gravely contended, that a homicide, committed under the circumstances supposed, so far from shocking all mankind and meeting with speedy punishment, should be palliated and even excused.

Upon the whole, my conclusion is that the bailiff and his assistant, up to the time of the attack of Cull on them, proceeded with entire regularity, and that there is nothing in the case furnishing the least excuse or palliation for the conduct of Cull.

Thirdly, and lastly. It is insisted that under the true construction of the act of March 2, 1833, the federal court can, under a writ of habeas corpus, relieve a party only when it appears that he is in custody under a state law which expressly seeks to punish him for doing what a law or process of the United States requires him to do. That, here, the state law does not make it criminal to execute the process of the United States or to enforce their revenue laws, but simply seeks to punish murder, no matter by whom committed; that the killing was done in this state; that the offense can be inquired of only in the state tribunals; that this court has no jurisdiction to try the accused; that under the construction of the facts most favorable to the relator he acted in self-defense, but that this is a matter which this court cannot pass upon, and which cannot be lawfully passed upon except by a jury of the vicinage.

I think there is great plausibility and even force in every branch of this proposition. True, much of its force is due to the ingenious form of its statement; but stripping it of this, and getting at the matter really contained in it, I think it still presents questions which I should find difficulty in answering if I had no aid from judicial decisions. I am, therefore, grateful that neither the question of the construction of the act of 1833, nor its application to cases similar to the present one, is now, for the first time, raised in a court of the United States.

By a long course of judicial decisions it may now be considered as settled, that this act gives relief to one in state custody, not only when he is held under a law of the state which seeks expressly to punish him for executing a law or process of the United States, but also when he is in such custody under a general law of the state which applies to all persons equally, where it appears he is justified for the act done, because it was "done in pursuance of a law of the United States, or of a process of a court or judge of the same." Ex parte Jenkins [Case No. 7,259], before Mr. Justice Grier; Ex parte Jenkins [unreported], before Judge Kane; U. S. v. Morris [Id. 15,811]; Ex parte Robinson [Id. 11,935], before Mr. Justice McLean; Ex parte Marshal [unreported]; Ex parte Trotter [unreported], decided by this court in 1862. The decisions in the courts of the United States are absolutely uniform on

this subject, and I find no opposing opinion of any court except a single one rendered by the supreme court of Pennsylvania—Thomas v. Crossin [5 Clark, 328]. But, surely, it cannot be expected that I should attach much importance to, much less follow, a single decision of a state court, opposed, as it is, to numerous decisions in the courts of the United States, some of them rendered by justices of the supreme court.

In the first case of Jenkins and others, it appears, that Jenkins had in his hands a warrant for the arrest of a "fugitive from labor" named Thomas, issued under the act of 1850, and that when he and his assistant endeavored to arrest the fugitive they were resisted and had a violent and bloody encounter. A warrant was regularly issued by a justice of the peace of the state of Pennsylvania for their arrest, on the charge of "an assault and battery with intent to kill." Under this state process they were arrested and put in jail. But they were discharged by Mr. Justice Grier, by virtue of a writ of habeas corpus, issued under the act of 1833, the judge holding that the deputy Jenkins and his assistant having done no more than they were justified in doing by the warrant, they were imprisoned for an act done in pursuance of a law of the United States within the meaning of the act of 1833, and entitled to their discharge, though they were in state custody for an alleged offense against the general laws of the state, passed to punish assaults generally, and not at all to restrict or oppose the enforcement of the laws of the United States.

In the second case it appears they were imprisoned by virtue of a capias sued out in a civil action, brought in the supreme court of Pennsylvania, by Thomas, complaining of the said assault. From this imprisonment they were discharged by Judge Kane, upon the same ground taken in the first case by Judge Grier.

After this, they were indicted in Luzerne county, Pennsylvania, "for riot, assault and battery, and assault with intent to kill," and were arrested and imprisoned under a bench warrant, founded on the indictment; but they were discharged under a writ of habeas corpus, issued upon the order of Judge Kane, and heard before him.

I think it is impossible to distinguish in principle these cases from the one now before me. If Mr. Justice Grier and Judge Kane had jurisdiction of the cases severally before them, surely I have jurisdiction in the present case. If Roberts was not in terms directed by the process under which he acted to kill Cull, neither was Jenkins directed by his warrant to beat or wound Thomas. If Roberts was in state custody under a warrant issued by a state judge, for an alleged offense against the state laws, so was Jenkins when he was discharged by Judge Grier. Nay, more, when the second and third discharges of Jenkins took place, he was in custody under process issued out of a state court, the one founded on a civil complaint, and the other on an indictment for crime; but when the writ was issued in this case, Roberts had not been indicted, he had only been committed by a county judge to await an examination. True, the warrant under which Jenkins acted was issued for an alleged "fugitive from labor," under the fugitive slave act of 1850, and the warrant under which Roberts acted was for an alleged criminal offense, under the revenue laws of 1866 and 1867. But I suppose no one will assert that the rights of masters to their slaves are higher than the rights of the government to its revenue; or that the person of an officer when seeking to arrest a fugitive slave is more sacred than when endeavoring to arrest a criminal.

I disclaim all right and power to discharge the relator on any such ground as that the proof shows he acted in self-defense.

A jury would probably acquit him on such ground, independent of the process under which he acted; but I have nothing to do with such an inquiry. It belongs only to the state court. I have only to inquire whether what he did was done in pursuance of a law and process of the United States, and so justified, not excused, by that law and process. If the relator is to be discharged by me, it is not because he is excusable, upon general principles of law, for taking the life of his assailant when it was necessary to save his own, but because he was authorized, and is justified by the law and process under which he acted, to do all that he did. If he was not authorized, and is not justified by that law and process in all that he did, he is not imprisoned "for an act done in pursuance of a law of the United States, or of the process of a court or judge of the same;" and I cannot discharge him, but must remand him. I can discharge only the officer who relies on the law and process of the United States as his sole authority and complete justification.

The question then arises, was the prisoner justified in killing Cull, by the law and process under which he acted? He was certainly acting under a lawful process, which (though it did not expressly command the killing of the deceased), did command his arrest; and the authorities are uniform to the effect that if one, in executing such a process, is resisted, and is obliged to take life, as in self-defense, he will be justified.

Bishop says: "In misdemeanors and breaches of the peace, as well as in cases of felony, if the officer meet with resistance, and the offender is killed in the struggle, the killing will be justified." 2 Bish. Cr. Law (3d Ed.) § 633. Even in civil cases, "if resistance be made, the person having authority to arrest or retake may repel force with force, and need not give back; and if death unavoidably ensue in the struggle, he will be justified." Id. § 664.

Mr. East says: "It may be premised, gen-

erally, that when persons having authority to arrest, ... and using the proper means for that purpose, are resisted in so doing, and the party resisting killed in the struggle, such homicide is justifiable." 1 East, P. C. 295.

Wharton says: "Homicide in self-defense, or se defendo, . . is . . excusable rather than justifiable." 1 Whart. Cr. Law, § 135. "It is justifiable, not only when the proper officer executes a criminal in strict conformity with his sentence, but also when the officer, in the legal exercise of a particular duty, kills a person who resists, or prevents him from executing it." Id. §§ 936, 937. Officers of the law, when engaged in the performance of their duties, are invested with a peculiar prerogative. If resisted when so employed, and the party resisting be killed in the struggle, such homicide is justifiable. And on the other hand, if the party having such authority, and exercising it properly, happen to be killed, it will be murder, in all who take part in such resistance, though there be no malice. Id. § 1030. See, also, Bish. Cr. Proc. § 615; Fost. Crown Law, 273-308; Hale, P. C. 457. Other authorities might also be cited, but it is not necessary, since, as I have already stated, they are absolutely uniform.

Now, the facts proven do incontestably show, that the relator was lawfully endeavoring to arrest Cull (for it is hardly necessary to say that he stands in the same attitude with the bailiff himself); that he was proceeding properly; that Cull not only suddenly set upon and violently resisted him, but actually endeavored to kill him; that he forbore to exercise his full, lawful right of immediately pressing forward and killing his assailant, if necessary, but retreated, imploring the assailant not to shoot; that the assailant continued to press forward, and he to retreat; and that not until he had been fired at four times. and his life was in instant peril, did he fire and kill his assailant. No one will be so hardy as to deny, in the light of the authorities cited, that the facts furnished a full justification for the homicide. The justification rests not on the mere fact that the relator's life was in peril, but on the law and process under which he was acting, and on which he is obliged to rely to make out his justification. But if the process justified, that is, authorized the homicide, then it is clear the relator is imprisoned for an act done in pursuance of a law of the United States, or of a process of a court or judge of the same, and must be discharged.

It is accordingly ordered, that the prisoner be discharged I have not been induced to arrive at this conclusion by any apprehension that the relator would not, if remanded, have a fair trial for his alleged offense, in the county of Mercer. I have profound respect for the learning and integrity of the judge who presides in that circuit, and the argument and bearing of the able attorney for the commonwealth, before me, are sufficient assurance of his fairness and honor. If I myself were to be arraigned for any alleged offense, I know of no tribunal before which I could be tried with fuller assurance that enlightened and exact justice would be done me than in that in which these gentlemen are the chief officials. I discharge the relator from no apprehension that injustice would be done him by a trial in the state court, but because he has a right to demand his discharge at my hands under the laws of the United States, which I am bound to administer.

To avoid misapprehension, I desire to say that this court claims no general supervisory jurisdiction over state courts, nor any general power to interfere with persons or property in their custody, except in a few cases, where the constitution and acts of congress have given such jurisdiction and power to the courts of the Union. Ordinarily, the federal courts have no more authority to interfere with persons or property in custody under a process from a state court, than the state courts have to interfere with persons or property in custody under a process from a federal court. The federal and state courts have, in many cases, a concurrent jurisdiction over the same persons and things, and the rule is almost universal, that the officer who first gets possession under process from his court, has the preference. Therefore, the general rule is, that if a person be imprisoned under a criminal or civil process of one, the other cannot take him from such custody for any purpose whatever. It is only in virtue of the act of March 2, 1833, supra, that I have the right to interfere in this case. This act expressly empowers federal courts and judges "to grant writs of habeas corpus in all cases of a prisoner . . in confinement where he . . shall be confined on or by any authority or law for any act done . . in pursuance of a law of the United States, or any . . process of any judge or court of the same." And this act, by the express provision of the constitution of the United States, is the "supreme law of the land . . anything in the constitution or laws of any state to the contrary notwithstanding."

Petitioner discharged.

Case No. 15,464.

UNITED STATES ex rel. MICHELS v. JAMES.

[13 Blatchf. 207; 7 Law & Eq. Rep. 16; 8 Chi. Leg. News, 111.] [1]

Circuit Court, S. D. New York. Dec. 6, 1875.

CONSTITUTIONAL LAW — CONGRESS — BILLS FOR RAISING REVENUE—POST-OFFICE LAWS.

1. A clause of the act of March 3, 1875 (18 Stat. 377), increasing the rate of postage on certain mail matter, is not unconstitutional, although it originated in the senate and was not an

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. 1 Law & Eq. Rep. 116, contains only a partial report.]

amendment to a bill for raising revenue, originating in the house of representatives, because it is not a bill for raising revenue, within the meaning of article 1, § 7, subd. 1, of the constitution, which provides that "all bills for raising revenue shall originate in the house of representatives, but the senate may propose or concur with amendments, as on other bills."

2. A bill establishing rates of postage is not a bill for raising revenue, within the meaning of the constitution.

3. Post office laws may be revenue laws without being laws for raising revenue.

[This was an application by Oran C. Michels for a writ of mandamus to be directed to Thomas L. James, postmaster of the city of New York.]

John W. Weed, for relator.

Henry E. Tremain, Asst. U. S. Dist. Atty.

JOHNSON, Circuit Judge. The question upon the merits presented in this case is, whether a clause of the act of congress, approved March 3, 1875 (18 Stat. 377), entitled, "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30th, 1876, and for other purposes," is or is not constitutional. The clause referred to increases the rate of postage upon third-class matter from one cent for two ounces to one cent an ounce. The ground of fact on which it is claimed that this clause was not constitutionally enacted is, that the clause originated in the senate, was not an amendment to a bill for raising revenue, originating in the house of representatives. The provision of the constitution, which is claimed to render invalid the clause in question, is this: "All bills for raising revenue shall originate in the house of representatives, but the senate may propose or concur with amendments, as on other bills." Const. art. 1, § 7, subd. 1.

Certain legislative measures are unmistakably bills for raising revenue. These impose taxes upon the people, either directly or indirectly, or lay duties, imposts or excises, for the use of the government, and give to the persons from whom the money is exacted no equivalent in return, unless in the enjoyment, in common with the rest of the citizens of the benefit of good government. It is this feature which characterizes bills for raising revenue. They draw money from the citizen; they give no direct equivalent in return. In respect to such bills it was reasonable that the immediate representatives of the taxpayers should alone have the power to originate them. Their immediate responsibility to their constituents, and their jealous regard for the pecuniary interests of the people, it was supposed, would render them especially watchful in the protection of those whom they represented. But the reason fails in respect to bills of a different class. A bill regulating postal rates for postal service, provides an equivalent for the money which the citizen may choose voluntarily to pay. He gets the fixed service for the fixed rate, or he lets it alone, as he pleases and as his own interests dictate. Revenue, beyond its cost, may or may not be derived from the service and the pay received for it, but it is only a very strained construction which would regard a bill establishing rates of postage as a bill for raising revenue, within the meaning of the constitution. This broad distinction existing in fact between the two kinds of bills, it is obviously a just construction to confine the terms of the constitution to the case which they plainly designate. To strain those terms beyond their primary and obvious meaning, and thus to introduce a precedent for that sort of construction, would work a great public mischief. Mr. Justice Story, in his Commentaries on the Constitution (section 880), puts the same construction upon the language in question, and gives his reasons for the views he sustains, which are able and convincing. In Tucker's Blackstone only, so far as authorities have been referred to, is found the opinion that a bill for establishing the post office operates as a revenue law. But this opinion, although put forth at an early day, has never obtained any general approval; but both legislative practice and general consent have concurred in the other view.

Another question has arisen, which has some similarity with that under discussion, and which, unless adverted to, might give rise to misapprehension. Thus, in U. S. v. Bromley, 12 How. [53 U. S.] 88, the question was, whether an act of congress which gave a writ of error in any civil action brought by the United States for the enforcement of the revenue laws of the United States, embraced within its meaning an act to reduce rates of postage and to prevent frauds on the revenue of the post office department. It was held, that the latter act was, within the meaning of the former, a revenue law of the United States, and that the writ of error could be sustained. The court says: "Revenue is the income of a state, and the revenue of the post office department, being raised by a tax on mailable matter conveyed in the mail, and which is disbursed in the public service, is as much a part of the income of the government as moneys collected for duties on imports." All this may be conceded, without involving the conclusion that such a law is an act for raising revenue.

The case of Warner v. Fowler [Case No. 17,182], though involving other statutes, was put substantially upon the same ground as the preceding case. It was an action against a postmaster for not delivering certain letters. The defendant claimed that, in detaining them, he acted under the laws in relation to the post office department, and that he was entitled to have the suit removed to the United States circuit court, under the statute, as being for an act done under the revenue laws of the United States. This claim was sustained by Judge Ingersoll, holding the circuit court in this district. The de-

cision was, in my opinion, correct, upon the ground that, while the post office laws are revenue laws, within the meaning of the statutes cited, they are not laws for raising revenue, within the provision of the constitution.

The motion for a mandamus should be denied.

Case No. 15,465.

UNITED STATES v. The JAMES MORRISON.

[Newb. 241;[1] 4 N. Y. Leg. Obs. 333; 6 Pa. Law J. 132.]

District Court, D. Missouri. March, 1846.[2]

CONSTITUTIONAL LAW—REGULATIONS OF COMMERCE—STEAM PASSENGER VESSELS—FERRY BOATS.

1. The act of congress, approved July 7th, 1838 [5 Stat. 304], "To provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," is founded upon article 1, § 8, cl. 3 of the constitution, giving congress power "to regulate commerce with foreign nations, and among the several states," &c.

2. If commerce is completely internal, confined to one state, congress has no power over it.

[Cited in U. S. v. The Seneca, Case No. 16,251. Distinguished in The Daniel Ball, Id. 3,564.]

3. Congress has no authority to require a license to carry on a ferry over the Missouri river, at a place entirely within the limits of the state of Missouri.

4. There is no law previous to the act of July 7th, 1838, requiring a ferry boat plying wholly within the limits of a state, to obtain a license.

5. The act of 7th of July, 1838, does not apply to such ferry boats.

[Cited in U. S. v. The Planter, Case No. 16,054. Followed in U. S. v. The William Pope, Id. 16,703.]

6. Whether ferry boats plying between the United States and Canada, would be required to obtain a license. Quere?

7. The phrase "coasting trade," cannot be applied to ferrying across a river.

[Cited in Ravesies v. U. S., 35 Fed. 919.]

In admiralty.

B. F. Hickman, for the United States.

S. M. Bay, for the James Morrison.

WELLS, District Judge. This is a case of libel. It is founded on the second section of the act of congress, entitled "An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," approved 7th July, 1838. The libel states substantially, that the boat was propelled by steam, and was employed in navigating the Missouri river, a navigable river of the United States, and in transporting goods, wares and merchandise, and passengers in said boat on said river, without the owners having obtained a license from the proper officer of the United States so to do, and charges that said boat was liable to a penalty of $500. The owners appeared and defended. The answer admits that the boat was propelled by steam, that it navigated the Missouri river, as charged, but denied that it navigated or transported freight and passengers in any other manner than as a ferry boat across said river at St. Charles, altogether within the limits of the state of Missouri, for which purpose they had a license under the laws of the state of Missouri. They admit that they had no license from the United States; but deny that one was necessary, or that they incurred any penalty. From the evidence and the admission of the parties, it appears that the facts of the case were correctly stated in the answer.

Upon this state of facts an important question arises for the consideration and determination of the court. Is a steamboat employed only as a ferry boat, altogether within the limits of a state, liable to a penalty for being thus employed, not having a license from the United States officer, under the provisions of the act of 7th of July, 1838? The first and second sections of that act are as follows:

"Section 1. That it shall be the duty of all owners of steamboats or vessels propelled in whole or in part by steam, on or before the first day of October, 1838, to make a new enrollment of the same under the existing laws of the United States, and to take out from the collector or surveyor of the port, as the case may be, where such vessel is enrolled, a new license, under such conditions as are now imposed by law, and as shall be imposed by this act.

"Sec. 2. That it shall not be lawful for the owner, master or captain of any steamboat or vessel propelled in whole or in part by steam, to transport any goods, wares and merchandise or passengers in or upon the bays, lakes, rivers, or other navigable waters of the United States, from and after the first day of October, 1838, without having first obtained from the proper officer a license, under the existing laws, and without having complied with the conditions imposed by this act; and for each and every violation of this section, the owner or owners of said vessel shall forfeit and pay to the United States the sum of five hundred dollars, one-half for the use of the informer; and for which sum or sums the steamboat or vessel so engaged shall be liable, and shall be seized and proceeded against, summarily, by way of libel, in any district court of the United States having jurisdiction of the offence."

The words of the act are comprehensive enough to include the case of this boat. It is propelled by steam, navigates a navigable river of the United States, transports goods, wares and merchandise and passengers upon said river, and has no license therefor from the proper United States officer.

[1] [Reported by John S. Newberry, Esq.]

[2] [Affirmed by circuit court; case unreported.]

It is not uncommon for a case to come within the words of an act, yet not come within the meaning of the act. It will be observed that the first section requires a "new enrollment" under the existing laws of the United States, and a new license taken out. The second section requires a license to be taken out under the existing laws. No license is spoken of, mentioned or described, other than that required theretofore. It is obvious that the license spoken of in the act is that prescribed by other and former laws of the United States, and could only be "a license to carry on the coasting trade," no other license known to the laws of the United States being at all applicable. This was admitted by the district attorney of the United States in the argument at the bar.

I will first inquire into the constitutional power of congress to require a license in this case, and then, secondly, to inquire whether, supposing the power to exist, it has been extended by the act of 1838 to this case. Even if we were to confine our inquiries to the second branch of the subject, it would greatly aid us in making those inquiries to ascertain the power of congress over the subject.

It is said in Sergeant's Constitutional Law, page 308, that "the general power of establishing regulations for the condemnation of vessels as unfit for sea or unworthy of repair, may, it would seem, be exercised by congress, either as applicable to trade and commerce, or as within the admiralty jurisdiction." And the supreme court of the United States in the case of Janney v. Columbia Ins. Co., 10 Wheat. [23 U. S.] 418, said something, arguendo, to the same effect. The admiralty jurisdiction is a part of the jurisdiction of the courts, and is found in the third article, section second, of the constitution of the United States: "The judicial power shall extend to all cases of admiralty and maritime jurisdiction." But the supreme court decided in the case of U. S. v. Combs, 12 Pet. [37 U. S.] 76, that "in cases dependent on the locality of acts done, this power is limited to the sea and to tide-waters as far as the tide flows, and does not reach beyond high-water mark." Of course that jurisdiction could not reach a transaction the locality of which was some thousands of miles above tide-water; for in this case the jurisdiction would depend upon the locality of the transaction. But the provisions of the act of 1838 are evidently founded on the power of congress to "regulate commerce." The license required is "to carry on the coasting trade," and the power was claimed, in the argument at the bar, under the clause "to regulate commerce." It was not claimed under the admiralty and maritime jurisdiction. The constitution, in article 1, § 8, cl. 3, declares that congress shall have power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." The authority of congress, as it regards the case at bar, is claimed under the power to regulate "commerce among the several states."

The power over navigation and intercourse is part of the power to regulate commerce, and is possessed by congress as fully as it possesses the power to regulate commerce; but, of course, not to a greater extent. There is no separate and distinct grant to regulate navigation or intercourse; they are incidents to or part of the power to regulate commerce. Wherever the right to regulate commerce does not extend, the right to regulate navigation or intercourse does not go. The latter goes with the former or follows it. The right to regulate commerce only extends to three descriptions of commerce: First, with foreign nations; second, among the several states; third, with the Indian tribes. It does not include the perfectly internal commerce of a state. The commerce to be subject to such regulations must be among, that is intermingled with, the several states. If confined to one state alone, congress has no power over it. It would have been strange if it was intended that congress should have power to regulate every description of commerce, to enumerate only particular kinds in the grant. And such are the doctrines and opinions of the supreme court. In Gibbons v. Ogden, 9 Wheat. [22 U. S.] 194, that court says: "It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary." Again: "Comprehensive as the word 'among' is, it may be properly restrained to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely internal traffic of a state, because it is not an apt phrase for that purpose, and enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention been to extend the power to every description." Id. 194, 195. Again: "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally." Id. 195. Again: "The completely internal commerce of a state, then, may be considered as reserved for the state itself." Id. This, also, is the doctrine maintained by the highest court of the state of New York. See Steamboat Co. v. Livingston, 3 Cow. 754.

Is the right of congress to regulate navigation more extensive than the right to regulate commerce? Does it extend to the regulation of navigation, which is not connected with "commerce with foreign nations, among the several states, and with the Indian

tribes?" The supreme court of the United States in Gibbons v. Ogden [supra] said, "A power to regulate navigation is as expressly granted as if that term had been added to the word 'commerce.'" This sentence was commented on in the argument at the bar, as if the supreme court intended thereby to convey the idea, that congress had the right to regulate navigation in all cases. It could not have an application so extensive, because, if navigation be comprehended in the word "commerce," it is limited with the limitations on that word; but suppose we add the word "navigation" to the word "commerce," as the court supposes may be done, it will then read, "Congress shall have power to regulate commerce and navigation with foreign nations, and among the several states, and with the Indian tribes." So we see that still, congress could only regulate navigation, when it could regulate commerce, that is, as it regards this case, "among the several states." And, indeed, it is clear that the supreme court must have intended to convey this idea; for in another part of the same opinion, it says: "The power of congress, then, comprehends navigation within the limits of every state in the Union, so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several states, or with the Indian tribes.'" And in the case of U. S. v. Combs, 12 Pet. [37 U. S.] 78, that court says: "The power to regulate commerce includes the power to regulate navigation as connected with the commerce with foreign nations and among the several states."

The next matter of inquiry will be, what is that commerce or navigation, which is completely internal or within the limits of a state. To make a particular branch of commerce or trade within a state, a part of the commerce among the several states, it would not be sufficient that it was remotely connected with that commerce among the several states; for almost everything and every occupation and employment in life are remotely connected with that commerce or navigation. And if congress has the right to regulate every employment or pursuit thus remotely connected with that commerce, of which they have the control, then it has the right to regulate nearly the entire business and employment of the citizens of the several states. Thus the cultivation and preparing of hemp, tobacco, cotton, rice, grain, &c., finding and preparing minerals, the manufacturing and retailing of goods, are all connected with "commerce with foreign nations, among the several states, or with the Indian tribes;" because they are the food of that commerce, without which, it would soon dwindle into insignificance, if it did not altogether perish. Yet, if congress has the power to regulate all these employments, and a thousand others equally connected with that commerce, then it can regulate nearly all the concerns of life, and nearly all the employments of the citizens of the several states; and the state governments might as well be abolished. It is not sufficient, then, that navigation, or trade, or business of any kind, within a state, be remotely connected, or, perhaps, connected at all with "commerce with foreign nations, or among the several states, or with the Indian tribes," it should be a part of that commerce, to authorize congress to regulate it.

The "coasting trade" is a part of the commerce among the several states; and it is not the less a part of that commerce, because the vessel navigates only from port to port, in the same state, up and down a navigable river of the United States, and never goes beyond the state boundary. This will appear more plain upon looking at the course of trade in the United States, upon its great navigable rivers. Goods are purchased at Philadelphia, are brought to Pittsburgh and there shipped. These goods come from parts beyond seas, or were manufactured in the United States, and were intended for sale in Mexico, or at Independence or other place in this state. But the boat in which they are shipped only goes as far as St. Louis. There the goods are reshipped on boats more suitable for the Missouri, and are, in that boat, conveyed to Independence. There they are landed and taken in wagons (if intended for Mexico), across the prairies to that country. If intended for the valley of the Osage, they are landed at the mouth of that river, and reshipped on boats more suitable to its navigation than those ordinarily navigating the Missouri. The same observations may be made in regard to goods, or Southern produce from New Orleans. Very few boats engaged in the trade between that place and St. Louis, ascend the Missouri, and very few that ascend the Missouri ascend the Osage river. These remarks will also apply to nearly all the navigation of the valley of the Mississippi, and will apply as well to boats that carry off the produce of the country, as those which bring merchandise. The boats that navigate the Missouri and Osage rivers, seldom go beyond the limits of the state of Missouri; and yet they are as much and as altogether employed in commerce and navigation among the several states, as if they made voyages beyond the limits of the state. The circumstance that several boats are employed, some without and some altogether within a state, does not make it the less "commerce" among the several states, or less "commerce with foreign nations," or in many cases, "with the Indian tribes." The commerce is a whole, parts of which are in several states. If congress cannot regulate it in one state, it cannot, for the same reason regulate it in another state. And thus it could not be regulated by congress at all, although it is undeniably commerce among the several states. And, in my opinion, it would be the destruction of this commerce, if each state in the Union through which it passed,

had the right to license vessels employed in carrying it on, and to exclude all except those thus licensed, merely because those vessels did not navigate beyond the limits of the state granting the license.

In Gibbons v. Ogden the supreme court says "commerce among the several states" cannot stop at the boundary line of each state. But, although commerce with foreign nations, among the several states, and with the Indian tribes, will include commerce and navigation up and down the navigable rivers of the United States, as part of the coasting trade, yet there is, undoubtedly, a description of commerce and navigation, that is altogether and completely internal, which belongs exclusively to the states, respectively; and which congress has no right to regulate. In the case of Gibbons v. Ogden the supreme court says: "It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states." Again, comprehensive as the word "among" is, it may properly be restricted to that commerce which concerns more states than one. The court of last resort, in New York, laid down the same principles, as will be presently seen. Steamboat Co. v. Livingston, 3 Cow. 743.

The next matter of inquiry will be, is a boat employed only in ferrying across the Missouri river, altogether within the limits of the state of Missouri, engaged in commerce or navigation, the instrument of commerce with foreign nations, among the several states, or with the Indian tribes? If this be answered in the negative, then congress has no right to regulate any commerce or navigation it may be employed in, or to require it to take out a license therefor; and this will be so, although the boat does in some sense navigate the Missouri, a navigable river in the United States. It is not supposed that a boat so employed is engaged in commerce with foreign nations or with Indian tribes. Is it, then, engaged in carrying on commerce among the several states? Is it engaged in carrying on any commerce at all? Is the navigation in which it is engaged an instrument to carry on commerce among the several states? It neither passes up or down the river, and may navigate a year without being twenty feet higher up or lower down, at any time, unless by accident or against the will of the master or owner, than it was at the beginning. Its navigation is neither the beginning, middle or end, or any part of the coasting trade, or any other "commerce among the states." No part of its employment is any part or any link in a chain of "commerce among the several states." Its employment has no other than a remote connection with "commerce or navigation among the several states;" no more connection than has the farmer who cultivates hemp, tobacco or cotton for a market in other states—the miner who digs and smelts lead—the manufacturer who manufactures for the same market, or the traveler who intends purchasing any of these articles. The employment of such boat may be connected with commerce or navigation "among the several states," as indeed is almost every business and avocation in life, more or less remotely; but it is no part of such commerce or such navigation. If it be any part of any commerce, it is that commerce which is altogether internal, as it regards the state of Missouri and other states. Its navigation is wholly disconnected with any other navigation, and is wholly within the state. If the commerce or navigation in which it is employed, be not wholly internal—if, indeed, it be engaged in any commerce—then I am unable even to conjecture or imagine any description of commerce or navigation which is so. This was the opinion of a majority of the supreme court of the United States, all the court except Mr. Justice Johnson, who, perhaps, dissented, in the case of Gibbons v. Ogden, above referred to. The opinion was, however, only given arguendo; it not being a matter necessarily to be decided in the cause. The court (page 203), speaking more particularly of the state inspection laws, says: "They form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government; all of which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, &c., are component parts of this mass." The doctrine thus laid down by the supreme court, is mentioned and approved both by Kent and Story; at least they do not in any way controvert or dissent from it. 2 Story, Comm. 515 and 1 Kent, Comm. 437.

The same opinion is also advanced and enforced by the court for the trial of impeachments and the correction of errors in the state of New York, in the case of Steamboat Co. v. Livingston, 3 Cow. 754. That court says: "The supreme court of the United States expressly disavows any authority in congress to interfere with the purely internal commerce and police of a state. Ferries may be subject to the acts of congress so far as they are used for carrying on the coasting trade, but those ferries which are the subject of state grant, if they can be called commercial regulations at all, belong clearly to the internal commerce of the state." Again: "Those ferries over which the state exercises its appropriate authority, are not connected with the coasting trade; they are not, in the constitutional sense, commercial regulations. But if they were, they belong to that exclusively internal commerce over which congress has no control." It

was said in the argument of the above case, that the state might establish a ferry between the cities of New York and Albany; and it was in answer, I presume, to that part of the argument that the court said: "Ferries may be subject to the acts of congress so far as they are used for carrying on the coasting trade." But the court said further, that to call such navigation a "ferry," would be an abuse of the term. As congress has the power to regulate commerce, when carried on by land as well as when carried on by water—carried on roads as well as on rivers—I will not say that it might not regulate some description of ferries, such as those between the United States and Canada, and perhaps others. But this, I think, has not been done. A ferry is nothing more than the continuation of a road, and as far as regards the authority of the state and general governments, does not differ from a toll bridge. And until it is made to appear that congress has the power to regulate the traveling on the ordinary roads of the state, and to license toll bridges, it would seem to me it could not regulate and license the ordinary ferries on those roads. For each state to regulate and license the coasting trade and exclude and admit what vessels it pleased within its limits, would be, and has been—as was seen in the controversy between New York, New Jersey, and Connecticut, in regard to the exclusive privileges granted to Livingston and Fulton by the former state—extremely inconvenient and dangerous. But for each state to regulate its ferries, has not produced and cannot, I should think, produce any inconvenience to the citizens of other states. It may be, that steam ferry boats should be regulated as directed in the act of 1838, in regard to vessels engaged in the coasting trade; but if so, the states are perfectly competent to make all such regulations and to see to their enforcement.

It was said in the argument of this cause that a license from the United States and one from the state were both necessary: that a license from the United States gave the right to navigate the river, and that from the state to land and take in passengers and freight and carry on a ferry. In the case of Gibbons v. Ogden, the supreme court said: "The word 'license' means permission or authority; and a 'license' to do any particular thing, is a permission or authority to do that thing, and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer to do what is within the terms of the license." The decree in that case is: "That the license to carry on the coasting trade gave full authority to navigate the waters of the United States by steam or otherwise for the purpose of carrying on the coasting trade, any law of the state of New York to the contrary notwithstanding." Now, if carrying on a ferry is carrying on the coasting trade, a license from the United States to carry on that trade, will give the right to carry on the ferry. And of course any license from the state of Missouri would be altogether inoperative, for it could only authorize the grantee to do that which he was already authorized to do by a license from the United States; and a license from the state would be inoperative for another reason, that is that the state had no authority over the coasting trade. And that the state has no control over that trade will be seen by looking at the decision of the court in the case of Gibbons v. Ogden, before cited, pages 198, 200. If, on the contrary, the carrying on a ferry be not carrying on the coasting trade, then the United States have nothing to do with it, and the license from the state would give the authority to carry on the ferry; and of course, a license from the United States would be inoperative. So that, in no point of view, can both licenses be operative. A license to ferry, is a license to cross at a certain place, carrying freight and passengers; and if it does not give that right, it gives nothing; if it does give that right, no other license can be necessary. What would avail the right to land and take in freight and passengers, as a ferry, without the right to cross over and reland? And of what avail would be a license from the United States to navigate the river, without also the right to land. Neither the United States nor the state ever grants such useless and inoperative privileges, and no constitution can require it. What is the reason that to run a boat between Independence and St. Louis no license from the state is necessary or ever granted; and yet, to cross a river, as a ferry boat, such license is necessary and has always been required? The reason is, that one is part of the coasting trade, and the other is not. It was admitted in the argument, that such license was necessary in the one case and unnecessary in the other.

It was also said in the argument, that perhaps this power in congress may be supported under the grant, in the constitution, to lay and collect taxes. The answer may be brief. No tax is collected or collectable under the laws of the United States applicable to this case, and the act of 1838 is to prescribe and impose certain regulations, not to lay or collect a tax. I come, therefore, to this conclusion: that congress has no authority to require a license to carry on a ferry over the Missouri river, at a place altogether within the limits of the state of Missouri.

The next matter of inquiry will be, is there anything in the laws of the United States, previous to the act of 1838, which requires a boat employed only in ferrying across a river, at a place wholly within the limits of a state, to obtain a license for such employ-

ment? A person will be greatly aided in the investigation, by bearing in mind the constitutional power of congress. For if words or phrases in an act, will bear a construction which is in accordance with the constitutional power of the legislature, and one which is opposed to that power, we are bound to believe, that the legislature intended that construction which is in accordance with their power. The title of the act, which is the principal one on this subject (18th Feb., 1793 [1 Stat. 305]), is "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The form of the license, given in the act itself, is "License is hereby granted for the said —— called the said ——, to be employed in carrying on the coasting trade." The act provides for the forfeiture of any ship or vessel, found trading between, &c., laden with foreign goods; and for the payment of custom duties, if laden with certain goods, &c., not being registered or licensed for carrying on the coasting trade. The coast is the shore. "To coast" is to navigate along the shore. The "coasting trade," is the trade along the shore. It cannot with any propriety be applied to ferrying across a river; and never, I think, has been so applied. Neither the phrase "coasting trade," nor the word "coasting," nor "trade," could with any propriety, be applied to a ferry across a river. Congress may, and probably has, the power, to apply its laws to some description of ferries, such as those between Canada and the United States, and probably others; but I am of opinion, that none of the acts of which we are now speaking, were intended to apply to the ordinary ferries within the limits of a state.

The opinion of Mr. Justice Johnson, in (the case of) Gibbons v. Ogden, was cited by the counsel for the United States, in the argument of this case. When properly considered, there is not, I think, much in it that favors the doctrine maintained by the counsel. It had been said, in the argument of that case, that the boat which plied between New York and Albany, was only a ferry boat. Mr. Justice Johnson, in noticing that part of the argument, said that in either character—that is, as a steamboat or a ferry boat—she was expressly recognized as an object of the provisions which relate to licenses. This was certainly correct, for in either character, or by whatever name she was called, she was engaged in "carrying on the coasting trade." It only now remains to say a few words in regard to the act of 1838. It was admitted by the United States counsel, in the argument of this cause, that the license required to be taken out, by that act, was a license to "carry on the coasting trade," and was no other than that required by the laws of the United States existing theretofore. This indeed, is evident from the provisions of the 1st and 2d sections. The 1st section requires a new enrollment, a new license; the 2d section, a license "under the existing laws." If, then, a vessel be neither engaged in the coasting trade, or indeed in any trade at all, the clearest and strongest language would be necessary to require such a vessel to take out a license for such purpose. We have seen that a license is an authority or permission to carry on that trade; if it be not intended to employ a vessel in that trade, why should the owner be required by law to take out a license therefor? If the law will bear no other construction than one so unreasonable, we would be bound to suppose it was intended to have that construction; but it will bear another construction, and that is, that it was intended that vessels engaged in the coasting trade should be required to conform to additional regulations, before being allowed to carry it on. The 1st section requires boats "to make a new enrollment, and take out a new license, under such conditions as are now imposed by law, and as shall be imposed by this act." There is not a word in the act of 1838 which applies particularly to ferry boats, and not one but will apply generally to vessels engaged in the coasting trade. I infer, therefore, that it was not intended to make any such extraordinary change in the existing laws. If such a change were contemplated, many details would be necessary to confine its operation to cases within the jurisdiction of the general government. As was said by the supreme court, in Gibbons v. Ogden, in regard to the power, "it would be inconvenient, and certainly is unnecessary." Ferry boats would have to quit their station, twice a year, and go frequently several hundred miles to be inspected and licensed; a trip for which they are unfit, and which would make other boats necessary to supply their places at the ferries, creating an expense which but few ferries would justify. It would abolish all the laws of the state in regard to such ferries, and materially interfere with its police, economy and revenue. Such important changes are not usually made by mere implication or construction, and no court would, I think, be justifiable in giving the laws in this case such an interpretation. My opinion is, therefore, that the act of 1838 does not apply to the steam ferry boat, the James Morrison.

NOTE. This case was taken to the circuit court of the United States on appeal, and the judgment of the district court affirmed. [Case unreported.] A more extended reference is made to the opinion of the learned judge of the circuit court, on appeal, in the case of U. S. v. The Wm. Pope [Case No. 16,703].

Case No. 15,466.

UNITED STATES v. JAMESSON.

[1 Cranch, C. C. 62.] [3]

Circuit Court, District of Columbia. July Term, 1801.

CRIMINAL LAW—ARREST OF JUDGMENT—DEFECTIVE INDICTMENT—MISDEMEANORS.

1. The want of the name of a prosecutor at the foot of the indictment is not a good ground for arresting the judgment.

2. A capias is proper process upon an indictment for misdemeanor.

Indictment [against R. B. Jamesson] for assault and battery. Motion in arrest of judgment: 1st. Because there is no name of a prosecutor indorsed on the indictment, agreeably to the act of Virginia. Rev. Code, p. 112, § 24. 2d. Because a capias was not the proper process. Id. § 28.

THE COURT was of opinion that the 24th section applied only to cases where an information was filed without a previous presentment. There may not be a prosecutor, and crimes ought not to go unpunished.

Motion overruled and judgment entered.

Case No. 15,467.

UNITED STATES v. The JAMES WELLS.

[Brunner, Col. Cas. 65; [1] 3 Day, 296.]

Circuit Court, D. Connecticut. Sept., 1808.[2]

EMBARGO ACT—CONDEMNATION—NECESSITIES OF NAVIGATION.

The homeward bound cargo of a vessel having proceeded to a foreign port in contravention of the act of congress of the 9th of January, 1808 [2 Stat. 453], supplementary to the general embargo act, is not liable to condemnation. On a libel against the vessel for having thus proceeded, necessity arising from stress of weather and the condition of the vessel is no defense.

Appeal from the district court of the United States for the district of Connecticut.

This was a libel founded on an alleged violation of the act of congress approved the 9th of January, 1808, supplementary to the general act laying an embargo on all ships and vessels in the ports and harbors of the United States. The brig of which Stephen Griffiths was claimant was charged with proceeding to a foreign port or place, contrary to the provisions of said acts, and was condemned by the decree of the district court. [Case unreported.] The cargo, of which the claimants were, Jesse Hurd of eighty puncheons of rum, N. G. Rutgers and B. Seaman of three hundred and twenty-six bags of coffee, and J. H. Rawlins & Co. of forty-seven hogsheads and fourteen barrels of sugar, and five hogsheads of rum, was restored. On the opening the cause it appeared that the cargo libelled was the return cargo of the vessel from the West Indies.

Mr. Daggett, for the claimants contended that the embargo law did not authorize a condemnation of this property. Though the vessel went out in violation of the embargo, the claimants are entitled to a restoration of the return cargo.

Mr. Wolcott, contra.

LIVINGSTON, Circuit Justice.—I have a strong impression that the provisions of the act apply only to the cargo carried out. In a case like this, nothing is to be taken against the claimants by implication. The most express words would be necessary to include the homeward-bound cargo. But congress have said nothing about it. We cannot supply any omission. The intention of the act was to prevent exportation. I am ready to say that those parts of the decree restoring the cargo ought to be affirmed. Proceed to the vessel.

The cause was conducted by the district attorney and Wolcott, on the part of the United States; and by Daggett and Bristol, for the claimants. The evidence, so far as it is material to the present purpose, is recapitulated in the opinion of the court.

LIVINGSTON, Circuit Justice.—This is a libel against the brig James Wells, for proceeding to a foreign port in contravention of an act of congress. Admitting the fact, the claimant interposes a plea of necessity, and contends that although he may have violated the letter, he is not within the spirit and meaning of the law. Whether such matter can form a good defense here, is a question of considerable magnitude. To interpret a statute by its equity, or to say cases are without its spirit, although within its express letter, is at all times a delicate and difficult office. It is making, instead of expounding, laws. It often sets in array against the rigorous provisions of an act, the feelings of a single judge who may not always have firmness enough to enforce them, if he be at liberty to mitigate their severity when they may be supposed to bear hard upon a particular case. He, besides, destroys that certainty in laws which is a property so much desired, and must ever constitute one of their chief excellences. Even when this mode of interpretation may be indulged, it should be strictly confined to cases which could not, from their nature or the infrequency of them, be supposed to have been foreseen by the legislature. But when the necessity or vis major which is relied on, arises from circumstances which were too obvious to have escaped the most ordinary capacity, but which, notwithstanding, are not found to form an exception from the general provisions of the law, a court may perhaps say, "Per quam durum, sit ita lex scripta est." When to this is added that another tribunal is erected and referred to by these very laws, invested with full power to relieve in cases of accident, etc., unintentional and innocent infractions, it can hardly be doubted but that the courts of the United

[3] [Reported by Hon. William Cranch, Chief Judge.]

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

[2] [Affirmed in 7 Cranch (11 U. S.) 22.]

States are designedly excluded in all cases of this nature from every equity of interpretation whatever, and that for a mitigation of their rigor recourse must be had elsewhere. Without, however, deciding how far a defense of this nature be admissible, where the act is silent as to any exception, the court will proceed to examine whether in point of fact the claim is supported. A more unpleasant office cannot devolve on a judge than to be called on to determine both the law and the fact, in a penal suit between the government and a fellow citizen. But whatever his feelings as an individual may be, and of these I should never wish to divest myself, he must not lose sight of those solemn sanctions he is under, to administer with strict impartiality the laws of his country. In these every man has an interest, and to permit those who violate them to pass with impunity is an injury to such who, from principle or from any other motive, make them the rule of their conduct.

The fact alleged in the libel being admitted, it will not be denied that the necessity on which the claim is founded should be made out in a manner to leave no reasonable doubt that it produced the violation complained of. The onus lying on the claimant, his proof should be strong and satisfactory. If anything short of this be admitted, laws, however salutary, may be easily transgressed and their penalties avoided.

This vessel sailed from New York on the 26th of February of the present year, bound on a voyage to St. Mary's, in Georgia. She was new, and without encountering any extraordinary bad weather, or meeting with any accident, we find her in a very few days bearing away for the West Indies. For this conduct no other reason is assigned but her leaky condition. Of this fact there is probably not much doubt; but that the danger arising from this circumstance was so imminent as to justify the act, is not so clearly established. It is true, that those on board must, prima facie, be the best judges of the necessity, which may exist for changing the course of a voyage; and where no circumstances arise to impeach their testimony, they will be entitled to and receive full credit. But where every one of the parties may possibly be implicated in heavy penalties, it cannot be regarded as a want of charity to listen to their allegations with some caution. The master, it is concluded, is in this predicament, and it may well be doubted whether all the other hands are not subject to the same penalties. If so a very strong inducement existed in them all to give a high coloring to the transaction. But without detracting from their credit on account of their participation in it, and their possible liability, it is not easy to believe that on account of the leak which they describe, a real necessity intervened for leaving the continent. Vessels in a more leaky condition than this one is described to have been in, have sometimes traversed the ocean, encountered considerable storms, and arrived in safety. There is too much reason, therefore, to think that unless some strong temptation to depart from the track of the original voyage had presented itself, more serious and successful efforts would have been made to reach St. Mary's. This surmise is much strengthened by the voyages performed by other vessels at the same season of the year, and on parts of the ocean not very distant from this brig. Neither has it escaped the attention of the court, that after bearing away, the winds and weather for a long time were very favorable to have made an attempt to reach the destined port; for whatever necessity may have produced at the time a determination to go to the West Indies, if a reasonable prospect, such as moderate weather and favorable winds shortly after, presented, of reaching the continent in safety, it ought to have been embraced; and if the cargo were found to be greater than the vessel could bear, there can be no hesitation in saying that part of it ought to have been sacrificed, if not the whole, in preference to landing it in a foreign country in direct violation of a public law, which could have been done without forfeiting the penalty of the bond which had been given to land it in the United States. This is an argument which was not urged by the counsel for the United States, but has considerable influence with me in the judgment I am about to give. It is not pretended that this vessel, if relieved of part or the whole of her cargo, might not have returned to the United States. The underwriters, if insurance had been made to St. Mary's, would have been liable; and if uninsured, the owner should have borne the loss himself rather than have gone to a foreign port. If this view of the subject be correct, there is an end of every justification arising from necessity. The carrying of the cargo to St. Bartholomews then becomes a voluntary act, which nothing could justify, but being driven there by a sudden and severe tempest, which did not leave time or opportunity to throw it into the sea.

But if this were not a duty, there are other circumstances which render it difficult to believe that this was not a concerted plan to evade the embargo laws. There is no evidence to show what was the value of flour at St. Mary's. It is a fair inference, therefore, that the cargo was chosen for a West Indian market, where the embargo would necessarily produce a scarcity of that article. We also find the owner on board as supercargo, which is not very usual in coasting voyages. He carried with him, also, notes payable in the West Indies; and although those may have been duplicates, it is not very customary, whatever may be the practice on land, to take such papers to sea. Nor is it very conclusively made out that there was a necessity to dispose of the cargo at Gustavia; and although the sale at that port constitutes

no part of the present offense, it is some evidence of the quo animo; for if repairs had been the only object of going there, the cargo would have been retained and brought back unless prevented by some compulsion or force on the part of government. It is also impossible to evade the very forcible circumstance of the holes which were bored in this vessel. On this subject, as well as on every other, the court has listened with great pleasure to the very ingenious remarks of the claimants' counsel; and although it felt desirous that the impressions which were unavoidably made, when this occurrence and some others were first mentioned, should be removed, it cannot say that the manner in which they have been accounted for has had that effect.

The secrecy with which these holes were made, the place chosen for the purpose, the instrument made use of, the manner in which they were closed, the mode of fastening the plugs, with the anxiety discovered to prevent a discovery previous to the first trial, and the chance by which the disclosure was at last made, render it very difficult to believe that their design was such as is now pretended, or any other than to produce a leak, which was to furnish the means of defense against a prosecution which it was foreseen would take place on the return of the vessel to the United States. I take no notice of the erasures in the log-book, because it is possible they may have been made bona fide; and it appears from the witnesses that from the winds which prevailed the vessel might very well have been where she was, when it was determined to bear away. But taking all the testimony and circumstances together, I am compelled with every inclination to come to a different result, to believe that the claimant has altogether failed in showing such a necessity as would, under an express exception in the statute, have justified him in going to a foreign port. The judgment of the court, therefore, is that the decree of the district court condemning the brig James Wells be affirmed.

[The case was taken on an appeal to the supreme court, where the decree of this court was affirmed. 7 Cranch (11 U. S.) 22.]

UNITED STATES v. The JANE CAMPBELL. See Cases Nos. 7,205 and 7,206.

Case No. 15,468.

UNITED STATES v. JARVIS.

[2 Ware (Dav. 274), 278;[1] 4 N. Y. Leg. Obs. 298.]

District Court, D. Maine. Feb. Term, 1846.

OFFICERS OF THE UNITED STATES — EXTRA COMPENSATION — CONSTRUCTION OF APPROPRIATION ACTS—PRINCIPAL AND AGENT—NAVY AGENT—REMOVAL FROM OFFICE—RENT AND CLERK HIRE.

1. Under the act of congress of March 3, 1839, c. 82, § 3 [5 Stat. 349], no officer of the United States, whose salary or emoluments are fixed by law and regulation, is entitled to any extra allowance or compensation in any form for disbursements of public money, or other service, unless the same is authorized by law.

[Cited in Browne v. U. S., Case No. 2,036.]

2. In the construction of temporary statutes, as annual appropriation acts, the presumption is that any special provisions of a general character, contained in such acts, are intended to be restricted in their operation to the subject-matter of the act, and they are not to be construed to be permanent regulations, unless the intention of making them so is clearly expressed.

3. The power of an agent may be revoked at any time by the principal, without notice, but if the agent, in the prosecution of the business of his principal, has fairly and in good faith, before notice of the revocation of his powers, entered into any engagements or come under any liabilities, the principal will be bound to indemnify him.

4. So an agent, after accepting an agency, cannot renounce it at pleasure, without notice or good cause, but on the condition of rendering himself responsible for any loss which may thereby be sustained by the principal.

5. No one can change his will to the injury of another where mutual rights and obligations exist between the parties.

6. These principles, having their foundation in natural equity, apply as well between the government and an individual as when both parties are private persons.

7. The defendant was appointed navy agent for four years, but removable at any time within the four years at the pleasure of the president. He was removed six months before the term expired, and without previous notice. Before his removal he had hired an office on a parol lease, the quarter terminating three days after his removal. Not having given notice of his intention to quit he became, by the local law, bound for one quarter's rent. He had also hired a clerk for the year terminating with the close of his term. On dismissing his clerk he paid him $200, or one quarter's salary after his discharge.

8. It was *held*, that these engagements having been fairly and properly made in executing the business of his agency, the United States were bound to indemnify their agent, and that these charges were an equitable set-off under the act of March 3, 1797 [1 Stat. 512].

This was an action of debt on the official bond of the defendant [Leonard Jarvis], as navy agent for Boston and Charlestown, for a balance alleged to be due from him on the final settlement of his accounts. The defendant was appointed navy agent in April, 1838, to hold the office during the pleasure of the president, for a time not exceeding four years. The compensation allowed for his services was one per cent on the amount of his disbursements, but not to exceed in the whole $2,000 a year. He was removed from office, September 27, 1841, six months and three days before the term of four years expired, and the first notice he had of his removal, or of an intention to remove him before the expiration of the term, was by the appointment of a successor. On the final settlement of his accounts by the accounting officers, there was found to be a balance due the United States of $715.97. The defendant claimed to be allowed $452.18, as commissions of one per cent on $45,218.59 paid to the heirs

[1] [Reported by Edward H. Daveis, Esq.]

of John Harris, for certain lands purchased by the secretary of the navy for the navy yard, as being an extra service, not coming within the regular duties of the navy agent, and for which he claimed to be entitled to a separate and additional compensation. And he also claimed $26.29, being the amount of several small items for office rent and charges for the remainder of the quarter ending October 1, and also one quarter's office rent from October 1 to December 31, 1841, after his removal from office. The defendant hired his office by a parol lease, and not having given seasonable notice of his intention to surrender it before the expiration of the quarter ending in October, by the local law of Massachusetts he became liable for an additional quarter's rent, which was paid by him, and the receipt is in the case. He also claimed $200 for one quarter additional clerk hire. His clerk was hired for a year terminating with April 1st, 1842, when the defendant's appointment would expire by its limitation. The clerk, being hired for the year, claimed his salary under the contract, but compromised for one quarter's salary instead of the whole balance, which was half a year. The amount charged for office rent and clerk hire was the same as had been allowed from quarter to quarter in his previous settlements.

Mr. Haines, U. S. Dist. Atty.
Mr. Preble, for defendant.

WARE, District Judge (charging jury). The most considerable item claimed by the defendant in off-set is $452.18 charged as commissions on the disbursement of $45,218.59, paid to the heirs of John Harris, for lands purchased for the navy yard in Charlestown. The owner of the land not having left children, the money was to be paid to his collateral heirs, and, as the secretary could not himself conveniently ascertain who they were, he employed the defendant to do the business. In his letter to him he says: "The money is sent to you that no mistake may occur as to paying it to the party entitled to receive it;—and to guard against any such mistake you are requested to consult the United States district attorney, Mr. Mills, and to pay over the amount and to take the proper receipts and acquittances for the same under his advice and direction." It is apparent that the service to be performed was one not only of considerable responsibility but of some delicacy; for if the defendant had paid the money to a wrong person he might have rendered himself responsible, and if he is entitled to any compensation it is not contended that the sum charged is too much. But it is argued by the district attorney that he is not entitled to any, but that he was bound to perform this service for the compensation which he received as navy agent. That salary was established as a compensation for performing the ordinary service attached to the agency. Now this does not appear to fall within the range of his ordinary duties as navy agent, and it appears to me to be so treated by the secretary in his letter. It was an extra service, and attended with additional responsibility. But then it is argued by the attorney that, admitting this, he is barred from receiving any additional compensation by the third section of the act of congress of March 3, 1839. That section, so far as it applies to this case, is in these words: "No officer in any branch of the public service, or any other person whose salary and emoluments are fixed by law and regulation, shall receive any extra allowance or compensation in any form whatever for the disbursements of public money, or the performance of any other extra service, unless the said extra allowance or compensation be authorized by law." The defendant was an officer whose pay and emoluments were fixed. It must then be admitted that the case comes within the words of the law, and must be governed by it, if the law is applicable to the case. But this is the very point which the defendant's counsel deny. The act, in which this section is found, is one of the annual appropriation acts. Its title is, "An act making appropriations for the civil and diplomatic expenses of the government for the year eighteen hundred and thirty-nine." The first section contains more than two hundred clauses, making as many distinct appropriations for the various branches of the public service, and embracing all the civil and diplomatic expenses for the current year. The second section contains a special provision to which I shall presently refer, and the third has the clause which has been read, and which it is contended governs this case.

The argument of the defendant is, that this section is intended to apply to the subject-matter of the act only, and is to be confined to the disbursements of the appropriations contained in the act. This is, perhaps, the construction that would at first most naturally suggest itself. The act itself is one of those annual acts which spend their power in the course of the year, to which we are not accustomed to look for permanent regulations. If the legislature annex to such an act any special provision which has a proper application to the subject matter of the act, and use no words indicating an intention to give it a more extensive operation, the just conclusion would seem to be, that the special regulation was intended to be confined to the matters embraced by the act. It is remarked by Mr. Justice Story in delivering the opinion of the court, in Minis v. U. S., 15 Pet. [40 U. S.] 445, that "it would be somewhat unusual to find engrafted, on an act making special and temporary appropriations, any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and when the language admits of no other reasonable

interpretation." This is emphatic language, and places this, as a rule of interpretation, on strong ground. The second section of this act also contains a special regulation applying to collectors of the customs, which is clearly intended to be permanent. It requires them to place money received on unascertained duties, or duties paid under protest, at once to the credit of the treasurer. The first words of the section are: "From and after the passage of this act all moneys paid to any collector," etc., words the meaning of which cannot be mistaken. But there are no words of the like import in the third section, and the omission of them undoubtedly favors the interpretation put upon it by the defendant's counsel. But, then, though these are the formal words most usually employed to exclude a doubt whether the regulation was intended to be permanent or not, they may be supplied by other language clearly indicating the intention of the legislature. Now it is quite certain that this section must extend to matters beyond the appropriations contained in the act. It provides that no officer in any branch of the public service, or any other person whose salary and emoluments are fixed by law or regulation, shall receive any extra allowance or compensation in any form, unless it is authorized by law. Now this act embraces but part of the appropriations for the year, so that we are necessarily carried beyond the subject-matter of this act. It must extend itself over all the appropriations of the year at least; and though it may be said that this clause of the law does not necessarily look beyond the current year, yet the second clause of the section evidently does. That provides that no executive officer, other than heads of departments, shall apply, from the contingent fund of which they have the control, more than thirty dollars annually, to pay for newspapers and pamphlets. The word "annually" here is necessarily prospective, and extends the operation of this clause to future years. There are, in the first clause, no restrictive words confining it to the current year. If part of the section was intended to be permanent, it is quite natural to suppose the whole was. It would be very unusual to unite, in a single section of a law, one provision intended to be permanent, with another intended to be temporary, without clearly distinguishing the permanent from the temporary part. My opinion is, that this section is a conclusive bar to the allowance of the commissions claimed on the disbursements in question; and whatever we may think of the equity of the claim, it is not for the court or the jury to be wiser or more indulgent than the law. This case was referred to in Browne v. U. S. [Case No. 2,036], as allowing the commission. It was a mistake.

This disposes of but part of the case. The other allowances claimed involve questions of much more delicacy and difficulty. The defendant claims an allowance of $26.29, for office rent for the three remaining days of the quarter ending October 1, and also for rent for the quarter following. These two claims stand on the same ground, and may be considered together. An office or place of business was necessary for the discharge of the duties of the agency, and the rent had been charged and allowed, at the same rate, in previous quarters It is admitted that it was hired and used by the defendant for the purpose of the agency and for no other, he not being engaged in any other business that required his having an office. It was hired on a parol lease; and, not having given reasonable notice of his intention to quit before the termination of the quarter, by the law of Massachusetts he became bound for another quarter's rent. Rev. St. Mass. pt. 2, tit. 1, c. 60, § 26. The ground of the claim is this: that, having been dismissed from office when it was too late to give the notice required by law, and having himself no previous notice that he was to be superseded, this is a loss which he incurred without fault on his part, in the business of the plaintiffs, for which they were bound to indemnify him. The answer is, that he held his appointment at the mere will of the president, and, being liable to be removed at any time without notice, he might have provided for the contingency in his contract.

If this was a question between two individuals, and not between an individual and the government, I cannot say that I should feel much difficulty in arriving at a conclusion satisfactory to my own mind. It was necessary, in the transaction of the affairs of the agency, that the defendant should have a place of business where he might be found in business hours. It was engaged on a parol lease, and by law he was bound to give reasonable notice of his intention to quit, or he became bound for another quarter's rent. He had held the agency for three years and a half, and the term for which he was appointed would not expire by its own limitation for six months. No complaint had been made against him, and he had no reason to suppose that he would be superseded before the expiration of that time. If he had engaged his office in the usual course of business, and there was nothing unreasonable in the terms on which it was engaged, considering the tenure on which he held the appointment, the principal would be liable for the loss. The question for the jury would be, whether an agent holding an appointment of so much importance, though the agency was revokable at will, should be expected to engage his office rooms on a tenancy from day to day, or week to week. If the jury should think that he acted prudently and in good faith, with a just regard to the interest of his principal, then I should say that in law he was justly entitled to look to his principal for an indemnity for a liability fairly incurred in the prudent prosecution of his proper business.

It is true that when a man appoints an agent or mandatary without limitation of

time, he may always revoke the appointment at will. A person may enter into many other engagements liable to be dissolved at will, but which, where other persons have fairly, and in the usual course of business, acquired an interest under them, the law will prevent him from dissolving them at an unreasonable time; or if it does not absolutely prevent the act, will hold him to indemnify those who may suffer an injury from it. This is a general rule of justice and equity, which is found in every system of refined and cultivated jurisprudence. The engagements may be terminated at will, but then this will must be exercised reasonably, and not in mere wantonness or malice. An illustration of the principle may be drawn from the contract of partnership. When entered into without any limitation of time, it may always be dissolved at the will of any of the parties. In that highly cultivated system of jurisprudence which forms the basis of the law of the whole continent of Europe, the Roman law, the renunciation of the partnership by one of the parties, to be valid, must be made in good faith, and not at an unreasonable time, to the injury of the common interest; for it is not, says the law, the private interest of the individual partner, but the common interest of the partnership that is regarded.[2] This principle, so conformable to natural equity, to good faith, and fair dealing, was adopted from the Roman law by the ancient jurisprudence, and is confirmed by the new Civil Code of France. Poth. Contrat de Societe. Nos. 150, 151; Code Civil Francais, Nos. 1869–70. And although no such restriction is perhaps established in the common law, yet it seems that a court of equity will interpose and restrain a partner from wantonly and maliciously putting an end to the engagement, to the injury of the common interest. Story, Partn. § 275, note.

But the case of a parol lease at will, which arises in the present case, is one which perhaps still more clearly shows, that when it is said that an engagement is liable to be terminated by either party, it is, in the sense of the law, a will under the control of reason and justice. Though it is said to be a contract merely at will, yet, independent of every statute regulation at the common law, the lessor cannot, without notice, eject the tenant and turn him into the street, nor can the tenant discharge himself from the liability to pay rent without giving the landlord reasonable notice, to enable him to find another tenant. 4 Kent, Comm. 111. These restrictions on the capricious and wanton exercise of the will, where the interests of other persons are affected, have their foundation in a rule of universal equity and justice, arising from the social nature of men, that a man shall so use his own rights as not to injure another. "Sic utere tuo ut alienum non lædas." This reasonable and equitable principle has also its application in the law of agency. There is no doubt, as a general rule, that the appointment of an agent may at any time be revoked by the principal without giving a reason for it, because it is the right of every man to employ such agents as he sees fit. The agent also has the same general right to renounce the agency at his own will; for it is an engagement at the will of both parties. But the contract of agency, or mandate, involves mutual obligations between the parties; and these commence, if not as soon as the appointment is made, at least as soon as the agent or mandatary commences the execution of the agency. If he has entered on the business, even if he does not accomplish prosperously what he has undertaken, he will be entitled, from his principal, to an indemnity for his expenses and services, if the failure does not arise from his own fault. Dom. Lois Civiles, liv. 1, tit. 15, § 2, Nos. 1, 2. After he has engaged in the business of the agency, the principal may at any time revoke his powers and dismiss him from his service. But if his power is thus revoked, the principal will be responsible to him for any engagements he may have entered into, and any liabilities he may have incurred in good faith, in the proper business of the agency, before he had notice of the revocation. Id. § 4, No. 1. And so the agent, after entering on the business, may renounce the agency. But then this must be done in good faith, and be preceded by reasonable notice, or the agent will be liable to the principal for any loss that may result to him from this cause. The agent cannot withdraw himself from his engagement wantonly, and without reasonable cause, without rendering himself responsible for the consequences. Id. Nos. 3, 4; Poth. Mandat, No. 44; Dig. 17, 1, 22, § 11, Id. 1, 27, § 2. And when a man has undertaken an agency, he will not merely render himself liable for damages to his principal, if he renounces the agency without notice and without just cause, but a court of equity will go further. If an agent is employed to make a purchase, and, finding the speculation likely to prove profitable, he renounces the agency and purchases for himself, equity will hold him a trustee for the principal, and give him the benefit of the purchase directly, without putting him to an action for damages. 1 Story, Eq. Jur. § 316.

It may be true that in our jurisprudence a precise authority may not be found for all these propositions among the adjudged cases. But they rest on such clear grounds of justice and good faith, that they may be well taken for granted without the authority of a direct decision (Story, Ag. § 467), and they all stand approved by the authorities of the

[2] "Semper enim non id, quod privatim interest unius ex sociis, servari solet, sed quod societat expedit. Item, qui societatem in tempus coit, eam ante tempus renunciando, socium a se, non se a socio, liberat. Itaque, si quid compendii postea factum erit, ejus partem non fert; atsi dispendium, æque præstabit portionem nisi renunciatio ex necessitate quadam facta sit." Dig. 17, 2, 65, §§ 5 and 6.

Roman law. They all flow from a great principle of social justice. A man cannot, wantonly and without reasonable cause, retract or annul his own acts and change his purpose, when others, in the ordinary course of business and in good faith, have acquired an interest in them, to the injury of such persons, without rendering himself liable to repair such injury. The greatest of the Roman jurisconsults reduced the rule to a short and pithy maxim: No man can change his will to the injury of another. Dig. 50, 17, 75. "Nemo potest mutari consilium suum in alterius injuriam." It is applied in some cases where no previous engagements exist between the parties, but its application is peculiarly stringent when mutual obligations by contract do exist. "If I agree with a mechanic," says Pothier, "to build me a house, and after the agreement I change my purpose and determine not to build, I may dissolve the engagement by giving him notice of the change of my will; but if before the notice he has purchased materials for the work and engaged workmen, I shall be bound to indemnify him for the loss he sustains by the change of my purpose." Contrat de Louage, No. 440; 19 Duvergier, Droit Civil Francais, § 370. If this was a case between two private persons, the case put by Pothier would differ in no essential particulars from the present. Both are contracts of hiring; for the contract with a salaried agent or mandatary is essentially a contract of hiring, though in some respects distinguishable from the common contract for the hire of labor. Id. tit. 8, c. 3. The defendant was a salaried agent, and he had, for the sole purpose of the agency and for the sole benefit of his principal, hired an office. He held, as all agents do, the appointment at the will of the principal, and he is dismissed without notice, while under this liability for rent. If the engagement of his office was, as to the terms, reasonable and proper and in good faith, under the circumstances, the justice of the case appears to me so clear, that the very statement of the facts carries with it the answer, and that conforms to the well-established principles of law.

The other charge, for clerk hire, does not appear to me to be distinguishable in principle from the rent. It is admitted that in the business of the agency a clerk was indispensable, and he had been allowed, as all officers of this description are, a reasonable sum for clerk hire. The amount claimed is the same as had been allowed and paid in previous quarters. The clerk was engaged for a year, terminating with the expiration of the term of the defendant's appointment; and, in strict law, he might, perhaps, have recovered his salary for the whole of the unexpired year. 2 Smith, Lead. Cas. (Am. Ed.) p. 25. The defendant compromised the claim by paying one quarter's salary. Is the defendant, who has been compelled to pay this sum for a liability incurred in the business of the plaintiffs, entitled to be indemnified by his principal? If the contract with the clerk were a reasonable and proper one under the circumstances of the case, the decision referred to, from Pothier, shows how it would be decided in a controversy between individuals. And whether the contract was, as to the period for which he was engaged, reasonable and proper, would be a question for the jury. If the duties of the clerk were such as might be safely intrusted to any ordinary person, it might be questionable whether the defendant, knowing the tenure of his own office, would be justified in contracting with him for a year. But it is to be remembered that the agency of the defendant involved great responsibilities, he having contracts and disbursements to make to the amount of several hundred thousand dollars a year, and in the transaction he required a clerk in whom he could place the most unreserved confidence. It is hardly to be expected that a person of such qualifications would be willing to engage his services on the same terms as a common day laborer. One who is fit to be trusted can usually engage on terms of more permanency; and one who would be willing to engage on such precarious conditions, as to be dismissed at any time without notice, the defendant might not be willing to trust to such an extent, that, if he proved unfaithful, he might himself be involved in ruin. Both his own safety and the interest of his principal would require him to act with more circumspection. When the defendant engaged his clerk, a year of the term for which he was appointed remained, and he had no reason to expect that he would be dismissed before that term expired. If in your opinion the contract with the clerk was, under the circumstances, reasonable and proper, and was a liability incurred in good faith, in the prudent transaction of the business of the agency, on the principles of law and equity he is entitled to an indemnity.

It will be observed that I have treated this case thus far as though it was a controversy between two private individuals; and have stated what appear to me to be the just conclusions of law. Are there any reasons of general justice or public policy, why the same principles should not be applied to these contracts between the government and an individual? After having reflected considerably on the subject, I feel bound to say that none have occurred to me. I know that it appears to be the fixed policy of the country, to hold the tenure of all appointments of this description to be at the will of the president. So also appointments of the same character between private individuals are liable to be revoked at will, and there are very satisfactory reasons why they should be so. But between individuals we have seen that, to a certain extent, this will is regulated and controlled

by the principles of equity, good faith, and fair dealing. If any just cause, for the revocation of an agency, arises out of the conduct of the agent, his powers may be revoked by the principal without subjecting himself to any of the responsibilities which have been mentioned. The agent must bear the consequences of his own misconduct or imprudence. But while he is in good faith prudently engaged in the business of the agency, if his authority is revoked suddenly and without notice, and he thereby suffers loss, the principles both of law and justice require the principal to indemnify him. Why should not the same measures of justice apply between the government and an individual?

If there are no grounds of justice to vary the decision, then I think there are reasons of public policy for holding that the same principles of law apply to one case as to the other. If the tenure of the appointment is merely at will, it is to be remembered that it is equally at the will of both parties. If the principal may revoke the agency without notice, and leave the agent to meet all the liabilities which he has incurred in the prosecution of the business of the agency, then the agent may renounce the agency without notice, and leave all the inconvenience to fall on the principal. I may have taken a very incorrect view of this subject, and, if so, I am happy that my error may be so easily corrected, but it appears to me that one can hardly overstate the public mischiefs that might arise from the establishment of such a doctrine. All the most important officers of the government hold their employments by this tenure. If they may, at any time, renounce and abandon the public business intrusted to them, with impunity, without first giving reasonable notice to the appointing power of their intention, so as to enable the government to supply their places, it is easy to see that inconveniences of the gravest nature might arise. Take a single branch of the public service, the collection of the revenue. Every officer, from the highest to the lowest, holds his office at will. Suppose the principal revenue officers of one of our large ports should at once come to the determination of abandoning their offices, and send by the mail notices of their resignation when there were cargoes in port, duties on which, to a large amount, would be due. In some ports it is not uncommon for duties to accrue to the amount of half a million, by the arrivals of a single day. There would be nothing to prevent all the goods from being smuggled ashore before the president could replace the officers by new appointments. If it be said that this is putting an improbable case, it at least fairly tries the principle, and it must be allowed to be a possible case. If the law be as I suppose it to be, and the same measure of justice and the rules of good faith and fair dealing hold between the government and an individual in public agencies, as do between individuals in private agencies, then the officer, before renouncing his trust, is bound to give reasonable notice to the government, that the appointing power may have time to put another in his place; and if he abandons it without giving such notice, whether it is done corruptly and in bad faith, or in mere wantonness and caprice, he is legally bound to indemnify the government for all the loss that may be thereby sustained.

On the whole, the view that I have of the law is this: The principal may at any time revoke and withdraw the power of an agent at his pleasure, and without notice. This is a right that is fully reserved to him by the law. But if the agent has entered on the business of the agency, and has fairly, in the ordinary course of business, and in good faith, entered into any engagements, or come under any liabilities, in the prosecution of the proper business of the principal, before notice of the revocation of agency, the principal will be bound to indemnify him, unless the agent had given just cause for such revocation. In the same manner the agent may at any time renounce the agency, but then he is bound to give the principal reasonable notice of his intention beforehand, to enable him to procure another agent; and if he does not, he will be bound to indemnify the principal for any loss he may sustain. And the same principles hold whether the government and an individual are parties, or both parties are private persons.

If the law be as it has been stated, the determination of this cause depends on a question of fact, which properly belongs to the jury to decide. If the jury are of opinion that the defendant, in engaging his office and his clerk on the terms he did, acted in good faith according to the usual course of business, and that the conditions, as to the time on which they were made, were reasonable and proper, and such as a faithful and prudent agent would make, acting for the benefit and interest of his principal, the jury ought to find for the defendant. They were liabilities incurred solely in the business of the plaintiffs, and for their benefit, from which the defendant himself derived no advantage, and for which the plaintiffs are bound to indemnify him. The defendant having actually paid these sums, under the statute of the United States of March 3, 1797, c. 74 [1 Story's Laws, 464; 1 Stat. 512], they constitute an equitable set-off against the plaintiff's demand. But if under the circumstances of this case, the defendant having been appointed to his agency for four years, of which six months remained, but liable to be removed at any time at will before the expiration of the four years, the jury are of opinion that he ought, as a prudent agent, to have engaged his office, and also his clerk, from day to day, or from week to week, or what would come to the same thing, merely at will, with the liberty of surrendering the office and of discharging his clerk at any

time, without notice, and consequently liable at any time to be turned out of his office, and to be left by his clerk, without notice, then you will find your verdict for the United States for the amount of these items, with interest from the time when they should have been paid.

The jury returned a verdict for the United States, for the sum of $532.26; allowing the set-off for office rent and clerk hire, as charged by the defendant, and disallowing the commissions charged on the disbursements to Harris's heirs.

[A writ of error was sued out in the circuit court, but was subsequently dismissed. Case No. 15,469.]

Case No. 15,469.

UNITED STATES v. JARVIS.

[3 Woodb. & M. 217.] [1]

Circuit Court, D. Maine. Oct. Term, 1847.

WRITS OF ERROR — BILLS OF EXCEPTION — FORM AND VERIFICATION—WAIVER OF EXCEPTIONS—AMENDMENTS.

1. Where a statement is made and signed by the judge, as to the facts in the case and the rulings on them, it may be sufficient evidence of their truth. But this does not amount to a bill of exceptions, so that a writ of error lies, unless it appears that the party objected at the trial to the rulings, and wished the exceptions noted and reduced to a bill. It must appear, further, that the exceptions were persisted in.

[Cited in Marine Stave Co. v. Herreshoff Manuf'g Co., 32 Fed. 824.]

[Cited in Kearney v. Snodgrass (Or.) 7 Pac. 310.]

2. The seal to a statement, verifying all the papers sent up, may be sufficient, though not in the usual place for a bill of exceptions

3. The proper form for a bill of exceptions is that in use under the statute of Westminster the second, and not of a case saved by one judge for the whole court.

[4. Cited in Walsh v. U. S., Case No. 17,116, and Tufts v. Tufts, Id. 14,233, to the point that amendments are frequently made after judgment, and writs of error are brought to reverse them.]

[Error to the district court of the United States for the district of Maine.]

This was a writ of error to reverse a judgment which had been rendered in the district court in favor of the respondent, on the 1st day of December, 1846. [Case No. 15,468.] The original action in which that judgment was rendered, was one of debt on an official bond given by the defendant [Leonard Jarvis], to secure his fidelity as navy agent, at the naval station in Charlestown, Massachusetts. The breach assigned was not accounting for $1,700 of money, and on this an issue was joined. It appears in the record, not from any bill of exceptions in the usual form, but from a statement of the judge in the following words, what took place at the trial; and this statement was relied on by the United States as a sufficient bill of exceptions:

"United States District Court. District of Maine, December Term, 1846.

"This was an action of debt on the official bond of the defendant, as navy agent for Boston and Charlestown, for a balance of seven hundred fifteen dollars ninety-seven cents, alleged to be due from him on the final settlement of his accounts. The writ and pleadings may be referred to by either party. The defendant was appointed navy agent in April, 1838, to hold the office during the pleasure of the president, for a time not exceeding four years. The compensation allowed for his services was one per cent. on the amount of his disbursements, but not to exceed in the whole, the sum of two thousand dollars per annum. Defendant was removed from office on the 27th day of September, A. D. 1841, six months and three days before the term of four years expired; and the first notice he had of his removal or of an intimation to remove him before the expiration of the term, was, by the appointment of a successor. On the final settlement of his accounts by the accounting officers, there was found to be a balance due the United States of $715.97, which balance was made of the following items, viz:—

To this sum disallowed in settlement, to 27th Sept. 1841, being on vouchers 486, 487 and 488, for clerk hire and office allowances, from 27th to 30th Sept. 1841, inclusive, (4 days,) the same being charged by and allowed to J. V. Browne, who was then the navy agent.....	26 29
To this sum disallowed in this settlement, being a charge for clerk hire beyond the time that Mr. Jarvis was the navy agent	200 00
To this sum disallowed in this settlement, being a charge for office rent beyond the time that Mr. Jarvis was the navy agent	37 50
To this sum disallowed in this settlement, being a charge for commissions beyond $2,000 a year, and being one per cent. on $45,218.59 paid to the heirs of John Harris awarded to them by the United States.....	452 18
	$715 97

"The defendant claimed to be allowed the above sum of $452.18, as commissions, at one per cent., on $45,218.59, paid to the heirs of John Harris for certain lands purchased by the secretary of the navy for the navy yard, as being an extra service, not coming within the regular duties of the navy agent, and for which he claimed to be entitled to a separate and additional compensation. And he also claimed $26.29, being the amount of several small items for office rent and charges for the remainder of the quarter ending October 1; and also $37.50 on one quarter's office rent from October 1st to December 31, 1841, after his removal from office.

"The defendant hired his office by a parol lease (and not having given seasonable notice of his intention to surrender it before the expiration of the quarter ending in October, by the local law of Massachusetts, he

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

became liable for an additional quarter's rent.) It was paid by him, and the receipt is in the case. He also claimed $200 for one quarter additional clerk hire. His clerk was hired for a year, terminating with April 1st, 1842, when the defendant's appointment would expire by its limitation. The clerk being hired for the year claimed his salary under the contract, but compromised for one quarter's salary instead of the whole, which was half a year. The amount claimed for office rent and clerk hire was the same as had been allowed from quarter to quarter in his previous settlement.

"The transcripts of account filed in the case and used at the trial in the district court, may be referred to by either party.

"Whereupon the district judge instructed the jury as follows:—

" 'On the whole, the view that I have of the law is this: the principal may at any time revoke and withdraw the power of an agent, at his pleasure, and without notice. This is a right that is fully reserved to him by the law. But if the agent has entered on the business of the agency, and has fairly, in the ordinary course of business, and in good faith, entered into any engagements or come under any liabilities in the prosecution of the proper business of the principal, before notice of the revocation of agency, the principal will be bound to indemnify him unless the agent had given just cause for such revocation. In the same manner the agent may at any time renounce the agency, but then he is bound to give the principal seasonable notice of his intention, beforehand, to enable him to procure another agent; and if he does not, he will be bound to indemnify the principal for any loss he may sustain. And the same principles hold whether the government and an individual are parties, or both parties are private persons.

" 'If the law be as it has been stated, the determination of this cause depends on a question of fact which properly belongs to the jury to decide. If the jury are of the opinion that the defendant, in engaging his office and his clerk on the terms he did, acted in good faith, according to the usual course of business, and that the conditions as to the time on which they were made, were reasonable and proper, and such as a faithful and prudent agent would make, acting for the benefit and interest of his principal, the jury ought to find for the defendant. They were liabilities incurred solely in the business of the plaintiffs, and for their benefit, from which the defendant himself derived no advantage, and for which the plaintiffs are bound to indemnify him.

" 'The defendant having actually paid these sums, under the statute of the United States, of March 3, 1797, c. 74 [1 Story's Laws, 464; 1 Stat. 512, c. 20], they constitute an equitable set-off against the plaintiff's demand. But if under the circumstances of this case, the defendant having been appointed to his agency for four years, of which six months remained, but liable to be removed at any time at will, before the expiration of the four years, the jury are of the opinion that he ought, as a prudent agent, to have engaged his office and also his clerk, from day to day, or week to week, or what would come to the same thing, merely at will, with the liberty of surrendering the office, and of discharging his clerk at any time, without notice; and consequently liable at any time to be turned out of office, and to be left by his clerk without notice, then you will find your verdict for the United States, for the amount of these items, with interest from the time when they should have been paid.'

"The jury returned a verdict for the plaintiffs, in the sum of $532.26, that being the amount retained by Jarvis, the defendant, for commissions at one per cent. for disbursements to Harris's heirs, together with interest on said sum from date of writ; and the jury allowed the defendant to retain the sum by him claimed as clerk hire and office rent.

"I certify that the foregoing is a correct report of the case, and of my instructions to the jury. Ashur Ware."

The plaintiffs in error sought to have the judgment reversed, on the ground that the directions of the judge in respect to the allowances of commissions and salary of clerk, were erroneous in point of law; contending that no act of congress, nor any sound legal principle justified these allowances.

The respondent objected, (1st,) that these questions were not duly raised on the record by a proper bill of exceptions, and (2d,) if they were, that the decision by the judge below was correct.

Haines, U. S. Dist. Atty.
Mr. Preble for respondent.

WOODBURY, Circuit Justice. The objection to the consideration of the question on the merits in this case, whether the ruling of the judge was correct or not, must, I fear, prevail, under the state in which we find this record. The report at the end of the record made and signed by the judge, is not in the usual form of a bill of exceptions, elsewhere; though it is understood to have been at times, for some years, employed in this district. But the practice here has not been uniform, as may be seen in the original record in Trafton v. U. S. [Case No. 14,135]. The form there as in England, is, after stating what was ruled by the judge, to say, this was excepted to by one of the parties; and then for the judge to affix his seal, as well as signature, in order to verify the fact that the exception was made and is truly set out. See St. Westm. II. which is 13 Edw. Pl., requiring it; [Jones v. Insurance Co. of North America] 4 Dall. [4 U. S.] 249; 1 Bac. Abr. "Bill of Exceptions," 517; Steph. Pl. 111; 5 Term R. 125; 5 East, 49; 1 Bos. & P., 32; Lil. Ent.

275, 323; 3 Burrows, 1692; Davis v. Wilson, 2 Har. & J. 345. In the Massachusetts district, if not in all others in this circuit, the form of a bill of exceptions in use, is substantially as in England. It is signed and sealed separately, and in its body sets out that the "counsel at the trial excepted and prayed this, his bill of exceptions, to be signed by the said judge, which being found to be true, the said judge hath, at the request of the said counsel," put his seal, &c. U. S. v. Kimball [Case No. 15,530], May term, 1844. Nor is the form here that which is in use when cases are carried to the supreme court of the United States. [Walton v. U. S.] 9 Wheat. [22 U. S.] 651.

The present seems to be rather a form of reporting a case by the judge who tries it, in order to bring it for consideration more deliberately afterwards, either before himself or a full court. No act of congress has prescribed or permitted any new form for a bill of exceptions; and as the constitution in its seventh amendment seems expressly to require, in a case like this, that no fact shall be "otherwise re-examined in any court of the United States than according to the rules of the common lay," so it is reasonably to be concluded, that no point of law should be, unless at least some act of congress justifies it. The judiciary act (section 22) permits a re-examination by writ of error. 1 Stat. 84. But what can or cannot be reached and considered under a writ of error is left to be settled as at common law. Conk. Prac. 68; U. S. v. Wonson [Case No. 16,750]; McLellan v. U. S. [Id. 8,895].

I do not think it material, however, in what part of the record the exceptions are set out, or the signature or seal is affixed, if they only appear, and so appear as to cover and authenticate the exceptions. Taylor v. Willans, 2 Barn. & Adol. 846. And if no seal be affixed, perhaps it can be cured by leave to put it to the exceptions afterwards; and the exceptions themselves, if made at the trial, may be completed afterwards on leave. [Walton v. U. S.] 9 Wheat. [22 U. S.] 651; U. S. v. Gibert [Case No. 15,204]; 6 Wend. 268; 1 J. J. Marsh. 58; 9 Conn. 545; 5 N. H. 336; 4 Mass. 507; 2 Dowl. (N. S.) 335. But unless these are done before judgment, and appear in the record itself before the writ of error is sued out, it will be difficult on principle to sustain the writ.

The liberality which prevails in allowing amendments on writs of error, is rather in these writs themselves than in the proceedings they are brought to reverse, though at times amendments in them also are allowed. Conk. Prac. 441; [Mossman v. Higginson] 4 Dall. [4 U. S.] 12; [Blackwell v. Patten] 7 Cranch [11 U. S.] 277. Thus, in some states amendments are allowed in bills of exceptions so as to conform to the truth. 7 Cow. 102; 5 N. H. 336; 11 Adol. & E. 1000; 3 Perry & D. 539. But here, though no seal is affixed to the signature at the end of his report concerning what took place, I think that omission can be considered as cured by his signature and seal in another part of the record to a statement that he sends "the record and process in the suit aforesaid, with all things concerning them." This is broad enough to cover the report, and without any unusual stretch in construction, may be considered as a verification of the truth of that report by his seal no less than by his signature. But there is a difficulty not cured by this. It is the omission in the report itself to state that his ruling at the trial was then and there excepted to by the present plaintiffs in error. The exceptions must, in fact, be made then. 6 Johns. 279; 9 Johns. 345; 5 N. H. 336; 1 T. B. Mon. 216; Ex parte Bradstreet, 4 Pet. [29 U. S.] 102; 5 Watts, 69, 677; 6 J. J. Marsh. 247. And it must so appear in the record. State v. Lord, 5 N. H. 336. This is deemed vital in order to make the proper bill of exceptions. Brown v. Clark, 4 How. [45 U. S.] 15; [Ex parte Bradstreet] 4 Pet. [29 U. S.] 102. The very expression itself, being a "bill of exceptions," shows that it must contain exceptions. And unless set out in writing as exceptions, it cannot be helped by parol evidence, showing that they were so intended, or by a subsequent bill signed. 3 A. K. Marsh. 360; Spaulding v. Alford, 1 Pick. 37; Pendleton v. U. S. [Case No. 10,924]; 5 Vt. 73, 218; 7 Vt. 223.

It is not enough for it to appear that objections were made, but they must be enumerated specially, and such only can be considered as exceptions. Dunlop v. Munroe, 7 Cranch [11 U. S.] 270. They must not only have been made, but not waived. They must be persisted in as exceptions. [Walton v. U. S.] 9 Wheat. [22 U. S.] 657; 11 Price, 110; 1 Bing. 17. The form in England is: "Wherefore, the said counsel for, and on behalf of the said plaintiff, did allege their exception aforesaid, to the opinion of the said justice, and require," &c. Lil. Ent. 252. It is believed to be thus defective in substance as well as in form, when closely analyzed. Here it does not appear in the report and record that objections were made at all, much less that they were persisted in with a view to obtain on them the opinion of a higher court through a bill of exceptions and writ of error. And though this court, from all the circumstances of the case and the ruling, might be satisfied that exceptions were made and persisted in, yet this is not in law sufficient, unless, as already shown, the court finds the exceptions expressly stated in the record to have been made and allowed. The exceptions, also, are the act of a party, and not of a judge; and they must, therefore, not only appear, but appear to have been made by one of the parties. Thus in Lilly, 275, "the same N. D. required of the same justices" to sign and seal the exceptions. Bratton v. Mitchell, 5 Watts, 69.

Though satisfied in this instance, that the course pursued did not originate with the

present judge or attorney in this district; and that holding it to be invalid will conflict with long usages in this district, and may endanger some other writs of error; yet I do not feel justified in sustaining it, when the respondent does not choose to waive objection to the defects. Such a waiver had doubtless occurred heretofore, in other cases, by not discovering it, or not wishing to rely on it when discovered. It may happen hereafter. But when it does not, as here, the public or individuals are not likely to suffer much by the decision of an intelligent district judge, standing as evidence of what the law of the case is, and which is the only consequence of not sustaining the writ. The omission here is so great, neither stating who wished the report of his charge to be drawn up, nor why; or that any exception, whatever, was taken to it at the trial; that it does not seem possible to sustain it under the act of congress, or any common law analogy.

This conclusion precludes any inquiry of mine into the merits of the ruling, however a decision on them by this court may be desirable to the government. It would be travelling out of the record, and also in a way to prejudge some similar question that may hereafter arise between them or other parties, in such way as to require and justify a final decision, and that by other judges, in this or other circuits; and whose views it would not be decorous for me to forestall, when the point is not directly before me. The writ of error must, therefore, be dismissed.

Case No. 15,470.

UNITED STATES v. The JASON.

[Pet. C. C. 450.] [1]

Circuit Court, D. Pennsylvania. April Term, 1817.

PAROL EVIDENCE—DOCUMENTS.

Written documents certified by foreign notaries, offered as evidence, may be contradicted by parol testimony.

This was an information for entering the Jason as an American bottom, after she had been sold by the American owner to a foreigner. To prove the transfer, the United States offered in evidence, a letter to the master authorising him to dispose of her, and a bill of sale to a Spaniard, certified under the seal of the notary public before whom it was acknowledged; also the order of the captain general, and president of the royal customs, for registering this vessel as a Spanish vessel, certified by three notaries, and a copy registered in his office under the royal seal of the college of notaries. Also, a certificate of the officer of the Spanish custom house at Havanna of the entry there of this vessel as a Spanish vessel, with a certificate of the college of notaries that the person giving that certificate is such an officer. The above papers were read with the consent of the defendant's counsel, they reserving the right to object to their admissibility in the argument of the principal question.

THE COURT admitted the captain and mate as witnesses in behalf of the claimant, to disprove the whole of the above evidence. The captain swore, that he never received any letter from his owner which authorised him to sell this vessel; that he never did sell her; that he commanded her out and home, as the property of the American owner, and that she never was entered otherwise than as an American vessel belonging to the owner.

THE COURT gave no opinion as to the admissibility of the evidence offered by the United States, but, taking it as unexceptionable, they decided that it was open to contradiction, and was satisfactorily disproved by the evidence offered by the defendant.

THE COURT was satisfied that either the papers offered in evidence were fabrications, or that the Spanish officers who gave the certificates had been imposed upon by false papers.

[1] [Reported by Richard Peters, Jr., Esq.]

Case No. 15,471.

UNITED STATES v. JEFFERS.

[4 Cranch, C. C. 704.] [1]

Circuit Court, District of Columbia. March Term, 1836.

INTERNATIONAL LAW — DIPLOMATIC RESIDENCE — UNAUTHORIZED ENTRY.

It is a breach of diplomatic privilege, by an officer of justice, to enter the dwelling-house of a secretary of legation, and seize there a runaway slave, for which the officer will be removed from office.

Francis S. Key, Esq., attorney of the United States, for the District of Columbia, having laid before the court a letter to him from the secretary of state, in these words: "F. S. Key, Esq., United States Attorney for the District of Columbia. Department of State, Washington, May 27, 1836. Sir, I transmit a copy of a communication from his Britannic majesty's envoy extraordinary and minister plenipotentiary, Mr. Fox, dated yesterday, complaining of the conduct of a constable named Jeffers, at the house of one of the members of his majesty's mission. You are requested to inquire immediately into the case and to ascertain and report to the department, under what authority the constable acted; with what process he was charged; by whom the process was issued, and on whose application; and generally what proceedings have taken place in the matter. You will also be pleased to inform me, to whom the constable is amenable, and in what manner he is removable for misconduct. I am, sir, your ob't. servant, John Forsyth." And a copy of the communica-

[1] [Reported by Hon. William Cranch, Chief Judge.]

tion from his Britannic majesty's envoy extraordinary, therein referred to, in these words: "The undersigned, his Britannic majesty's envoy extraordinary and minister plenipotentiary, feels it his duty to bring the following case, involving a breach of the privilege of the diplomatic body, under the immediate consideration of Mr. Forsyth, secretary of state of the United States. A colored lad, serving for hire in the family of Mr. Bankhead, his Britannic majesty's secretary of legation, was this morning taken away from the house of that gentleman by a constable of the name of [Madison] Jeffers, belonging to the capitol ward of this city, upon the plea of conveying him to his master, Mr. King, from Alabama. No previous intimation of a wish to remove the lad from Mr. Bankhead's service had been given to him either by Mr. King or by any one else. Mr. Bankhead, in order to avoid any disturbance, allowed the servant to be removed, but formally protested against the proceeding; and the undersigned now submits the case to the consideration of Mr. Forsyth, in the confident expectation that immediate redress will be granted by the government of the United States for this act of authority exercised by a constable of the District, in the house of one of the members of his Britannic majesty's mission, in violation of the privileges of the diplomatic body. The undersigned has the honor to renew to Mr. Forsyth the assurances of his distinguished consideration. H. S. Fox. Washington, May 26th, 1836. The Honorable John Forsyth, &c. &c. &c." It is, on the motion of the said attorney of the United States, ordered, that the said Madison Jeffers, in the said communication mentioned, be removed from the office of constable of the county of Washington, unless he show cause to the contrary on the thirty-first day of May instant, provided a copy of this order shall have been served upon him this day. By order of the court, May 30th, 1836. Test: William Brent, Clerk.

The rule having been duly served, the said Madison Jeffers appeared on the 31st of May and, by way of showing cause, filed his affidavit admitting the facts, but alleging his ignorance of the diplomatic privileges, and his belief that he was executing his duty lawfully, in arresting a fugitive slave, and disclaiming all intentional disrespect to Mr. Bankhead.

His counsel, Mr. W. L. Brent, contended that Jeffers, as the agent of the owner of the slave, had a right to take him anywhere; and also that, as a constable, he had a right to take up a runaway. That the diplomatic privilege extends only to foreign ministers, and upon certain terms; and not to servants of a secretary of legation. That the servant had not been registered according to the act of congress of 30th of April, 1790, § 26 (1 Stat. 112), and therefore Jeffers had a right to arrest him; because the act of congress for punishing the violation of privilege does not extend to those who may arrest a servant not registered. By not registering his servant the minister has waived his privilege. Seacomb v. Bowlney, 1 Wils. 20.

THE COURT stopped Mr. Key in reply.

THRUSTON, Circuit Judge, said he wished no further time or argument. He was of opinion that Jeffers should be dismissed from office.

MORSELL, Circuit Judge, concurred.

CRANCH, Chief Judge, would have taken time to consider; but said that his present opinion coincided with that of the court.

Whereupon THE COURT passed the following order: "Madison Jeffers, upon whom a rule was laid on the 30th of May last, to show cause why he should not be removed from the office of constable for the county of Washington, upon the grounds therein stated, appeared and filed his affidavit, and the same was read and heard, and he was further heard by his counsel. Whereupon it is considered by the court, that the said Madison Jeffers was guilty of a violation of the privileges of his Britannic majesty's envoy extraordinary and minister plenipotentiary, as stated in his letter to the secretary of state, referred to in the said rule; and the said Madison Jeffers, having shown no sufficient cause to the contrary, it is thereupon considered by the court, this 7th day of June, 1836, that the said Madison Jeffers be, and he is hereby, removed from his said office of constable for the county aforesaid."

Case No. 15,472.

UNITED STATES ex rel. MERCHANTS' NAT BANK v. JEFFERSON COUNTY.

[5 Dill. 310; 1 McCrary, 356; 7 Cent. Law J. 130; 6 Reporter, 486; 7 Am. Law. Rec. 154; 2 Tex. Law J. 164; 24 Int. Rev. Rec. 354; 26 Pittsb. Leg. J. 8.][1]

Circuit Court, E. D. Arkansas. 1878.

MUNICIPAL BONDS—ENFORCEMENT OF JUDGMENT—LEVY OF TAXES COMPELLABLE BY MANDAMUS—OBLIGATION OF CONTRACTS.

1. Where a statute authorizes a county to issue its negotiable bonds, and makes it the duty of the county court "to levy a special tax of sufficient amount to pay the interest and principal of said bonds as the same become due," the power of taxation thus given enters into and becomes a part of the obligation of the contract between the county and every holder of such bonds; and, under the constitution of the United States, this obligation of the contract cannot be impaired or lessened in any degree by the constitution or laws of the state afterward enacted.

[Cited in Board of Commissioners v. King, 14 C. C. A. 421, 67 Fed. 206.]

[Cited in Voorhies v. City of Houston (Tex. Sup.) 7 S. W. 682.]

2. In such case, it is the duty of the county court to levy and cause to be collected a tax sufficient in amount to pay the interest and principal of such bonds as the same mature, and

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 6 Reporter, 486, and 26 Pittsb. Leg. J. 8, contain only partial reports.]

if it does not perform this duty it may be compelled to do so by mandamus.

On the 26th day of October, 1877, the relator recovered a judgment in this court against Jefferson county for $5,120.70 and costs, on negotiable bonds issued by said county in pursuance of the provisions of the act of the general assembly of this state, entitled "An act to authorize certain counties to fund their outstanding indebtedness," approved April 29th, 1873. By the terms of this act the boards of supervisors of the counties named therein were authorized "to issue the bonds of such counties in any sum necessary to pay the outstanding indebtedness of such counties," etc. The bonds were to be made payable in not less than three nor more than ten years, and to bear interest at the rate of eight per cent per annum, payable semi-annually. The 5th section of the act declares: "It shall be the duty of the board of supervisors issuing bonds under the provisions of this act, to levy a special tax of sufficient amount to pay the interest and principal of said bonds as the same become due. Such tax shall be collected in the lawful currency of the United States, and shall not be appropriated to any other purpose than that for which it was levied. If any board of supervisors neglect or refuse to levy the tax herein provided for, the holder of any such bond shall have the right to compel such levy by a writ of mandamus," etc. The constitution of the state adopted October 30th, 1874, abolished the board of supervisors, and devolved all their duties and jurisdiction on the county court, and declared they should "be regarded as a continuation of the board of supervisors." Section 23 of schedule to constitution. It also provided that "no county shall levy a tax to exceed one-half of one per cent for all purposes, but may levy an additional one-half of one per cent to pay indebtedness existing at the time of the ratification of this constitution." Article 16, § 9. The act under which the bonds were issued was passed, and the bonds issued, before the adoption of the present constitution. The constitution of 1868, in force at the date of the passage of this act, unlike the present constitution, contained no limitation on the power of taxation for county purposes; any rate was lawful that was authorized by act of the legislature. Upon the relation of the judgment plaintiff, a rule issued, directed to the county judge of the county, requiring him to show cause—if any he could—at a time stated in the rule, why a peremptory mandamus should not issue out of this court requiring the county judge and justices of the peace of the county, composing the county court, for the levy and appropriation of taxes, to convene at the time and place fixed by law for the meeting of said court for the annual levy of the county and other taxes, and, when so convened, to proceed, in conformity to the requirements of the 5th section of the act under which the bonds were issued, to levy a special tax on all the taxable property of the county, payable only in United States currency, sufficient to pay the relator's judgment. This rule was duly served on the county judge. No response to the rule has been filed, and the relator moves for judgment awarding the peremptory writ.

John McClure, for relator.

CALDWELL, District Judge. It is a popular but erroneous opinion that the restriction on the taxing power of counties contained in the constitution of 1874 repeals or annuls the provisions of the act of 1873, making it the duty of the county court to levy a special tax sufficient to pay the interest and principal of the bonds issued under this act, as the same become due.

This erroneous view, in one instance heretofore, occasioned costs and inconvenience, and, to prevent misconception on the subject in the future, it is deemed proper to state, with some fulness, the law applicable to this class of cases.

It has long been settled by repeated decisions of the supreme court of the United States, and of many of the states, that the usual provision contained in acts authorizing counties to issue negotiable bonds, making it the duty of the proper county court, or board, to levy an annual tax sufficient to pay the principal and interest of such bonds as the same fall due, enters into and becomes a part of the obligation of the contract between the county and the holder of the bonds; and the power and duty of the proper county authorities to levy the tax required by the terms of the act authorizing the issue of the bonds cannot subsequently be withdrawn, so long as a single bond remains unpaid.

When bonds are issued under such an act, the act itself becomes a part of the contract, as much so as if it had been written out at length on the face of the bond, and it cannot be repealed or abrogated by any law of the state—neither by act of the legislature nor constitutional provision—until the obligations incurred under it are paid and discharged according to their terms.

The supreme court of the state has recently decided that the act under which these bonds were issued was legally passed under the constitution then in force; that it is a constitutional and valid law, and that a tax levied by the county court to pay the interest on the bonds was a valid and legal tax. Badgett v. Worthen (Nov. term, 1877) 32 Ark. 496.

The constitution of the United States declares that "no state shall pass any ex post facto law, or law impairing the obligation of contracts." Article 1, § 10. And it further declares that "this constitution, and the laws of the United States which shall be made in pursuance thereof, * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to

the contrary notwithstanding;" and that "All executive and judicial officers, both of the United States and of the several states, shall be bound by oath, or affirmation, to support this constitution." Article 6.

In this state the public property of the county cannot be sold on execution to pay the debts of the county, and the only mode of discharging such debts is by the levy of a tax on the taxable property of the citizens of the county. It is obvious that the bond of a county would be valueless unless there existed a legal right to require the levy of a tax to pay it; and, as to such contracts, this right is the principal, if not the only, element of their value, and constitutes the vital part of the obligation.

This right, to the full extent to which it was granted by law for this purpose at the date of the issue of the bonds, is protected from invasion or impairment by the constitution of the United States.

In Von Hoffman v. City of Quincy [4 Wall. (71 U. S.) 535], the precise question here involved was presented to the supreme court of the United States, and that court, in an opinion concurred in by every member of the court, said: "When the bonds in question were issued there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest, as it accrued from time to time, upon the entire debt. But for the act of the 14th of February, 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by that act will be insufficient; and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired; and if there be nothing applicable, it may be regarded as annulled. A right without a remedy is as if it were not; for every beneficial purpose, it may be said not to exist. It is well settled that a state may disable itself by contract from exercising its taxing power in particular cases. It is equally clear that where a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor cannotannul, and which the donee is bound to execute; and neither the state nor the corporation can any more impair the obligation of the contract in this way than in any other. The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that act had not been passed. A different result would leave nothing of the contract but an abstract right—of no practical value—and render the protection of the constitution a shadow and a delusion." Von Hoffman v. City of Quincy, 4 Wall. [71 U. S.] 535.

And the doctrine laid down in the case last cited has been reaffirmed in numerous cases. In Riggs v. Johnson Co., 6 Wall. [73 U. S.] 166, 194, Mr. Justice CLIFFORD, delivering the opinion of the court, states the rule in these words: "Where a state has authorized a municipal corporation to contract and to exercise the local power of taxation to the extent necessary to meet the engagements, the power thus given cannot be withdrawn until the contract is satisfied." And this is the settled doctrine of all the courts. City of Galena v. Amy, 5 Wall. [72 U. S.] 705, 709; Rees v. City of Watertown, 19 Wall. [86 U. S.] 107, 120; U. S. v. Treasurer of Muscatine Co. [Case No. 16,538]; 1 Dill. Mun. Corp. § 41, and note; Burroughs, Tax'n, p. 426, § 139; State v. City of Milwaukee, 25 Wis. 122; Western Savings Fund Soc. v. Philadelphia, 31 Pa. St. 175; Beckwith v. English, 51 Ill. 147; Vance v. City of Little Rock, 30 Ark. 440, 441.

It is no answer to say that the present constitution does not utterly destroy the right given by the act under which the bonds were issued—that a limited tax may still be levied. If by any subsequent act of the state the rate could be limited to five mills, it could be limited to one, or taken away altogether. "One of the tests that a contract has been impaired," says the supreme court of the United States, "is that its value has by legislation been diminished. It is not by the constitution to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligations—dispensing with any part of its force. * * * And the test, as before suggested, is not the extent of the violation of the contract, but the fact that in truth its obligation is lessened, in however small a particular." Planters' Bank v. Sharp, 6 How. [47 U. S.] 327.

And the same court, in a recent case, held a provision of the constitution of the state of North Carolina, exempting property from sale on execution, void as to debts contracted before its adoption, and the court, in this case, state the rule to be that "The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as to substantially impair and lessen the value of the contract is forbidden by the constitution, and is, therefore, void." Edwards v. Kearzey, 96 U. S. 595.

Nor does it affect the question that the law of the state impairing the obligation of a previous valid contract is made part of the constitution of the state, not even though congress has authorized and ratified such constitution. On this point the supreme court of the United States say: "Congress cannot,

by authorization or ratification, give the slightest effect to a state law or constitution in conflict with the constitution of the United States. That instrument is above and beyond the power of congress and the states, and is alike obligatory upon both. A state can no more impair an existing contract by a constitutional provision than by a legislative act; both are within the prohibition of the national constitution." Gunn v. Barry, 15 Wall. [82 U. S.] 610, 623; Jefferson Bank v. Skelley, 1 Black [66 U. S.] 436; Dodge v. Woolsey, 18 How. [59 U. S.] 331.

The supreme court of appeals of Virginia, in a recent case, held that the provision of the constitution of that state allowing property to the value of $2,000 to be held exempt from execution for debts contracted before its adoption was in conflict with the constitution of the United States, and void as respects its application to such debts. The court said: "The fact that an enactment tending to impair contracts is embodied in the constitution of a state, does not protect it. The prohibition of the United States constitution is upon the states, irrespective of the form its laws may take or the agencies which enact them. A state has no more power to impair the obligation of a contract by a constitution than by a legislative act;" and the unanimous opinion of the court concludes in language as marked for the force with which it inculcates the moral and social duty of observing the obligation of contracts, both public and private, as for its clear enunciation of the rule of constitutional law applicable to them: "No state and no people can have any real and enduring prosperity except where public faith and private faith are guarded by laws wisely administered and faithfully executed. The inviolability of contracts, public and private, is the foundation of all social progress and the corner stone of all the forms of civilized society where an enlightened system of jurisprudence prevails. Under our system of government it has been wisely placed under the protection of the constitution of the United States, and there it rests, secure against all invasion." The Homestead Cases, 22 Grat. 301.

It is a remarkable fact that this state has, by her legislative enactments and constitutions, contributed largely to the exposition and elucidation of that clause of the constitution of the United States that declares: "No state shall pass any law impairing the obligation of contracts." Among the earliest acts of the legislature of the state was one passed in November, 1836, incorporating the Bank of the State of Arkansas. The 28th section of the act provided "that the bills and notes of said institution shall be received in all payments of debts due to the state of Arkansas." The bank failed in 1839, leaving a large amount of its issues outstanding, which sunk in value until they became almost worthless. It was obvious, if the state kept her pledge, and continued to receive these worthless bills in payment of debts and taxes due her, no revenue could be collected to support the state government. In this emergency the legislature of the state, on the 10th of January, 1845, repealed the 28th section of the act incorporating the bank, which declared its bills should be received in payment of all debts due the state, and enacted that nothing but current money of the United States should be received in payment of state taxes. Public sentiment, no less than the necessities of the state, seemed to demand this action; and the supreme court of the state held the repealing act valid, and that the state was no longer bound to receive the bills of the bank in payment of debts due her. Woodruff v. Attorney General, 8 Ark. 236.

But the case was appealed to the supreme court of the United States, and that court reversed the judgment of the supreme court of the state, and held that the last act was in conflict with the constitution of the United States, and void, because it impaired the obligation of the contract the state had made, by the terms of the 28th section of the first act, with every one who became a holder of these bills, to receive them in payment of all debts due her; and that a tender of the bills of the bank in payment of a debt due the state after the repealing act was passed was a good and legal tender. Woodruff v. Trapnall, 10 How. [51 U. S.] 203.

Whether the constitution of a state, or an act of its legislature, conflicts with the constitution or laws of the United States, is a federal question, the ultimate and final decision of which, by the constitution and laws of congress, is vested in the supreme court of the United States, whose decision is binding on all other courts, both federal and state. And the supreme court of the state when this cause came before it again, declared "the decision of the supreme court of the United States conclusive upon the point." Woodruff v. Trapnall, 12 Ark. 640. And, as the result of the judgment of the supreme court of the United States, the state was compelled to, and did, redeem this worthless bank paper.

Other legislation of the state in reference to this bank furnishes another illustration of the impotency of state laws to impair the obligation of contracts. The state being the sole owner of the stock of the bank, assumed to herself, by act of her legislature, the right to administer the whole assets of the bank, without regard to the rights guaranteed to the holders of the bills of the bank under the charter. The supreme court of the state maintained the validity of this legislation. State v. Curran, 12 Ark. 321.

But, on appeal to the supreme court of the United States, that court reversed the judgment of the supreme court of the state, and declared such acts of the legislature "impaired the obligation of contracts made with the lawful holders and bearers of bills of the Bank of the State of Arkansas, and so were

inoperative and invalid." Curran v. Arkansas, 15 How. [56 U. S.] 304. And the supreme court of the state gave full effect to the judgment of the supreme court of the United States, and caused it to be carried into execution, its own decision and "the laws of the state to the contrary notwithstanding." State v. Curran, 15 Ark. 20.

In 1851 the legislature of the state passed an act relating to the swamp lands of the state—one section of which provided that, to encourage persons to purchase the swamp and overflowed lands, the same should be "exempt from taxation for the term of ten years, or until said lands be reclaimed." Many persons purchased these lands on the faith of this promise of the state not to tax them for the period named. Public opinion changed, and in 1855 the act which exempted the swamp lands from taxation was repealed, and such lands purchased under the act of 1851 were declared subject to taxation. The supreme court of the state held the act of 1855 was in conflict with the constitution of the United States, and void.

Mr. Justice Compton, who delivered the opinion of the court, said: "The constitution of the United States declares that no state shall pass any law impairing the obligation of contracts. * * * This prohibition on the law-making power is justly ranked among the wisest provisions contained in the federal constitution. Without it, private rights would at all times be liable to invasion by the enactment of laws consequent upon the fluctuating policy, strong passions, and sudden changes; and with it nothing more is required than the observance of an elevated morality." State v. Crittenden Co. Ct., 19 Ark. 360. In this one short sentence the learned judge fully vindicates the wisdom, justice, and necessity of this provision of the constitution of the United States.

Another case afterwards arose under these same swamp land acts. The act of 1851 provided for contracts for the making of levees and drains, and for the payment of contractors in scrip, which it was declared should be received in payment for swamp lands. The 14th section of the same act, as we have seen, exempted swamp lands from taxation for the period of ten years, and this section, as before stated, was repealed by the act of 1855. In this state of the statutes, the question arose whether swamp lands purchased after the repeal of the 14th section, with levee scrip issued before the repeal, were subject to taxation—in other words, whether the repealing act did not impair the obligation of the contract of the holder of the scrip under the first act? The supreme court of the state decided that it did not have that effect, and that the lands were subject to taxation. McGehee v. Mathis, 21 Ark. 40. This case was appealed to the supreme court of the United States, where the judgment of the supreme court of the state was reversed. Chief Justice Chase, who delivered the unanimous opinion of the court, said: "The contract of the state was to convey the land for the scrip and to refrain from taxation for the term specified. Every piece of scrip was a contract between the state and the original holder and his assigns. Now, what was the effect of the contract when made? Did it not bind the state to receive the scrip in payment for swamp land, exempted for a limited time from taxation? The scrip, if not receivable for lands, was worthless. To annul the quality of receivability was to annul the contract. But the exemption of the lands for which it was receivable from taxation was a principal element in its value; and repeal of the exemption was the extinction of this element of value. This was clearly an impairment of the contract. The state could no more change the terms of the contract by changing the stipulated character of the land to be conveyed in satisfaction of the scrip as to liability to taxation, than it could abrogate the contract altogether by refusing to receive the scrip at all in payment for land. We are constrained to regard the repeal of the exemption act, so far as it concerns lands paid for, either before or after the repeal, by scrip issued and paid out before repeal, as impairing the contract of the state with the holders of the scrip." McGehee v. Mathis, 4 Wall. [71 U. S.] 143.

The constitution of this state adopted and in force in 1868 declared: "All contracts for the sale or purchase of slaves are null and void, and no court of this state shall take cognizance of any suit founded on such contracts." * * Article 15, § 14. By this provision the framers of that constitution sought to invalidate and destroy the obligation of contracts for the sale and purchase of slaves that were valid contracts under the constitution and laws of the state in force at the time they were made. The effort proved futile. The supreme court of the state declared this section of the constitution of the state impaired the obligation of contracts, and was for that reason in violation of the constitution of the United States, and void; and such contracts were enforced according to their legal effect and obligation under the constitution and laws in force at the time they were made. Jacoway v. Denton, 25 Ark. 625; Sevier v. Haskell, 26 Ark. 133; Pillow v. Brown, Id. 240. And the supreme court of the United States decided the same question in the same way, and for the same reason. White v. Hart, 13 Wall. [80 U. S.] 646.

In no one of the cases cited, in which legislative acts and a section of the constitution of this state were declared to be in conflict with the constitution of the United States, and void, was there a plainer or more palpable violation of that instrument than there is in this case. For when it is said that "to levy a special tax of sufficient amount to pay the principal and interest of

said bonds as the same become due"—as is expressly required by the terms of the act under which the bonds were issued—will require a levy in excess of the limit allowed by a constitutional provision subsequently adopted, the statement is a confession that this provision of the constitution, when applied to these contracts, impairs their obligation, and is, therefore, so far as it relates to them, null and void.

If a natural person gives his bond agreeing to pay a given sum of money on a day certain, it will not be pretended that the state could, by a law afterwards enacted, extend the time of payment; and if, upon the non-payment of such bond, the holder should put it in judgment, will it be contended that by such a law the state could deny to the judgment plaintiff the right to have execution for his whole debt and to levy upon and sell sufficient property to make it? By the law of this state counties are declared to be bodies "corporate and politic," and endowed with power to contract and to sue and be sued. In this case the county was by law specially authorized to issue these bonds, and to stipulate for payment of the interest and principal at fixed and stated times; and it was made its duty to levy a tax sufficient to meet these payments according to the stipulation of the bonds. Upon what principle can the state, by a subsequent enactment, relieve the county from the obligation to pay the bonds at the time and by the means agreed upon, any more than it could relieve a natural person from the obligation to pay his debt according to the terms of his contract? Confessedly, in the case of a natural person, a state law passed after the debt was contracted, declaring that not more than five mills on the dollar of the aggregate value of the defendant's property should be taken on execution in any one year for its satisfaction, would be a nullity; and if a nullity in that case, why not a nullity in the case of a county? The protection afforded to the obligation of contracts by the constitution of the United States is not limited to the contracts of natural persons, but extends as well to all corporations—public and private—endowed by law with power to contract.

The constitutional limit is applicable, of course, to ordinary county warrants issued prior to the adoption of the constitution. These warrants having been issued for ordinary county purposes, and not under any special act, law, or contract requiring the levy of a tax to pay them, they fall within the provision of the constitution, and a five-mill tax, and no more, may be levied to pay them. And but for this provision in the constitution, it is doubtful what remedy, if any, the holders of these warrants would have had to enforce their payment. U. S. v. Ouachita Co. Ct. [Case No. 14,876], April term, 1876.

If the county court of Jefferson county, or of any other county in this district to whom peremptory writs of mandamus may issue in this class of cases. entertains any doubt as to whether the supreme court of the United States will adhere to its many well-considered judgments, declaring the duty of this court, and of county courts as well, in this class of cases, there is a ready means of settling that doubt. The act of congress gives the county the right to appeal from the judgment of this court awarding the peremptory writ, to the supreme court of the United States; and if the required steps for that purpose are taken within sixty days after the rendition of the judgment awarding the writ, all proceedings under the writ are stayed until the determination of the cause in that court.

That is the only tribunal that can review the judgment of this court; it cannot be reviewed, nor the process upon it enjoined or otherwise obstructed or impeded, by the orders or process of any other court. Riggs v. Johnson Co., 6 Wall. [73 U. S.] 166; Weber v. Lee Co., Id. 211; U. S. v. Keokuk, Id. 514; Supervisors v. Durant, 9 Wall. [76 U. S.] 415; Mayor v. Lord, Id. 409; Amy v. Supervisors, 11 Wall. [78 U. S.] 136; Ex parte Holman, 28 Iowa, 88; Vance v. City of Little Rock, 30 Ark. 452, 453; Brooks v. City v. Memphis [Case No. 1,954]; U. S. v. Silverman [Id. 16,288].

The power of this court to enforce its judgments, in this class of cases, according to the terms of the contract and in the mode authorized by the laws of the state, is not an open question. It would be an anomaly in the judicial system of any government to invest its courts with jurisdiction to hear causes and render judgments, and yet deny to them the power to execute and enforce their judgments. Argument upon this question in this and all other courts was long since foreclosed by the unanimous judgment of the supreme court of the United States. Knox Co. v. Aspinwall, 24 How. [65 U. S.] 377.

And the doctrine established in the case last cited—that the circuit courts of the United States have the power, and that it is their duty, to issue this writ, in this class of cases, to the proper officers of counties, cities, and towns, to compel the levy of a tax, and to enforce obedience thereto—has been reaffirmed by that court in a long line of cases, coming down to a late date. Supervisors v. U. S., 4 Wall. [71 U. S.] 435; Von Hoffman v. City of Quincy, Id. 535; City of Galena v. Amy, 5 Wall. [72 U. S.] 705; Riggs v. Johnson Co., 6 Wall. [73 U. S.] 166; Weber v. Lee Co., Id. 310; Walkley v. City of Muscatine, Id. 481; U. S. v. Keokuk, Id. 514, 518; Benbow v. Iowa City, 7 Wall. [74 U. S.] 313; Butz v City of Muscatine, 8 Wall. [75 U. S.] 575, Mayor v. Lord, 9 Wall. [76 U. S.] 409; Heine v. Levee Commissioners, 19 Wall. [86 U. S.] 655; Board of Liquidation v. McComb, 92 U. S. 531.

It is apparent that some of the counties in this district, under authority of acts of the legislature, have issued bonds to fund previous indebtedness, to aid in the construction of railroads, and to build court-houses and jails, to an amount beyond their present ability to pay, without the imposition of a tax too excessive to be borne by any one community, and the imposition of which would lead to general delinquency in the payment of taxes. It would seem to be for the interest of the creditors and counties alike, in such cases, by negotiation to reduce the volume of indebtedness within a limit the counties are able to pay, and for the counties thereafter to pay the interest without the addition of costs. Especially would this be a just measure in the case of those counties that received little or no consideration for their bonds, by reason of the improvident action on the part of their officers and the fraudulent action of the parties to whom the bonds were originally issued. But this is a matter which addresses itself to the counties and their creditors, and over which this court has no control, and which cannot be effected through its agency.

This court is powerless, in this class of cases, to relieve against the results of bad laws and the folly of the people in voting, and their officers in issuing, bonds under such laws. In answer to an appeal similar to appeals that have been made to this court in this class of cases, the supreme court of the United States said: "The counsel for the plaintiff in error has called our attention, with emphasis and eloquence, to the diminished resources of the city and the disproportionate magnitude of its debt. Much as personally we may regret such a state of things, we can give no weight to considerations of this character, when placed in the scale as a counterpoise to the contract, the law, the legal rights of the creditor, and our duty to enforce them." City of Galena v. Amy, 5 Wall. [72 U. S.] 705.

Popular opinion, for the time being, in particular localities, however unanimous it may be, and from whatever cause arising, cannot in a court of justice be allowed to prevail against the constitution and legal rights of the humblest suitor. Should this court yield to such influences, it would thereby only add additional costs to the already heavy burdens of these counties; for its error would meet with speedy correction in that court whose judgments in exposition of the rights of suitors under the constitution of the United States are binding on all courts, and uniform in their operation on all persons and in all places within the jurisdiction of the United States. And this court would not long enjoy the esteem and confidence of the people of these very counties themselves if it should strike down the constitution and the law to give them a temporary relief and gain their present applause.

An order will be entered directing the peremptory writ of mandamus to issue in the terms of the rule. This opinion is applicable to all cases of judgments rendered on bonds issued prior to the adoption of the present constitution, under acts requiring a levy of a sufficient tax to pay them.

The clerk is directed to forward a certified copy of this opinion to the county courts of the several counties against whom peremptory writs may be awarded in similar cases. Ordered accordingly.

Case No. 15,473.

UNITED STATES v. JENKINS et al.

[2 Law Rep. 146.]

Circuit Court, S. D. New York. Aug. 3, 1838.

SHIPPING—NATIONALITY OF VESSEL—WHALING VOYAGES.

1. The ownership of a vessel determines her national character, and this may be proved in the same manner as that of any other chattel.

2. Vessels under a register, and not having a license, may be legally employed on a whaling voyage, and may come into American ports without subjecting themselves to the disadvantages or disabilities of foreign vessels.

The defendants were indicted for an endeavor to make a revolt on board the whaling ship Georgia, of New London, Captain J. P. Hall. She was regularly registered as an American vessel, but not licensed, and was on a fishing voyage in the South Atlantic Ocean, when the offence occurred. Evidence was adduced on the part of the prosecution which proved that the prisoners had refused to obey the captain's orders, and acted in such a way as to clearly come under the legal definition of attempting to make a revolt.

Mr. Nash, for the prisoners, raised two objections: First, that the United States district attorney must prove the American character of the vessel, by the production of the custom-house papers. Secondly, that a registered vessel was not authorised to engage in the fisheries, and therefore the defendants could not be charged with any offence committed on board her.

Dist. Atty. Butler contended that, according to the law of 1835, it was only necessary to show that the vessel was de facto an American vessel. owned by American citizens, claiming to be, and in fact being, an American vessel. And that, although deprived of the privileges of American vessels, according to our revenue laws, she must still be considered an American vessel according to the law of 1835, whether she was de jure or not an American vessel. Secondly, that a register was sufficient for this purpose, and that it was not necessary, by the act of 1792 [1 Stat. 287], to take out a license unless for the purpose of obtaining certain privileges and immunities, but that her not having done so did not render her the less an American vessel, de facto if not de jure.

BETTS, District Judge (charging jury). The defendants have put in only a general plea of not guilty, but they have also a right to avail themselves of anything which goes to show they are not guilty. It is, therefore, not sufficient merely to prove their conduct criminal, in the abstract, but it must be also shown that the act which they have committed is made criminal by law.

The defendants now take the ground, that the duty, an alleged breach of which they are being tried for, was not obligatory on them, and that, therefore, this court has no jurisdiction over them, and cannot take cognizance of their conduct, while they were on board that vessel. If this court were to act solely on its own impression, it could entertain no doubt or hesitation in relation to the question. Because, ever since 1789 and 1793, prosecutions of this sort have been frequently before this court, and it has always exercised jurisdiction over them, and the prisoners, if convicted, have been invariably punished. The court would, therefore, feel itself fully warranted in adhering to that interpretation of the law, which it had heretofore given, if it had not been suspended by an expose of a high character. It appears that, within the last two months, a question has been raised at Rhode Island, whether men on board a whale ship, circumstanced as the one now in question, are amenable to the laws of the United States for certain breaches of discipline. And that court decided that they are not. This court, however, entertains a different opinion; but, in deference to the respected authority which has judged otherwise, we shall not now pass upon the question without further consideration, but put it in a shape in which it can be finally determined. And if it appears that this court has been so long in error, we shall of course alter our view of the law, but, if we consider ourselves right, we shall continue to entertain the same opinion, until it is corrected, not by a coordinate jurisdiction, highly as we respect it, but by that court which can alone overrule us, which is the supreme court of the United States. The court of Rhode Island and this court possess but the same authority, and neither of them have power to lay down rules for the guidance of the other, except as advisory. We, however, look to the court of Rhode Island with great respect, and, if that court had been the first to lay down the rule in relation to this question, we would readily conclude to decide as that court has decided, until the court at Washington determined the matter. But this court has, for nearly forty years, decided differently, and it now becomes a question whether this court have laid down the rule correctly, or that the more recent decision shall be adopted as the right one. The question then arises thus: The law says that if American seamen commit certain acts they are subject to be prosecuted, and other laws require certain preliminary conditions to be complied with, before vessels can possess certain privileges and advantages. And, if the rule laid down by the court of Rhode Island is correct, it may go no farther than this,—that all vessels sailing with a register, must pay duties on oil and skins, like foreign vessels, and be liable to the inconveniences and disadvantages of foreign vessels, and yet the seamen on board them be subject and amenable to the laws of the United States.

This court will now lay down its view of the law in such a broad and comprehensive way as will suffice to have the question finally determined. I lay it down as a rule of law, that persons are subject to criminal prosecution for offences committed on board American vessels, on the high seas, or in foreign ports, and that the ownership of the vessel determines her national character, within the interpretation of these laws, and that the ownership may be proved in the same manner as that of any other chattel, and that it is not necessary for the public prosecutor to produce any documentary evidence. Such has been the uniform course of decision in this circuit for years past, and the principle seems to be distinctly recognized. [U. S. v. The Pirates] 5 Wheat. [18 U. S.] 199. It is, therefore, sufficient to prove by parol evidence that the vessel was owned by American citizens. Whatever effect the want of a license, and proceeding on a fishing voyage under a register, may have as to the privileges and advantages of the ship under our revenue laws, her being documented with the one or the other improperly, does not denationalize the vessel. She may be subject to duties and disabilities at the custom-house, as if not documented at all, or as if she was a foreign vessel, but no act of congress takes away her intrinsic character of American property. But the court will go farther, and say that vessels, under a register, and not having a license can be legally employed on a whaling voyage, and can come into American ports without subjecting themselves to the disadvantages or disabilities of foreign vessels; and that these vessels which go to the South Atlantic Ocean, ought to be admitted on paying American tonnage duties, and no duties on the oil; and that the statute which requires a license, refers to a different sort of trade.

The jury, bearing in mind these propositions, will now retire to consider the evidence, and determine on the guilt of the defendants. If the jury find them guilty, the court will suspend their sentence until the case is fully argued before the judges.

The jury retired for a few minutes, and brought in a verdict of guilty against all the prisoners

[The case was afterwards heard on motion in arrest of judgment. See Case No. 15,473a.]

Case No. 15,473a.

UNITED STATES v. JENKINS et al.

[1 N. Y. Leg. Obs. 344.]

Circuit Court, S. D. New York. 1843.

ARREST OF JUDGMENT—ENROLMENT AND LICENSE OF COASTING VESSELS.

Where the crew of an American whaling vessel were convicted of an attempt to revolt on a whaling voyage to the South Seas, and it appeared on the trial that the vessel had not been enrolled and licensed under the act of congress of 1793 [1 Stat. 305], entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," *held*, that the case did not come within the operation of the cruising act of 1835 [4 Stat. 776], that the prisoners were improperly convicted, and that they were entitled to an arrest of judgment.

This was a motion in arrest of judgment. The prisoners, who were seamen, and part of the crew of the American ship Georgia, were indicted for endeavoring to make a revolt while employed on a whaling voyage from New London, Connecticut, to the South Atlantic Ocean. The indictment contained several counts charging the commission of the several offences mentioned in the second section of the act of congress of 1835. They severally pleaded not guilty.

On the trial of the case before his honor, Betts, District Judge, evidence was adduced to show that the ship Georgia was a whale ship belonging to the port of New London, Connecticut, where her owners resided; that the defendants belonged to the ship as a part of the crew; that the vessel sailed from New London, Oct. 27, 1838, to go on a whaling voyage to the South Georgia Islands, and elsewhere in the Southern Atlantic Ocean. The charges in the indictment were distinctly proved against all the defendants. Hall, the captain of the vessel, proved that the ship was an American vessel at the time of the shipping of the crew, and then was, and still is, owned by citizens of the United States, residing in New London, and in its vicinity. This evidence was objected to by the defendants' counsel, on the ground that parol evidence could not be given of the ownership of a vessel, but that the bill of sale, or other document, must be produced to establish the ownership and national character of the vessel. The evidence was received, but the objection was reserved for the future opinion of the court. It also appeared, in the progress of the trial, that the vessel had not been enrolled and licensed under the act of congress, approved on the eighteenth day of February, one thousand seven hundred and ninety-three, entitled, "An act for enrolling and licensing ships or vessels to be employed in the coasting trade, and fisheries, and for regulating the same," to carry on the whale fishery, but had been registered under the act of congress approved on the thirty-first day of December, one thousand seven hundred and ninety-two, entitled, "An act concerning the registering and recording of ships or vessels," and had proceeded on her voyage, and made the same, and returned to her original port without any such license. The register of the vessel was kept on board during her voyage, and on her arrival at New London was deposited with the collector at that port.

The defendants' counsel, on this state of the case, asked the court to charge the jury that the voyage carried on in this vessel, without an enrollment and license, according to the acts of congress of the eighteenth of February, one thousand seven hundred and ninety-three, was an illegal voyage, and the vessel could not be deemed an American vessel, that the crew were not bound to go on a voyage, and could not be legally guilty of endeavoring to make a revolt on board of this vessel, under the act of congress of one thousand eight hundred and thirty-five, upon which they stand indicted.

The learned judge charged the jury that the prisoners, composing a part of the crew of the Georgia on the above-mentioned whaling voyage, were in a condition to be guilty of the offence charged in the indictment. That it was not necessary for the ship Georgia to have been enrolled and licensed for the whaling voyage above mentioned, under the act of one thousand seven hundred and ninety-three, but that when she had sailed on the voyage with her register, she was an American vessel, within the meaning of the act of congress under which the defendants were indicted. That it never was intended by any act of congress that whale ships, sailing under a register merely, but not enrolled and licensed, should entirely lose their American character, although it was possible that such vessels might be liable to pay foreign duties upon entering our ports. As this latter point was not involved in the present case, it was not necessary to decide it; in every other respect, said the learned judge, the voyage was a legal one: that this vessel was an American vessel in the sense required by the act upon which the prisoners were indicted. If therefore the jury believed from the evidence, that the defendants had committed the acts charged in the indictment, they ought to find them guilty. But in order to afford opportunity for a more deliberate examination of the acts of congress, it was recommended by his honor, and assented to by the district attorney, and the counsel for the defendants, that if the verdict should be for the United States, that it should be subject to the opinion of the court on the questions of law above stated. The jury brought in a verdict of guilty against all the defendants. [Case No. 15,473.]

A. Nash now moved in arrest of judgment. The learned counsel cited the act of congress of 1789 [1 Stat. 55], and also the act of 1793, and Weston v. Penniman [Case No. 17,455], and contended that inasmuch as the act of congress requires vessels to be regis-

tered for the foreign trade, and licensed for the coasting trade, that without these prerequisites the vessel must be deemed in law an alien and a foreign vessel, and is not included within the crimes act of 1835, § 2; that the provisions of the statute, not having therefore been complied with, the prisoners were improperly convicted. With reference to the character of the vessel, the learned counsel observed that a penalty being imposed by the act of congress upon a person who sailed a vessel without a register or license, the person who held the vessel, or was in possession of it, was holding it contrary to law, and could not claim the protection of the act of congress passed for the protection of owners and officers sailing as an American ship or vessel on the high seas. That the contract in this case for hiring the men to go the voyage contrary to the acts of congress was tainted, and not binding in law, and unless the legal relationship of master and seamen existed, and such a relationship only could be recognized in law, the defendants could not be deemed guilty under the act of congress. Hunt v. Knickerbacker, 5 Johns. 327. The same principle is recognized in De Grot v. Van Duzer, 20 Wend. 390. Wherever a contract is made in contravention of a statute, or contrary to the policy of the law, the same is void. Wheeler v. Russell, 17 Mass. 258. So 10 Barn. & C. 446; Sharpe v. Teese, 4 Halst. [9 N. J. Law] 352; Chit. Cont. 334; Bartlett v. Vinor, Carth. 252; Bluxland, Code Nap. 444. Contracts are void which are opposed to the national policy and institutions.

B. F. Butler, for the United States, contra. The act of congress was directory, and although the owner or the master of a vessel might be liable to incur a penalty or suit for not obtaining a registry or an enrolment and license for a vessel, pursuant to the act of congress, and although a suit might be maintained against such master and owner by the government of the United States, yet it would not affect the crew who had regularly shipped in the ordinary manner to go upon a lawful voyage. The crimes act of 1835 did not except the crews of such vessels out of the penalties of that act. U. S. v. The Pirates, 5 Wheat. [18 U. S.] 185. Mr. Justice Johnson, of the supreme court of the United States, decided that on an indictment for piracy, the national character of a merchant vessel of the United States might be proved without evidence of a certificate of registry. That the national character of the vessel was circumstantial to the crime. He likened the case of a man on board of an American vessel on the high seas taking and carrying away with an intent to steal or purloin the goods of another. In such a case, the question whether the vessel was enrolled or licensed pursuant to the act of congress could not be discussed in an indictment for the offence of stealing upon the high seas.

THOMPSON, Circuit Justice. In the First circuit in the case of U. S. v. Rogers [Case No. 16,189], Judge Story decided that seamen then under an indictment for an endeavor to revolt, who had shipped on board of an American vessel for a voyage on the high seas, and the vessel had sailed without a register or enrolment and license pursuant to the act of congress 1793, could not be convicted; that the case did not come within the crimes act of 1835; and that the crew were entitled to their discharge. This vessel was the brig Troy, belonging to Bristol, Rhode Island, the crew of which were indicted in June, 1838, for an endeavor to commit a revolt. The decision of Mr. Justice Story is in full force and effect in the Eastern circuit, and one cardinal principle pervades the law of the United States courts, viz. that the same should be uniform in the different circuits, and until that decision is reversed, I shall hold the law as expounded thereon to be the law of this circuit. The judgment therefore must be arrested. Judgment arrested.

Case No. 15,474.

UNITED STATES v. JENNEGEN.

[4 Cranch, C. C. 118.] [1]

Circuit Court, District of Columbia. Dec. Term, 1830.

BIGAMY IN DISTRICT OF COLUMBIA — MARYLAND STATUTES—EVIDENCE—PUNISHMENT.

1. The statute of bigamy (1 Jac. I. c. 11) was expressly enacted and declared to be in full force to all intents and purposes in Maryland, by the act of 1706 (chapter 8); and by the bill of rights of that state, and the act of congress of February 27, 1801 [2 Stat. 103], became the law of the county of Washington.

2. Quære, whether, in a prosecution for bigamy, evidence of a marriage de facto is evidence of a marriage de jure?

3. On a conviction for bigamy, the court may dispense with the burning in the hand.

Indictment for bigamy, under the Maryland act of 1706, c. 8, which enacted and declared the British statute of 1 Jac. I. c. 11, against bigamy, to be in force in the then province of Maryland.

Mr. Swann, U. S. Atty., offered parol evidence, (the testimony of the mother of the first wife,) that the prisoner was married to her daughter (Elizabeth Hunt) in Philadelphia by a minister of the Methodist Church; and cited Archb. 358; 1 Hale, P. C. 692; and Rex v. Inhabitants of Brampton, 10 East, 282; Morris v. Miller, 1 W. Bl. 632; Id., 4 Burrows, 2057.

Mr. Coxe, contra, contended that it must be proved to be a legal marriage according to the laws of Pennsylvania. That the United States must first show what the law of Pennsylvania is; and then a marriage according to that law. He also contended that it was not competent to the legislature or

[1] [Reported by Hon. William Cranch, Chief Judge.]

Maryland to enact a foreign law; and that the statute of 1 Jac. I. c. 11, was not in force in Maryland on the 27th of February, 1801, and was not one of the laws which, by the act of congress of that date, continued in force in the county of Washington (2 Stat. 103). Upon the first point he cited 1 Hawk. P. C. c. 32, § 10; 26 Geo. II. c. 33, § 14; Ilderton v. Ilderton, 2 H. Bl. 145, 158; Archb. 87.

Mr. Swann. It is only necessary to prove a marriage de facto, by showing a contract, a solemnization by a person appearing to be a clergyman, and cohabitation. 6 Bin. 408.

THE COURT (THRUSTON, Circuit Judge, absent,) permitted the mother of the first wife to testify that the prisoner was married to her daughter, Eliza Hunt, on the 17th of March, 1827, by a minister of the gospel, in Philadelphia, at the house of the witness's husband, No. 165 South street, by Mr. Prettyman, a Methodist preacher; and that the prisoner and her said daughter from that time cohabited as man and wife.

The second marriage, namely, to Sarah Ledberg, was proved by another witness.

THE COURT, at the prayer of Mr. Coxe, the prisoner's counsel, instructed the jury, that it was incumbent upon the United States to prove to their satisfaction, that the marriage in Pennsylvania was a valid marriage according to the laws of Pennsylvania; but refused to instruct them that there was no evidence of the law of Pennsylvania; the court being of opinion that proof of a marriage de facto was prima facie evidence of a marriage de jure.

THE COURT said they would consider the question whether the statute of James was in force by virtue of the Maryland act of April, 1706, c. 8, upon a motion in arrest of judgment; and also the correctness of their opinion upon the evidence, in a motion for a new trial.

Upon the motion for a new trial because the evidence of the first marriage was insufficient, Mr. Coxe, for the prisoner, cited Dalrymple v. Dalrymple, 2 Hagg. Ecc. 54, 58, 60; Scrimshire v. Scrimshire, Id. 395; Middleton v. Janverin, Id. 437, 447.

Upon the motion in arrest of judgment, he contended that if the statute of James, "and every article, clause, matter, and thing in the said act contained," is to be "in full force to all intents and purposes," then it is in force in England and Wales only; to which places its operation is expressly limited by the act itself. He also contended that the legislature of Maryland, in the year 1706, was not competent to enact a statute by reference to a foreign law.

Mr. Swann waived his right to reply, and submitted the case to the court.

CRANCH, Chief Judge. The ground of the motion in arrest of judgment was, that the statute of James was not in force in Maryland on the 27th of February, 1801, when the laws of Maryland were adopted by congress as the laws of this county. By the act of Maryland, 1706, c. 8, it is enacted, "That the act of parliament made at," &c., "in the first year," &c., "of our sovereign lord, King James the First," entitled "An act to restrain all persons from marriage until their former wives and former husbands be dead," "and every article, clause, matter, and thing in the said act contained, shall be and are in full force, to all intents and purposes, within this province." It was objected by the counsel of the prisoner, that it was not competent for the legislature to enact a statute by reference to a foreign law. That if the act of Maryland of 1706, c. 8, be taken strictly and literally, "and every article, clause, matter, and thing in the said act contained," is to be in force in Maryland, then the legislature of Maryland has enacted, "that if any person or persons within his majesty's dominions of England and Wales, being married," &c.; so that the statute still applies only to persons in England and Wales. But such could not have been the intention of the legislature of Maryland. Their meaning evidently was that the act should be, and actually was in force in Maryland, in the same manner and to the same extent, as it was in force in England and Wales. The words, "are in full force," imply a recognition of the already existing validity of the statute of James, in Maryland; and such was the fact; for there had been prosecutions in Maryland, under that statute, as early as 1682. See Kilty's Report to the Legislature, p. 170. So that, whether it was expressly reënacted by the Maryland act of 1706, or was one of those English or British statutes which had been "introduced, used, and practised by the courts of law or equity," in Maryland, before the Revolution, it became the law of Maryland, under the 3d section of the bill of rights. There can be no doubt, therefore, that the statute of 1 Jac. I. c. 11, was in force in Maryland on the 27th of February, 1801, and by the act of congress of that date (2 Stat. 103) became part of the law of this county. The motion for a new trial was because no evidence was given of the law of Pennsylvania, to show that the first marriage was conformable to the requisitions of that law. The cases cited by the counsel of the prisoner, upon this point, seem decisive that the foreign law must be proved, and that the foreign marriage cannot be presumed, prima facie, to be valid unless the foreign law be given in evidence. I think, therefore, that a new trial ought to be granted.

MORSELL, Circuit Judge, concurred in this opinion, as to the motion in arrest of judgment, but not as to the motion for a new trial. (THRUSTON, Circuit Judge, absent.)

In this state of the case, the prisoner, having been in gaol nearly or quite a year, withdrew his motion for a new trial, and the

court, in consideration of his long imprisonment, sentenced him to seven days' further imprisonment, and dispensed with the burning in the hand.

Case No. 15,475.

UNITED STATES v. JENNISON.

[1 McCrary, 226.] [1]

Circuit Court, D. Kansas. June, 1874.

FRAUDULENT CLAIMS AGAINST THE UNITED STATES — ACT OF MARCH 2, 1863, CONSTRUED.

The act of March 2, 1863 (12 Stat. 696, §§ 1–3), for the punishment of frauds upon the government by conspiring to obtain the payment or allowance of false claims against it, and by making false affidavits, etc., in support of such claims, construed and applied.

The defendant [Charles R. Jennison] was indicted under the act of congress of March 2, 1863 (12 Stat. 696), for attempting to defraud the United States of the sum of $52,843.64. The indictment in one of the counts charged the defendant with conspiring with one Elias K. Moss for that purpose. The defendant was in command of the Seventh Kansas regiment, in 1861. The affidavit on which the indictment was founded is as follows:

"State of Kansas, County of Leavenworth, ss. I hereby certify that on this 16th day of November, 1871, before me, the subscriber, personally appeared C. R. Jennison, late colonel in the war for the suppression of the Rebellion, and now a citizen of the county of Leavenworth, state of Kansas, who, being duly sworn, makes oath that he is the identical Colonel C. R. Jennison who commanded troops in the Union army during the Rebellion. That while colonel commanding, he was, by order dated October, 1861, and signed by Maj. Gen. Hunter, ordered to move his command to Kansas City, Mo., and there relieve Gen. Sturgis, who was ordered with his command to join Gen. Fremont, Sturgis' command being a part of Fremont's command. Gen. Sturgis was ordered to take all supplies, both quartermaster and commissary, with him to Fremont; that when his (Jennison's) command reached Kansas City, he was compelled to subsist there, both as to quartermaster and commissary stores, upon the country. He ordered his command as a matter of necessity to move on the city of Independence, county of Jackson, state of Missouri, and there to procure supplies; that he did move with his command to the said city of Independence, reaching there the fourteenth day of November; that he collected the citizens into the public square of said city of Independence, and there ordered the quartermaster goods in a hardware store in said city to be taken and carried away for the use of the army; that he has since learned and now knows that said hardware store belonged to Elias Kendall Moss, at that time of Independence, and that said goods consisted principally of such articles as were used in the quartermaster's department of the U. S. army; and he further states that the goods taken from said Moss at that time by his (Jennison's) command and by his order, were fully of the value stated by said Moss in the account presented by him against the United States, to the best of his knowledge and belief, to wit: $52,843.64. He also states that in that community, as in all others, many articles were taken that were not strictly in accordance with government custom; thereby many innocent parties have suffered without the knowledge of the commanding officer. The quartermaster goods of the stock of hardware taken from the said Moss were used by and for the benefit of the army that could be used, and those things that were deemed unnecessary were sold, and the proceeds turned over to the government, as will appear by the records under his administration. Finally, he states the goods in the foregoing account were taken as a matter of necessity for the benefit of the United States, and were actually used and became the property of the United States. He further states that he has no interest in the prosecution of this claim, either direct or indirect. [Signed] C. R. Jennison. Witness: Julius Haug.

"Sworn to and subscribed before me this 16th day of November, A. D. 1871, and I hereby certify that the affiant is respectable and entitled to credit. [Signed] Julius Haug, Clerk of the District Court in and for Leavenworth County, Kansas."

The indictment alleges that the material statements in this affidavit were false, and known to be so by the defendant when he made them. The evidence produced by the government tended to show that in November, 1861, Jennison's command took possession of—or, in the language of a witness, "jayhawked"—Moss' store at Independence, Missouri, and carried away every article in it, the value of which, however, the prosecution claimed did not exceed $5,000 or $10,000, and that none of the goods were taken for or went to the use of the government. There was some counter evidence on these points. The specific nature of the charges in the indictment and the state of the case made by the testimony appear in the charge of the court.

George R. Peck, Dist. Atty., for the United States.

T. P. Fenlon, J. B. Stewart, and E. Stillings, for defendant.

MILLER, Circuit Justice (charging jury, orally). This trial, through which you have patiently sat for the last twenty-four hours, is no doubt considered by the gov-

[1] [Reported by Hon. Geo. W. McCrary, Circuit Judge, and here reprinted by permission.]

ernment and by the defendant, as one of very considerable importance, and it is important to both parties. I shall endeavor, therefore, to lay down the principles of law that are applicable to the case as clearly as I can, so as to enable you to come to a just conclusion.

The charge, or charges,—for there are four counts in the indictment,—may be divided substantially into two charges, as they are described in the statute upon which the indictment is founded. The first of these which I will mention, though not the first in order, is the charge of conspiracy. The language of the statute on that subject is: "Any person who shall enter into an agreement, combination or conspiracy to cheat and defraud the government of the United States, or any department or officer thereof, by obtaining or assisting to obtain the payment or allowance of any false or fraudulent claim, shall be" [12 Stat. 697] subjected to a certain punishment. That is the language of the act defining conspiracy. And it requires a combination or agreement between two persons, for the purpose of cheating and defrauding the United States in procuring the payment of a false claim. The alleged false claim here is the one set up by Mr. Moss. The charge is that the defendant, Col. Jennison, and Mr. Moss, entered into a combination for the purpose of cheating the United States, by imposing this false claim upon it. In order to convict the defendant on that charge, it is indispensably necessary that you should be convinced by the testimony that there was such a combination or agreement between these two parties. The question whether the defendant aided or intended to aid in imposing a false claim on the government, is another question, and different from conspiracy. He may have intended to aid it without entering into a conspiracy. There must have been a combination, an agreement, an understanding between them that there was a claim to be presented, that it was a false claim, and that they combined, united for the purpose of imposing it on the government, and thus cheating and defrauding it. I think I can take the liberty of saying to you, that, in the absence of any testimony whatever that Jennison ever in his life saw Mr. Moss, and there being no claim that those two men ever met, or even exchanged correspondence in writing, never even knew each other personally, I think I may say to you that you may dismiss the charge of conspiracy from your consideration. There is not sufficient evidence to sustain the charge of conspiracy

Then there remains the other charge,—the one made here,—which is described in the following language in the statute: "Any person who shall, for the purpose of obtaining or aiding in obtaining the approval or payment of any such (false) claim, make, use or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, statement, certificate, affidavit or deposition"—which is the offense charged here—"knowing the same to contain any false or fraudulent statement or entry, or who shall make or procure to be made, or knowingly advise the making of any false oath to any fact, statement or certificate, voucher or entry, for the purpose of obtaining or of aiding to obtain any approval or payment of any claim against the United States, or any department or officer thereof" [12 Stat. 696], shall be punished, etc. This is the language of the statute, and is what has to be established to your satisfaction as having been done by Col. Jennison, in order to convict him. The charge here, divesting it of all other matters, is that the defendant made a false affidavit in support and in aid of a false claim of Mr. Moss against the government of the United States. Now, I instruct you that it is necessary that the claim itself should be a false claim; in the next place, that the defendant should have made an affidavit; and in the next place, in that affidavit he should have stated facts which were not true; and in the next place, he should have known that they were not true; and he should have stated them with the intent of aiding Mr. M. in cheating and defrauding the government. These elements are necessary for a conviction.

I perhaps might stop here, as that is the law, and about all the law of this case, but I think it proper myself to take some notice of what has been shown in the case. You have all seen the claim, which is satisfactorily shown to have been presented by Mr. Moss against the United States, and the affidavit of the defendant has been read, and his statements been commented upon, and are familiar to you.

The main reliance of the government to convict the defendant is upon the supposed false statement as to the amount or value of the loss sustained by Mr. Moss in consequence of what might be called the raid of the 14th of November, 1861; and second, in the falsehood of the allegation made, that the goods were taken for the uses and purposes of the army of the United States, and if they were not used, a large part or the whole of them were sold, and, to use a modern phrase, the money covered into the treasury. That is the substance of what Jennison swears to in that matter. As regards the value of these goods, the testimony is very inconclusive in every respect. There is no pretense of testifying to the value of the whole or any part of the goods. There is no pretense of producing any exhibits or invoices or written statements of the actual value of the goods at any time, either just before or just after, or any number of years before or after they were taken. The United States has relied wholly on the evidence of one or two men who claim to have been familiar with the goods in the store and with the size of the store. That is the class

of evidence which I have permitted to go to you, and which I remarked at the time, was to be considered for what it was worth. It is very sure that no man going to a store and looking at the goods in it, unless he makes some very accurate calculations or close examinations, can give a certain judgment as to the value of the goods. Nevertheless, inasmuch as that is the best the government has been able to produce, it goes to you for what it is worth. The discrepancy between the witnesses and the amount sworn to by Col. Jennison is very large. It is for you to consider how much nearer correct they are than Jennison, and also what opportunities Jennison had to know. It is further proper to say that one of the witnesses for the government stated, on looking at Moss' bill, that the prices put down there were not exorbitant prices. The prices claimed by Moss, their own witness stated to be fair prices. So I think you can hardly charge to Jennison an error or mistake as to the amount or value of the goods, as far as concerns the prices, if the schedule shown is correct. But if he is mistaken at all—if he made a false statement at all—to use the language of the indictment, it is probable its falsity consisted in the quantity of the goods. I leave it for you to say whether the defendant intended to commit a crime, the punishment for which might be a term of years in the penitentiary. It is for you to consider all the circumstances under which he might have made an honest mistake. It does not appear that he was ever inside of the store. We have had the testimony of witnesses who were there. Col. Anthony was there, and other witnesses were there, but no man says that Jennison was in the store at that time, or at any other time; therefore he is not chargeable with a knowledge of the quantity of the goods from a personal inspection of them. You should consider that the witnesses testify ten years after the transaction occurred, and that it occurred under circumstances likely to confuse a man, if he were looking at the goods, and it is for you to say whether Jennison made a false statement in regard to the value of those goods.

The other branch of the case is the one I apprehend you will have difficulty over, if you have any difficulty at all, and that is, he is charged, and the affidavit does say, that he took those goods for the use and benefit of his own regiment; though he says in the affidavit that many of them were misapplied and appropriated without his knowledge to wrongful purposes. He says what were not used by the troops were sold by him and the proceeds turned over to some quartermaster. In regard to that he has offered no proof whatever. The other side has offered some circumstantial testimony to show that that is probably not true. They have attempted to show, with what success I leave for you to say, that the troops were not in need of goods of the kind in that store. They have attempted to show that those goods could not have been carried away. They have attempted to show that he could not have sold those articles, and the proceeds put in the treasury, because Col. Anthony states if any such thing had occurred he must have known it. On the other hand, it is to be observed that while the witnesses say only one wagon—and one says only an ambulance—was there, the testimony shows that five or six came away. What amount of those goods could have been moved in the wagons? Were any of the goods applied to the service and use of the regiment? And did he, as he claims, sell any of them after, though irregularly, without taking a voucher, and deposit the money in some place that he thought was the proper place? That is for you to say. It is your duty to determine whether he made a false statement under oath, knowing it to be untrue, and whether he made it with a willful purpose of cheating the government. If he has made a statement and sworn to it, not corruptly, but without much thought or investigation, and having some circumstances on which to base it, you will not be hard with him. But if you believe he had a corrupt purpose,—had an intention to aid in defrauding the government,—if he swore to what was false and knew it to be false, you will find him guilty.

The jury, after being out a few minutes, returned a verdict of "Not guilty."

Case No. 15,476.

UNITED STATES v. JENTHER.

[13 Blatchf. 335.] [1]

Circuit Court, S. D. New York. April 29, 1876.

OFFENCES UNDER POSTAL LAWS — EMBEZZLEMENT OF LETTER—SUFFICIENCY OF INDICTMENT —VARIANCE—NEW TRIAL.

1. Under section 5467 of the Revised Statutes, an indictment against a letter-carrier for embezzling a letter entrusted to him as a carrier, to be carried and delivered by him, is not defective, although it does not aver that the letter had not been delivered to the party to whom it was directed.

[Cited in U. S. v. Lacher, 134 U. S. 632, 10 Sup. Ct. 628.]

2. That section creates, first, offences appertaining to letters, and, next, offences appertaining to the contents of letters, and then contains this proviso: "and provided the same shall not have been delivered to the party to whom it is directed." Semble, that such proviso does not apply to the first class of offences. If, however, it does, it is for the accused to prove the delivery, as a defence.

3. An indictment under said section described the letter embezzled thus: "A letter enclosed in an envelope, addressed and directed as follows, that is to say, to M. D., No. 122 W. 26 St., a more particular description of the manner in which said envelope was directed being to the jurors unknown, said envelope having been destroyed:" *Held*, that it was competent to give evidence relating to a letter contained in an envelope directed "M. D., No. 122 W. 26 Street," the word "to" and the abbreviation "St." not being on the envelope, the variances not being material.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

4. On a motion by the defendant for a new trial on an indictment, on the ground that the evidence failed to sustain a particular allegation in the indictment, it ought to appear that the objection was made at the trial in a manner sufficiently formal to attract attention.

[This was an indictment against Albert K. Jenther upon the charge of embezzling a letter intrusted to him as a letter carrier. The case is now heard on motions in arrest of judgment and for a new trial.]

Benjamin B. Foster, Asst. U. S. Dist. Atty.
Ambrose H. Purdy, for defendant.

BENEDICT, District Judge. The accused was indicted under section 5467 of the Revised Statutes, charged with embezzling a letter entrusted to him as a carrier, to be carried and delivered by him. Having been found guilty, he now moves in arrest of the judgment, and also for a new trial. The main ground of the motion in arrest of the judgment is, that the indictment is defective, in that it contains no averment that the letter had not been delivered to the party to whom it was directed, it being supposed that the statute makes it necessary for the prosecution to aver and prove such negative fact.

The section under which the indictment is framed is devoted to the creation of two kinds of offences—one appertaining to letters, the other to the contents of letters. In creating the offence of embezzling letters, the statute describes the subject of the offence as a letter intended to be conveyed by mail, or to be carried or delivered by a mail carrier, mail messenger, route agent, letter carrier, or other person employed in a department of the postal service, or forwarded through or delivered from any post office, and which shall contain an article of value. This portion of the section is, to all appearance, complete, and there is nothing in it to indicate that it does not state all the ingredients of the offences intended to be created thereby.

The statute then passes to another subject, namely, the contents of letters, and creates certain offences in respect thereto. In this part of the statute occurs the proviso: "and provided the same shall not have been delivered to the party to whom it is directed." If it be true that the proviso is intended to be applicable to the offences created by the first part of the section, as well as to those created by the part of the section to which it is appended, still it is not so connected with the description of the offences relating to letters as to compel its insertion in an indictment. The offence of embezzling a letter, as created by the statute, can be fully set forth without including the proviso, for, the proviso is not incorporated into that portion of the statute, but is separated from it by a provision relating to a different subject-matter. The general rule is, that, if there be any description in the negative, the affirmation of which would be a defence, the proof of it lies on the defendant, and it need not be stated. Rex v. Baxter, 5 Term R. 83. This rule is properly applied in the case of a letter carrier charged with the embezzlement of a letter entrusted to him to be carried and delivered. The delivery of the letter would be a defence, and the fact of delivery peculiarly within the knowledge of the person charged with such delivery.

Moreover, this indictment charges an embezzlement by the letter carrier of a letter entrusted to him to be carried and delivered. The fair and plain implication here is, that no delivery of the letter had been made. Upon this ground, also, the indictment can be sustained. The motion in arrest of judgment must, therefore, be denied.

The motion for a new trial raises a question of variance. The indictment describes the letter embezzled in the following manner: "a letter enclosed in an envelope, addressed and directed as follows, that is to say, to Mary Dilsworth, No. 122 W. 26 St., New York City—a more particular description of the manner in which said envelope was directed being to the jurors unknown, said envelope having been destroyed." This description is varied slightly in different counts of the indictment. The evidence to the admission of which objection is taken related to a letter contained in an envelope directed, "Mary Dilsworth, No. 122 W. 26 Street, New York City," the only variance being, that the word "to," placed before "Mary Dilsworth," in the indictment, was not upon the letter, and the abbreviation "St.," given in the indictment, was not upon the letter, but, instead, the word "Street" was written out in full. Neither of these variances is material. The sense is the same. No word is changed, nor any word important to the sense omitted. Besides, the indictment states that the envelope is lost, and that such loss prevents a more particular description of the manner in which the letter was addressed; and, although the phraseology adopted in this particular is not happy, still it may properly, I think, be held to convey the idea, that exactness in the direction stated was not intended, not being possible, as the envelope was lost. It may, also, be said, that the introduction of the preposition "to," before the name, together with the accompanying statement of loss of the direction, notwithstanding the use of the words "as follows," shows that it was the intention of the pleader not to set out the direction, but only to describe the person to whom the letter was addressed. These reasons are sufficient to dispose of the question of variance.

The only remaining ground of objection to the verdict is, that the evidence failed to show that the letter contained an obligation and security of the United States, as averred in the indictment. The witness testified, that she placed in the letter three dollars, in one dollar bills. The district attorney is confident that the witness also said the bills were

national bank bills. This the defendant's counsel denies, and I am unable, from my notes or recollection, to say which is right. But, this is certain, no such point was called to my attention on the trial. A general objection was made, that the averment of the indictment in respect to the contents of the letter had not been proved; but, it was replied, that the letter had been proved to contain three one dollar bills. There may, also, have been something said about the necessity of proving that the bills were bills of the United States, but, I am certain the objection now made, that, upon the evidence, the bills may have been bills of some state bank, and so not obligations of the United States, as averred in the indictment, was not brought to my consideration at the trial. Such an objection, if intended to be relied on, should have been made in a manner sufficiently formal to attract the attention of the court, and when the omission, if it existed, could, beyond reasonable doubt, have been cured. Made first at this time, in any formal manner, it is justly to be disregarded. The motion for a new trial is, for these reasons, denied.

Case No. 15,477.

UNITED STATES v. JERNEGAN.

[4 Cranch, C. C. 1.] [1]

Circuit Court, District of Columbia. April Term, 1830.

BIGAMY—WHERE INDICTMENT TO BE TRIED.

An indictment for bigamy must be tried in the county in which the second marriage was celebrated.

Indictment [against Bernard A. Jernegan] for bigamy. The second marriage was in the county of Washington, D. C.

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion that it could not be tried here (in Alexandria county), under the statute of Virginia of 22d December, 1792, p. 195, c. 104, § 14.

Case No. 15,478.

UNITED STATES v. JOE.

[4 Chi. Leg. News, 105; 15 Int. Rev. Rec. 57.]

District Court, D. Washington Territory. Sept. Term, 1871.

JURISDICTION OF FEDERAL COURTS—CRIMINAL INFORMATIONS.

1. The proceeding by criminal information in the United States courts is, so far as the court is aware, with a single exception, entirely unknown.

[Disapproved in Re Wilson, 18 Fed. 34.]

2. The supreme court is the only court of the United States which derives any part of its power directly from the constitution. The circuit and district courts are, by authority of the constitution, creatures of the national legislature having such jurisdiction, and only such, as congress has been pleased to confer upon them, and having no common law jurisdiction, though drawing upon the common law for modes of procedure and practice when necessary to carry into effect the jurisdiction given by statute.

[Cited contra in U. S. v. Block, Case No. 14,609.]

3. The district courts of the territory although they may in a sense be said to be of general jurisdiction, yet in the exercise of their jurisdiction, and the settlement of their practice as circuit and district courts of the United States, are subject to like limitations, with the circuit and district courts themselves. The act of 1789 to establish the judiciary system is an express grant in so many words. It gives jurisdiction over crimes and other matters in it expressly enumerated, and is also an example of grant by implication, for in the express grant of criminal jurisdiction is contained impliedly a grant of authority to summon and regulate grand juries. If the circuit and district courts of the United States have jurisdiction to proceed in criminal causes upon information that authority must spring from the constitution and statutes of the United States either expressly or by implication.

4. The court construes that part of the Vth amendment to the United States constitution relating to prosecutions by indictment and information and the various acts of congress, and defines the powers of the federal courts in criminal cases, and the proper mode of proceeding.

Leander Holmes, U. S. Atty., for the motion.

GREENE, J. The attorney of the United States comes and files a criminal information, charging one Cultus Joe with the offense of selling spirituous liquor to an Indian, contrary to the statute; and moves that a warrant of arrest issue against the accused, that he may be imprisoned or bailed for trial before this court. It is contended that the proceeding by information is concurrent in such cases as this with that by indictment, and is preferable as being the less expensive and more simple mode. There is no doubt in my mind that, if this court can take cognizance of crimes not capital nor infamous, upon information of the United States attorney, a warrant of arrest may properly issue in this case. It is not urged by the prosecuting officer, and does not appear to me, that there is any authority of law which would allow the proceeding by information in this case, which would not also allow it in every case of an offense not capital nor infamous. Nor does there appear to be any reason why an information should not lie in this case, if properly lying in any other. In short, the offense charged is one of a large class of offenses, and the argument before me is, that this class of offenses, and this particular offense, because one of the class, may, under the constitution and laws of the United States, properly be prosecuted by information. Although not infrequent in England and some of the states, the proceeding by criminal information in the United States courts, so far as I am aware, is (with perhaps a single exception, which I will hereafter specify) entirely unknown. By English common law, the attorney-general, or in

[1] [Reported by Hon. William Cranch, Chief Judge.]

the vacancy of his office, the solicitor-general, can prosecute by information, without leave of court, for any misdemeanor whatever, except misprision of treason. Cole, Cr. Inf. 9. The master of the crown office, though now required first to obtain leave of court, had originally, on the relation of a common informer or private person, like power. 4 Bl. Comm. 308. The exercise of this power is, however, rarely resorted to by the attorney-general, unless moved to it by a house of parliament, the lords of the treasury, the commissioners of some public department or the very serious nature of the case. Cole, Cr. Inf. 9, 10; Bish. Cr. Proc. § 605. Our prosecuting attorneys correspond in function rather to the English attorney-general than to the master of the crown office, and according to this analogy, it would seem proper, whatever may be the power, that in practice, if criminal informations are to be allowed in United States cases at all, they should only be exhibited in cases of great urgency, or by direction of congress, or of some department. But as the exhibition of an information in England is, notwithstanding the practical limitations, really at the absolute discretion of the attorney-general, the practice of that officer, and the restriction of the master of the crown office, are alluded to here, chiefly as the basis of an inference, that the proceeding by indictment has met with more favor among the English bar and the English people than that by information, and being concurrent was not unlikely to be preferred exclusively by the original law-makers of our national government. If Lord Coke is to be trusted, the provision of Magna Charta that no English subject should be deprived of life, liberty or property, save by the law of the land and the judgment of his peers, is decisive of the preference of the English people at the date of that concession; for, he says, the true sense and exposition of the words "by the law of the land" is "by indictment or presentment of good and lawful men." 2 Inst. 50; and see 2 Hale, P. C. c. 20. And there is good reason to suppose that such a preference did exist in the minds of our first legislators, strengthened and justified by the oppressive use made in this country by the English crown of criminal informations, immediately preceding the colonial struggle for independence.

Certain it seems to be, that the proceeding by indictment has, as matter of fact, had preference given it, not only by the first, but by all subsequent congresses, as is evident from even a hasty survey of the body of our criminal law and the power delegated to our courts. The supreme court is the only court of the United States which derives any part of its power directly from the constitution. The circuit and district courts of the United States are, by authority of the constitution, the creatures of the national legislature, having such jurisdiction, and only such, as congress has been pleased to confer upon them, and having no common law jurisdiction, though drawing upon the common law for modes of procedure and practice, when necessary to carry into effect the jurisdiction given by statute. The district courts of this territory, although they may in a sense be said to be of general jurisdiction, yet in the exercise of their jurisdiction and the settlement of their practice as circuit and district courts of the United States, are obviously subject to like limitations with the circuit and district courts themselves. The entire jurisdiction and practice of the circuit and district courts is given them either by express letter of written law, or by necessary implication from that letter. The act of 1789 [1 Stat. 73] to establish the judiciary system of the United States is at once an example of an express grant—since in so many words it gives jurisdiction over crimes and other matters in itself expressly enumerated,—and is also an example of grant by implication, for in the express grant of criminal jurisdiction is contained impliedly a grant of authority to summon and regulate grand juries. U. S. v. Hill [Case No. 15,364]. These are instances of the only possible ways in which a circuit or district court has acquired, or can acquire, power or jurisdiction in any case or proceeding. If the circuit and district courts have authority to proceed in criminal causes upon information, then that authority must spring from the constitution and statutes of the United States, either expressly or by necessary implication.

But the power to proceed by criminal information is nowhere expressly granted. Search the constitution and statutes from beginning to end, and it is believed there can be found no provision mentioning or expressly referring to a proceeding by criminal information. The only provision of the constitution that can be construed to hint at such an information is in the fifth amendment, which says, that: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger." The history of this amendment does not, so far as I am informed, disclose the reason of it; that, we are left to gather mainly or wholly from the words themselves. The wording, together with the historical fact, that at the time of its adoption our country had but newly emerged from a condition of military rule, might plausibly be held to indicate a mere design authoritatively to put an end to and prevent any assumption of power by military tribunals to punish persons guilty of capital or otherwise infamous crimes, in time of peace and public security. Yet it can not be denied, that the words are really susceptible of a broader meaning. A broader meaning I think they have, but not the construction counsel has put upon them.

Capital crimes, and most of those called infamous, never were prosecutable at common law otherwise than by indictment, and it has been argued that this amendment was intended to adopt the common law in the main, varying it in part, as matter of right and practice in cases to arise under the United States statutes. It is argued that this amendment forbids procedure, otherwise than by presentment or indictment in some cases, and thereby, by implication, adopts the procedure by information or indictment in other cases. By this is probably meant that it explicitly adopts in substance the common law limits for the exclusive use of indictments, and thereby impliedly adopts substantially the common law limits for their use concurrently with informations. But mark, the prohibition of the constitution is not co-extensive with that of the common law. It is fundamentally different. At common law, some infamous crimes could be prosecuted by information: under this amendment, they must all be prosecuted by presentment or indictment: by the common law prosecution of misprision of treason, otherwise than by presentment or indictment, was forbidden; by this amendment it is not forbidden. An information for misprision of treason would be a novelty in jurisprudence, and would require an explicit grant of power to introduce it. Yet here it is granted by implication, if the power to use criminal information is at all here declared by implication; for it is a rule of construction, applicable here, that what is so made law by implication must be the complement of what is made law by expression; and this amendment, if, by implication, it authorizes the use of criminal informations, must be understood to authorize the use of them in all cases, except where their use is expressly excluded. I do not think that there is any such meaning as counsel would imply, in this constitutional provision.

As the constitution stood before amendment, congress had absolute power to regulate criminal procedure in the national courts, civil and martial. It was prudent, then, by such an amendment, to put a limit to that power. Thus regarded, the utmost implication that can be extracted from it is, not that criminal informations are to lie, but that congress is free to provide, by any mode it sees fit, for prosecution before courts civil or courts martial, of crimes not capital nor infamous. Congress, being thus free, has not seen fit to make any enactment expressly adopting the proceeding by criminal information. There is not, even, in any statute, an allusion to such a proceeding. But, as we have seen, if there is any authority for such a proceeding, it must be granted expressly, or by necessary implication. We do not find any express or implied grant in the constitution, and none express in the statutes. Is there necessarily implied in the statute any such grant? How can there be? Not even an allusion to criminal information is found in the statutes. An indictment will lie in all cases, and is, under the constitution, absolutely necessary in some. A grand jury and its power to indict is necessary by implication, because else many species of crime could not be reached by any mode of procedure known to the law. But a criminal information, however convenient, can never be necessary, since an indictment lies in all cases. How can an unnecessary mode of procedure, all reference to it and recognition of it being absent from the statutes, be claimed to be given by necessary implication from them? I cannot understand how it can.

It seems to be the opinion of reputable law-writers, that the courts of the United States need positive authority of congress, before a proceeding by criminal information can be entertained. 2 Story, Const. (3d Ed.) p. 593, § 1786; Conk. Treatise (4th Ed.) p. 591. That the courts have never understood themselves to possess jurisdiction of a criminal information, is patent from the fact that in not a single reported case from the adoption of the constitution to the present time, a period of eighty years, has a court of the United States assumed jurisdiction of such a proceeding. In one district, indeed, to my knowledge, and I think in some others, in internal revenue cases, where the accused has been desirous to submit himself to the judgment of the court, without the delay and publicity incident to the action of a grand jury, his desire has been accomplished by the filing, by the United States attorney, of a criminal information, and by the entry, by himself, simultaneously, (the United States attorney consenting) of a plea of nolo contendere. In such cases, the accused, by his acts, voluntarily waived all exception to the proceeding, and in no other cases, did I ever hear of an information being accepted by a United States court, as the first pleading in a criminal prosecution. Congress itself, has all along labored under the impression that the mode of procedure by criminal information was not possessed by the courts of its creation. If we turn to the acts of the national legislature, prior to June 11, 1864, touching procedure for the punishment of crime, we find that procedure intentionally and expressly, all made to fit the proceeding by indictment, and that proceeding only. Section 29 of the crimes act of 1790 (1 Stat. 117) gives to persons "indicted" the right to have counsel, the right to witnesses and process; and section 31 provides that the "indictment" for any offense not capital, shall be found within two years, and though the word "information" occurs in this section, it plainly means an information for fines and forfeitures only. In the limitation, section 3 of the act of 26th March, 1804, (2 Stat. 290) "indictment" is named as the appropriate first pleading, in a prosecution for crime, and "information" in a prosecution for a fine or forfeiture. Section 14 of the act of 3rd of

March, 1825, (4 Stat. 118) provides that a party refusing to plead to an "indictment," shall be proceeded against as if he had pleaded not guilty. The act of 3rd March, 1835, (4 Stat. 777) empowers the court to enter a plea of not guilty when a person "indicted" stands mute. The statute of 8th August, 1846, in section 2 (9 Stat. 72) provides for the transfer of an "indictment" from the circuit to the district court, and vice versa; in section three it gives "grand juries" of the district court, cognizance of all crimes and offenses within the jurisdiction of the circuit and district courts; and in section 11 it gives process for witnesses to the defendant in an "indictment" pending. And the first section of the act of 26th February, 1853, (10 Stat. 162) provides for the joinder of offenses in one "indictment," and for the consolidation of "indictments." The statutes that I have cited are not all that might be cited, but they are fair samples. The legislation is uniform, and, to all appearance, that of a legislature ignorant that there is any other authorized mode of procedure than that by indictment. Congress, in the act of 11th June, 1864, (13 Stat. 124) provides a summary proceeding by sworn complaint, instead of indictment, for the trial of offenses not capital nor infamous, when committed by seamen. The third section of this act, by declaring that, on the trial of cases under it, "it shall not be necessary that the accused shall have been previously indicted," distinctly recognizes that, without such declaration, an indictment would have been necessary. Now, if at the time of making this law, congress understood the constitution expressly to adopt for United States courts the proceeding by indictment in certain cases, and by implication (as has been contended), the proceeding by information or indictment, in other cases, then congress knowingly made a useless and a void law. Useless, because an adequately simple and summary procedure for prosecuting such offenses was already provided, namely, by information. Void, because if the constitution adopted one sort of procedure for certain cases, and that sort and another impliedly for all other cases, it thereby anticipated and prevented all provision of other methods by congress. Congress, in passing this act of 1864, evidently had in mind the fifth constitutional amendment; evidently supposed that amendment left it free to provide any mode of proceeding it pleased for the trial of offenses not capital nor infamous; and evidently did not suppose that the constitution fixed in the courts the right to proceed on criminal information. Since the act of 11th of June, 1864, congress has passed no law, from which any mode of procedure may be inferred to be sanctioned, other than those recognized by that and previous enactments.

I am not disposed to take cognizance of a proceeding, which has not ever been used in United States courts, which congress has never adopted or recognized, and which, however convenient it may be, does not give that effectual security against vexatious prosecution which is afforded by the action of a grand jury. I shall, therefore, decline to issue the warrant of arrest in this case. Motion overruled.

Case No. 15,479.

UNITES STATES v. JOHN.

[4 Cranch, C. C. 336.] [1]

Circuit Court, District of Columbia. Oct. Term, 1833.

LARCENY—THEFT OF POCKET-BOOK.

A conviction for stealing a pocket-book is a conviction of stealing all that it contained, at the time of the theft, belonging to the same owner.

Indictment for stealing a five-dollar bank-note. The prisoner [the negro John] had been convicted, at this term, of stealing a pocket-book valued at ten cents, and sentenced. The bank-note was in that pocket-book, at the time it was stolen, and belonged to the same man, Francis Gray. The verdict, in this case, was taken, subject to the opinion of the court, on the question whether the former conviction of the prisoner, for stealing the pocket-book, is a bar to this prosecution, all matters, or points of law, reserved.

THE COURT (nem. con.) rendered judgment for the prisoner.

UNITED STATES v. The JOHN GRIFFIN. See Case No. 7,348.

Case No. 15,480.

UNITED STATES v. JOHNS.

[1 Cranch, C. C. 284.] [1]

Circuit Court, District of Columbia. Dec. Term, 1805.

ACTIONS ON DUTY-BONDS.

In actions upon duty-bonds, the United States are entitled to judgment at the return term.

Debt on a duty-bond, returnable to this term; special bail. The defendant [R. Johns] appeared in proper person.

Mr. Jones, for the United States, on the last day of the sitting of the court, moved for, and obtained a rule on the defendant to plead instanter.

The defendant being called, and not appearing, judgment was entered by default, for the penalty to be released on payment of the sum mentioned in the condition, with interest and costs. See Act Cong. March 2, 1799, § 65 (1 Stat. 676).

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,481.

UNITED STATES v. JOHNS.

[1 Wash. C. C. 363;[1] 4 Dall. 412.]

Circuit Court, D. Pennsylvania. April Term, 1806.

VIOLATION OF SHIPPING LAWS — CASTING VESSEL AWAY — INDICTMENT — CHALLENGES OF JURORS —EVIDENCE AS TO INSURANCE—PROOF OF STATE LAWS.

1. Indictment for casting away and destroying a vessel, of which the defendant was owner, on the high seas, with intent to prejudice the underwriters. The defendant has a right to challenge thirty-five of the jurors; the number of challenges allowed at common law, in capital cases.

[Cited in U. S. v. Dow, Case No. 14,990.]

2. The law not making it an offence in the owner to destroy his vessel, to the prejudice of the underwriters on the cargo, no evidence can be given to establish a charge against the defendant, for such destruction, to the prejudice of the underwriters on the cargo; even if such a charge was contained in the indictment. Evidence of the value of the property insured, may be given, for the purposes of showing inducements to destroy or to preserve it.

3. The prosecutor must show that the insurance was a valid insurance; and if made by an incorporated company, the act of incorporation must be shown; and it must be shown, that the contract of assurance was executed, so as to bind the company.

[Cited in Re Kaine, Case No. 7,598.]

4. The president of the incorporated insurance company, by whom the property was assured, although a stockholder, may be a witness to prove the handwriting of the defendant, to the manifest of the cargo; because, the conviction of the defendant would not be evidence in a suit on a policy against the company.

[Cited in The Missouri, Case No. 9,653.]

5. A law of a state certified by the clerk of the executive council, and the seal of the state annexed, is good evidence of the law, according to the provisions of the act of congress, passed 26th May, 1790 [1 Stat. 122]. As to public acts of judicial bodies or others, except the laws or acts of a state it directs who is to authenticate them.

6. The words in the indictment, that the defendant destroyed the vessel, "with intent to gain corrupt advantage to himself," are mere surplusage, and need not be proved. It is necessary to state that "the intent was to prejudice the underwriters."

7. The legal meaning of the term "destroy," as used in the act of congress, is to unfit the vessel for service, beyond the hopes of recovery, by ordinary means. This, as to the extent of the injury, is synonymous with "cast away." Both mean such an act as causes the vessel to perish,—to be lost,—to be irrecoverable by ordinary means.

[Cited in U. S. v. Vanranst, Case No. 16,608.]

8. Quere.—Whether a corporation is a person, within the meaning of the act of congress.

The defendant [Richard Johns] was indicted for casting away and destroying a vessel, on the high seas, of which he was owner, with intent to prejudice the Baltimore Insurance Company, who had underwritten thereon. There were four counts, the two first of which charged him, generally, with casting away and destroying his vessel, and differed from each other only in this, that he is charged with having directed, or procured it to be done. The 3d and 4th have the same difference, but they state the particular manner in which the destruction was caused, viz.: by boring three holes in her bottom.

[1. The defendant was brought, by habeas corpus, before the court, holding an adjourned session, on the 8th of January, 1806, when it appeared that, on the 26th of December, 1805, he had been committed by the mayor of the city of Philadelphia, charged on the oath of Andrew Clarke with having on the 20th day of August last, or thereabouts, on the high seas, scuttled the schooner Enterprise of Baltimore, with intention to defraud the underwriters, as he believes.] [2]

Mr. Rawle, C. & J. R. Ingersoll, S. Levy, and Mr. Ewing, for defendant.

[2] [The prisoner's counsel objected, 1st. That the commitment was vague, and did not describe the offence, within the words of the act of congress. 2d. That the offence was not committed within the district of Pennsylvania; and no demand having been made for his surrender by the executive of any other state, there was no law to warrant his arrest, or detention. 3d. That the evidence was not sufficiently strong, to found an indictment against him and he was entitled, at all events, to be discharged on bail.

[It was answered, by the attorney of the district, 1st. That whatever might be the formal defects of the original commitment, the court, being now satisfied with the evidence, would remand the prisoner for trial. 2d. That it was not necessary, for that purpose, to give positive proof of guilt; but to show probable cause for the accusation. 3d. That the case did not come, at all, under the constitutional, or legislative, provisions, for the surrender of a fugitive from the justice of another state; but it was the case of a crime against the United States, committed on the high seas; when the trial is directed to be in the district, where the offender is apprehended. 1 Stat. 113, § 8; Id. 91, 92, § 33.

[BY THE COURT. Upon a habeas corpus, we are only to enquire, whether the warrant of commitment states a sufficient probable cause to believe, that the person charged, has committed the offence stated. We have heard the evidence; and cannot doubt of its sufficiency to that extent. We do not think, that the prisoner ought either to be discharged, or bailed. He must be remanded for trial.] [2]

Before the jury were sworn, it became a question, how many of them, the prisoner might challenge peremptorily. The counsel for the prisoner insisted, that he had a right to challenge thirty-five, this being the num-

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

[2] [From 4 Dall. 412.]

ber which might be challenged in all capital cases at common law (4 Hawk. P. C. 389; 4 Bl. Comm. 353); and the act of congress (1 Stat. 113) which limits the number to twenty, refers expressly to the crimes therein mentioned; whereas this law was not passed till 1805.

Of this opinion was THE COURT.

[2] [The clause, respecting challenges is in these words: "If any person, or persons be indicted of treason against the United States, and shall stand mute, or refuse to plead, or shall challenge peremptorily above the number of thirty-five of the jury; or if any other person or persons, be indicted of any other of the offences hereinbefore set forth, for which the punishment is declared to be death, if he or they shall so stand mute, or will not answer to the indictment, or challenge peremptorily above the number of twenty persons of the jury; the court, in any of the cases aforesaid, shall notwithstanding proceed to the trial of the person or persons so standing mute, or challenging, as if he or they had pleaded not guilty, and render judgment thereon accordingly."

[The attorney of the district, said he was indifferent which way the court decided the point; but it was proper to remark, that the 29th section of the judicial act referred, generally, to the state law, for the rule relating to juries (1 Stat. 88); that the state law limited the right of peremptory challenge, in cases like the present, to the number of twenty; that the 30th section of the penal act (1 Stat. 113) obviously considers the whole law of peremptory challenge provided for, in future, as well as existing, capital cases; and that it was improper to refer to a common law rule, if a rule was prescribed by statute.

[PETERS, District Judge. The words of the penal act, when they restrain the common law right of peremptory challenge, also expressly confine the operation of the restraint, to the offences before set forth in the act. For offences not set forth in the act, the only rule is furnished by the common law; and it is the privilege of the prisoner, that it should be applied and enforced.

[WASHINGTON, Circuit Justice. The right of challenge was a privilege highly esteemed, and anxiously guarded, at the common law; and it cannot be doubted, but that at the common law, a prisoner is entitled, on a capital charge, to challenge peremptorily, thirty-five of the jurors. If, therefore, the act of congress has substituted no other rule (and, in the present instance, it is clear that none has been substituted) the common law rule must be pursued. It is not easy, indeed, to assign a reason, for introducing the words, that confine the provision, respecting peremptory challenges, to offences before set forth in the act; but it is enough to bind our judgments, that the words are actually introduced. In the case of U. S. v. Russel [Case No. 16,209], on an indictment for murder on the high seas, tried at October term, 1806, the prisoner's counsel, at first, claimed the right of peremptorily challenging thirty-five jurors; but, that being an offence set forth in the penal law, was expressly embraced by the provision limiting the peremptory challenges to twenty; and the claim was, accordingly overruled.] [2]

The amount of the evidence was, that the prisoner, being the owner of the schooner Enterprise, lying at Baltimore, determined to make a voyage to Porto Bello, and to take with him a cargo of goods, which he and Butler were to purchase on credit. In June, 1805, he applied to Captain Snyder of Baltimore, to get the insurance effected for him, valuing her at 2700 dollars. Snyder, after objecting to the danger of the voyage, but advising, that in case he should persist in it, that he should take a particular route, so as to avoid the St. Domingo privateers, which he would fall in with, by passing between that island and Cuba, called the Moro passage; and being assured by the prisoner, that he intended, and should pursue the route thus advised; agreed to get the insurance done, and to give his notes for the premium, which he accordingly effected. The prisoner also applied to Snyder, to effect an insurance on the cargo, valued at 12000 dollars. Snyder expressed his surprise, that the prisoner and his partner could get credit for so large a quantity of goods, but was assured, that there would be no difficulty. Snyder accordingly agreed upon the premium, and gave his notes for the amount of this sum, insured on the cargo. By the manifest of the cargo taken on board, it was stated at 9690 dollars. It appeared by the testimony of Snyder, that the prisoner purchased from him a spike gimlet, at the price of twenty-five cents, but the precise bore could not be ascertained. He sailed on the voyage, and it appeared by the testimony of one of his sailors, that there was no opportunity, during the passage to sea, for him to unlade any part of his cargo. He was met with, not far from Cuba, by a French privateer, who took the captain and all his hands on board the privateer, and put the whole of them except Taylor, the witness for the prisoner, under the hatches. This witness stated, that for three hours, the boat was constantly passing to, and returning from the Enterprise, and at one of the trips, though surrounded by the privateersmen generally, he saw goods and packages in the boat. The captain and crew were afterwards permitted to return to their vessel. On going on board, they found all the hatches open; great destruction appeared; and the store room, fixed between the two bulk heads, in which all the dry goods had been deposited, entirely emptied. They made sail, and the next day, about twenty hours after they had

[2] [From 4 Dall 412.]

[2] [From 4 Dall. 412.]

left the privateer, they perceived the vessel to leak. It gradually increased, and at eleven at night, all hands were called on deck; but by twelve she was cleared, after which, the witness declared they could not free her by constant pumping. The next morning, the water covered the cabin floor; and about seven o'clock they all abandoned her, waterlogged, having only time to take with them, a small piece of raw, and another of boiled beef, and a small quantity of bread. At this time, they were in sight of land, which they reached that afternoon. Not finding water where they landed, they coasted along, and in about thirty-six hours, reached St. Jago de Cuba. In a day or two after, Captain Hughes, of the Friendship, met with the Enterprise at sea, her decks covered, and the water flowing through the hatches. He went on board, and by pumping, relieved her so, that with great difficulty, he was able to tow her to the Moro castle. He found her sails cut, and her light sails gone. With the assistance of ten or a dozen hands, obtained from a garde de costa, lying at the castle, and two pumps, he entirely freed her of water, in about eight hours, and then perceived three auger holes in her bottom, about the size of his forefinger to the knuckle, near the keel, and in the store room, the ceiling having been first cut away. After stopping these holes, the schooner was perfectly tight. He carried her up the next day to St. Jago, and moored her about fifty yards from a vessel, in which he saw the prisoner then standing. The prisoner never, at any time, came on board the Friendship, or made any inquiries respecting his vessel, except that the day after she came up, he inquired of one of Captain Hughes's sailors, without any question from the sailor leading to it, where the holes were. Captain Hughes applied to the consul, who sent a letter to the prisoner to attend at his office. He there offered to compromise with Hughes, which he refused, but charged the prisoner with having destroyed the vessel. This the prisoner denied. The cargo was taken possession of by the government, and after twenty days' public notice, was sold, with the vessel, producing eleven or twelve hundred dollars. Hughes put in his claim, which was not admitted, but the proceeds were retained, and the claim of Hughes is still pending. None of the witnesses ever saw the prisoner at the coffee house, where the Americans resorted, or in company with any of them, whilst at St. Jago. Mr. Douglass advised the prisoner to clear up the reports which were circulating, that he caused the destruction of the vessel. This he promised to do, but never took any step in the business. When first charged with the fact by Hughes, he said, he was not insured—said the holes were made by the privateersmen, who had robbed him of goods to the amount of 6100 dollars. At another time, he said they had robbed him of goods to the amount of 12000 dollars. The French privateer arrived at St. Jago about this time, and one of the officers called upon Hughes to go with him in search of Johns. They went to a house where they understood he lodged. Saw him pass from the front to the back room, but he was denied by the keeper of the house. The prisoner never attended at the sale of the vessel and cargo, or at all interfered to interpose his claim. He never gave notice to Captain Snyder of the loss, or made an offer to abandon.

These were the circumstances relied upon to establish the guilt of the prisoner. On the other side, it was insisted, that they were too slight to convict him, and that there was good ground to suppose the holes to have been bored by the French privateersmen.

During the examination, the following points were made at the bar, and decided by the court: 1st. It was objected by the counsel for the prisoner, that any evidence should be given respecting the insurance on the cargo. That the act of congress only applies to the casting away, burning, or destroying, a vessel, by any other than the owner, or if by the owner, then it must be to the prejudice of the underwriters on the vessel, or the owners of the cargo, or the other owners of the vessel; provided the court should think itself at liberty to reject the word "if," which in that part of the sentence, which respects the owners of the cargo, or the other owners of the vessel, makes nonsense of the sentence.[3]

BY THE COURT. The law does not make it an offence in the owner to destroy his vessel, to the prejudice of underwriters on the cargo; and if it did, this is not charged in the indictment; and consequently no evidence can be given, to establish a charge against the defendant, for a destruction to the prejudice of underwriters on the cargo. But the attorney may nevertheless give evidence, and so may the defendant, of the cargo being insured, and the value of it, in order to show the quo animo, the motive which might have influenced the defendant to destroy, or to save the vessel. If the cargo was greatly overvalued, it might suggest a motive to the prisoner for destroying the vessel; and the reverse, if not overvalued; and still more if undervalued.

The district attorney offered to read the policy of insurance on the vessel, which was objected to, without producing the charter of incorporation of the Baltimore Insur-

[3] The words are: "If any owner of a ship or vessel, shall wilfully cast away, burn, or otherwise destroy said ship or vessel, with intent to prejudice any person who hath underwrote, or shall underwrite any policy thereon; or of any owner or owners of goods laden therein; or of any other owner or owners of the said vessel, he shall suffer death," &c. &c. This section is intended to be almost a literal transcript of the fourth and eleventh of George I.; except that those statutes say, "to the prejudice of any person, &c.; or of any owner or owners," &c. But, in this law, the words are changed to "with intent to prejudice;" and "if" is inserted instead of "of." But, to make sense of it, the word "if" must be entirely expunged.

ance Company. 2 Ld. Raym. 1532; 1 Bos. & P. 40.

BY THE COURT. The gist of the offence is, that the vessel was destroyed to the prejudice of this company. Unless a valid insurance was made, it could not be to the prejudice of this company, as laid in the indictment. To prove that the company can act under, and be bound by a common seal, it must appear that they are legally incorporated and authorized so to act. That the president pro tempore, who affixes the seal, could thereby bind them. The charter of incorporation, therefore, must be produced.

It was accordingly read.

Mr. M'Kim, the president of the Baltimore Insurance Company, was now offered as a witness, to prove the handwriting of the defendant, to the manifest of the cargo. He was objected to, as being a stockholder, and therefore interested to convict the prisoner. 1 P. Wms. 595; 1 Macn. Ev. 52, 53, were read.

BY THE COURT. The conviction of the prisoner would be no evidence, in a suit on the policy, against the company, and therefore the witness is not interested.[4]

Upon producing the act of the state of Maryland, incorporating the Baltimore Insurance Company before mentioned, it was certified by the clerk of the executive council, and the seal of the state was annexed. This was objected to, because it did not appear, that it was authenticated by an officer, who had power to do it, and to affix the seal of the state.

BY THE COURT. The act of congress, as to all public acts of judicial bodies and others, except the laws or acts of a state, directs who is to authenticate them; but as to the latter, it merely requires the seal of the state to be annexed. This law, being so authenticated, is proper evidence, within the true construction of the act of congress.[5]

The points of law, raised in the argument, were as follows:

1st. That a vessel cannot be said to be "cast away or destroyed," if she is afterwards recovered and restored to her former situation. A vessel was stranded by the captain, and was afterwards got off: upon an indictment against the captain, under St. 4 Geo. I. c. 12, and 11 Geo. I. c. 29, it was determined, that if a vessel be run aground, or stranded on a rock, to defraud underwriters, and is got off in a condition to be easily refitted, she cannot be said to be cast away, or destroyed. East, P. C. 1097, 1098, decided in 1765. Johnson's Dictionary was quoted. Cast away, means to shipwreck; shipwreck is to destroy, by dashing on rocks or sands. Wreck is where a ship perishes. In this case, the vessel was easily repaired; and by pumping, and plugging the holes, was as tight and staunch as ever.

2d. That presumptive evidence is not sufficient to convict the prisoner; and to prove this, the counsel read 8 Mod. 66, 67, 74.

3d. That the indictment states, that the prisoner destroyed the vessel with intention to prejudice the insurance company, and to gain corrupt advantage to himself; whereas it was proved, that the vessel was not insured for a farthing more than she was worth.

4th. The words of the law are, "to prejudice any person or persons who hath underwrote;" but a corporation is not a person, or persons. Plowd. 177; 1 Leach, 215, 2 Strange, 1241.

In answer to this last point, Mr. Dallas cited 1 Wood. El. Jur. 195; 1 Mod. 164; 2 Inst. 702, 703.

5th. The indictment states the prisoner to be owner of a certain ship or vessel, called the Enterprise of Baltimore; that the company insured said ship or vessel, called the Enterprise, not saying "of Baltimore." The objection taken, was twofold: 1st, the variance; and 2d, her being called a vessel or ship in the disjunctive. An indictment that A forged, or caused to be forged, is bad. 2 Hawk. P. C. c. 25, § 58; 2 Rolle, Abr. 80; 5 Mod. 138.

6th. To prove that Captain Hughes, the salvor, was interested, so far at least as to discredit him, it was contended; that if the Enterprise was voluntarily injured and abandoned, she became a derelict, and belonged to the first finder; and of course, if Hughes should be able to convict the defendant, he would be entitled to recover from the Spanish government, the whole proceeds of the vessel and cargo: aliter, if she be abandoned from a necessity, not voluntarily produced by the master or owner. 2 Bl. Comm. 89; 2 Vern. 317; Leach, 207, were read.

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[4] This opinion is supported by the cases of Rex v. Bray, Cas. t. Hardw. 358; Rex v. Boston, 4 East, 572; Abrahams v. Bunn, 4 Burrows, 2251; Smith v. Prager, 7 Term R. 60; Masters v. Drayton, 2 Term R. 496. See, also, Phil. Ev. 38, 87. The only exception appears to be the case of forgery; and this is considered as an anomaly, and is much shaken by a case decided in New-York. 1 Phil. Ev. 90. I have no doubt that it ought to be now overruled. Whether a conviction in a criminal proceeding can be given in evidence in a civil action, is vexata questio. 2 Phil. Ev. 237.

[5] As to the proof of entries in public books, it is clearly settled, that where an original is of a public nature, and admissible in evidence, an examined copy will equally be admitted. 2 Phil. Ev. 320. It is a general rule, that a copy, authenticated by a person appointed for that purpose, is good evidence of the contents of the original, without proof of its being examined. Id. 292. Where a deed is by law to be enrolled, the endorsement by the proper officer on the back, is evidence of enrolment. Id. Examined, sworn copies of all acts of a public nature, may be given in evidence. Gilb. Ev. 47; Peake, Ev. 24. It would seem, on the whole, that an office copy, certified, is not sufficient, unless the officer is expressly authorized to give copies, though he be the keeper of them, and is authorized to record the original—They must be examined and proved in the ordinary way to be copies.

Before WASHINGTON, Circuit Justice, and PETERS, District Judge.

WASHINGTON, Circuit Justice (charging jury.) The court think it unnecessary to give an opinion upon these objections, which appear upon the face of the indictment, and particularly that which is made to a corporate body, being included in the words "person or persons," because the defendant may avail himself of them, should he be found guilty, on a motion in arrest of judgment. As to the third objection, that he is stated to have destroyed his vessel, with a view to gain corrupt advantage to himself, &c. these words are merely surplusage, and need not have been proved. The intent to defraud the underwriters, it was necessary to state, and it is stated.

Before the prisoner can be found guilty, you must be satisfied of the following facts: 1st. That Johns was the owner of the Enterprise: this is acknowledged. 2d. That she was insured: this is proved. 3d. That she was cast away, or otherwise destroyed. This is a mixed question of law and fact. The question of law is new; and in giving a legal definition of those words, we have very few sources of information to resort to. But after the fullest consideration, which we have been able to give the question, we are of opinion, that to "destroy a vessel" is to unfit her for service, beyond the hopes of recovery by ordinary means. This, as to the extent of the injury, is synonymous with "cast away;" it is the general term. Casting away is, like burning, a species of destruction. Both of them mean such an act as causes the vessel to perish; to be lost; to be irrecoverable by ordinary means. Whether, upon the evidence, and agreeable to this definition, the Enterprise was cast away or destroyed, is a matter of fact for your decision. 4th. That the prisoner perpetrated the act, or directed or procured it to be done, positive evidence is not necessary. Circumstantial evidence is sufficient, and is often more persuasive to convince the mind of the existence of a fact, than the positive evidence of a witness, who may be mistaken; whereas a concatenation, and a fitness of many circumstances, made out by different witnesses, can seldom be mistaken, or fail to elicit the truth. But then those circumstances, should be strong in themselves, should each of them tend to throw light upon, and to prove each other, and the result of the whole, should be to leave no doubt upon the mind, that the offence has been committed; and that the accused, and no other, could be the person who committed it. Under these precautions, let the case of the prisoner be examined. The first we hear of him is at Baltimore, the owner of this vessel, and having it in contemplation to make a voyage, with a cargo belonging to one Butler and himself, to Porto Bello. He procures her to be insured by the Baltimore Insurance Company, at 2,700 dollars, and the witness, who was his friend on the occasion, and appearing on the part of the prosecution, declares that she was fully worth that sum. What motive, then, could he have to destroy her? He would not only be a loser in respect of the value of the vessel, but all his objects of trade, and all the profits which he no doubt anticipated, (for why else should he undertake the voyage?) would be thereby defeated. In the next place, we find him insuring 12000 dollars on a cargo, appearing by the manifest to be worth only 9,690 dollars. At first view, this appears an overvaluation, and consequently to afford a temptation to destroy the cargo. But since it does not appear, that the freight was insured, and since a man, without meditating a fraud, may wish to insure expected profits, he would probably be a loser even in respect of the cargo; or at any rate, there could exist little, if any temptation, to perpetrate the crime with which he is charged. We then follow him from Baltimore into the West India seas, and find him in the possession of French privateersmen; whose conduct, if the witness be believed, would prove them rather to deserve the name of pirates, It appears, by the testimony of the same witness, that the whole of the cargo taken in at Baltimore, fell into the hands of these men, and you will judge, from his evidence, whether any, and what part, was taken out by them. In about twenty hours after the prisoner and his crew were restored to the vessel, she was discovered to leak; the difficulty of freeing her increased; but yet we find, that in one hour, from eleven to twelve, she was freed; after which, every exertion was made in vain. It afterwards appeared, that the leak was produced by three holes bored in her bottom. These must have been made by the privateersmen, by Johns, or by some of his crew; because she was waterlogged when they abandoned her. If by the privateersmen, it is extremely difficult to account for her not leaking, for so long a time after her liberation, and that the leak should increase in the proportion it did, without any new apparent cause. I say it is difficult to account for this, unless we suppose, that after making the holes, they were imperfectly filled up, and afterwards forced open in succession, by the pressure of the water. As to this, you must be the proper judges. Still it is not clear, that the prisoner made the holes. The store room, it is true, communicated with the cabin; but it appears that the key generally remained in the door, and it is possible that opportunities may have offered for the crew to have done the act. These things are merely suggested for your consideration.

It is not less difficult to account for the prisoner's conduct, after he saw his vessel in safety at St. Jago. If he had not wished her destruction, nothing could have been more natural, than that he should immedi-

ately have inquired into the circumstances by which his vessel had been saved; into the causes which had produced her supposed loss, and that he should have taken steps to reclaim her. Instead of this, he at no time called upon the salvor, but, on the contrary, he seems to have taken pains to avoid him. When charged with being guilty of having done the act, and advised by his friend to clear it up, we find him contenting himself with a simple denial of the charge. He never appeared at the sale of the vessel or cargo, or interposed a claim for either. His inconsistencies; at one time declaring that he was not insured; sometimes saying, that he had been plundered of goods to the amount of 6000 dollars; at another, of 12,000 dollars; his avoiding the company of the Americans; being denied to persons, who came after him: can with difficulty be reconciled with the character of fairness—whether with that of innocence, you must decide. It is proper, however, to remark, that these circumstances do not necessarily prove more, than that he regretted the recovery of the vessel and cargo. A man, whose property is fully, or more than covered, may not be sorry that it is lost; and yet he might be very far above the commission of a criminal act to produce the loss. It is for you to say, whether this construction should be given to his conduct. Upon the whole, you will weigh the evidence, and not convict the prisoner, if you doubt of his guilt.

Jury found the prisoner not guilty.

Case No. 15,482.

UNITED STATES v. JOHNSON.

[See Case No. 3,393.]

Case No. 15,482a.

UNITED STATES v. JOHNSON.

[This case, decided by BAXTER, Circuit Judge, and SWING, District Judge, and referred to in an editorial paragraph in 8 Cent. Law J. 180, was certified to and decided by the supreme court, in 100 U. S. 82. It is not otherwise reported.

Case No. 15,483.

UNITED STATES v. JOHNSON.

[4 Cin. Law Bul. 361.]

Circuit Court, S. D. Ohio. June, 1879.

NATIONAL BANKS—"MONEYS" DEFINED—EMBEZZLEMENT BY PRESIDENT—INDICTMENT—AUTHORITY OF BANK OFFICERS — EVIDENCE IN CRIMINAL CASES.

1. The word "moneys," as used in section 5209 of the United States Statutes, includes the bills of national banking associations, as well as the coin and legal tender notes of the United States.

2. An indictment of a president of a national banking association, under said section, for embezzlement of the moneys of such association, must show that the moneys were lawfully intrusted to his possession.

3. An indictment of such officer, under said section, for drawing bills of exchange, and assigning notes without authority from the directors, need not allege such drawing and assigning to have been with intent to injure and defraud such association.

4. If a bill or note relates to the business of the association, the general authority conferred by the directors upon the officer to draw bills and sign notes would be sufficient authority.

5. But, if they relate to the individual and private business of the officer, they would not be authorized by the general powers thus conferred.

6. The rule as to the weight of evidence, presumption of innocence, character and reasonable doubt in criminal causes.

Indictment for violation of the national banking law (section 5209, Rev. St. U. S.).

The defendant is charged in the indictment with a violation of section 5209 of the United States Statutes, which provides that "every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, signs any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association, or any other company, body politic or corporate, or any individual person; or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who, with like intent, aids or abets any officer, clerk, or agent, in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years, nor more than ten." The indictment contains seventeen counts, and charges the defendant, whilst acting as president of the Fayette County National Bank, with embezzlement of the moneys of the bank, with the wilful misapplication of the moneys of the bank, and, as president of the bank, with drawing bills of exchange and assigning promissory notes, without authority from the directors.

Upon a motion to quash the indictment, it was held by the court, that it was true, that where an indictment is so defective that no judgment could be rendered upon it against the defendant, the court may, in its discretion, quash it, and the same may be said of the several counts in an indictment. But, when the indictment is for a plenary offense, this will not be done unless the indictment is plainly and clearly bad; and so if the motion to quash be to a failure of the counts and the indictment contains good counts which would support a general verdict. As a general rule, the motion will be denied,

and the party will be put to his demurrer or motion in arrest of judgment. There are several good counts in this indictment, and from its general character, the motion will be overruled. The defendant then demurred to each count in the indictment, assigning, as cause of demurrer to the counts, charging embezzlement and misapplication of the money of the bank; that they did not show that the defendant was the lawful custodian of the money, nor that it was with intent to injure and defraud; and, as cause of demurrer to those counts charging the drawing of bills of exchange and the assignment of notes, that they did not set out the instrument nor allege the intent to injure and defraud.

Channing Richards, Dist. Atty., for the United States.

Mills Gardiner and E. M. Johnson, for defendant.

BY THE COURT. The intent to injure and defraud is not made by the statute an element of the offense described in either of these counts, and it was not, therefore, necessary to aver it. The counts charging the drawing of bills and the assignment of the note, describe them with sufficient particularity and definiteness; it was not necessary that they should set copies of either. The demurrer, therefore, as to these counts, is overruled. The counts charging the wilful misapplication are also sufficient, and the demurrer as to them is overruled. But the counts charging embezzlement do not show any proper averment that the defendant was in the lawful possession of the moneys he is charged with embezzling, and the demurrer as to them is therefore sustained.

CHARGE OF THE COURT (SWING, District Judge). The indictment contains seventeen counts, and charges the defendant, as president of the Fayette County National Bank, with the embezzlement and wilful misapplication of the money belonging to the bank, with the drawing of bills of exchange, and the assignment of bills of exchange, as president of and on behalf of the bank, without the authority of the directors of such bank. The first, third, fifth, seventh and ninth counts charge the defendant with embezzlement. Upon demurrer these counts have been held by the court to be sufficient in law; therefore for your consideration. The second, fourth, sixth and eighth counts charge the defendant with a wilful misapplication of the moneys of the bank. The tenth, eleventh, twelfth and thirteenth counts charge the defendant with drawing bills of exchange without authority from the directors. The fourteenth, fifteenth, sixteenth and seventeenth counts charge the defendant with assigning, as president of the bank, promissory notes, without authority from the directors. The district attorney, however, does not claim to have introduced evidence establishing the charges contained in the sixth, eighth, sixteenth and seventeenth counts. This leaves for your consideration the evidence bearing upon the charges contained in the second, fourth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth counts in the indictment.

Before directing your attention to the particular charges, it is proper we should understand the meaning of this section. In order to properly construe this section, it must be read in connection with the entire statute of which it is part. The statute provides for the organization of banking associations by vesting in them the power to elect or appoint directors, and by their board of directors, to appoint a president, cashier and other officers, define their duties, etc. It also defines the nature and character of the business in which they should engage, by providing that they should exercise, by their board of directors, or duly authorized officers or agents subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; by obtaining, issuing and circulating notes. It also limits the liabilities which may be incurred to such associations, by any one borrower, to an amount not exceeding one-tenth of their capital stock. So that we see, of necessity, that the duties which the directors are authorized to confer upon the president, vice president, and cashier, must be only such as relate to the business of the association, as defined by the act, and must be confined to such business. It further appears from these provisions that these associations are created for the benefit of the public as well as for the stockholder; for the depositor, the merchant and business man, who purchase their drafts or bills, so that the object of the law-makers, in the enactment of this section, must have been the protection of the rights of all these; to preserve the moneys, funds and credits, and all other property of the association, for the benefit of these parties, and to prevent those who may be entrusted with their management from misapplying the same; to secure from them a faithful and honest administration of the trust which has been confided to them.

Coming to the words and terms of the particular section under which the indictment is found, a question is made in regard to the proper definition of the word "moneys," as used in this section of the statute. It may be conceded that this term primarily means coin, but it is also held to mean any currency usually and lawfully used in buying and selling, and may embrace bank notes. It is admitted that if bank notes were made legal tender for all purposes that they would be included in the term. But it is said that na-

tional bank notes are not so, and therefore not embraced within it. The national bank notes are made a legal tender for all debts due the United States, except duties on imports, and for all debts due from the United States to individuals, corporations, and associations within the United States, except the interest on the public debt and in redemption of the national currency; and every national bank is compelled to receive the national currency for every debt due to it. So that, in a general sense, it may be said that the national currency is embraced within the term "moneys." But I think when we examine all the sections of this act there can be no doubt as to the sense in which the word is used. The word "money" and the words "lawful money" are both used in this statute. Sections 5191–5195, which provide for the kind of money in which the national bank currency shall be redeemed, and the reserve fund, which shall be kept in hand for that purpose, use the term "lawful money." But in section 5136, which confers upon the associations the power of loaning, the term "to loan money" is used. In section 5200, where limiting the amount to be loaned to one individual, the word "money" is used. In section 5202, limiting the indebtedness of the bank, the word "moneys" is used. And, in sections 5207 and 5208, immediately preceding the one under which the indictment is found, the word "money" is used, as "money loaned," "money so loaned," and "amount of money." And in this section it is the "moneys" of the association. I think, in view of use by it of the terms "lawful money" and "money," it cannot be claimed that congress intended "lawful money" only to be embraced within the inhibition; but it intended it to include all money, whether such as it had denominated lawful money or money only, whether gold, silver, legal tender notes, or national currency notes. Nor does the fact that in this section the word "fund" is used militate against this construction. This word more properly applies to stocks, public securities, and invested sums from which income is derived, and the words "moneys" and "funds," being the only words used in this section which could include national bank currency, as between these two it is manifest that congress intended it to be included within that of moneys. And this construction is consistent with the rule that penal statutes shall be strictly construed; for, under this rule, the court must give to the words of the statute their full meaning, their wider instead of narrower interpretation, when it is manifest from the entire statute that such was the intent of the legislature in their use.

With this interpretation I will direct your attention to the specific allegations of the several counts, which you are to consider.

The second count charges the defendant with wilfully misapplying, on the 2d day of October, 1875, thirty thousand dollars of the money of said association, by appropriating it to his own use. The fourth count charges in like manner the misapplication and appropriation, but of a different amount and on a different date. In both these counts the time and amount is not material. If the government shows the misapplication of the sum of money at any time before the finding of this indictment, so that it is not behind a period which is barred by the statute of limitations, it would be within the time they are required to prove. And if they show the misapplication of any sum of money, although it might not be thirty thousand dollars, or nine thousand dollars, it would be within the allegations of these counts. In order to convict the defendant upon either of these two counts, the evidence must satisfy your minds, beyond a reasonable doubt, that he misapplied the moneys of this association, by converting them to his own use. If he became indebted to the bank legally and properly by transactions which he was authorized to have with the bank, it would not be a misapplication of the funds of the bank, although he might, in the winding up of the bank, be found to have been indebted to the bank in a large sum. But if he took the money of the bank and willfully appropriated it to his own use, disconnected with the transactions of the bank, it would be a wilful misapplication of the moneys.

The tenth count charges that the defendant, as president and in behalf of said association, on the 7th day of June, 1875, unlawfully drew a bill of exchange upon the Fourth National Bank of Cincinnati, in favor of I. H. Dial, for the sum of five thousand dollars, without authority from the directors. If the evidence satisfies your minds beyond a reasonable doubt, that the defendant drew the bill described in this count without the authority of the directors, he would be guilty under this count. If this bill of exchange was drawn in relation to the business of the bank, his general authority by the directors to draw bills of exchange would be authority to draw the bill; but if it were purely relating to his own private business, disconnected with that of the bank, such a general authority would not authorize him to draw this bill; and what was the nature of this transaction you are to determine from all the evidence in this case.

The eleventh count charges, in like manner the drawing of a bill of exchange, on the 17th day of April, 1875, but with intent to injure and defraud the bank. The same charge I have given you in regard to the tenth count applies to this, with the addition that, under this count, you must find beyond a reasonable doubt, that this draft was drawn with intent to injure and defraud the bank. The intent must be established from the evidence in the case. If the bill was used by him to appropriate money to his own use, and that necessarily deprived the bank of the money which was drawn by him through it, and that

would be to the injury of the bank, the law presumes that he intended such injury in the drawing of the bill.

The twelfth and thirteenth counts charge the defendant in like manner, with drawing on the 31st day of August, 1875, a bill of exchange upon the Fourth National Bank of Cincinnati, for ten thousand and thirty-four dollars and thirty-eight cents. These two counts are for the same transaction; the only difference being that the thirteenth charges that he drew the bill with intent to injure and defraud the association, and the twelfth does not charge such intent. The instructions which I have given you in regard to the tenth count you will apply to the twelfth count, and that I gave you in regard to the eleventh count you will apply to the thirteenth count.

The fourteenth and fifteenth counts charge that the defendant, as president, and on behalf of the bank, on the 21st of August, 1875, assigned to the Merchants' National Bank of Cincinnati a certain note for ten thousand dollars, made by himself, dated August 21st, 1875, and payable eight days after date to the order of A. C. Johnson, president, without authority from the directors of the Fayette County National Bank at Washington. If the evidence satisfies your mind, beyond a reasonable doubt, that the defendant assigned the note described as president without the authority of the directors, he would be guilty, under this count of the indictment. If this note was in reference to the business of the bank, the general authority given him by the directors might be sufficient to warrant him in assigning the note. But if this note was wholly disconnected with the business of the bank, and was his private business,—had no connection with the bank at all,—he had no right to assign it, as president. That would be without authority of law, and not within his general authority. The fourteenth and fifteenth counts are alike that the fifteenth charges the assignment of the note to have been made with intent to injure and defraud the bank. If the necessary result of assigning the note was to take from the bank the amount thereof, and appropriate it to his own use, and thereby deprive the bank thereof, that would be a fraud upon the bank, and would be to its injury, and the law presumes that he intended that result. The rule as to the weight of proof differs in civil and criminal causes. In civil causes a preponderance of evidence justifies a jury in returning a verdict for the party in whose favor such preponderance may be. But, in a criminal cause, the rule is different. A preponderance of evidence will not warrant a verdict of guilty. The law presumes the defendant to be innocent, and this presumption can only be overcome by evidence which satisfies the minds of the jurors beyond a reasonable doubt that he is guilty. If the evidence fails to do this, the defendant is entitled to an acquittal. The doubt must, however, be a doubt which arises out of the evidence in this case,—one which is the result of an honest and careful investigation of all the facts and circumstances which are in evidence,—and must be in relation to these a reasonable doubt, one in consonance with reason, not in opposition to it.

As a general rule, in civil causes, the character of the parties cannot be put in evidence. Exceptions are found in cases of defamation and fraud, but in criminal causes it is the right of the defendant to place in evidence his good character, and this is to be taken into consideration with the other evidence in the case; not that, if a person is shown to be guilty, that his previous good character should acquit him, but he is entitled to its consideration as a part of the evidence of the question of his guilt. And it is upon this principle that the presumption is that one who has been uniformly honest and upright will not readily turn from the paths of a correct life, and become suddenly bad. The fact there was found upon settlement a balance due from the defendant to the bank will not of itself justify a conviction, but the fact is to be taken in connection with the other evidence in the case, as reflecting upon charges contained in the indictment.

If the evidence in this case establishes in your minds, beyond a reasonable doubt, that the defendant committed the acts in either of the counts in the indictment, it will be our duty to return a verdict of guilty as to such counts. If, however, after a careful consideration of all the evidence in the case, there is, in your minds, a reasonable doubt, whether he has committed any of said,—any of such acts,—it will be your duty to render a verdict of acquittal.

Case No. 15,484.

UNITED STATES v. JOHNSON.

[1 Cranch, C. C. 371.] [1]

Circuit Court, District of Columbia. Dec. Term, 1806.

CRIMINAL LAW — EXAMINATION OF JURORS — COMPETENCY OF WITNESSES.

1. The court will not ask a juror, before he is sworn, whether he has formed and delivered any opinion as to the case; but leave the party to challenge for favor.

2. A witness is not competent to testify as to the similitude of handwriting, who has only seen, for a few minutes, papers acknowledged by the defendant to be in his handwriting.

[Cited in Talbott v. Hedge, 5 Ind. App. 560, 32 N. E. 788.]

Indictment [against Jeremiah Johnson] for forging a check on the Office of Discount and Deposit at Washington, the said office being a bank established under a charter from the government of the United States. The indictment was under the act of Maryland, November, 1797, c. 96, § 2.

[1] [Reported by Hon. William Cranch, Chief Judge.]

F. S. Key, for the defendant, requested that the jurors might be asked whether they had formed and delivered any opinion upon the case.

THE COURT (DUCKETT, Circuit Judge, absent) refused to suffer the question to be asked, saying, that if the defendant wished to challenge the jurors for favor he might do so.

Mr. Alexander, a witness for the United States, upon being asked by the court what knowledge he had of the handwriting of the prisoner, said that he had, as a justice of peace, seized a book of accounts, which the prisoner acknowledged to be in his handwriting; that he examined the handwriting in the book, which he had in his possession only about fifteen minutes; that he also saw, in Mrs. Cassin's possession, a piece of writing which the prisoner acknowledged to he his; and had, since the prisoner was confined in jail, received two notes from the prisoner; that his only knowledge of the prisoner's handwriting was derived from those circumstances; that he could only swear that the check was like what he had seen.

Key & Dorsey, objected to this testimony, and cited McNal. Ev. 417, (Yates's opinion;) and Peake, Ev. 67.

Mr. Jones, contra, cited Esp. 144; 1 W. Bl. 384.

THE COURT said that Mr. Alexander's testimony was not evidence of the handwriting of the prisoner.

Verdict, not guilty.

Case No. 15,485.

UNITED STATES v. JOHNSON.

[2 Cranch, C. C. 21.] [1]

Circuit Court. District of Columbia. June Term, 1811.

BURGLARY—ENTRY OF STOREHOUSE.

A storehouse, not within the curtilage, but in which the clerk of the owner usually sleeps, is, in law, the mansion-house of the owner; and burglary may be committed therein.

This was an indictment for a burglary by breaking and entering the dwelling-house of Mr. Cassin. The building which the prisoner entered was a storehouse on a lot contiguous to the house in which Mr. Cassin lived; but not in the curtilage; his storekeeper, however, usually slept in it at night.

Morsell & Van Horne, for the prisoner, contended that this was not a dwelling-house; but if it was, it was the dwelling-house of the storekeeper, and should have been so charged in the indictment.

THE COURT (CRANCH, Chief Judge, absent), said that this was a dwelling-house, where a person sleeps at night, and is liable to be put in fear. The storekeeper was the servant or agent of Mr. Cassin. A person may have two dwelling-houses, in either of which burglary may be committed. 1 Hale, P. C. 556; Crown Cir. Comp. 207, 480. The sleeping in a house at night fixes its character, whether or not it be a dwelling-house; for a house which is only occupied and resided in during the day, is not considered a dwelling-house. 1 Hawk. P. C. c. 38, §§ 10–20. On the contrary, if a person takes an inn of court, or a room for the purpose of lodging, burglary may be committed therein.

Verdict, "Not guilty."

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,486.

UNITED STATES v. JOHNSON.

[4 Cranch, C. C. 303.] [1]

Circuit Court, District of Columbia. March Term, 1833.

INDICTMENT — ASSISTING SLAVE TO RUN AWAY — SUFFICIENCY OF AVERMENTS.

In an indictment under the Maryland law of 1796, c. 67, § 19, for assisting, by advice, the transporting of a slave, whereby his owner was deprived of the service of his slave, it is not necessary to state what the advice was, nor how it assisted; nor is it necessary to state a criminal intent, nor that the accused knew he was a slave and intended to run away.

The indictment, which was founded on the Maryland act of 1796, c. 67, § 19, charged that the defendant [Abraham Johnson] did, on the 19th of April, 1833, "assist the transporting of a certain slave named Joseph Dozier, the property of Lucy R. Miller, of Washington county aforesaid, from the said county and district, by advice, and by conveying said slave in a gig from said county and district to the city of Baltimore, in the state of Maryland, then and there, thereby depriving the said Lucy Miller, the owner of said slave, of the service of her said slave, against the form of the statute," &c.

The jury having found the defendant guilty, his counsel, Mr. Jones, moved, in arrest of judgment: 1st. That the indictment is vague and uncertain in not stating what the advice was; nor the nature of it, by which the defendant assisted, &c., nor how the advice did assist. 2d. In not charging a criminal intent, nor that the defendant knew that Dozier was a slave, or intended to run away.

Mr. Key, contra. The indictment need not aver a knowledge or intent not mentioned in the description of the offence in the statute. Rex v. Sainsbury, 4 Term R. 457.

Mr. Jones, in reply. It is not sufficient to state the offence in the vague terms of the statute. The act must appear to have been unlawfully done. If the statute be taken literally, a man may be punished for giving a pass to his own slave. 1 Chit. 231.

[1] [Reported by Hon. William Cranch, Chief Judge.]

But THE COURT (CRANCH, Chief Judge, doubting) overruled the motion, as well as the motion for a new trial, and fined the defendant $50.

Case No. 15,487.

UNITED STATES v. JOHNSON.

[1 N. J. Law J. 162.]

District Court, D. New Jersey. May 14, 1878.

FUGITIVES FROM JUSTICE—INTERSTATE RENDITION—HABEAS CORPUS—JURISDICTION OF FEDERAL COURTS.

[The federal courts cannot, by habeas corpus, release a person held for trial in a state court, either on the ground that he was seized in another state in an illegal manner, and without compliance with the act regulating interstate rendition, or on the ground that he is held to answer for a different crime than that for which he was extradited.]

The prosecutor, in custody in the Essex county jail, sued out a writ of habeas corpus in the United States district court. He had been arrested in the District of Columbia, and brought under a requisition from the governor of New Jersey to this state. It was claimed the arrest was irregular, etc. The opinion sets forth the main facts.

A. Q. Keasbey and George M. Robeson, for prosecutor.

G. N. Abeel and Jacob Vanatta, for defendant.

NIXON, District Judge. I am quite clear that the facts presented by the return and the testimony in this case preclude the court from discharging the prisoner on these proceedings, whatever may be the opinion of the court in regard to the methods adopted by the agents of the state to obtain the possession of the body of the petitioner; and I should be sorry to say or do anything which might be construed into an approval of such methods and proceedings. It nevertheless appears affirmatively that the prisoner is detained by the legal authority of the state, to answer certain alleged violations of the criminal laws of New Jersey. The case falls within the provisions of section 753 of the Revised Statutes of the United States, which restricts the writ of habeas corpus to a case, where the prisoner in jail is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or an order, process or decree of a court or judge thereof; or is in custody in violation of the constitution, or of a law or treaty of the United States; or unless when it is necessary to bring the prisoner into court to testify.

It appears by the petition, return and evidence that the prisoner was brought into the state of New Jersey from the District of Columbia by persons claiming to act under the constitution and laws of the United States, in regard to the extradition of fugitives from justice. The second section of article 4 of the constitution provides that a person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state whence he fled, be delivered up to be removed to the state having jurisdiction of the crime. The act of congress of February 12, 1793 (section 5278, Rev. St. [1 Stat. 302]), was passed to provide the machinery to carry into effect this provision, and it is therein made the duty of the executive of the state or territory to which a person charged with the crimes generally designated in the constitution has fled, upon lawful demand, to cause the fugitive to be arrested and surrendered up. The alleged fugitive in the present case being in the District of Columbia, the demand was made upon the chief justice of the supreme court, under section 843 of the Revised Statutes, relating to the District of Columbia, wherein that officer is directed to deliver up fugitives from justice in the same manner and under the same regulations as the executive authorities of the several states are required to do under the extradition act (Rev. St. §§ 5278, 5279). The demand of Gov. Clellan upon Chief Justice Carter was dated March 11, 1878, and was based upon the allegations that the prisoner stood charged with the crime of perjury, committed in the county of Essex, state of New Jersey; that he had fled from the justice of said state, and had taken refuge within the District of Columbia. It requested that the petitioner be delivered up to Robert Lang and Andrew J. McManus, who were authorized to receive and convey him to the state of New Jersey, there to be dealt with according to law.

The grounds alleged in the petition for the discharge of the prisoner were, that he was a citizen of Connecticut, residing at New Haven, in said state; that in the latter part of February last he left his home for the purpose of attending to certain business in the city of Washington in relation to legislation then pending before the congress of the United States under consideration by a committee of the senate; that he passed openly, in the daytime, through the state of New Jersey, and took rooms at the hotel in the city of Washington, where he remained from day to day in the open and public pursuit of the business objects for which his presence was required at the capital, and attended from time to time before the senate committee, and held conferences with different members of congress, concerning the business which he had in hand; that he was thus engaged on the 11th of March last, and in the evening of that day had retired to his bed as usual, when, at about midnight, he was awakened and disturbed by the entrance of three men into his room, who informed him that they had authority to arrest him, and

intended to take him to the state of New Jersey; that he demanded their authority, which they refused to produce, insisting that he should go with them to the police station; that he requested that they would permit him to send for his counsel, which they also refused; and that, finally, upon their threats to use force, and in order to avoid disturbance in the hotel in the middle of the night, he allowed them to take him without actual resistance to the police station, upon the express condition and promise that they would send for his counsel early in the morning; that they placed him in close confinement, and did not allow him to see or communicate with any person, but kept him confined until about one o'clock p. m. on the 12th of March, when they placed him in the train, and brought him to Newark, New Jersey, and lodged him in the Essex county jail, where he has since remained; that during all this time they exhibited no warrant or paper of any kind, although he repeatedly insisted that they should do so, and he could obtain no information as to the grounds or authority for arrest except vague verbal statements of the officers, one of whom, during the morning, in reply to reproaches of the petitioner for their failure to notify his counsel, said that he would frankly let him understand that he was not to be allowed to see counsel or any person until he got to New Jersey; that he has since ascertained that Robert Lang, as the agent of the state of New Jersey, arrived in Washington on the evening of the 11th of March, with a requisition from the governor of the state of New Jersey; that before presenting the same to the proper authorities in the District of Columbia, in order to ascertain whether a warrant would be issued thereon, and without any judicial proceedings or warrant whatever, the said agent, with the assistance of the police officers, invaded the sleeping room of the petitioner, and hurried him to the police station, as before stated, and kept him there until, at the opening of the court in the next morning, they went before Chief Justice Carter, and presented the requisition, and obtained a warrant for the arrest of the petitioner "if he should be at large," and for his delivery to said agent for removal to New Jersey; that the said requisition and the warrant were founded upon an indictment against the petitioner found in April, 1877, in the Essex oyer and terminer, for perjury, alleged to have been committed by him in an examination under oath before a police justice, upon a complaint against him for an alleged conspiracy; that the petitioner is advised that such indictment was void on its face, for the reason that no person charged with crime can lawfully be put under oath on a preliminary examination, and that perjury cannot be assigned thereon, and for other causes apparent upon said indictment; that if the petitioner had had opportunity to consult counsel or defend himself against said arrest, no warrant could properly have been issued on said requisition, and, if issued, it would have been vacated upon proper legal proceedings; that upon a writ of habeas corpus, issued on his application, and allowed by one of the justices of the supreme court of New Jersey for the purpose of being admitted to bail, the warden returned that he held him in custody only by virtue of the said requisition and the proceedings thereon; that such proceedings were instituted in pursuance of a law of the United States, providing for the surrender of fugitives from justice fleeing from one state to another; that the petitioner was not in fact a fugitive from justice, and had committed no crime in New Jersey or elsewhere; that the indictment which formed the basis of such extradition proceedings did not charge any crime under any statute or at common law, and that, therefore, the arrest in the manner aforesaid was illegal, and a gross violation of the rights of the petitioner as a citizen of the United States.

If the same return had been made to the writ of habeas corpus in this case, that the warden annexed to the writ issued for the prisoner on his application to the supreme court of the state to be admitted to bail, to wit, that he was held in custody only by virtue of the commitment issued by the governor to the keeper of the jail of the county of Essex, the sole question presented would be, whether it were competent for this court to inquire into the sufficiency of the evidence upon which the governor of New Jersey and the chief justice of the District of Columbia acted in making the requisition by the one and the order for rendition by the other. But the return as amended sets forth the existence of new facts which had arisen since the writ was allowed. It not only awarded that the prisoner had been delivered into his custody by virtue of the writ of commitment issued by Governor McClellan of New Jersey, but also that he was held (1) by virtue of writs of capias from the court of oyer and terminer in and for the county of Essex, for the term of April, 1877, and the term of April, 1878; and (2) by virtue of orders of said court remanding him to his custody for trial upon the indictments to which he had hitherto pleaded, the terms of which were annexed, and which were the cause of his detention. The writ of habeas corpus was tested and allowed April 16, 1878. It appears by the copies of the papers annexed to the return, that on the 19th of April the court of oyer and terminer of Essex county caused the prisoner to be placed at its bar to be charged in the indictment for perjury, upon which the requisition had been made, and, on his plea of not guilty, the court had remanded him to the custody of the warden of the jail for trial, upon the 8th of May, upon the indictments to which he had before pleaded; that upon the 26th of April he was again brought to the bar of the court to be charged upon another indictment

for conspiracy, and upon his plea of not guilty the court had again remanded him to the same custody and control to be held for trial. The traverse to the return substantially admits the truth of these allegations, but seeks to break their force by charging that if the arrest of the petitioner, by means of which he was brought within the jurisdiction of this state, was unlawful, he was entitled to his discharge from custody and return to his home, notwithstanding he has been charged with other indictments, and has been ordered to be held for trial since the service of the writ of habeas corpus.

We are thus brought to the consideration of the naked questions (1) whether a fugitive from justice extradited from one state of the Union to another, on the charge of a commission of a specific crime, can be held by the courts of the state to which he is sent for trial for another and different crime; and (2) whether such person may be detained by the authorities of the state, for the prosecution, notwithstanding it may appear that his arrest under the rendition proceedings was without legal authority. If these inquiries are answered in the affirmative, if the state courts, without regard to the lawfulness or unlawfulness of the methods adopted to obtain the custody of the body of the prisoner, may now detain him for trial upon the same or other indictments, charging him with offences against the criminal laws of the state, he has no claim upon this court for a discharge on the grounds that his rights as a citizen were violated by the parties who secured his person in a foreign jurisdiction, other than by a due process of law.

Questions were discussed on the arguments which may properly arise between governments, as to the construction of extradition treaties, or between individuals as to responsibility for the invasion of personal rights, but which, in my judgment, are not involved in the present inquiry. It may be true, that when a treaty exists between two independent nations in regard to the surrender of fugitives, and a criminal is given up on the allegation that he has committed a specified crime, good faith between the governments requires that he should not be tried for other offences. It may be true, that when a citizen has been placed under restraint without lawful cause, he can hold every one who caused or contributed to his imprisonment to a strict responsibility in a civil action. In the one case the right of asylum is sacred, except so far as it has been yielded by the terms of the international compact, and any abuse or perversion by one government of the privileges of arrest granted by the treaty is a just cause of complaint on the part of the other. In the other case, so zealous is the law in regard to any invasion of the individual liberty of the citizen, that all unauthorized restraint of his person is followed by damages against the offending party. But here a court of competent jurisdiction has the custody of a person who is charged with the commission of certain offences against the laws of the state. The answer to the charge is, that some other party has done a wrong to the prisoner, by violating the laws of another state in arresting him without proper authority. In a criminal case, this can hardly be reckoned a pertinent response. A person arraigned for the commission of a felony cannot plead in bar, that he ought to be excused from answering the charge, because other parties have trespassed upon his personal rights. It is a confounding of matters which are essentially separate and distinct. It is a claim on the part of the accused that his criminal violation of the laws is to be condoned by his personal injuries. It is asking a court to suspend the exercise of its most responsible duties, to wit, the trial of alleged offenders against the penal code of the state, while the persons charged with the crime are instituting preliminary investigations into the method adopted to bring them within its jurisdiction. Such a course, for obvious reasons, is allowable in a civil suit between private litigants, but, for like obvious reasons, cannot be, and never has been, allowed in criminal proceedings, where the object of the prosecution is to punish an offence against the public. On a claim of this sort, the court says to the prisoner: "You are going too fast; we will consider one thing at a time, and every thing in its regular order. The precise matter which now concerns you and the court is whether you are guilty of the crime charged against you. As you happen to be found within our jurisdiction, we will first settle that question, and afterwards, if need be, will inquire into the circumstances attending your rendition for trial, or will leave the respective governments to discuss them, or will remit you to the recovery of such damages as you may be able to obtain in the civil courts for the violation of your rights of person."

All the authorities in Great Britain and the United States, when carefully distinguished and interpreted by the circumstances, support this view of the law. The earliest cases in England to which the attention of the court has been called are Rex v. Marks, 3 East, 157, before the king's bench in 1802, and Ex parte Krans, 1 Barn. & C. 258, in the same court in 1823, in both of which it was held, that when a party was liable to be detained on a criminal charge, the court would not inquire on a habeas corpus into the manner in which the capture had been effected.

The Case of Scott, 9 Barn. & C. 446, before the king's bench in 1829, was this: A rule nisi had been obtained for a habeas corpus to bring up the body of the prisoner in the custody of the marshal, in order that she might be discharged, on the ground that she had been improperly apprehended in a foreign country. It appeared in the return that

an indictment for perjury had been found against her in London; that a warrant for her arrest to appear and plead had been granted; that the police officer, having the warrant, went beyond the jurisdiction, and followed her to Brussels, and then arrested her, conveyed her to Ostend against her will; thence back to England. Chief justice, on discharging the rule, said: "The question is this: Whether if a person charged with a crime is found in this country, it is the duty of the court to take care that such party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them." The courts of South Carolina in the same year were considering the same question as appears by the case of State v. Smith, 1 Bailey, 283. Smith had been convicted in 1821, under the laws of South Carolina, of stealing a slave, and had received sentence of death, but was pardoned by the governor, on condition that he would remain in close confinement until January 1, 1823, and then, within fifteen days, leave the state, and never return to it. The pardon was accepted by the defendant, who remained in confinement the time specified, and, within fifteen days after being liberated, removed to North Carolina, where he resided until 1827. He then returned to South Carolina, and remained there until July, 1829. On the 6th of that month, the governor issued his proclamation stating that the defendant was then at large in South Carolina, in open violation of the condition of his pardon, and offering a reward for his apprehension. On the 17th of the same month, the defendant again went into North Carolina, and was shortly afterwards forcibly seized by certain citizens of South Carolina, without any warrant or authority from any officer or tribunal of either state, except the proclamation of the governor, and was brought into South Carolina, and lodged in jail. The prisoner was brought before Chancellor Harper, by writ of habeas corpus, and a motion made for his discharge, on the ground that, his arrest being illegal, his detention was equally so. The chancellor, in refusing the discharge, said: "The ground principally relied on is the irregularity in the manner of his arrest. He was arrested by means of a violation of the laws and jurisdiction of the state of North Carolina. * * * But, when an individual charged with a criminal offence is before a magistrate, the sole inquiry is, does there appear sufficient cause for his commitment, or binding him to his answer? No matter what irregularities have occurred in his arrest, or whether he has ever been arrested or no; if it appear that the laws have been criminally violated, it is the duty of the officer to take measures for vindicating them by a prosecution." An application was afterwards made for his discharge before the court of appeals, on account of his illegal arrest, and the court sustained the views of the chancellor; holding that it was no ground for the discharge or exemption from punishment of a person who had been guilty, within the limits of South Carolina, of an offence against the laws, that he was subsequently arrested with lawless violence in the territory of another state, and brought within South Carolina, in violation of the jurisdiction of the state in which he was arrested; and that, in whatever manner he was brought within the jurisdiction of South Carolina, he must answer for the previous violation of her laws.

In the case of State v. Brewster, 7 Vt. 118, before the supreme court of Vermont, in 1835, an attempt had been made in the court below to have the proceedings in an indictment against the defendant dismissed, on the ground that he was forcibly, and against and without the assent of the authorities of Canada, brought from the province, the place of his residence, by citizens of Vermont, for the purpose of being prosecuted for the offence charged. The court held that the matter set up could not avail the prisoner. "In this case" it said, "the offence, if committed at all, was committed within our jurisdiction, and it is punishable by our laws. The defendant, although a foreigner is, if guilty, equally subject to our jurisdiction with our own citizens. His escape into Canada did not purge the offence nor oust our jurisdiction; being retaken and brought in fact within our jurisdiction, it is not for us to inquire by what means or in what precise manner he may have been brought within the reach of justice; it becomes then immaterial whether the prisoner was brought out of Canada with the assent of the authorities of that country or not. If there were anything improper in the transaction, it was not that the prisoner was entitled to protection on his own account. The illegality, if any, consists in a violation of the sovereignty of an independent nation. If that nation complain it is a matter which concerns the political relations of the country, and that aspect is a subject not within the constitutional powers of this court."

Dows' Case, reported in 18 Pa. St. 37, was before the supreme court of the neighboring state of Pennsylvania in the year 1851, in many of its features is quite similar to the one under consideration. The prisoner was indicted for forgery in the county of Alleghany. It being ascertained that he was in the state of Michigan, a requisition was made by the governor of Pennsylvania upon the executive of that state for his surrender. In pursuance thereof, the governor of Michigan issued his warrant to arrest and surrender Dows to the authorities of Pennsylvania. Afterwards he was arrested at Detroit by the officers of a steamboat, when on board of said boat, and was carried to Erie, in Pennsylvania, and there delivered to the sheriff of Erie, and conveyed to Pitts-

burgh, and lodged in jail. The officers of the boat had no warrant in their hands at the time of the arrest. The sheriff of Erie county was also without warrant. A writ of habeas corpus was issued by the supreme court at the instance of the prisoner, claiming that he was entitled to be discharged from custody on account of the defect in the mode of his original arrest. Chief Justice Gibson delivered the opinion of the court, and said they would have been bound to let the prisoner go free if his release had been demanded by the governor of Michigan, but, as he had not demanded it, the illegality of the capture could not be set up by the fugitive. The supreme court of Iowa, in State v. Ross, 21 Iowa, 467, held that it was no defense to an indictment charging the defendants with crime committed in Iowa that they were arrested without authority in Missouri, and wrongfully brought within the jurisdiction of Iowa. "It may be conceded," remark the court, "that the prisoners were arrested in Missouri, and carried into this state, by force and against their will, by parties acting without authority. After being thus brought to the state, however, they were turned over to the civil authorities, and proper steps taken for their detention and trial. * * * The claim is that the prisoners were brought within the jurisdiction of the state by fraud, violence, and without any semblance of authority, and that comity to the rights of sister states, a just appreciation of the rights of the citizen, and a due regard for the integrity of the law and its administration demand that the court should, under such circumstances, refuse its aid, and, indeed, that there can be no rightful exercise of jurisdiction over those thus arrested. * * * The liabilities of the party arresting them without legal warrant, for false imprisonment or otherwise, and their violation of the penal statutes of Missouri, may be ever so clear, and yet the prisoners not be entitled to their discharge. * * * That our laws have been violated is sufficiently shown by the indictment; for this the state has a right to detain the prisoners, and it is of no importance how or where their capture was effected."

No reference has been made to the cases of U. S. v. Caldwell [Case No. 14,707], U. S. v. Lawrence [Id. 15,573], Com. v. Hawes, 4 Am. Law J. 524, or to the opinion of Lindsay, C. J., affirming the judgment of the inferior court in the last stated case, reported in 13 Bush, 697, all of which were so fully discussed in the argument, because in my judgment, they are not pertinent to the present inquiry. They all turn upon the construction of the treaty between the United States and Great Britain in regard to the extradition of fugitives from justice, and involve the authority of the courts to hold a surrendered fugitive for trial, for any other than extraditable offences. It may, however, be remarked in reference to this question that, by the second clause of the sixth article of the constitution of the United States, treaties are declared to be the supreme law of the land; and by the second section of the third article, they are brought as directly within the judicial power as cases in law and equity, arising under the constitution and laws of the United States. Unless, therefore, there was something in the treaty with Great Britain which required the aid of legislative provisions to give it effect (see [Foster v. Neilson] 2 Pet. [27 U. S.] 253), it is somewhat difficult to understand or indorse the reasoning of the learned judge who decided the Cases of Caldwell and Lawrence [supra], and especially where he asserts that complaints of the abuse of extradition proceedings do not form a proper subject of investigation in the courts of the United States.

It is the conclusion of the court, upon principle and authority, that the state court has the right to hold the prisoner for trial for the offences charged against him, without reference to the circumstances under which his arrest was made in a foreign jurisdiction. It necessarily follows that there is no authority here to discharge him on the habeas corpus. Neither the constitution of the United States nor the 753d section of the Revised Statutes makes any provision for the writ in such a case, and the prisoner must be remanded.

Case No. 15,488.

UNITED STATES v. JOHNSON.

[2 Sawy. 482.] [1]

District Court, D. Oregon. Dec. 20, 1873.

ELECTIONS — BRIBING VOTERS — INDICTMENT — JUDICIAL NOTICE.

1. The court takes notice that the state of Oregon is a representative and judicial district of the United States.

2. An allegation that an election was held at East Portland precinct, equivalent, under the circumstances, to one that an election was held in such precinct.

3. An averment that an election was held in a certain precinct on the day prescribed for holding such election is sufficient, it being presumed, under the circumstances, that such election was legal.

4. Semble, that an allegation that defendant gave B. $2 50 to vote at said election, is sufficiently certain.

[This was an indictment against George W. Johnson, charged with offering a bribe for the purpose of procuring a vote.]

Addison C. Gibbs, for the United States.

Joseph N. Dolph and E. C. Bronaugh, for defendant.

DEADY, District Judge. This indictment was found December 9, and contains but one count. It charges, that on October 13, 1873, at an election held on said day at East Portland precinct, in the county of Multnomah

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

and state of Oregon, for representative in the congress of the United States, the defendant did then and there, knowingly, etc., "give to one Robert Bruce, he, the said Robert Bruce, not having a right to vote at said election, for the reason that the said Bruce had already voted at said election for representative in congress at South Portland precinct, in said county, the sum of $2.50 as a gift, bribe and reward to him, the said Robert Bruce, to vote at said election, so held at East Portland precinct aforesaid, thus preventing the said Robert Bruce from freely exercising the right of suffrage: contrary to the form of the statute, etc."

The defendant demurs to the indictment, because, first, the facts stated do not constitute a crime; second, the crime charged is not triable in the district of Oregon; and, third, it was not found and presented in conformity to the statutes. The indictment is found under section nineteen of the act of May 31, 1870 (18 Stat. 144).

So far as the allegation concerning the preventing of Robert Bruce from freely exercising the right of suffrage is concerned, it is a mere conclusion of law not warranted by the premises, and may be rejected as surplusage. It having been already alleged that Bruce had no right to vote at the election in East Portland precinct, he had no right of suffrage to exercise on that occasion. See U. S. v. Hendric [Cases No. 15,346 and 15,347].

The indictment without this allegation is similar to the one in U. S. v. Hendric, in which it was held, that the crime of counseling a person to vote who was not qualified to do so, was sufficiently charged by alleging that the defendant knowingly offered a bribe to such person to vote.

On the argument of this case it was further maintained, that the indictment should contain an averment that a legal election was held in East Portland precinct; and it was also objected that it does not appear that the election was held in the district of Oregon, or in the precinct aforesaid, or in any precinct.

The allegation that an election was held at a precinct in the county of Multnomah and state of Oregon, is equivalent to an allegation that such election was held at a precinct in the representative and judicial district of Oregon; the law being, and of this the court takes notice, that said districts and state are identical in area.

So with the allegation that the election in question was held at East Portland precinct. The primary sense of "at" is nearness, but it is also used in the sense of "in"—as "at church, at school, at your house." See Worcest. Dict. In all these instances, and many more that might be mentioned, the word "at" signifies the idea of being in or near the place named, according to circumstances.

True, the act regulating elections only authorizes them to be "held in the several election precincts of the state" (Sess. Laws 1870, p. 80); and such is the language of the constitution (article 2, § 17), where it is declared that "all qualified voters shall vote in the election precinct in the county where they may reside," etc. Yet it appearing that "at" is, in many cases, used in the sense of "in," and this appearing to be one of them, because an election, legal or otherwise, could not be held elsewhere than in an election precinct in the county of Multnomah, it being a presumption of law that such county is divided into election precincts, so that no part of it is not included in one of such precincts, the words are so far equivalent.

It is also objected that it is not alleged that East Portland precinct is, or was, an election precinct. If there were any other precincts known to the constitution and laws of the state there would be force in this objection; but this is not so. In this state a precinct is a political division or part of a county established by the county court for the purpose of holding elections therein, and there is no authority to establish one for any other purpose. But a precinct being established, the law uses it as a convenient division of territory, wherein to permit the election of justices and constables, and the exercise of their jurisdiction and authority. Presumably, then, the East Portland precinct is an election precinct, and an election held there was held in an election precinct.

As to the objection that it is not alleged that the election in question was a legal or duly authorized one, it is admitted that the better mode of stating a matter of this kind is to aver that it was duly held, had or done. But if the facts stated do not warrant the allegation it avails nothing; and conversely, if the facts make a case of prima facie legal election it is sufficient.

The election is not expressly described in the act defining the offense as a legal one. It simply provides "that if at any election for representative in congress" any person shall commit the crime therein defined he shall be punished, etc. Of course, the words of the act are to be construed as only applicable to a legal election, and the same may be said of the same words in the indictment.

No question is made but that the governor had power to authorize and direct that a special election be held on the day named in the indictment, in the several election precincts in the state. Code Or. p. 710, § 50. It is also admitted that the court must take notice of the fact that the executive of the state did call a special election for representative in congress from this district on that day. So much being taken for granted, and it being averred that the alleged illegal act or crime was committed with reference to an election held in said precinct on that day for representative as aforesaid, the most reasonable conclusion is that it is the duly authorized election which is meant and intended, and not an imaginary, illegal one.

. Objection is also made that while it is averred that Bruce had already voted at said election for representative, etc., at South Portland precinct, it is not directly averred that an election was held in such precinct on such day. It is questionable whether it was necessary to do more in this indictment than to allege that Bruce had no right to vote at the election in East Portland precinct, without saying why. But if it was necessary to state the reason, I think it was sufficient to say, because he had already voted on that day for representative, etc., without mentioning the precinct or place.

But an election was appointed to be held in the South Portland precinct that day for the same purpose as in the east one, and it being averred that Bruce had voted there, it is implied and presumed that there was an election there.

It must also be borne in mind that the allegations of the indictment relating to the holding of the election of October 13, are all matters of inducement only, and therefore need not be stated with the same particularity and certainty as the description of the offence itself.

Another objection is pressed with some force and plausibility, which is, that the description of the offence is so ambiguously stated, that it is uncertain whether it is intended to charge that the defendant gave Bruce $2.50 to induce him, the said Bruce, to vote illegally, or to induce him, the said Bruce, to permit the defendant to vote, whether legally or illegally, does not appear.

It must be admitted that the indictment is not as certain as it should be, in this respect. Take the sentence stripped of the qualifying clauses, which somewhat obscure it, and it reads thus: "The defendant did give to Robert Bruce the sum of $2.50 to vote at said election." Taken literally, the allegation is susceptible of either meaning.

But considered with reference to the law of the case, it is probably sufficiently certain that the bribe was given to induce Bruce to vote. Bruce had no power to permit defendant to vote at that election unless he was one of the judges thereof, and that is not alleged, and therefore there could be no object in offering the bribe for that purpose. But it being alleged that Bruce had no right to vote at said election, and it being in the power of the defendant to bribe him to do so, notwithstanding, it is quite certain that the bribe was given to induce the unqualified voter to vote rather than to induce him to permit the defendant to vote, when it does not appear that the former had any power to accept or reject votes at such election.

The demurrer is overruled.

UNITED STATES (JOHNSON v.). See Cases Nos. 7,418 and 7,419.

UNITED STATES v. JOHNSON. See Case No. 14,672.

Case No. 15,489.

UNITED STATES ex rel. FOOTE v. JOHNSON COUNTY.

[5 Dill. 207, note.] [1]

Circuit Court E. D. Missouri. 1879.

CONSTITUTIONAL LAW — RAILROAD AID BONDS — LEGISLATION OF MISSOURI—OBLIGATION OF CONTRACTS.

The act of the legislature of Missouri of March 8th, 1879, in respect of the levy of taxes for the payment of county indebtedness, known as the "Cottey Act," if applicable to the payment of judgments rendered against counties upon railroad aid bonds issued prior to such act, is in conflict with the provision of the federal constitution which prohibits the states from impairing the obligation of contracts.

Elisha Foote, the relator, is a judgment creditor of the defendant county upon railroad aid bonds. To an alternative mandamus the county pleaded, in its return, the act of the legislature of Missouri of March 8th, 1879, quoted in U. S. v. Lincoln Co. [Case No. 15,503], in the manner set forth in the opinion of the court, to which return there was a demurrer.

John B. Henderson and others, for the relator.

Thomas C. Reynolds and others, for the county.

Before DILLON, Circuit Judge, and TREAT and KREKEL, District Judges.

KREKEL, District Judge. The relator, Elisha Foote, on the 20th day of April, 1878, recovered in this court a judgment against Johnson county for the sum of $4,416.22 on bonds issued on account of subscription to the Warrensburg and Marshall Railroad Company, made by Warrensburg township, in Johnson county. [Case No. 4,912.] Relator made demand for payment, which being refused, he applies for a mandamus to compel the county court and treasurer of Johnson county, Missouri, to pay him any sum of money that may be in the hands of the treasurer of said county and collected for the purpose of paying the coupons on the bonds issued, and if, after such payment, any balance remains unpaid thereon, then that said county court cause to be levied, assessed, and collected by a special tax on the property of Warrensburg township, under and according to the provisions of the laws of Missouri, sufficient to pay the remainder of said judgment.

An alternative writ of mandamus issued, to which the treasurer makes return as follows: That the moneys collected to pay interest coupons on bonds issued by Johnson county, on behalf of Warrensburg township, amount to $4,652.28, $1,502.28 whereof are now in the hands of the treasurer; that the balance was loaned out in November, 1876, under the or-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

der of the county court, and has not been paid, and there are no other funds of Warrensburg township. Further answering, he says that he cannot pay any money except on the order and warrant of the county court.

The county court, in their first return to the alternative writ, filed September 2d, 1878, say that, on the facts set out in the treasurer's answer, which they make a part of their return, they submit whether they should answer further.

These returns being held insufficient, on leave for further return, the county court, on the 23d day of November, 1878, certifies obedience to the alternative writ, by showing that they had collected the several amounts loaned out and paid the proceeds thereof, including cash in treasury, on said judgment.

On March 11th, 1879, respondents, the county court, filed a further return, and for cause why they should not be commanded to levy and collect taxes to pay the balance remaining unpaid on said judgment, show: 1. That relator had failed to avail himself (as he was bound to do) of the law as it existed at the time of the issuing of the bonds, and still exists in the state of Missouri, giving the circuit court supervisory power over the county court regarding the levy, assessment, and collection of the tax to pay said judgment. 2. The unconstitutionality of the act under which the bonds issued. 3. That the act of the general assembly of the state of Missouri, approved April 12th, 1877, prohibited the payment of bonds issued under the so-called railroad act of March 23d, 1868, until said act shall have been declared constitutional by the courts of final jurisdiction. That the supreme court of Missouri, a court of final jurisdiction, had decided said last mentioned act unconstitutional, and the county court was thus prohibited from making payment of said judgment. 4. That they have no authority to levy a tax on real estate only, as commanded to do by the alternative writ. 5. That they can levy a tax at the regular May term of the court only. 6. That by an act of the general assembly of the state of Missouri, approved March 8th, 1879, entitled "An act concerning the assessment, levy, and collection of taxes, and the disbursement thereof," said county court is deprived of power to levy the tax mentioned in said alternative writ, except with the previous sanction of the circuit court of said county, and said judges of said county court are threatened with punishment and forfeiture of office should they levy said tax without being ordered first to do so by said circuit court. 7. The treasurer has no power or authority in the premises, except under the order of said court.

To this last and further return a demurrer is filed for insufficiency in law.

As to the first plea, that relator had not availed himself of the supervisory power given the circuit courts over county courts in Missouri regarding tax levies, it will be sufficient to say that respondents' plea does not show a state of facts falling within the supervisory power of the circuit court, even if such power could have been called into exercise in a case like the one before the court, which is doubted.

The second plea, that the act under which the bonds issued is unconstitutional and void, is pleaded, as stated by the counsel, for the purpose of being made available in the contingency of the supreme court of the United States changing its views regarding the constitutionality of the act of March 23d, 1868.

The third plea sets up the act of April 12th, 1877, as prohibiting county courts from complying with such orders as are prayed for by relator, until the act of March 23d, 1868, shall have been previously decided to be constitutional by the courts of final resort. Regarding this plea, it may be said, in the first place, that the act of April 12th, 1877, is one enabling and authorizing counties, cities, and towns to compromise their debts, and provides that no township bonds "shall be purchased, redeemed, or renewed," provisions altogether inapplicable to the case before us, in which payment of a judgment obtained on such bonds is involved. In the next place, this court, in the original case, decided the act of March 23d, 1868, to be constitutional, following the decision of the supreme court of the United States. Again, the supreme court of the United States is a court of final jurisdiction. If by the use of the word "courts" is meant that both the state and United States courts of final jurisdiction must decide in favor of the constitutionality of the act, then, for this reason, the act must be held void so far as it is pleaded and applicable to this case, for reasons more particularly pointed out in the consideration of the sixth plea pleaded. The supreme court of Missouri having held the act of March 23d, 1868, constitutional when the bonds were issued, United States courts will protect rights acquired under such holding against any change of views of the supreme court of that state, as was decided by Judge Dillon in the original case, following the adjudications of the supreme court of the United States in Alcott v. Supervisors, 16 Wall. [83 U. S.] 678; Township of Pine Grove v. Talcott, 19 Wall. [86 U. S.] 666, and cases cited.

The fourth plea, that the county court has no authority to levy taxes on real estate exclusively, will be disposed of by allowing relator to amend his petition for mandamus so as to include personal property and merchants' statements, as provided by the act of March 10th, 1871, amending the act of March 23d, 1868, and by amending the alternative writ of mandamus herein so as to conform to the amended prayer for the writ. U. S. v. Union Pac. R. Co. [Case No. 16,601].

The fifth plea pleaded, that the county court can only levy taxes, under existing laws, on the first Monday in May of each

year, may not apply to a case in which special authority is given to levy, assess, and collect taxes for a designated purpose; yet this court, having due regard to the cost incurred by such collection, has always directed the levies to be made at the time and with other county revenue.

The sixth plea, setting up the act of the general assembly of Missouri of March 8th, 1879, depriving county courts of the power to levy the tax mentioned in the alternative writ, except with the previous sanction of the circuit court of Johnson county, and the threatening with punishment the violation of the law, deserves, and will receive, the consideration at the hands of the courts which the legislative will expressed in enactments is entitled to, and which it will always respect, when not in conflict with other and higher obligations resting upon it.

On the first day of February, 1871, the day the bonds and coupons upon which the judgment in the original suit was obtained were issued, the act of 23d of March, 1868, authorizing their issue, in its 2d section, provided: "In order to meet the payments on account of the subscription of the stock according to its terms, or to pay the interest and principal on any bond which may be issued on account of such subscription, the county court shall from time to time levy and cause to be collected, in the manner as county taxes, a special tax, which shall be levied on all the real estate lying within the township making the subscription, in accordance with the valuation then last made by the county assessor for county purposes."

At the time of the passage of the act of March 23d, 1868, and at the time of the issuing of bonds thereunder, the laws of Missouri provided for the levy and collection of county taxes as follows: An assessor is elected every two years, who lists and assesses all the property (not specially exempt), including licenses, in the state; he returns a list of his assessments to the county clerk; this list is passed on by a county board of equalization, and any errors are corrected by the county court. The sheriff is ex-officio collector, and to him a copy of the assessor's lists is furnished at a specified time. He collects the revenue, is required to make settlements with the county court, and pay over the money collected to the treasurer.

The treasurer, under the 3d section of the act of March 23d, 1868, is "required to receive and collect of the sheriff of the county the income from the tax provided in section 2 (already quoted), and to apply the same to the payment of the stock subscription according to its terms, or to the payments of interest and principal of the bonds, should any be issued in payment of such subscription; he shall pay all interest on such bonds out of any money in the treasury collected for this purpose by the tax so levied, as the same becomes due, and also the bonds as they mature, which shall be cancelled by the county court, and this service shall be considered a part of his duty as county treasurer."

The fifteenth paragraph of the constitution of Missouri of 1865 provides: "That courts of justice ought to be open to every person, and certain remedy afforded for every injury to person, property, or character: and that right and justice ought to be administered without sale, denial, or delay."

That part of the constitution of the United States prohibiting states from passing laws "impairing the obligation of contracts," is found in all Missouri constitutions, past and present.

The second sub-division of article 6 of the constitution of the United States provides that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

We have thus before us the outlines of the rights and remedies to which relator was entitled at the time of the issuing of the bonds. The question is, to what extent did they enter into the obligation and contract, and have they been in any way impaired by the several acts of the general assembly of the state of Missouri pleaded by the respondents?

The question of the effect of the constitutional provision prohibiting the states from passing laws "impairing the obligation of contracts" came under review before the supreme court of the United States as early as 1810, in the case of Fletcher v. Peck, 6 Cranch [10 U. S.] 87. In this case Georgia undertook to rescind a prior act under which individual private rights had been acquired, and Chief Justice Marshall, after stating that "the validity of the rescinding act might well be doubted if Georgia were a single sovereign power," goes on to say: "But she is a member of the American Union, and that Union has a constitution, the supremacy of which all acknowledge, * * * declaring that no state shall pass * * * laws impairing the obligation of contracts. * * * Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment, and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed; the restrictions on the legislative power of the states are obviously founded in this sentiment, and the constitution of the United States contains what may be deemed a bill of rights for the

people of each state." The rescinding act was held to be void.

The case of Bronson v. Kinzie, 1 How. [42 U. S.] 311, was regarding the validity of an act of the legislature of Illinois, which, after the mortgage had been given, enacted a law giving mortgagors the right to redeem within twelve months after sale, and prohibiting the sale from being made at less than two-thirds of its appraised value. This act was held to be unconstitutional. After discussing at great length rights and remedies, Chief Justice Taney, speaking of the remedy, says: "It is the part of the municipal law which protects the right, and the obligation by which it enforces and maintains it. It is this protection which the clause in the constitution now in question mainly intended to secure, and it would be unjust to the memory of the distinguished men who framed it to suppose that it was designed to protect a mere barren and abstract right, without any practical operation upon the business of life."

In Hoffman v. Quincy, 4 Wall. [71 U. S.] 535, Mr. Justice Swayne, speaking of the remedy, says: "The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the constitution against invasion. The 'obligation of a contract' is the law which binds the parties to perform their agreements, citing Sturges v. Crowninshield [4 Wheat. (17 U. S.) 122]. The prohibition has no reference to the degree of impairment; the largest and the least are alike forbidden, citing Green v. Biddle [8 Wheat. (21 U. S.) 1]. The objection to the law on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviations from its terms by postponing or accelerating the period of performance which it prescribes * * * impairs the obligation."

In the case of White v. Heart, 13 Wall. [80 U. S.] 646, when an act of the Georgia legislature came under review, the court says that "the ideas of validity of a contract and the remedy to enforce it are inseparable, and both are parts of the obligation which is guaranteed by the constitution against invasion." Accordingly, whenever a state, in modifying any remedies to enforce a contract, does so in a way to impair substantial rights, the attempted modification is within the prohibition of the constitution, and, to that extent, void. Walker v. Whitehead, 16 Wall. [83 U. S.] 314, is to the same effect.

In Murray v. Charleston, 96 U. S. 433, decided at the October term, 1877, the United States supreme court, speaking through Justice Strong, says: "The provision of the constitution that no state shall pass a law impairing the obligation of a contract, is a limitation upon the taxing power of a state as well as upon all its legislation, whatever form it may assume." See, also, U. S. v. Miller Co. [Case No. 15,776], note. The effect of this doctrine upon limitations of taxation placed in constitutions and laws of states after the time of contracting the obligations, is easily seen.

The last reported utterance of the supreme court of the United States, in Edwards v. Kearzey, 96 U. S. 595, is that the remedy subsisting in a state when and where the contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects the remedy as to substantially impair and lessen the value of the contract is forbidden by the constitution of the United States, and, therefore, void. In this case the court goes over the whole ground, approving their former holdings, and giving a very instructive review of the past, in many particulars specially applicable to our present condition.

The state authorities are abundant, and as pointed and direct on the question under consideration as the federal. Citing a few of the many may suffice, commencing with Missouri.

In Baily v. Gentry, 1 Mo. 164, decided in 1822, the question was the constitutionality of the stay law for two and a half years, unless property two-thirds in value be taken by creditors. Judge McGirk cites Sturges v. Crowninshield, 4 Wheat. [17 U. S.] 122, and adopts Chief Justice Marshall's definition, holding that a contract is an agreement to do or not to do a particular thing; the law binds him to perform his undertaking, and this is, of course, the obligation of his contract. "The defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum at that day, and this is the obligation. In the definition of Chief Justice Marshall of the obligation of a contract we most heartily acquiesce. Any law that releases a part of the obligation, in the literal sense of the word, impairs it. The means afforded to enforce satisfaction for a breach of contract are, perhaps, of themselves no part of the contract; yet they may form a part of the binding force of a contract; for without legal means to enforce the performance of a contract, it can have no legal effect. It is in law as if no contract existed." Speaking of the remedy, the court says that under the constitution there always must be a remedy, "and this remedy is to be applied without any postponement or hinderance."

The question came again before the supreme court of Missouri in Bumgardner v. Circuit Court of Howard Co., 4 Mo. 40. Here the constitutionality of a stay law which had been passed, staying collection of judgments under ten dollars one month, under thirty dollars two months, and under ninety dollars four months, was involved. The court affirms its holding in Baily v. Gentry, above cited.

In the case of Stevens v. Andrews, 31 Mo. 205, Judge Napton, speaking for the court,

approvingly cites the Missouri and Illinois cases,—Bronson v. Kinzie, 1 How. [42 U. S.] 311, and McCracken v. Haywood, 2 How. [43 U. S.] 268,—and says: "The propriety of overruling these decisions, even if they did not meet the entire concurrence of the judges now composing the court, might very well be questioned. But the decisions of the supreme court of the United States, in the two cases cited, are quite as conclusive on the subject as the adjudication here."

A more recent decision of the supreme court of Missouri (State v. Shortridge [March term, 1874] 56 Mo. 126), brought under review the levy of a tax of more than one-twentieth of one per cent, under the charter of the Missouri and Mississippi Railroad Company. The court, after determining that the tax levy is limited to one-twentieth of one per cent, says: "At the time this railroad charter was passed, the general law authorized county courts which had issued bonds to railroad companies to levy taxes without limitation to pay the interest on their bonds, and to provide a sinking fund to pay the principal. 1 Rev. Laws 1855, p. 429, § 34. This provision was continued in the general statutes of 1865, and is still the law of this state (that is to say, at the time when the opinion was delivered). And no doubt this provision would have entered into and formed a part of these bonds, and might have so entered into the obligation of the contract as to prevent a subsequent repeal by the legislature if there had been no restriction contained in the special act authorizing this subscription." As there are no restrictions in the act of March 23d, 1868, under which the bonds issued, the above doctrine applies in full force, and is in exact harmony with all the cases hereinbefore cited. See, also, State v. Miller, 66 Mo. 329.

Other state courts are in harmony with Missouri courts. The case of Blair v. Williams came before the supreme court of Kentucky in 1823, and is reported in 4 Litt. 35. It involved the constitutionality of a stay law of that state, and the court holds that "the legal obligation of a contract consists in the legal remedy, and that the clause in the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts refers to the legal obligation, and not to the obligation arising from conscience alone, and that a law passed after the contract is made, extending the time of payment of a judgment, impairs the obligation of a contract and violates the constitution of the United States." See, also, Sabatier v. Creditors (decided in 1828) 6 Mart. (N. S.) 310; People v. Bond, 10 Cal. 563; Tennessee & C. R. Co. v. Moore, 36 Ala. 371; People v. Brooks, 16 Cal. 11; Oatman v. Bond, 15 Wis. 20; Hadfield v. City of New York, 6 Rob. (N. Y.) 501; Jones v. McMahon, 30 Tex. 719.

This citation of authorities, which could be extended almost without limit, establishes that the provision of the constitution of the United States prohibiting legislatures from impairing the obligation of contracts was intended to secure contracts, as well as remedies substantially necessary for the enforcement thereof, against state interference, and neither can be impaired by state constitutions, laws, or adjudications.

The authorities are conflicting as to the extent to which legislatures may control the remedies; but all agree that such as existed at the time of entering into the contract cannot be so changed as to make it less valuable. The changing and enacting of new laws, thereby establishing additional tribunals, requiring them to pass on questions over which, from the very nature of federal judicial power and jurisdiction, they can have no control, thus or in any other manner causing unreasonable delays, fall within the constitutional prohibition.

Let us examine, in the light of reason and adjudication, the act of the general assembly of the state of Missouri of March 8th, 1879, in order to see whether it is in conflict with them. At the time the bonds sued on were issued, the law authorizing their issue required the county court to levy and cause to be collected, as other county revenue, a special tax sufficient to pay the interest and principal of the bonds as either became due —a simple, direct, and short proceeding.

The act of March 8th, 1879, in its 1st section, limits the assessment, levy, and collection of taxes to state revenue, the payment of interest on the state debt, the taxes for current county expenditures, and for public schools, not to exceed the rates prescribed by the constitution and laws of this state, thereby abrogating the provisions of the act of March 23d, 1868, which directs the county court to levy and collect, as other county revenue, taxes to pay the interest and bonds issued under it. But the collection may take place under the 2d section of the act of March 8th, 1879, providing that the prosecuting attorney of the county, at the request of the county court, shall present a petition to the circuit court or judge, setting forth the facts and specifying the reason why other than the taxes in the 1st section specified should be collected; and if the court or judge is satisfied of the necessity of the collection of other taxes not in conflict with the constitution and laws of the state, he may make the order for the collection of the tax. Under these provisions, take the case of relator Foote, who obtained a judgment on township bonds—a class of bonds the supreme court of Missouri has declared void, and the supreme court of the United States valid—what would be the undoubted action of the state circuit judge, who, under the recent act, is to determine whether the tax is in conflict with the constitution and laws of the state? It could be but one way, and that against the validity of the tax, notwithstanding the provision for payment of the obligation under the act authorizing the is-

suing of the bonds. The act of the 23d of March, 1868, directs the county court "to levy and cause to be collected, in the same manner as other county taxes," a special tax to pay the interest and bonds. The 1st section of the act of March 8th, 1879, limits the collection of county revenue "to current county expenditures," and relegates the collection of all other taxes to the 2d section of the act, under the proviso "that the circuit court or judge, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy, and collection thereof will not be in conflict with the constitution and laws of this state," shall make an order directing the county court to levy and collect such tax. As the supreme court of Missouri has decided the bonds for the payment whereof the taxes are to be levied void, the circuit court or judge, as before stated, could act but one way, and that is, refuse to make the order for the levying of the tax, thereby denying relator all remedy.

But this is not all. Judgments of United States circuit courts held valid by the supreme court of the United States are virtually, under the recent act of the legislature, if applicable to such judgments, to be submitted to the county and circuit courts of the state of Missouri, and if by either found invalid, the provision requiring the collection of a tax, found in the act of the 23d of March, 1868, upon the faith of which the bonds issued, are to be ignored and held to be of no avail to the relator. Such is not the law. The courts of the United States are as much the courts of the people of Missouri as their own courts. The judgments of federal courts are to be treated in the states as at least of equal standing with judgments of state courts, and should as readily be obeyed and carried into effect. The law of March 8th, 1879, must be declared inapplicable to the proceedings in this case—held void so far as it attempts to affect it, and held not to be a sufficient return to the alternative writ of mandamus.

Regarding the 5th section of the act under review, which provides punishment for violations of the provisions of the act, the question arises, is it intended to prohibit the employment of the ministerial machinery of the state by punishing its officers for obeying judicial orders and process of United States courts? Notwithstanding the strong tendencies disclosed throughout the whole act, and specially in the section already examined, such a conclusion should not be arrived at unless there is no escape from it for obvious reasons. As already stated, the courts of the United States are the courts of the people of Missouri, and as such should find their ready support. A successful denial of a partial use of the ministerial machinery of the state by the United States courts for purposes of enforcing its judgments, might necessitate the creation of additional federal officers, or the employment of the present force in a manner not likely to be more acceptable to the people of the states than their own officers. The common bond of union can only work out its full benefits by a ready discharge of duty which comity and the relation of the states and the people thereof owe to each other.

For these and other reasons, no presumption that the act of the legislature under review is intended to deny the use and employment of the ministerial machinery of the state in executing process of the United States courts will be indulged in.

It is strongly urged in argument that the taxes asked to be collected cannot be collected or paid without ncurring criminal penalties provided in the 3d and 5th sections of the act under review. This is nothing new. The question came before the supreme court of the United States in Riggs v. Johnson Co., 6 Wall. [73 U S.] 166, and the remedies are there pointed out in case of interference with persons or officers who are directed and carry out orders or process of the United States courts. See, also, U. S. v. Silverman [Case No. 16,288]. As said in the former case, no such apprehension as interference with the process of this court will be anticipated.

The question lately decided by the supreme court of Missouri in the case of State v. Macon Co. [68 Mo. 29],—not yet reported,—whether county courts in ordering warrants on the treasurer are acting judicially or ministerially, need not be reviewed in the case before the court, for under any proper reading of the decision it is inapplicable here, for it will hardly do to say that when a law, as in the act of March 23d, 1868, directs special taxes to be levied and collected for a specific purpose, that to draw warrants, if such are necessary, in favor of those entitled to the money collected, is a judicial act. The question whether mandamus is the proper remedy to compel county courts to make levies and enforce the collection of taxes when required by law to do so, or to compel the issue of warrants on the treasurer on a specific or general fund, has been so often determined in this court, with the approval of the supreme court of the United States, that it can scarcely be said to be an open question. See U. S. v. County Court of Vernon County [Case No. 14,877].

A suggestion has been made that the act of March 8th, 1879, may not have been intended to act retrospectively, nor intended, by the use of the words "the tax for current county expenditures" in its 1st section, to interfere with collections provided for in the 2d section of the act of March 23d, 1868, which directs the collections to be made "in the same manner as county taxes." Such an interpretation, however gladly we would accept it, seems difficult to harmonize with the whole tendency of the act. The return of respondents certainly does not proceed upon that idea, for such a construction would show its insufficiency as a return.

The conclusion arrived at is that the act of

March 23d, 1868, points out a plain ministerial duty to be performed by the county court, without let, hinderance, or supervision of the circuit courts of the state; that the act of March 8th, 1879, deprives the county court of this power and transfers it to the circuit court or judge, who is to act under limitations, seriously affecting, if not altogether depriving relator of his rights. This so impairs his remedy given by the act under which the bonds issued as to substantially lessen the value and efficiency thereof, thereby falling within the constitutional prohibition as expounded by a long line of federal decisions culminating in 96 U. S. (October term, 1877), heretofore cited.

The further return of the county court of Johnson county is held to be insufficient, and the demurrer thereto sustained, and a peremptory writ of mandamus ordered. Ordered accordingly.

[This case was originally published in 5 Dill. 207, as a note to United States v. Lincoln Co., Case No. 15,503.]

Case No. 15,490.

UNITED STATES v. JOHNSTON.

[1 Cranch, C. C. 237.] [1]

Circuit Court, District of Columbia. June Term, 1805.

ALIENS AS JURORS—ASSAULT—EVIDENCE.

1. An alien cannot be a petit juror, because he cannot be a freeholder; but see Young v. Marine Ins. Co. [Case No. 18,162].

2. In an indictment against one of several who made a joint assault, the acts of the others at the same time may be given in evidence.

Indictment for assault and battery and resisting a collector of militia fines.

A juror called to be sworn, who was an alien, was rejected by the court. See New Rev. Code, 101, c. 73, § 12, 29th of November, 1792.

Mr. Swann, for the defendant, objected to evidence of what was done by Glover in company with Johnston, at the time of the assault and battery.

Mr. Youngs, on the same side. The United States have chosen to consider it as two separate assaults by indicting them separately.

PER CURIAM (nem. con.). The conduct of every person joining in the assault may be given in evidence. The evidence offered is admissible.

Case No. 15,491.

UNITED STATES v. JONES.

[14 Blatchf. 90.] [2]

Circuit Court, S. D. New York. Jan. 10, 1877.

PERJURY—FALSE SWEARING ON APPLICATION FOR NATURALIZATION—EVIDENCE.

On an application to a state court for the naturalization of a foreigner, J. testified, as a witness, that he was well acquainted with the applicant. It appeared that he was a total stranger to the applicant, and volunteered as a witness. *Held*, that this was sufficient evidence to warrant a conviction of J., on an indictment for perjury, under section 5392 of the Revised Statutes.

This was an indictment, under section 5392 of the Revised Statutes, for perjury, in swearing, as a witness, upon an application made to a state court for the naturalization of a foreigner. After conviction, the defendant [George Jones] moved for a new trial, on the ground that there was not sufficient evidence to support the verdict. The evidence showed that the defendant, at the time of an application to the state court for the naturalization of a foreigner, testified before the court, in behalf of the applicant, that he was well acquainted with the applicant, and that the applicant had lived in the United States for five years, and, during that period, had behaved as a man of good moral character. The prosecution showed, by the testimony of the applicant himself, that he had no acquaintance with the defendant, and that the defendant was a total stranger to him. It also appeared, that, at the time the applicant appeared before the court, the defendant was loitering about the door of the court room, having no apparent business there, and that, without any previous request or suggestion from the applicant, he accosted the applicant, and volunteered to be the witness upon his application to the court.

Benjamin B. Foster, Asst. U. S. Dist. Atty.
Abram J. Dittenhoefer, for defendant.

BENEDICT, District Judge. The testimony given by the defendant, that he was well acquainted with the applicant, implied a mutual acquaintance, and was contradicted by the evidence of the applicant, that he had never known the defendant. This evidence, coupled with the evidence as to the circumstances under which the oath was made, and the absence of any evidence tending to show previous acquaintance, was sufficient to warrant the verdict.

Case No. 15,492.

UNITED STATES v. JONES et al.

SHORE v. JONES et al.

[1 Brock. 285.] [1]

Circuit Court, D. Virginia. May Term, 1814.

EMBARGO BONDS—ENFORCEMENT BY COLLECTOR—RIGHT TO MOIETY OF PROCEEDS—JUDGMENT—AFFIRMANCE ON ERROR.

1. A bond was given to J. S., the collector of the district of Petersburg, under the 2d section of the embargo act of the 22d of December, 1807 [2 Stat. 451], and the bond being forfeited, suit was instituted upon it, in the district court, by the collector. Before judgment was obtained, J. S. died, and T. S., his deputy collector, continued in the discharge of the duties of the of-

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

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

fice until the 14th of December, 1811. On the 30th of November, 1811, judgment was rendered for the penalty of the bond against one of the co-obligors. On the 26th of November, 1811, J. J. was appointed collector for the same port, but did not qualify until the 14th of December, 1811. The defendant obtained a writ of error to the judgment of the district court, and the judgment of the district court was affirmed in the court above. The amount of the penalty of the bond was then paid into the circuit court, and, thereupon, T. S., executor of J. S., filed his petition, claiming a moiety of the moiety of the amount so paid, which the law directed to be distributed among the revenue officers of the district where the penalty was incurred. There being no naval officer for the district of Petersburg, the only revenue officers were the collector and surveyor. *Held*: That although J. S. died before judgment, yet as his deputy continued to act as such until after judgment, the rights of J. S. are considered as preserving the same validity as if he had been at that time in life, and discharging the duties of his office. The rights of J. J., his successor, could not accrue until he had qualified as such.

2. The judgment of the district court having been affirmed, the rights of all persons under it continued the same as if the writ of error had never been sued out.

3. The proportion of the penalty given to the collector, belonged to the collector who was in office when the bond was given, and who had prosecuted it to judgment, and not to the collector who happened to be in office when the money was paid

On the 23d of November, 1808, an embargo bond was executed at the custom house of Petersburg, by Thomas Pearse, master of the ship Sally, of Philadelphia, and others, his sureties, to the United States, in the penalty of $46,300, upon the usual conditions, viz., that if the cargo of the said vessel should be relanded in the United States, the danger of the seas excepted, then the obligation to be void, otherwise, to remain in full force. The bond was, in fact, given to John Shore, then collector of the port of Petersburg, in pursuance of the second section of the embargo act of 1807, c. 5 [2 Stat. 451]. No certificate of the relanding of the cargo of the vessel being transmitted to the secretary of the treasury, Shore, in pursuance of instructions from the treasury department, brought suit on the bond, as forfeited, in the district court for the district of Virginia, against George Pegram, Jr., one of the obligors, to recover the penalty. Before judgment was recovered on the bond, John Shore died, viz., on the 30th of October, 1811, and Thomas Shore, who had charge of the office at the time of the death of John Shore, as deputy collector, continued to act as deputy collector until the 14th of December, 1811. After the death of John Shore, and before the 14th of December, 1811, to wit: on the 30th of November, 1811, judgment was rendered in the district court, for the penalty of the bond, against Pegram. [Case unreported.] Pegram obtained a writ of error to the circuit court, from the judgment of the district court, pending which he died, and the writ was revived in the name of his administrator. On the 5th of June, 1813, the judgment of the district court was affirmed. [Case No. 10,906.] Joseph Jones, qualified as collector for the port of Petersburg on the 14th of December, 1811, but his commission bore date the 20th of November preceding, and, consequently, a few days antecedent to the rendition of the judgment in the district court. At the time that the bond was executed, Andrew Forborne was surveyor of the district of Petersburg, for the port of City Point. Forborne died in office, after suit brought, but before judgment, and John H. Peterson qualified as his successor, on the 16th of March, 1811. At the May term of this court, 1814, Pegram's administrator paid into court, the whole amount for which judgment had been rendered against his intestate, whereupon cross petitions were filed by the district attorney, in behalf of the United States, praying the whole sum to be paid to him, or deposited in bank to the credit of the treasurer of the United States: by the present collector and surveyor of the district of Petersburg: and by the representatives of the deceased collector and surveyor, praying a payment over, and distribution of the sum so recovered, according to the rights respectively claimed by them. A bill was also filed on the chancery side of the circuit court, by the representatives of the deceased collector and surveyor, against the present collector and surveyor, and the clerk of the court, praying a moiety to be paid over to them, or such other portion as they were entitled to, by law. Upon the hearing of the cross petitions, the circuit court overruled the prayer of the motion of the district attorney, the court being of opinion, that the United States were entitled only to a moiety of the money, and that the same ought to be paid to the collector of the district on behalf of the United States. Upon the question presented by the bill, and answer in the case of Shore's Executor v. Jones, whether the embargo laws should be interpreted to give the reward to the collector who was in office when the bond was taken, or to the collector officiating when the penalty was paid, the chief justice delivered his opinion.

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

MARSHALL, Circuit Justice. There are some incidental points in this case, which, though not relied upon, it may be proper to dispose of, in the first instance, for the purpose of simplifying the question. The deputy of John Shore, having continued to act as his deputy, until the judgment was rendered in the district court, the rights of John Shore are considered as preserving the same validity, as if he had been at that time in life, retaining his office and performing its duties. The rights of Joseph Jones, could not commence, until he became the officer. The judgment of the district court,

having been brought into the circuit court, not by appeal, but by writ of error, and having been affirmed, the rights of all the parties under it, remain the same as if the writ of error had never been sued out. The contest, then, in this case is, between the representatives of the person who was collector when the penalty was incurred, and who remained the collector, until the judgment was rendered; and the person who is collector, when the distribution of the penalty is to be made. This question depends in a great degree, on the true construction of the act, "to regulate the collection of duties on imports and tonnage," passed the 2d day of March, 1799 (1 Story's Laws, 573–664, inclusive [1 Stat. 627]), since this penalty is to be distributed according to the rules prescribed in that act. In construing it, the attention of the court has been directed to the phraseology of the 89th section, and it has been contended, very truly, that the word "collector," throughout that section, applies to the collector for the time being, only. Yet, this construction must be sustained, rather by the necessary meaning, than by the grammatical arrangement of the sentence; rather by the life, than by the dead letter of the law. "The collector, within whose district the seizure shall be made," &c. It would seem, if we examine this sentence, without considering the nature of the duty intended to be performed, that the person who commenced the duty, must end it. "The said collector," &c., that is, the collector who instituted the suit, &c. But when we look to this duty, the contrary construction is at once adopted. The duty is entirely official, not in any degree personal, and must be performed by the tenant of the office. But suppose the collector who receives the money, dies before payment and distribution. This duty must necessarily be performed by his executors, not by the collector for the time being. The 91st section distributes the fines, forfeitures, and penalties, imposed by the act. It declares that "one moiety shall be for the use of the United States, and be paid into the treasury thereof, by the collector receiving the same: the other moiety shall be divided between, and paid in equal proportions to, the collector, and naval officer of the district, and surveyor of the port, wherein the same shall have been incurred, or to such of the said officers as there may be in the said district." Were this clause to be construed, without reference to the object of the legislature, it will readily be admitted, that the officer for the time being, and the officer at the moment of distribution, is the person designated by the law. But no legislative act, no instrument of any description, is construed without regard to the object and intent of its framers, as manifested by itself. Language is too imperfect to admit of such a rule. The same words, in different connexion have a different import. The intention, therefore, must be regarded; and to find that intention, whatever relates to the subject must be inspected.

If the moiety of this penalty be a gratuity to the officer of the district, or a donation to the office, then there is nothing to control that construction, which the words most naturally import. If it be not a gratuity, but a compensation for service, or a stimulus to those who are to perform the service, and on whom the stimulus is to operate, and if such officers will come within the description of the law, they are the persons designated by the law. The attempt to prove that this is not a mere donation to the officers, would be a waste of words and of time. If it be a compensation for services, or a stimulus for the performance of services, it must be bestowed on those who have performed, or who are expected to perform, the services which the law intends to remunerate. Penalties are imposed for the purpose, not of enriching the treasury, but of enforcing the execution of laws, and the legislature, is, therefore, uniformly liberal in its compensation out of penalties, to those who have contributed to the punishment of offenders, and, through that medium, to the enforcement of the law. Any thing like a rateable portion, therefore, of reward to service, is not to be expected; but the kind of service for which the reward is intended, must be looked for and discovered when the reward is claimed by different persons. The same inquiry must be made, if we consider the reward as a stimulus to the officer.

On the part of Mr. Jones, it is contended that, in the view of the legislature, the whole transaction, from its commencement, to its final termination; from the commission of the act, on which the penalty is to accrue, to the receipt of the money, is to be considered as one entire thing, consisting of different parts, deemed equal by the legislature; and that the compensation is bestowed on the person who happens to perform the concluding part of the service, that is, to receive the money, or who is then in office. This construction, which is admitted to be rather favoured by the words of the distributing clause of the section, is said to be equally consistent with the intent and spirit of the law; since the service is equally meritorious with any other that is performed, and since this construction will, equally with any other, stimulate the officer to exertion.

On the part of Mr. Shore, it is contended, that the duties intended to be stimulated and rewarded, terminate with the judgment, if not before, and that the receipt of the money has no connexion with the right to a distributive share of it.

In arguing the merits of the claimants, it has been contended, that no service is to be performed, previous to the judgment, of such importance as to give the officers of that period a superior claim to their successors, or to justify an opinion, that the

legislature intended the reward to stimulate those services, which were to be performed anterior to that period, rather than such as might afterwards become necessary for the collection of the money. In support of this proposition, the argument has been confined to the very case before the court; to an embargo bond. But it is to be recollected, that this is only one of many cases, to which the same principle of distribution applies. The act of 1799, which gives the principle, creates a great number of penalties and forfeitures, and adapts their distribution to the nature of those penalties and forfeitures, and to the services which are to be rendered for their detection and punishment. The act of 1809 (act to interdict commercial intercourse, 2 Story's Laws, 1120, § 18 [2 Stat. 550]), then, adopts the rule of distribution prescribed in the act of 1799. Perhaps the persons favoured by that rule, may be most certainly discerned by looking something further into the nature of the service to be performed by those who, under that act, might claim reward. These penalties are imposed, some for acts of omission, others for acts of commission. In cases of omission, the labour of the officer is not considerable, but is perhaps essential to the security of the revenue. In all of them this attention must be kept alive, in order to observe the conduct of those who are transacting business in the office, and he must be on the alert to take care that all the formalities prescribed by law are observed. If, in any instance, they are neglected, he must take care that measures are pursued which shall enable the United States to convict the offender. Those of commission are very numerous. It would be tedious to recapitulate them, but it may not be improper to mention one or two as examples. If any part of the cargo of a ship bound to the United States, shall be unladen within the limits thereof, without authority, the goods are forfeited, and the master and the mate shall respectively pay $1,000. So, if any person shall assist in such unlading, he forfeits treble the value of the goods and the vessel which shall receive them, if they be put on board a vessel. (Act 1799, §§ 27, 28.)

If a part of these penalties and forfeitures be given to the revenue officers, what are the services it is given to remunerate, and what are the services the reward is intended to stimulate? To discover these frauds, the officers of the revenue must be watchful, they must be on the alert. If they are not, the frauds will be committed, and they will escape punishment. It is detection which saves the law from infraction, and secures the punishment. So, there is a penalty for sailing from a district before entry, or for not making a full entry within a limited time. These penalties are inflicted for the security of the revenue, and they require the attention of the officers to vessels arriving within the district, in order to secure the observance of the law. So, penalties and forfeitures are incurred, if a vessel, sailing from one port to another, does not obtain at the port of departure, certain certificates required by law, and exhibit those certificates at the port of delivery within a limited time after her arrival. It is obvious, that the enforcement of this provision depends entirely on the officers at the time of incurring the penalty, and of its detection. Thus too, baggage is exempted from duty, and certain forms are to be observed by the persons claiming it, but the officer may examine the baggage, and if upon examination any article be found subject to duty, not mentioned by the owner, the article is forfeited, and a penalty of treble the value imposed on the person committing the offence. Again we find the law enforced by the watchfulness and attention of the officer.

It is unnecessary to continue this examination of particular cases. Go through the law, and it will be perceived that the government rests for the security of its revenue on the fidelity and vigilance of those officers who act at the time of the offence, at the time of its detection, and during its prosecution. If we turn from these to the embargo laws, in order to ascertain the motives which induced the legislature to adopt the principle of distribution, prescribed in the act of 1799, we shall derive some aid from looking into other penalties than that incurred by the breach of the bond. Any vessel which sails from a port of the United States without a permit, or which sails to a foreign port, is liable to forfeiture. Any foreign vessel, taking on board any specie or cargo, is liable, with the specie or cargo, to forfeiture, and every person concerned in such unlawful shipment, is liable to a penalty, not less than $1,000, nor more than $20,000. In these, and in many other cases, the most entire reliance is placed on the officers of the revenue, to secure the law from violation by their vigilance; and, certainly, it is reasonable to suppose, that it was the object of the legislature to stimulate this vigilance by rewarding it. If, in the particular case of an embargo bond, there was really no merit in the revenue officers who took and prosecuted the bond, this might be a reason with the legislature for not classing it with cases in which such merit exists, but can furnish no reason to the court for withdrawing it from the influence of those cases. There is not, however, this total destitution of merit which has been insisted on. A degree of skill and attention is requisite in taking the bonds, to avoid the object being defeated as has happened in this court in several cases (Dixon v. U. S. [Case No. 3,934]; U. S. v. Gordon [Id. 15,232]; U. S. v. —— [Id. 14,413]) by the officers' mistaking the proper form in which they should be taken. The vessel and cargo must be valued, the bond must conform to that valuation, and evidence of value must be furnished on the

trial. The taking of the bond is preceded by that vigilance, which is requisite to prevent the vessel from sailing without giving the bond. These considerations might be sufficient to induce the legislature to leave this penalty on the footing of all others, incurred under the different acts of congress, on this subject, and under the duty law.

The court will now pass from the services which it is reasonable to suppose the legislature intended to reward, in order to examine the provisions and phraseology of the law, for further lights on this question, whether services up to the judgment, or subsequent to the judgment, were the objects of this legislative bounty. It is first observable, that the bounty is payable in equal proportions to the collector, naval officer, and surveyor. If the receipt of the money is the fact for which compensation is made, why this distribution? Why are the naval officer and the surveyor put on an equal footing with the collector? They incur no portion of the risk or trouble incurred in receiving and paying away the money, nor do they participate in the commission allowed for collecting duties. If, however, this compensation is intended, not as a reward for collecting the money recovered, but for the vigilance required for the execution of the law, the motives to this distribution are obvious. They are equally sentinels on the port, equally on the conduct of those who are to be watched; and having, on this account, equal claims, are thus prevented from entertaining those reciprocal jealousies which might seduce them to thwart the operations of each other, and, perhaps, impede detection, if the particular informer engrossed the prize. The reward is given, "to such of the said officers as there may be in the said district." As there may be when? Certainly, when the reward is earned. Suppose, after judgment, and before the receipt of the money, one of these officers should be discontinued by law. Would he lose any share of the penalty? Suppose another officer, a naval officer in the district of Petersburg, should be added. Would he be entitled to a share of the penalty? It is admitted, that this is merely stating the question in controversy, but it is stating it in a form which leads, in some measure, to an opinion on it. If the revenue officers, who are the legal sentinels, and whose duty it is to watch, do not detect the offences, the reward is divided between the informer, and the unsuccessful sentinels. Yet the informer has nothing to do with collecting the money. In the case of the officers of the revenue cutter, who are entitled to a moiety of the penalty, if it be recovered on any information given by them, it seems to be admitted, that the officers at the time of discovery, are entitled to claim the reward. This is admitted, because they claim solely in the character of informers. But the words applicable to them, are the same as those applied to the revenue officers, and not more susceptible of an interpretation, according to the nature of the case. The clause respecting the witness, would, unquestionably, be equally proper, whether the interest of the person called on, be certain or contingent: but there is something in its language, which deserves some, though not much attention. The share, says the law, to which the witness would otherwise be entitled, shall revert to the United States.

The right of the United States, is inchoate on the commission of the offence, and is consummated by the judgment. The term "revert," which is here used, indicates, that in the mind of the legislature, something was done, in consequence of which, a portion of this right had passed out of the United States, which returned on the fact of calling the person to whom it had passed, as a witness. And the same words are applied to an officer of the revenue, an officer of the revenue cutter, and a common informer. In such case, the share to which the witness would otherwise have been entitled, reverts to the United States. It is more worthy of remark, that the appropriate compensation for receiving money, is a commission on the money received, to be retained by the receiver. The appropriate and usual reward for those who detect offences against the laws, and prosecute them to punishment, is a part of the penalty, and the language and provisions of this section, seem to proceed on that idea. It directs, that "one moiety shall be paid to the United States, by the collector receiving the same; the other shall be divided in equal proportions between the collector and naval officer of the district, and surveyor of the port wherein the same shall have been incurred." If the part of the collector had belonged to him who received the money, he would not be directed to pay it to the collector of the district, but to retain it himself. The language of "payment" and "retainer," are too distinct to be confounded with each other. It is perfectly understood, that this phraseology is to be accounted for, by the fact, that the suit may be prosecuted, and money may be received by the collector of the district, in which the seizure was made, while the beneficial interest is in the revenue officers of the district in which the penalty was incurred. But this does not impair the argument. If the receipt of the money induced the reward, why is it not bestowed on the officer who collects it? Why on the officer who does not, and who has, in law, no right to collect it? It would seem, as if the language and provisions of the law, excluded the idea, that any part of the penalty was intended as a compensation for its collection. The idea that this is a gift bestowed on the office for the purpose of enhancing its emoluments, is not sustained by the general course of legislation on the subject. If the acts respecting the emoluments of the office of collector be examined, it will be found that the legislature has required the collector to show

regularly the amount of the commissions, has reduced the per centage by several successive acts, and has finally directed that the emoluments of office shall not exceed a specific sum. This regulation does not comprehend penalties, but it shows that the share of penalties is not given to the office for the purpose of annexing value to it, but is given to the individual to stimulate and to reward his services in enforcing the execution of the laws.

The counsel for Mr. Jones have, with great force and argument, called on their opponents to say at what time a right to a share of the penalty vests in the individual, and have urged the dimculty of doing this, as a reason for fixing on the moment of distribution as that at which the right vests. This difficulty is not imaginary, but is felt as a real one. In this case, however, the only contest is between those who claim at the time of the judgment, and those who claim after it. There are some reasons, in addition to those which have already been urged, for supposing the judgment to fix ultimately the rights of the parties. The judgment changes entirely the nature of the right. From a claim to a penalty or forfeiture depending on evidence, the right to which is contested, it becomes a positive debt, and the right is vested absolutely in the United States. It would seem reasonable that all rights which were, pending the action, contingent and uncertain, should then, likewise vest in the persons entitled to them. No further proof is requisite, no further vigilance necessary, no further controversy exists, a claim to a penalty is converted into a debt. If collection may be delayed by fraudulent covers of property, it is equally the case in every other debt, and furnishes in no other instance a motive for giving more than a commission. Neither can the idea, that because this is a perpetual office, the officer can be considered as always in being under contemplation of law, as in the case of the king or other sole corporation, avail the plaintiff. The office is not hereditary. It is filled by individuals appointed by the executive, and between the removal of one officer, and the appointment of another, a long interval may elapse. Though the office never dies, the individuals who fill it do, and as their emoluments are considered in the light of compensation for services, the rewards of services rendered by one, ought not to be bestowed on another.

The result of the best consideration which the court has been able to bestow on the subject, is, that the acts, taken altogether, show the intention of the legislature, in giving to its revenue officers a portion of the penalties and forfeitures, inflicted for a violation of the embargo laws, to have been to stimulate those officers to vigilant exertion of duty in detecting offences and prosecuting the offenders to conviction, and that those alone are entitled to those rewards who have performed the service. This intention is sufficiently apparent to give to those words of the distributive section a construction different from that which they most naturally bear, if separated from every other part of the act, and to apply them to those who were officers when the service was performed, not to those who are officers when the distribution is to be made.

NOTE.—So far as the claim of the deceased collector was concerned, it will have been perceived, that although John Shore died a few days before the judgment was rendered, yet, as the duties of the office continued to be discharged by his deputy, until subsequent to its rendition, the court held that John Shore virtually survived the judgment, and that the chief justice relied strongly on that fact as establishing the validity of his claim. This doctrine of constructive survivorship, however, did not apply to the claim of the representative of Forborne, the late surveyor, who died long before the judgment was rendered, and whose successor had been in office many months previous thereto. After the above opinion was delivered, the court being divided on the question, whether the remaining moiety of the penalty (the United States being entitled to the other moiety,) should be paid to the collector then in office, to be by him distributed according to law, as the court should direct, or without any direction on the subject, certified that question to the supreme court. Upon the hearing of the suit in chancery, on the bill, answers, and proof, in which none of the facts were controverted, a question occurred before the court, whether Forborne's representative was entitled, in right of his intestate, to receive the moiety of that portion of the penalty which was, by law, to be distributed among the several revenue officers of the district wherein the penalty was incurred: upon which question the court was divided, and the same question was certified to the supreme court. Mr. Justice Story, in delivering the unanimous opinion of the court, said, "That the right of the collector to forfeitures in rem, attaches on seizure, and to personal penalties on suits brought, and in each case it is ascertained and consummated by the judgment; and it is wholly immaterial whether the collector die before or after judgment. And they are further of opinion, that the case of the surveyor is not, in this respect, distinguishable, in any manner, from that of the collector. We are, therefore, of opinion, that the representatives of the deceased collector and surveyor, and not the present incumbents in office, are entitled to the distributive shares of the moiety of the money now in the registry of the circuit court." The supreme court certified to the circuit court, as their opinion, 1. That in the case of the United States v. Jones et al., the moiety of the money now remaining in the custody of the circuit court, in the proceedings in the case of the United States, appellants, v. Joseph Jones and others, mentioned, should be paid to the said Joseph Jones, collector of the district of Petersburg, to be by him divided, in equal proportions, between Shore's executor and Forborne's administrator. 2. That in the case of Shore's Ex'r v. Jones, the representative of the late surveyor, in right of his intestate, was entitled to receive one moiety of that portion of the penalty in the proceedings mentioned, which is, by law, to be distributed among the several revenue officers of the district wherein the penalty was incurred. See 1 Wheat. [14 U. S.] 462; 3 Pet. Cond. R. 624.

Case No. 15,493.

UNITED STATES v. JONES.

[Brunner, Col. Cas. 462;[1] 2 Wheeler, Cr. Cas. 451.]

Circuit Court, D. New York. April, 1824.

WITNESS—PARDONED FELON.

A person who has served out a sentence on conviction of felony may be restored by pardon to competency as a witness, but the jury is the sole judge of the credit to be given to his testimony.

[Cited in Stetler's Case, Case No. 13,380; Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 630.]

[Cited in Curtis v. Cochran, 50 N. H. 244; State v. Blaisdell, 33 N. H. 393.]

[2] [Mr. Tillotson opened the case on the part of the United States, and presented to the jury the outlines of the evidence which would be adduced. He said the murder was committed on the high seas, in 1818. The brig Holkar sailed from the port of N. Y. in Oct., 1818, under Captain Brown, and a coloured crew, with the exception of one man. The brig sailed for Curacoa, and reached the port of her destination. She took in a return cargo; and while on the high seas, the crew arose, mutinied, and murdered Captain Brown, the mate of the vessel, and a Captain Humphries, who was a passenger on board. The district attorney stated the difficulties in procuring testimony, after a lapse of six years, but said that he should present everything that could be reached.

[Evidence on the Part of the State.

[He then called Thomas M'Cready, who is a clerk in the custom house. Witness produced the register of the Holkar, which has never been surrendered, dated March 5, 1818. The vessel cleared for Curacoa, October 18, 1818. She was an American vessel, owned by Richard Cole, and Samuel Brown was the master. The list of the crew was produced and read, an objection to the reading having been overruled by the court. The name of the prisoner at the bar was entered John Robinson.

[John G. Bogart proved the notarial list, which corresponded with the entry in his register. He shipped the crew, but could not identify the prisoner at the bar, although he had some recollection of his face.

[Joseph Lyon had some property coming home in the Holkar when she left Curacoa, but he had never been on board of her. The property was insured by the Mercantile Insurance Company, who paid the amount insured, to Mills, Minton, & Co., to whom it had been made over a few months after the loss of the Holkar. There was no suit against the company.

[James Flynn, one of the branch pilots, knew Capt. Brown before he commanded the Holkar. He was a stout, square man, about 5 feet 9, with large black whiskers. Two of his front upper teeth projected beyond his lip, which gave him a very peculiar appearance. Has never seen him since he left in the Holkar, on Sunday morning, October 18, 1818. He has no recollection of the prisoner. All the crew were black excepting the mate. If there was any other, he was of a copper or dark colour.

[Diana Valentine: Witness remembers the brig Holkar. Her husband shipped part of the crew. Does not know exactly when, but thinks it was about five years ago. Her husband kept a sailors' boarding house at 63 Bancker street. It was in the fall of the year, and the Holkar sailed on Sunday morning. Does not know the name of the captain. He was a stout man, with large, heavy whiskers. One of his teeth projected out, but does not know whether it was his upper or lower tooth. Remembers that her husband shipped the prisoner at the bar, and a man by the name of Harry Cook. The prisoner went by the name of Tom Jones. He did not board there, but was at the house a great deal. The brig lay at the time at the left hand side of Dover street wharf. Was on the wharf at the time she sailed, and saw Mr. Conklin and Mr. Spence. Did not see the prisoner again for three years. (Witness went up to the prisoner to see him. Has no doubt that he is the man shipped by her husband.) Captain Coles commanded the brig before Captain Brown.

[Cross-examined by counsel for prisoner: Has lived in Bancker street for six years. Does not known Oliver King. Saw the prisoner two or three days before Johnson was hanged, in the street, and was well acquainted with him. The day before Johnson was hung, Mr. Conklin came for witness to come and see if it was the man. Did not remember that he was on board the Holkar till reminded of it by the cook. Her first husband's name was John Thompson. Knows that one of Captain Brown's teeth was out. Remembered that it was on Sunday the Holkar sailed. Harry Cook called him Tom Jones, on board the Holkar. Saw him three or four times since. Can't say Oliver King shipped on board Holkar. Four years since she saw Oliver King. About three years ago saw Jones, and spoke to him. Had heard that the Holkar was lost, but he did not strike her as being one of the men on board. Harry Cook was a large, stout man.

[Mr. Bogart called again: A man by the name of John Thompson shipped the prisoner. Recollects that Thompson became security for prisoner, 16th October, 1818, and received his advance, as appears by his register. The crew were all coloured. Knew Captain Brown. Does not recollect anything about his person, only that he was a large man.

[Azel Conklin, one of the city constables,

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

[2] [From 2 Wheeler, Cr. Cas. 451.]

was on the wharf on Sunday morning, when the Holkar sailed, and remembers that the crew consisted of coloured people. Does not know Captain Brown. He was a stout, portly man. He was pointed out to the witness as being the captain. Black hair and large whiskers. Knew John Thompson, and has often seen Diana. Thinks she was on the wharf at the time. Knows that Thompson shipped some of the crew. Was told so by him. Happened to be passing at the time and remembers remarking, "I should not like to go to sea with that crew."

[Cross-examined: Bancker street was of a very bad character. Has very often to go to that street to look for rogues, &c., but had never heard anything against the house of Thompson.

[Peter Willis knows that the prisoner shipped on board the Holkar. He got Mr. Thompson to ship him. Saw him on board when the brig sailed, and believes it was Sunday. Was at the wharf when the brig sailed. Saw prisoner and Oliver King on board. Remembers it. Did not know Captain Brown.

[Cross-examined: Lives in Leonard street, and lived at the time in Catharine street. Went up to Mr. Thompson and got three dollars; and he then went with him and prisoner to the brig. Is sure he is the man. Has been acquainted with him ten years. He used to board with Henry Parsons. Witness goes to sea off and on. Arrived from France, August 29th last. About four or five weeks ago witness saw prisoner in Bancker street. Knew him as soon as he saw him. Called him Tom Jones, and shook hands with him. Had heard of the Holkar being lost. Said nothing to him about it. As soon as he saw him he remembered it. Saw King the same day, and next day heard he was taken up. Never had any quarrel with the man. When he was living in the house with the prisoner he missed seven dollars, and thought hard of the prisoner, but had no quarrel about it. Witness was never taken up for anything but assault and battery, and buying a fiddle. Was acquitted. Has been in Bridewell two or three times. Saw prisoner two or three days before he was taken, and knew him. The prisoner first knew him. Shook hands. Called him Tom Jones. Asked him where he came from. He answered, "From the southward."

[Julia Freeman: Had known the prisoner five or six years ago. Three or four weeks ago, Jones called on her and asked her if she did not recollect him, as having staid with her sister. He called himself Thomas Jones. Her sister's name is Mary Adams, who lived in Bancker street. He has not staid with her sister since his return.

[Cross-examined: She knew nothing of the Holkar. At first she did not recollect the prisoner, he has altered so much; but she knew him very well when he lived at her sister's.

[Conklin, called again: Was present at the police when the prisoner was asked if he knew the woman called Diana. He answered yes,—said he boarded at Mrs. Parson's in James street, with her.

[Diana was called again, and stated that she boarded with the prisoner at Henry Parson's.

[Oliver King, a mulatto man, and the principal witness, was next called. (Mr. Haines objected to the competency of the witness, on the ground that he had been in the state prison. It appeared that he had been indicted for grand larceny, and convicted on the 7th of October, 1819, when he was sentenced to the state prison for three years, and had served his time out. The counsel for the prosecution replied, and produced a pardon from the governor, dated the 9th of April, 1824. See the judge's charge. The objection was overruled by THE COURT, and the examination proceeded.) Witness shipped on board the brig Holkar, in 1818, commanded by Samuel Brown. He shipped with Alexander Cheevers (or Shivers), Charles Moutiza, Patrick Butler (his right name was Harry Cook, called Cook or Doctor), James Irving, John Robinson (the prisoner), John Williams (white man), and himself and mate. They were all colored people except John Williams. Sailed on the morning of Sunday for Curacoa, where they arrived and discharged, and took in a return cargo, and started for New York. At Curacoa, Shivers had a dispute with the captain. Captain Humphries, a passenger, took charge of the vessel; the captain and mate being sick, the men refused to work under him, when they were put in prison, except Robinson, Jones, and the cook, but Robinson was afterwards taken up for stealing part of a barrel of beef from the vessel, and remained in prison till the brig sailed. The night before, Alexander Cheevers and Charles and James ran away, but were taken up and carried on board, the morning she sailed. John Williams was left at Curacoa, where he went in a Dutch man of war. Capt. Humphries came passenger in the brig, but used to do captain's duty sometimes. When they had been out seven or eight days, the captain sent them up to bend another topsail about dusk; John, James, Charles, Alexander, and witness. They had some dispute aloft, and being reproved, they made some answer which induced the captain to go down and load his pistols. James and Charles pretended to be sick, and went below and staid in their berths. The captain made tea and coffee, and sent to them from the cabin. Charles was sick at this time. Charles and James and witness were in the captain's watch. The prisoner and Alexander Shivers were in the mate's watch. The witness was in his berth and nearly asleep, when Alexander came down, and asked Charles whether he was ready, Charles said, "Yes." Witness asked what they were going to do? Charles answered, "None of your business." Robinson said he was going to call the mate forward and tell him there was something wrong

there. Charles then told witness that they were going to kill the captain, the mate and passenger. Robinson (the prisoner) went and called the mate forward. He came forward, and Charles and James jumped out of the forecastle; Charles and James with a crowbar, and James with a hand-spike. Witness then heard somebody strike, and heard the mate cry "Murder!" and stamp on the deck. Witness was below. When witness got upon deck, the mate was fallen. Witness cried out, "For God's sake, what are you doing!" Charles then answered, "You son of a bitch, if you say a word, I will knock your brains out." Alexander took his (the mate's) watch out of his pocket, and Charles, Alexander and James hove him overboard. They then went aft, and witness followed them. The prisoner said he would call Captain Humphries up, for he used to do captain's duty. He went down, but Captain H. would not get up. He then went down and told Captain Brown the mate wanted him forward. Captain B. got up, and went forward as far as the windlass, when he started back, and all at once began to walk aft. Charles ran out from behind the camboose, and struck at him with a crowbar, which the captain caught in his hand, exclaiming, "Charles is that you?" Charles said "Yes." Alexander Cheevers now ran around the long-boat, and struck him twice on the head with a hatchet. James then took the handspike and struck him over the face. The prisoner then came with a harpoon, struck the captain in the left side. His head was lying towards the starboard. The captain put his hand upon his breast, and then they picked him up and threw him overboard, and told witness to take the helm. At the time the mate was killed, the prisoner had the helm; and while they were killing the captain, the witness had the helm, but part of the time left it to see the fray. This done, Charles said, "Let us go down now and kill that damned privateer son of a bitch Captain Humphries;" upon which all went down in the cabin, and told witness to keep the helm. Witness heard Captain Humphries crying murder for some time, and then all four came up from the cabin, bringing Captain H. with them, and laid him down; and they hove him overboard. The cook came up after they had thrown Captain Humphries overboard. They told him to go down and clear up the blood in the cabin; he went and got a bucket of water, and did it. They said Captain Humphries was getting the captain's pistols out, when they struck at him, and broke one of them in his hand. Alexander Shivers took charge of the brig. They then ran near Porto Rico, to the Mona Passage, and from thence to St. Domingo. Prisoner then bored holes in the brig to scuttle her, and they intended to go ashore in the boat. About two o'clock in the afternoon, a vessel was near them, and they were frightened, and took out the boat, and put aboard some provisions and clothing, and they all got in, except the witness, who at first refused to go, until Charles took a pistol and threatened to shoot him if he did not. They went ashore about Jacquemel. After the murder, they found on board a box of gold, buckles, &c.: they also found 115 dollars, and a Masonic apron, which was thrown overboard.

[Cross-examined: Witness was born in Orange county. His mother belonged to Benj. Sears. Lived with his father at Staten Island until he was ten years old. This was his second voyage in the same vessel. Never saw prisoner before. He went by the name of John Robinson. Never heard him called Jones. Came back in schooner, called the American, of Kennebeck. When they landed at St. Domingo, they went to Bennet, a town inhabited by blacks. Witness said nothing to anybody about the murder, as he was afraid. They got one hundred and fifteen dollars, of which they gave witness 12 or 15. From Bennet they went to Jacquemel, where he walked. Alexander went up first, when they were all sent for by the commandant, but did not go then. Witness got on board the barque America, of Kennebeck, and went to the Havana. Said nothing of it to the captain, as he was afraid of being tried in Havana. Saw the mate of the George Washington (whom he had seen at Curacoa), and told him all about it. Wanted witness to go to Africa with them for slaves. Came from Havana in the sloop Flag of Truce to New Orleans, from thence to New York in the brig Dolphin. Had irons put on him while on board of the brig G. Washington. Does not know the name of the captain and mate. He was brought in irons to New Orleans, where he was put in jail. Mr. Orr assisted him, and he got him out of prison, with whom he then lived for some time. This was some time in April. Witness came in the brig Dolphin, Captain Kent, as a hand, but he said nothing of this affair to anybody on board. Arrived about the first of May, 1819. Does not know how many days passage. Went to the police in two or three days after he arrived in New York, and told all the particulars. About the latter part of August was taken up for stealing. He then lived with his mother in William-st. Did not do much of anything. Worked at the steam-boats, carrying wood. Did not steal at all after he came ashore. Confessed that he stole, before the police. Did not break open the door of Doctor Drake's house, and did not go up stairs in the house at all for the things.

[Oliver Stevens, clerk of the police, knows Oliver King. He has been brought up at that office two or three times.

[King called again: Had but one pistol in the boat. Was at the time 18 or 19 years old. Captain Brown was a large, stout man.

[Mary Adams: Knows the prisoner. Five years ago lived in Bancker-st. at Maria Sales'. Does not know whether he sailed in the brig Holkar. He went to sea about that time. Don't know what vessel. Saw him in prison

for the first time since his return. He knew witness immediately.

[Cross-examined: Never told witness that he was going to sail in the Holkar; never heard him called Robinson, but Tom Jones.

[The counsel for the prosecution here rested the case; and THE COURT directed a recess for an hour, that the jury might obtain some refreshments. At a few minutes before 5 o'clock the court re-assembled, and the defence was opened by Mr. Haines.

[Evidence for the Prisoner.

[John Edwards: Knows the prisoner. He sailed in the brig Commodore Porter, Captain Doane, in 1818, to bring timber from St. Mary's. Witness knew him in Baltimore, more than fifteen years ago. Saw him when he came home in the Maria, since 1818, whence he shipped immediately in a vessel lying at Pine-street. He was always called Tom Jones. Shipped him by that name about 18 months since. His character is very good, as given by Captain Downes. Has heard lately that he was on board the Holkar. The first voyage was about three months. Witness went four voyages to St. Mary's. The prisoner went the 1st and 2d voyage. The third voyage he returned a little before Christmas. Knows Oliver King. Witness stood his bail twice, and his girl's. Don't know his character as to truth and veracity. He has the character of a thief. Witness never heard anything against Diana Valentine, nor against Peter Willis.

[Evidence for the People.

[Oliver Stevens again: Has seen King often. Thinks he would speak the truth, and would believe him under oath.

[John Edwards again: Saw King the next day after the prisoner was taken up. Went up to see him. Asked what Tom had been doing. He would not tell. Saw him again in the evening, when he told witness. Did not tell King if he was in his (King's) place, he would not have him taken up.

[Azel Conklin called again: The character of the last witness does not stand very fair. From the knowledge he (witness) has, he should not be willing to place confidence in him, where he was prejudiced either way. Witness has known Oliver King four years, and would put twice the confidence in him that he would in the last witness.

[James Hopson, police justice: The examination of Oliver King, of the 3d of June, 1819, was read. Witness said King came voluntarily, and underwent this examination. Never saw him before he made this deposition, nor since, till he came and gave information that prisoner was in town. He never had reference, nor had any other person, to this examination, as it was filed in the police office. (We have compared the examination with the testimony, and it agrees exactly.)

[Jarvis Lockwood: Knows Diana Valentine. She lived in his family. Knew her in 1810 to 12; 14 or 15 years. Her character is good for truth and veracity. Has seen her six or seven times since she was married. Keeps a very decent sailor boarding house.

[Zebulon Homans, a marshal: Does not know much of John Edwards. He is an immoral man. Diana Valentine's character good every way. Has known her for 4 years. Was a regular woman in going to church. Never saw anything improper in her house. She sustained a very good character among her white neighbours. Oliver King's general character is not very good.

[Julia Wills: Knows the prisoner at the bar. The 2d year after the peace, lived at Henry Parson's. Her husband shipped him. Found him a pretty steady, clever man. Her husband shipped him the year after the peace. Witness knows King's family. He is not as clever as he might be. Has been a bad boy from his childhood up. When he went to school he used to pick up things not his own.[2]

Mr. Tillotson, for the United States.

Haines & Van Wyck, for the prisoner.

THOMPSON, Circuit Justice (charging jury). The question for you to decide is one involving the life of the prisoner. It is for you to say whether he is guilty or not guilty. The material point in this case is, whether the prisoner at the bar is the person who shipped on board the Holkar, in 1818, as sworn to by David Valentine, Oliver King, Peter Willis, and Mr. Bogart. The offense as charged in the indictment, if committed at all, is an aggravated piratical murder. It took place upon the high seas, and is therefore within the jurisdiction of this court. It satisfactorily appears by the evidence, that the Holkar cleared for Curacoa in October, 1818. There can be no doubt of this fact; indeed, it is not denied. It appears also that the vessel was commanded by Captain Brown; that her crew, with the exception of one person, was composed of colored people. This appears by the testimony of Diana, King, Willis, Mr. Bogart, and Mr. Conklin. It appears by the register of the ship and notarial list of Mr. Bogart (which agree with each other), that Alexander Cheevers, Charles Montiza, Patrick Butler (called Cook), James Irving, Charles Robinson (the prisoner), King, the witness, and the mate were the crew of the vessel. The vessel sailed for Curacoa, since which time nothing has been heard of her. The insurances upon the Holkar and her cargo have long since been paid. There is no doubt, therefore, the vessel has been lost, whether in the manner related by King or not remains for you to determine.

Before his honor recapitulated King's testimony, he called the attention of the jury to the infamy of his character. It appears (said he) by the record of the general ses-

[2] [From 2 Wheeler, Cr. Cas. 451.]

sions that King has been convicted of a larceny, and has been sentenced to the state prison, has served out his time, and has received a pardon from the executive of the state, for the purpose of making him a witness against the prisoner, all since the commission of the alleged murder. His honor observed, he had no doubt of the efficacy of the pardon, and that he was now a competent witness; his credibility, however, was still a subject for the consideration of the jury. The law has made him a competent witness; but the jury were not compelled to believe him, and he should advise the jury to give no weight to his testimony where he was not corroborated by others. He adverted to the examination of King, made on the 3d of June, 1819, immediately on his arrival in this country. The objection then to his credibility did not exist. That examination, and his testimony here to-day, appear to agree in all essential particulars; and it appears by Justice Hopson, that it was not possible for him to have had access to that paper.

His honor instructed the jury, that the testimony of King ought to have no weight in their minds, unless corroborated by others, or by the circumstances of the case, and proceeded to detail the principal facts of the loss of the vessel, and the murder of Captain Brown, the mate, and Captain Humphries, as related by King (see his testimony). He remarked upon the consistency of King's story, the minute history of the circumstances he had given, the difficulty, not to say impossibility, of King's framing such a connected chain of facts.

It could not have escaped the jury (said his honor) that the case depended materially upon the circumstances. Before he enumerated them, he remarked upon the nature of circumstantial evidence. A number of cases have been cited and read, to show you the dangerous tendency of this kind of proof. It is possible an innocent person may have suffered, but such cases (if any such there were) could be no objection to this kind of evidence; if jurors were to disregard it, there would be an end to the administration of law, and to government. It was (he observed) the duty of the jury to weigh all the evidence for and against the prisoner, and that fair and legal inferences were to be made from facts and circumstances proved, they were often more satisfactory and conclusive than the testimony of witnesses.

Then as to the identity of the prisoner. Notwithstanding he shipped on board the Holkar by the name of Charles Robinson, and was known only by the name of Tom Jones, yet it appeared by the testimony of a number of witnesses he was the same person. Diana Valentine swears positively that she was well acquainted with the prisoner; that she had boarded in the same house with him before the Holkar sailed. Peter Willis has known the prisoner for ten years, and testifies he shipped on board the Holkar; he knew him in this city by the name of Tom Jones. Julia Freeman, Mary Adams (see the testimony) swear they know the prisoner; he was called Jones. There was no doubt, continued his honor, that the prisoner at the bar was the same person who shipped on board the Holkar by the name of Charles Robinson, and that he is the same person known by the witnesses by the name of Tom Jones.

His honor then proceeded to recapitulate the circumstances of the case, the sailing of the Holkar, no information having since been received of her, King's examination, his connected story, the recognition and arrest of the prisoner, King's testimony, etc., and concluded that the case depended almost entirely upon his testimony, as he was proved to be a convicted felon; although restored to competency by the clemency of the executive, it was the duty of the jury to sift his testimony; that where he was not corroborated on the main points, by testimony of witnesses, or by the circumstances, they ought to pay no regard to it; and that if after a full and impartial view of the case, they were satisfied the evidence did not support the indictment, or if they had a fair and reasonable doubt, it was their duty to acquit; but if they were satisfied that King was corroborated by the testimony of other witnesses and by the circumstances of the case, and they had no reasonable doubt of the prisoner's guilt, it was their duty to say so.

He was found guilty, and sentenced to be executed on the 11th June, 1824.

A pardon has the effect to restore a felon to competency as a witness. See State v. Foley, 15 Nev. 68, citing above case.

Case No. 15,493a.

UNITED STATES v. JONES.

[2 Hayw. & H. 160.] [1]

Circuit Court, District of Columbia. June 4, 1854.[2]

OFFICERS—SPECIAL ALLOWANCES—ORDER OF SECRETARY OF TREASURY.

1. Money received by a naval officer for a special designated purpose, and accompanied by instructions from the secretary of the navy, is not covered by the specified allowances enumerated and prohibited in section 2, of the act of congress of March 3, 1835 [4 Stat. 757].

2. The order of the secretary of the navy to the defendant to apply a sum of money to the payment of the expenses attending the injuries by him while in Paris on special duty, is obligatory on the accounting officers of the treasury.

3. An order issued by the head of one of the departments of the government, for the payment of an account authorized by him, cannot be controlled by the subordinates of another department, such an order is binding on all the officers by whom the account is to be audited.

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

[2] [Affirmed in 18 How. (59 U. S.) 92.]

It appears that some years back Lieut. [Catesby Ap Rogers] Jones was absent on leave in Paris, and while standing on the Boulevard during one of the emeutes which occurred at the time, was wounded by a stray bullet, fired by one of the conflicting parties, and severely injured. On being taken home, he was attended by a French surgeon. The expenses of medical attendance during his sickness, and subsequent to his recovery amounting to $1,000 This he claimed to be reimbursed by the United States, having been wounded while in their serivce, and in a foreign port. His sojourn at Paris, having been an absence on leave, and as the government felt some hesitation as to whether the case came under the provisions of the act, the suit was brought before the judges of the circuit court to have their opinion as to the validity of the claim.

Case agreed. This is an action for money had and received, docketed by consent, to try the right of the plaintiff to recover from the defendant the sum of $1089 upon the facts hereinafter set forth, which are agreed to be taken, as if proven, tc wit: The defendant is, and was at the time and times hereinafter referred to, a lieutenant in the navy of the United States. Being at Paris, in France, by the authority and permission of the United States government, that is, he was on leave of absence, to wit: on the 4th day of December, in the year 1851, he was there severely and dangerously wounded during the emeute, or revolutionary outbreak, which resulted in the establishment of the imperial government, without any act or default of his touching his rights or duties as such lieutenant as aforesaid. On the 16th day of August 1852, the secretary of the navy of the United States, to whom the facts aforesaid, touching the wounding of the defendant and his actual condition had been duly and fully reported, (he, the said defendant, being then and there on special duty, as appears by letter of July 17th, 1852, prout the same hereto annexed, for the purpose of collecting information in relation to the steam marine of France,) in consideration thereof, issued and transmitted to Messrs. Baring Brothers & Co., agents of the United States navy department, at London, a letter of credit, bearing date August 16th, 1852, and an order to the defendant of the same date, on receipt of the last named (order) the said Lieutenant Jones drew upon the said Baring Brothers & Co. for the sum of $1,000, which, with the difference of exchange, &c., is the sum claimed by the United States in this action and none other. It is agreed that the said sum was fully and necessarily exhausted in discharging the expenses attending the injuries aforesaid, received by the said defendant, in Paris as aforesaid; and that the French government have not "granted reclamation for the injuries sustained" by the said defendant as aforesaid. It is further agreed that the said order of the secretary of the navy, and the said letter of credit on the said Baring Brothers & Co. were not, nor was either of them at any time revoked or countermanded; but that the accounting officers of the treasury have charged the amount so as aforesaid, drawn by the said Lieutenant Jones, against him on his pay account, and have refused to recognize the authority of the secretary of the navy in the premises. If the court shall be of opinion that the United States can recover the amount aforesaid from the said Lieutenant Jones upon the facts aforesaid, then judgment is to be entered against him for $1089 and costs. Otherwise, judgment for the defendant with costs.

Phil. Barton Key, U. S. Atty.

J. M. Carlisle and C. L. Jones, for defendant.

Before MORSELL and DUNLOP, Circuit Judges.

MORSELL, Circuit Judge. This case comes before the court on the following agreed statement of facts, by which it is contended that it appears the defendant, without lawful authority, has received and retains moneys belonging to the United States to the amount of $1089, and which he is liable for in this action. The subject of the claim has been acted upon by the accounting officers of the treasury, who have refused to recognize the authority of the secretary of the navy in the premises, upon the ground that the defendant was at the time a lieutenant in the navy of the United States, and the injury, on account of which the medical services were rendered, occurred while he was abroad on leave of absence, and therefore the case is within the prohibition of the 2d section of the act of congress of 1835, March the 3d, c. 27, which is in these words: "That no allowance shall hereafter be made to any officer in the naval service of the United States for drawing bills, for receiving or disbursing money, or transacting any business for the government of the United States, nor shall be allowed servants, or pay for servants or clothing, or rations for them, or pay for the same, nor shall any allowance be made to him for rent of quarters, or to pay rent for furniture, or for lights, or fuel, or transporting baggage. It is hereby expressly declared that the yearly allowance provided in this act is all the pay, compensation and allowance that shall be received under any circumstances whatever, by any such officer or person, except for traveling expenses when under orders, for which ten cents per mile shall be allowed." The title of the act is, "An act to regulate the pay of the navy of the United States," and considerably increases the pay of all the officers of the navy. On the part of the United States, the counsel contends that the decision of the auditor is correct and must be sustained. The point of his argument has been to show the true construction of the statute just recited, as ap-

plied to the case of the defendant as stated in the agreed facts. The money received by the defendant for the purpose therein stated was without any lawful authority, and ought to be considered as the money of the United States in his hands and improperly withheld. The substance of the learned attorney's argument has been much the same as that of the auditor, made in the case of Commander G. I. Pendergrast to the comptroller, which he supposes was a case somewhat similar and stronger than that of the defendant in this case, and the validity of the grounds upon which that claim was disallowed has been recognized by the navy department and by committees of congress. The auditor's argument in the case is strong and powerful. As to all the cases intended by the act to be embraced within its prohibitions, the argument brings to its support, as the evils intended to be prevented by the law, the antecedent practices which had existed in the navy department, in making allowances to naval officers in addition to their pay; that it appears from the act itself, compared with the previous laws, that it was framed upon the principle of abolishing all such allowances, and limiting the discretion of the secretary, and of granting a sufficient increase of pay to greatly more than it had been before, to cover all the necessary incidental expenses which had been the subject of those allowances. That if the payment by the navy department of bills for medical attendance and medicine, contracted by a naval officer for his own personal use and benefit with a private physician or apothecary be an allowance to the officer, such payment is prohibited by the act; the term "allowance" used in the law means the same there that it did in the published rules and regulations of the department, in force at and before the passage of the act, which was for the expenses incurred by an officer in the employment of a private physician, where no medical officer of the navy was at hand. It is in the book of regulations classed under the head of "allowances," to whom made, but to the sick officer; further as to which. it is found in an analogy derived from the act itself, as the rent of quarters, a case parallel in all respects, particularly mentioned as prohibited; as to the ground that the expenses in question might be charged upon the fund formed from the money contributions of the officers and seamen of the navy. It is sufficient to say that the contributions referred to are expressly confined by the act of Feb. 26, 1811 [2 Stat. 650], to the erection and support of naval hospitals, and the only benefit which the contributors, as such, become entitled to, is the use of those hospitals; as to the usage of the office also urged in support of the claim, if the usage be agreeable to the law its production is useless, and if it be not, it is a custom more honored in the breach than in the observance, and cannot alter the law. It is denied that there is any such usage; so as to an allowance for bills of private physicians for medical attendance upon officers employed on the coast survey, this too is an error, only one case allowed, made and passed inadvertently. It is erroneous also to suppose that where officers abroad, in consequence of the absence or disability of a naval medical officer have employed private physicians to attend them, it has been usual to allow the bills presented for such service, the contrary is the fact; that these observations are, for the most part, applicable also to his purchase of medicine, &c. Comptroller Parris, to whom the foregoing opinion was addressed, "concurred with the 4th auditor in his able exposition of the grounds on which he disallowed the claim of Commander Pendergrast." It was also urged by the attorney of the United States that the order made in this case, and for the purpose stated by the secretary of the navy was in violation of the law, and not obligatory or binding on the 4th auditor in the settlement of the defendant's account, to credit him with said amount according to said voucher produced by him. He also relied on the act of 1823, c. 9 [3 Stat. 723], entitled, "an act concerning the disbursement of public money," to show the authority of the accounting officers of the treasury, to examine and settle the account of the defendant in this case.

On the part of the defendant, the learned counsel have contended that "the medical attendance of an officer is not such an allowance as was contemplated in the prohibition of the act of congress of March 3, 1835, but a necessary supply, expense or allowance, under whatsoever name it may be called, which every officer, seaman and marine, by the terms of his service, is entitled to receive from the government" refers to the opinion of Attorney General Toucey, September 28, 1848. Also to the head of the bureau of medicine and surgery, which after being endorsed with the disapproval of the 4th auditor, was considered with and acted upon by the secretary of the navy. This document which is made a part of the evidence in this case will be more particularly noticed under the last head of this opinion.

2nd. That the order of the secretary of the navy is conclusive and not to be upset by the auditor. To support this position the opinions of Attorney General Berrien in Parker's Case, 2 Op. Attys. Gen. 303; Taney, 10th of September, 1831, Tharp's Case, Id. 464, 465; Butler, 26th of March, 1834, Parker's Case, Id. 625, 626; Johnson, 19th of April, 1849, Lassell's Case, 5 Op. Attys. Gen. 87; Crittenden, 13th of November, 1852, Id. 630.

3rd. If in error as to the other points yet in disbursing this money, the defendant is by express law released from all responsibility by the act of congress of March 3, 1849 [9 Stat. 419], that the secretary of the navy is a commanding officer of the navy, refers to Attorney-General Crittenden's opinion.

4th. There is no mistake of facts. If there

is any mistake, it must be a mistake of law, and money paid under mistake of law, where the facts are all known, cannot be recovered back. The order of secretary is the order of the president. U. S. v. Eliason, 16 Pet. [41 U. S.]. Jones is not a disbursing officer.

Such I think are substantially the grounds of the argument made on each side of the case now before the court. Before proceeding to consider them, I think it would be proper in order to bring directly and more fully into view the action of the secretary on the subject, to notice the order of the navy department, dated July 17th, 1852, and directed to the defendant, as lieutenant of the United States navy, Paris, France. It directs him, on the receipt of it, to regard himself as on special duty, for the purpose of collecting such information in relation to the steam marine as he might be enabled to obtain, and might deem to be of importance to the government and navy of the United States. His stay in France, under that order for special duty, might be extended to six months, if he should deem it necessary for the collection of the information in question. He would at the end of that time, or sooner, if he should be prepared with the desired information, return to the United States, and report the result of his researches to the department. He must keep an account of his traveling expenses, taking vouchers for payments when it could be done, to enable him to certify to the accounting officers the actual expenses incurred on account of travel, this shows the special service by which he was detained in France. Subsequently on 11th day of August, 1852, Thomas Harris, of the bureau of medicine and surgery, navy department, in a letter directed to the secretary says: "In reply to your verbal inquiry, I have the honor to state that no precedent of a claim can be found in this office for the allowance of a claim, such as that presented by Lieutenant Jones of the navy, to be reimbursed the expenses attending the medical treatment while in Paris. I submit however that the act of congress, which is relied upon by the accounting officers of the treasury, in the rejection of such accounts, does not seem to sustain them in the position they have taken." He then proceeds to take particular notice of the law, and states his reasoning thereon, and comes to the following conclusion: "I think the claim of Lieutenant Jones cannot be referred to either of the heads of 'pay,' 'compensation' or 'allowance,' and it is believed to be within the legitimate power of the department to grant." Then follows the action of the secretary in the following words: "United States Navy Department. Washington, Aug. 16, 1852. Messrs. Baring Brothers & Co., Temporary Agents United States Navy Department, London—Gentlemen: Be pleased to honor the draft of Lieut. Catesby Ap. R. Jones, United States Navy for $1,000, and charge the same to this department. A specimen of his signature accompanied letter from this department, under date of 8th of April, 1851. Very respectfully, your obedient servant, John P. Kennedy." Then follows the letter from the secretary, dated "Navy Department, Washington, Aug. 16, 1852," to defendant, in these words: "Sir: The department has issued a letter of credit in your favor upon Messrs. Baring Brothers & Co. (triplicate herewith enclosed) for $1,000. The department is induced to place this amount in your hands, to enable you to discharge the expenses attending the injuries received by you in Paris; but it is to be distinctly understood, that should the French government grant reclamation for the injuries sustained by you, this amount must be returned to the treasury of the United States. Very respectfully, your obedient servant, John P. Kennedy. Lieut. Catesby Ap. R. Jones, United States Navy, Paris, France."

The arguments on the part of the United States have much power and force in them, as to the construction and application of the act of 1835, § 2 (before recited), extending its prohibition to special or extra allowances to the officers of the navy therein named, for expenses incurred by reason of sickness, whether for medical attendance or otherwise, the conclusiveness however of them, it appears to me, must be considered as overcome for various reasons. There is nothing in the facts or circumstances to show that the increase of pay was for the purpose of meeting expenses of that kind, so peculiar in their nature and necessity, or for any other reason than for the increase or former occasion; so with respect to the antecedent and subsequent practice and usage, there is a material contrariety in the statements. With respect to the terms used in the statute, the present case can not without the most forced construction be brought within any of the enumerated conditions. The money received was for the special designated purpose contained in the instructions, to which purpose the defendant was bound to apply it. That was neither of the purposes, or in the nature of them, for which no allowance was to be made, as specified in the section. If this case does not fall within any of those expressly enumerated, neither does it within the general language used in the last part of the section, which can include nothing but things of the same species or kind. The case of Commander J. G. Pendergrast is supposed by the auditor to be somewhat similar to this, but stronger, because he was sick while on duty. That case was also disallowed by the auditor, but afterwards allowed in a report of the committee on naval affairs, who concurred in the opinion of Attorney General Toucey. The question in that case was whether in the absence of a surgeon at a navy yard, to

which an officer is ordered on duty, he is entitled to medical attention, and may employ a private physician at the expense of the government. Under such circumstances the attorney general supposes the expenses are necessarily incurred, and that the term allowance in the act of 1835 is inapplicable to the officer. His own words are: "I think the payment of the expense in such a case is not an extra allowance, nor any allowance to the officers or seamen, but the payment of the proper and necessary expense of the vessel or navy yard for which it was the duty and intention of the government to provide." This opinion of the attorney general and committee of congress, certainly show that the terms "allowance, &c.," and the concluding general terms of the secretary, are not to be considered in the extensive sense claimed for them by the auditor, and that the law admits of exceptions, when as to the supposed parallel case of quarters, &c. I think the inference is directly the reverse, and that expressing the one without that of the other, shows it was not intended to be included where necessary, there are also other respectable opinions on the subject directly opposed to the strict construction contended for on the part of the plaintiff.

There is another feature in this case which I think deserves notice, the fund which the secretary drew was one over which he had control in his official character, for the purposes among others of being disposed of to accomplish such objects and ends as his judgment might be deemed of importance to the government and navy of the United States, of course the special service that the defendant was directed to regard himself on, for six months (if necessary) to collect such information in relation to the steam marine of France, as he might be enabled to obtain and might deem to be of importance to the government and navy of the United States, must be considered to be within the legitimate scope of the special duty. The defendant was in Paris, and one whom the secretary could confide in, as most fitting and suitable for this duty, he could receive no pay or compensation for his services, and the afflictive dispensation with which he had most unexpectedly been visited, involved him in the exhaustion of all his pecuniary means; if then it became indispensably necessary to the attainment of the object in view, that a sum of money equal to the purpose of relieving him from the embarrassment should be advanced, and it was so advanced, I think the secretary had a right so to do.

But if incorrect in the forgoing views, I proceed to consider the next part of the case, that is to say, what effect is to be given to the order and action of the secretary? The facts according to the agreed statement were all before the secretary and adjudicated on by him; the result of which judgment, was that the claim now sought to be recovered back, should be received by the defendant from Messrs. Baring Brothers & Co. and applied to the payment and discharge of the expenses attending the injuries received by him in Paris; but with the distinct understanding that should the French government grant reclamation for the injuries sustained by him, said amount so received should be returned to the treasury of the United States, and this application was made as directed. It must be borne in mind that the transaction for which the expenditure was incurred, was in the department of the secretary of the navy. I consider the conclusive, obligatory effect of this order so fully settled by authorities, that there will be no need for any argument by me. I refer first to the opinion of Attorney General Berrien in the Case of Parker, December 4th, 1829. After stating the order in which the business passes through the offices of the accounting officers of the treasury, to the 2nd comptroller, he says: "It is his duty to certify the balance arising thereon to the secretary of war, in whose department the expenditure was incurred." He proceeds: "Thus far, I should believe that the decision of the 2nd comptroller was final, not liable to question by any other than the secretary, acting under the authority of the president; but the secretary must possess this power, or congress would not have placed him at the head of the department of war, to be subjected to the control of a subordinate officer of the treasury, when the account has been settled and certified to the secretary, he is then to issue his requisition for its amount, and unless he is a mere machine, or liable to the control of his own, or the subordinates of another department, he must be entitled before he does so, to review, and if need be to reverse the decision of the comptroller. If this were not so in the case under consideration, a subordinate officer of the treasury department might regulate the military allowances of the army, contrary to the will of the secretary of war, and of the president of the United States." 2 Op. Attys. Gen. p. 303.

On the subject of the sucessor in office's power to open the decision of his predecessor he says: "If it was competent to the late secretary to prescribe the principles, on which the settlement should be made, it must be competent to his successor when that decision is reported to him to determine whether that principle has been adhered to in settlement of the account;" so in this case the only question open for the action of the auditor was, whether the defendant had applied the money as directed by the decision. So Attorney General Toucey: "An erroneous decision of the officer in favor of the claimant and the payment of the money became conclusive on their successors in office and the government." 1 Op. Attys. Gen. 786; Cooper's Case, 5 Op. Attys. Gen.

p. 62. So Attorney General Johnson, 2 Op. Attys. Gen. 1993; 5 Op. Attys. Gen. p. 87: "The opinion of the secretary of the interior directing the claim of H. Lassell, for $2224.95, against the Marina Nation of Indians to be paid, is in my judgment binding upon all the subordinate officers by whom the account is to be audited and passed, this has been the practice of the government from its origin, and is as well authorized by the laws organizing the departments as it is absolutely necessary to the proper operation of the government I deem the point so clear that I feel it to be unnecessary to refer to opinions upon the question given at different times by this office." Attorney General Butler is to the same effect. To these might be added the various decisions of the supreme court, establishing the same principles. I think therefore the law is with the defendant and that judgment ought to be entered for him on the agreed statement of facts.

DUNLOP, Circuit Judge. The case agreed shows that the sum of money now sued for by the United States was, by the order of the late secretary of the navy, placed in the hands of Lieutenant Jones, with directions to disburse it in a particular way, according to the secretary's mandate, and that this mandate was strictly complied with by the defendant. Under these circumstances it seems to me the accounting officers of the treasury can not legally charge the sum to Lieutenant Jones. Supposing the construction of the act of 3rd March, 1835, to be as maintained by the 4th auditor, still I think if the defendant has paid away the money committed to his charge, in faithful compliance with the secretary's order, which is admitted by the case agreed, the secretary and not Lieutenant Jones must account and answer to the United States. The 2nd section of the joint resolution of the 3rd of March, 1849, is in these words: "And be it further resolved, that every disbursement of public money, or disposal of public stores, made by order of any commanding officer of the navy, which shall be objected to by the accounting officers of the treasury, in the settlement of the accounts of any disbursing officer, shall, nevertheless, be allowed to such disbursing officer, and the commanding officer by whose order such disbursement or disposal was made, shall be held accountable for the same, provided that satisfactory evidence of such order, and of the payment of public moneys, or disposal of public stores, under the same, shall be produced." This case is, I think, in the spirit and meaning of this provision of law.

I am therefore of opinion that the judgment of the court on the case agreed, ought to be for the defendant, but without costs.

[NOTE. A writ of error was sued out from the supreme court of the United States, where the judgment of this court was affirmed, Messrs. Justices Daniel and Catron dissenting. 18 How. (59 U. S.) 92.]

Case No. 15,494.

UNITED STATES v. JONES.

[3 Wash. C. C. 209.] [1]

Circuit Court, D Pennsylvania. April Term, 1813.

PIRACY—STATUTORY CRIMES—UNLAWFUL ACTS OF PRIVATEERS—NAVAL REGULATIONS—PROOF OF OWNERSHIP OF VESSEL—IMPEACHING WITNESS.

1. The defendant, who was the first lieutenant of an American privateer, the Revenge, was indicted for piracy committed upon a Portuguese vessel, and for assaulting the Portuguese captain and the crew, and putting them in bodily fear, &c. The defendant was charged with boarding the vessel, and by force and intimidation, taking from her money and other articles, not claiming the vessel as prize, but pretending that the Revenge was an English vessel, and that the articles would be paid for, by an order on the English consul. The 8th section of the act of congress, makes murder and robbery on the high seas, acts of piracy. The words "which, if committed in the body of a county," do not relate to "murder" and "robbery," but to the words immediately preceding them, "or any other offence."

[Cited in Sparf v. U. S., 156 U. S. 167, 15 Sup. Ct. 318.]

2. To define the meaning of the term "robbery," the common law must be resorted to. Whenever a statute of the United States uses a technical term, which is known, and its meaning clearly ascertained by the common or civil law, from one or other of which it is obviously borrowed, it is proper to refer to the source from which it is taken, for its meaning.

[Cited in Re Ezeta, 62 Fed. 992.]

[Cited in Bedell v. Janney, 4 Gilman, 205.]

3. The act of congress of 26th June, 1812 [2 Stat. 759], does not repeal the provisions of the law relating to piracy.

4. Robbery is the felonious taking of goods from the person of another, or, in his presence, by violence, or by putting him in fear, and against his will.

[Cited in Hill v. State (Neb.) 60 N. W. 923; State v. Gorham, 55 N. H. 166.]

5. The general rule of law, that robbery on the high seas is piracy, has no exception or qualification in favour of commissioned privateers, in any act of congress, in the common law, or in the law of nations.

[Cited in Davison v. Sealskins, Case No. 3,661.]

[Cited in Dole v. Merchants' Mutual Marine Ins. Co., 51 Me. 469.]

6. The law for the better government of the navy, which enjoins on inferior officers and privates, the duty of obedience to their superiors, speaks of the lawful orders of the superiors.

7. If many go to do an unlawful act, and one only do it, all are principals. But, if they go to do a lawful act, as to visit a vessel to ascertain her character, and all but one commit a felony, though in his presence, but without his participation, their crime is not imputable to him.

[Cited in brief in Spies v. People, 122 Ill. 90, 12 N. E. 908, and 17 N. E. 898.]

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

8. Although the usual evidences of property in a vessel, are the register and bill of sale, if there be such papers, and in the cargo, the invoice, bills of lading, &c., yet, that other evidence may be admitted.

[Cited in U. S. v. Peterson, Case No. 16,037.]

9. A party cannot discredit his own witness, by proving, that on a former occasion, he swore differently from what he has now sworn.

[Cited in Harris v. Berry, Case No. 6,115.]

10. Quere, whether, under some circumstances, there be an exception to this rule.

The prisoner [John H. Jones] was indicted for feloniously and piratically entering a certain Portuguese brig (by name,) and assaulting the captain, &c., putting them in bodily fear, and feloniously, &c., stealing, &c., out of said brig, and from the possession of said captain and mariners, certain enumerated articles. It appeared in evidence, on the part of the prosecution, that the defendant was the first lieutenant of a privateer schooner, called the Revenge, William Butler master, duly commissioned by the president of the United States, on the 12th of October, 1812. It was proved by the captain, and a third lieutenant of the Portuguese brig, called the Triumph of Mars, that he sailed in the said brig from Lisbon, on the 16th of September last, bound to New-York; the vessel, and cargo on board, belonging to a Portuguese subject, residing at Lisbon. That on the 2d of November, she was chased and brought to by this privateer. That the prisoner, with four seamen, boarded her and called for her papers, which were exhibited, and examined by the prisoner. They were the royal register, the certificate of the American consul at Lisbon, the invoices and bills of lading. The prisoner then loaded his pistols, presented one of them to the breast of the captain, and informed him that he was a prisoner. The captain was then ordered to open his trunks, and those of his officers, from which, and from the locker of the vessel, he took out fifty dollars belonging to one of the officers; seventy-five half joes belonging to the owners for the use of the vessel; one hundred and eighty dollars belonging to the captain; and eighty-four dollars belonging to one of the officers and a seaman. A general plunder then commenced; and a quantity of sugar, cabin furniture, the clothes of the people, rigging, and a variety of other articles, were seized and carried off to the privateer, the prisoner being present the whole time, and directing what was done. All this was done in the presence of the captain and officers of the brig, who supposed the privateer to be French, although, during the whole transaction, she had English colours flying. The witnesses were positive as to the identity of the prisoner. No seizure of the vessel, as prize, was made or intimated; but on the contrary, the prisoner said that he would send an order to the English consul, to pay for the articles taken. This was said after the articles were taken, and in answer to the captain's complaint, that he should be so treated by an English privateer. After the last boat load of the plunder was carried away, the captain of the Portuguese brig was ordered, as soon as the privateer should fire a gun, to hoist sail and pursue his voyage. This was done, as soon as the prisoner got to the privateer; and the brig proceeded to New-York, where she arrived on the 16th of December.

The defendant's counsel objected to any evidence being given of the property in the brig and cargo, but the written documents, such as the register, or bill of sale, invoices and the like.

WASHINGTON, Circuit Justice. The usual evidence of property in a vessel is, the registry and bill of sale, if there be such papers; and of the cargo, the invoice, bill of lading, bill of sales, &c. But this is not the only evidence, nor is it always the best. It does not appear, that there was any registry or bill of sale of this vessel; and although there were invoices, and a bill of lading of the cargo, yet, other evidence of property may be given; such as acts of ownership and the like. The Portuguese captain proves, that this vessel and cargo belonged to a Portuguese subject, who put the cargo on board, and employed him and the crew to navigate the vessel. This is sufficient.

On the part of the prisoner, it was proved by four witnesses, two of whom, viz. Le Brun and Whitford, were called and examined in support of the prosecution, that the prisoner boarded the brig by order of Captain Butler, for the purpose of inquiry and examination. That the prisoner treated the Portuguese captain with great politeness; forbade one of his men from even receiving, as a present, a small quantity of sugar from one of the Portuguese crew, and threatened to put to death any of his men, who should take away the smallest article from the brig, without the orders of his captain. That after examining the papers of the brig, and remaining in the brig about half an hour, he returned in the boat to the privateer; and after having made his report to Captain Butler, and complaining of being unwell from not having eaten his breakfast, or being intoxicated, as some of the witnesses supposed, he laid himself down on the deck and slept, or seemed to do so, until after the vessels separated. These witnesses deposed, that the prisoner brought nothing with him from the brig, that they saw or knew of. It was proved, however, that after Jones returned from the brig, and had lain down, Captain Butler ordered his boat to return to the brig, and to bring from her whatever the crew wanted. That a man of the name of Hancock, about the size of the prisoner, very much resembling him in size and countenance, and dressed precisely as the Portuguese witnesses described the prisoner to have been, went in the boat, and returned

with a considerable sum of money in his bosom and pockets. That the articles proved to have been taken away by the Portuguese witnesses, were brought to the privateer by Hancock and others of the privateer's crew, in the different trips made to and from the brig; and amongst other articles, two bags of sugar, which were divided amongst the crew. The dress of the prisoner, when he boarded and returned from the brig, was proved to be totally different from that described by the Portuguese witnesses.

The points of law raised by the counsel for the prisoner were: (1) That robbery on the high seas, is not piracy by the laws of the United States, not being punishable with death by such laws; and the 8th section of the law for the punishment of crimes, which defines piracy, declares those offences committed at sea, to amount to felony and piracy, which, if committed on land, would be punished with death. If the offence is not defined and made punishable by some act of congress, neither the law of nations nor the common law can be resorted to—and that it is not defined in this law. (2) That if robbery on the high seas amounts to felony and piracy under the 8th section of the above law, it is virtually repealed by subsequent laws in relation to persons acting under a commission of marque and reprisal—those laws having declared a milder punishment, and a particular mode of trial. 1 Leach, 306. The act of the 26th June, 1812, declares, that all offences committed on board of letters-of-marque, by any officer or seaman, shall be tried and punished in like manner as if committed on board of a public armed vessel; and the trial and punishment are prescribed by the act for the government of the navy. (3) Robbery cannot be committed, unless the taking be from the person of the owner—which is not proved in this case, even by the witnesses for the prosecution. (4) Piracy cannot be committed by a person acting under a commission. Bynck. (Duponceau's Ed.) 127, 135; 2 Azuni, Mar. Law, 351. If piracy could be committed by one acting under a commission from the United States, the 9th section of the act would have been unnecessary. (5) The prisoner was an inferior officer, and was bound to obey the orders of Captain Butler; of course, he cannot be punished for having done so.

Dallas, for the prosecution, insisted, that robbery on the high seas is declared by the act of congress to be felony and piracy, and that the definition of robbery is to be sought in the common law;—that it amounts to piracy, both by the law of nations and the common law of England, though committed by persons acting under a letter-of-marque, if it be done feloniously, as in this case, 2 Wood. Lect. 422; 1 Leoline, Jenk. 94; 2 Leoline, Jenk. 714; 5 State Tr. 313, 314; Moll. b. 1, c. 2, § 23; 1 Hawk. P. C. 267, 270; 4 Bl. Comm. 171, 173; 8 State Tr. 73.

WASHINGTON, Circuit Justice (charging jury). Although this case will probably be decided upon the evidence, it is of great importance that the questions of law which have been raised, in the able discussion which the case has received, should be settled—in order that the commanders of our public armed vessels, and more particularly those belonging to commissioned privateers, may know how far their commissions authorize them to go, in relation to neutral vessels which they may meet with at sea. The offence charged in this indictment, is piracy, by a robbery, committed upon the property of a neutral, met with on the high seas. Before a definition of robbery is attempted, it will be proper to dispose of some preliminary objections, intended to show that robbery on the high seas is not an offence punishable as piracy, by the laws of the United States. It is said, that the defendant is not indicted for piracy, under the law of nations;—that in the courts of the United States, no indictment at common law will lie; and that there is no statute of the United States, which makes this an offence. It is true, that the defendant is not indicted for an offence against the law of nations, or the common law; and that, unless the offence charged in this indictment be made punishable by some law of the United States, the prisoner must be acquitted. But nothing can be more clear, than that robbery on the high seas is declared to be felony and piracy, by the 8th section of the act "for the punishment of certain crimes."

We understand the argument to be, that as robbery on land is not declared by any act of congress to be a capital offense, it is not declared by this section to be piracy, if committed on the high seas. This is by no means the correct construction of the law. Murder and robbery, committed on the high seas, are declared to amount to piracy; and also, any other offence, which would be punishable with death, had it been committed on land. It is clear, that the words "which if committed within the body of a county," &c. relate not to "murder or robbery," but to the words immediately preceding, "or any other offence." All that remains, then, under this section, is to ascertain the meaning of the word "robbery"; and it is admitted that the common law definition of the term may be resorted to. If a statute of the United States uses a technical term, which is known, and its meaning fully ascertained by the common or civil law, from one or the other of which it is obviously borrowed, no doubt can exist that it is necessary to refer to the source whence it is taken, for its precise meaning.

2. It is objected, that although robbery on the high seas should be piracy under this statute of the United States, still it is repealed by subsequent laws, which subject the offender to a slighter punishment, and a different mode of trial. The answer to this is,

that the 8th and 9th sections of the law for the government of the navy, which inflicts such punishment upon those who shall take from a vessel captured at sea any part of her cargo, or embezzle the same, or who shall maltreat any of the persons, relates expressly to prizes, or to vessels seized as prize, and not to acts of piracy; and the act of June, 1812, respecting privateers, is confined to the conduct of persons on board of privateers, and is intended for their government. But for piratical acts committed on others, no punishment, or mode of trial by a court martial, is prescribed; and it would be strange if it were, when it is observed that this court martial is to be called upon the application of the captain of the privateer: for, suppose the captain and his crew should commit piracy, by robbery, or by running away with the vessel—he would be the last man to invite an inquiry by a court martial; and yet it is said, that for such an act, he cannot be tried by the proper civil tribunal of the United States. This cannot be the law.

3. Having disposed of these objections, it will be proper to give the definition of robbery, which is the felonious taking of goods from the person of another, or in his presence, by violence, or by putting him in fear, and against his will. It is objected, that the taking must be from the person. The law is otherwise; for if it be in the presence of the owner,—as if by intimidation he is compelled to open his desk, from which his money is taken, or to throw down his purse, which the robber picks up,—it is robbery; as much as if he has put his hand into the pocket of the owner, and taken money from thence. See 2 East, Cr. Law, 707; 1 Hale, P. C. 533; 1 Hawk. P. C. c. 34, § 5. But the taking must be in the presence of the owner. We have then got so far in the examination of this cause, as to have ascertained that the felonious taking of goods from the person of another, or in his presence, on the high seas, by violence, or by putting him in fear, and against his will, is felony and piracy by the law of the United States, and punishable with death.

4. But the taking must be felonious; and it is contended, in behalf of the prisoner, that spoliation of the property of a neutral, on the high seas by a commissioned cruiser, cannot be felonious, and consequently is not piracy;—that the commission is a complete shield to the persons acting under, though in contravention of it, against any species of taking, although the same would amount to robbery, at common law, if committed on land. The counsel on each side have directed their principal strength to this part of the case; and its novelty, as well as its importance, has merited the attention which has been bestowed upon the examination of it. But we ask, where do the counsel find this qualification of the general rule, that robbery on the high seas is piracy? Not in the 8th section of the act of congress constituting this offence. That section is general in its expressions, and applies to all persons whatsoever committing robbery on the high seas. Not in the law of nations—for many respectable writers on public law, are express upon the subject, that piracy may be committed by persons acting under a commission to cruise; and there is not a dictum of any writer to the contrary, to our recollection. Such is the clear opinion of Sir Leoline Jenkins, supported by Molloy, Woodeson, and by the decision given in Kyd's Case, 5 State Tr. 313, 314; which latter case, though decided at common law, is clearly bottomed upon the principles of the maritime law of nations, with which the common law in this respect agrees. This doctrine is not contradicted by Bynkershoek, who was relied upon by the prisoner's counsel, who merely says[2] that if a commissioned cruiser exceed his authority, he would not, on that account, hold him to be a pirate. Neither is he held to be a pirate, or contended in this argument, by any person, to be a pirate on that account. If such a cruiser capture a neutral vessel, he exceeds his authority; but if he takes her as prize, it is a marine trespass, but not an act of piracy. Yet if the taking be felonious, and with intent to commit a robbery, this writer does not say, that the act would not amount to piracy; and certainly it would be strange, if a commission to do a lawful act, sanctioned by the law of nations, could grant, by implication, impunity against a crime which that law views with abhorrence, and which all civilized nations unite in punishing with the greatest severity.

The counsel, who endeavour to maintain this qualification of the general law of piracy, would not, we presume, turn to the common law, in order to find it; and if they were to do so, they would equally be disappointed. Beside the positive decision against it in Kyd's Case, there is no analogy to the doctrine, to be met with in the common law. If an officer, having a warrant against a particular individual, to arrest his person, or to seize his property, should abuse the person of his prisoner or his property, or should take the property of some other person than of him against whom the writ was directed, he would be a trespasser; should he, under cover of such an authority, steal the property, it would be larceny. So, with respect to a commissioned cruiser. If he take the property of a neutral, he is a trespasser, and will be compelled, not only to make restitution, but compensation also, in damages, unless he had probable cause for seizing the property as good prize. And if he should

[2] The words of this learned writer are, "but whether one be a pirate or not, depends upon the fact, whether he has or not, a commission to cruise; and if it should be alleged, that he exceeded the authority which that commission gave him, I would not, on that account, hold him to be a pirate."

make the seizure, not as prize, but with a felonious intent to convert the property to his own use, without inquiry and trial, what reason can be given, why his commission should shield him from the charge of felony and piracy? In deciding in either case, whether the act amounts to trespass or felony, the quo animo is to be sought after, and is to be judged of by the actions of the party. If the doctrine, that a commissioned cruiser cannot commit an act of piracy, is not to be found in the 8th section of the act of congress, nor in the common law, or law of nations, does it receive any countenance in the provisions of the 9th section of the same act of congress? We understand the argument founded upon this section, to be this;—that if a commission granted to a cruiser by the United States, does not protect one of its citizens against a charge of piracy, committed upon a neutral and a foreigner, a commission granted by a foreign nation to one of our citizens, would not excuse a piratical or hostile act committed against another citizen, or against the United States. The 9th section, therefore, was altogether unnecessary, since, upon the doctrine that the commission in such case makes no difference, the offence described in the 9th section, would be punishable under the general expressions contained in the 8th section. But the legislature, by introducing the former section, has thereby intimated an opinion, that even a commission granted by a foreign nation, much more one granted by the United States, would not protect the cruiser against a charge of piracy, for robbery committed upon the high seas, unless the legislature should prescribe a different rule in relation to foreign commissions. Such we understand to be the argument. Let it be remarked, in the first place, that this mode of arriving at the legislative meaning of a law, is not always to be depended upon. The reason which induced the making of the provision, from which the inference is drawn, can only be guessed at. It may be made merely from abundant caution —from inattention to some general principle of law, or of some provision in former laws; or it may be copied from a law found in some other code, without attending to the particular reason, which had induced its adoption into that code. The 9th section of this law, is, in fact, copied from the statute of the 11 & 12 Wm. III., c. 7, the history of which statute is explained by Hawkins. It was aimed at commissions granted to cruisers, by James II., after his abdication; which, by many, were considered as conferring a legal authority to cruise, so as to protect those acting under them against a charge of piracy. Still, we admit, that unless some other reason can be assigned for the introduction of a similar provision into our law, the argument which has been founded upon it, would deserve serious consideration. We do not think it difficult, to assign a very satisfactory reason for the adoption of this section, without viewing it in the light of a legislative construction of the 8th section, or of the general law.

If a citizen of the United States, should commit acts of depredation against any of the citizens of the United States, it might at least have been a question (see 2 Browne, Civil & Adm. Law, 461), whether he could be guilty of piracy, if he acted under a foreign commission, and within the scope of his authority. He might say that he acted under a commission, and not having transgressed the authority derived under it, he could not be charged criminally. But the 9th section declares, that this shall be no plea; because the authority under which he acted is not allowed to be legitimate. It declares to the person contemplated by this section, that in cases where a commission from his own government would protect him from a charge of piracy, that is, where he acted within the scope of it, or even where he acted fairly, but under a mistake, in transgressing it, yet that a foreign commission should afford him no protection, even although he had not exceeded the authority which it professed to give him. But it by no means follows from this, that a citizen, committing depredations upon foreigners or citizens, not authorized by the commission granted by his own government, and with a felonious intention; should be protected by that commission against a charge of piracy. Another object of this section seems to have been, to declare that acts of hostility, committed by a citizen against the United States, upon the high seas, under pretence of a commission issued by a foreign government; though they might amount to treason, were nevertheless piracy, and to be tried as such.

5. The only remaining question of law which has been raised in this cause is, that the prisoner ought to be presumed to have acted under the orders of his superior officer, which it was his duty to obey. This doctrine, equally alarming and unfounded, underwent an examination, and was decided by this court in the Case of General Bright [Case No. 14,647.] It is repugnant to reason, and to the positive law of the land. No military or civil officer can command an inferior to violate the laws of his country; nor will such command excuse, much less justify the act. Can it be for a moment pretended, that the general of an army, or the commander of a ship of war, can order one of his men to commit murder or felony? Certainly not. In relation to the navy, let it be remarked, that the 14th section of the law, for the better government of that part of the public force, which enjoins on inferior officers or privates the duty of obedience to their superior; cautiously speaks of the lawful orders of that superior. Disobedience of an unlawful order, must not of course be punishable; and

a court martial would, in such a case, be bound to acquit the person tried upon a charge of disobedience. We do not mean to go further than to say, that the participation of the inferior officer, in an act which he knows, or ought to know, to be illegal, will not be excused by the order of his superior.

What remains for us to say, as it concerns the evidence only, will be short. The evidence of the two Portuguese witnesses, unless it should in your opinions be overbalanced by that given in favour of the prisoner, makes out fully the case stated in the indictment. The captain, officers, and crew, of a friendly vessel, were, by intimidation and against their will, forcibly despoiled of their property by the prisoner, taken in their presence and carried away; and all this was done with a felonious intent, if it is possible by the conduct and actions of men to develop their intentions;—that the prisoner did not act under a mistaken opinion, that the property belonged to enemies, is plain; because in that case, it would have been good prize, and the seizure would have been made as prize, and would, and ought to have been, sent in for adjudication. But no attempt of this sort was made. The spoliation was made under false colours; and the illegality of it was acknowledged by the prisoner, when he spoke of payment being made for the property, by the English consul, at Lisbon. It has not been pretended, that the privateer had not men enough to spare, for the purpose of taking possession of this vessel, and sending her in for adjudication, if it ever was the intention of the captors to consider her as prize. The plundered property was carried to the privateer, and instead of being preserved with a view to future inquiry, it was converted to the use of the spoliators; part of it at least, divided amongst them, and the rest concealed. After their arrival within the United States, instead of instituting proceedings for the purpose of condemning the property, a profound silence in relation to it was observed. These circumstances, if sufficiently made out in proof, are sufficient to establish a felonious intent. Le Brun and Whitford, supported by two other witnesses, all of them belonging to the privateer, confirm the testimony of the Portuguese captain and mate, as to the spoliation. All of them concur in describing a scene of lawless plunder, disgraceful to the national character of our country, and to that flag, which the gallantry of our naval officers and their crews has signalized, and caused to be respected. But, as to the identity of the prisoner, the evidence of the four witnesses belonging to the privateer, is directly opposed to that of the two Portuguese witnesses. They concur in stating that the prisoner first boarded the brig, and that his conduct, during the short time he remained on board of her, was unexceptionable;—that he forbade his men to take away with them the smallest article, threatening them with the most severe punishment, in case of disobedience;—that he returned to the privateer indisposed, and was either asleep, or appeared to be so, during the whole time that the robbery, by the order of Captain Butler, was committed. The Portuguese witnesses are positive, as to the identity of the prisoner. But without imputing to these much abused strangers, an intentional deviation from truth, it is possible they may very innocently have mistaken Hancock for the prisoner; as it appears that they strongly resemble each other, in the features of the face and in size. If, indeed, the prisoner's witnesses are believed, the mistake is apparent; because they prove the dress of Hancock to have been precisely that, by which the prisoner is described by the Portuguese witnesses; and that of the prisoner, to have been different in all respects. To you it belongs, to weigh conflicting evidence, and to judge of the credit of witnesses; and in doing this, you ought to throw into the prisoner's scale, the good character, which, previous to this affair, he is proved to have borne.

Should you incline to acquit the prisoner of any active participation in this robbery, he cannot be convicted upon the ground of his being a member of the society which committed the offense. If a number of persons associate to do an unlawful act, and proceed to its execution, it will be no excuse to one of them who was present, that he did not individually do the act—all are principals. But if the thing to be accomplished be lawful, as the visitation of this vessel was, and all but one of the party commit felony, though in the presence of that one, but without his participation; the crime of his companions is not imputable to him. You will now retire, and consider of this case.

Verdict, not guilty.

Case No. 15,495.

UNITED STATES v. JONES et al.

[3 Wash. C. C. 224.] [1]

Circuit Court, D. Pennsylvania. April Term, 1813.

CRIMINAL LAW — BAIL — ILLNESS OF PRISONER — EVIDENCE.

1. The humanity of the law, no less than the feelings of the court, favour the liberation of a prisoner on bail, who is proved to be suffering under a disease, which may be ultimately dangerous, from his being kept in confinement. It is not necessary that the danger from confinement should be either immediate or certain—if the disease is represented, by a skilful physician, to be such as that confinement must be injurious, and may be fatal, it is proper to bail the prisoner.

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

2. A bill of indictment being found against a prisoner, the court will not go into an examination of the evidence, for the purpose of taking bail.

[Cited in Kendle v. Tarbell, 24 Ohio St. 200; People v. Tinder, 19 Cal. 547; State v. Herndon (N. C.) 12 S. E. 270.]

Indictment for piracy. The district attorney, having stated to the court, that he could not safely try this case at the present term, on account of the absence of material witnesses, whose attendance at the next court, steps were taking to procure, directed the case, with the assent of the court, to be continued.

A motion was now made to admit the prisoners [Jones, Pickle, and Reese] to bail, upon the ground that the continuance was not made by order of the court, upon a motion for that purpose, founded upon an affidavit of the absence of material witnesses. An additional reason was assigned as to Jones —that his state of health required it. As to Reese, his counsel proposed to go into the evidence against him, to show that he ought to be bailed, because when the subject of bail was under the consideration of the district judge, the case of this man was not before him.

WASHINGTON, Circuit Justice. In the exercise of that discretion with which the law invests the court upon this subject, we should no doubt be greatly influenced to a favourable exercise of it, where the continuance appeared to be capricious and unreasonable on the part of the law officer of the court. But in this case, a very sufficient reason for the continuance was assigned by the district attorney; and though not verified by affidavit, the court was satisfied, and assented to the continuance. This, therefore, furnishes no good cause for bailing the prisoners. As to Jones, it is proved by the physician who has attended him since February, in jail, that his health is bad, his complaint pulmonary, and that, in his opinion, confinement during the summer might so far increase his disorder as to render it ultimately dangerous. The humanity of our laws, not less than the feelings of the court, favour the liberation of a prisoner upon bail, under such circumstances. It is not necessary, in our view of the subject, that the danger which may arise from his confinement should be either immediate or certain. If, in the opinion of a skilful physician, the nature of his disorder is such that confinement must be injurious, and may be fatal, we think he ought to be bailed.

As to the case of Reese, it is immaterial, now, whether his case was before the district judge, or not. The bill of indictment being found, we do not feel ourselves at liberty to inquire into the evidence against him.

Bail for Jones ordered in 10,000 dollars himself, and two sureties, each 5000 dollars.

[NOTE. Defendant Jones was subsequently tried and acquitted. Case No. 15,494. At the April term, 1814, the other two defendants were tried together, and also acquitted. Case No. 15,496.]

Case No. 15,496.

UNITED STATES v. JONES et al.

[3 Wash. C. C. 228.] [1]

Circuit Court, D. Pennsylvania. April Term, 1814.

PIRACY — UNLAWFUL ACTS OF PRIVATEERS — EVIDENCE.

1. Indictment for piracy committed on a Spanish vessel by the defendants, the first lieutenant and subaltern officers of the American privateer Revenge. As there is no proof that in the first instance any unlawful acts were meditated by the commander of the Revenge and his officers, it will not be sufficient to prove acts of robbery committed by him and his crew generally—it must be proved that the defendants participated in the taking, and that they did it feloniously.

2. The jury should be satisfied, if they believe that the defendants participated in the taking of the property from on board the Spanish vessel, that they knew, or might have known, at the time of capture, that robbery, and not capture as prize, was contemplated.

3. The captain of the Revenge may have been guilty of robbery, and those who executed his orders be innocent.

This was an indictment against these persons [Jones, Pickle, and Reese] for piracy, committed on the high seas. Jones was the first lieutenant, and the other defendants subaltern officers on board of the Revenge, a commissioned privateer commanded by Captain Butler. It was proved, that during her cruise, in November, 1812, she fell in with a Spanish ship on a voyage from Havana to Cadiz, which she had chased for upwards of an hour before she came up with her. The Revenge was under English colours, and the ship under Spanish, as proved on the part of the prosecution—and under English, as stated by some of the prisoners' witnesses. The ship fired two guns to windward, but at such a distance as could not reach the privateer, and which was done, as was proved by one of the mariners of the ship, to induce the privateer to display her real character. When the privateer got near to her, she gave her a broadside, and afterwards a discharge of musketry; and she struck her colours. The witnesses for the prosecution stated that all these acts of hostility were committed under English colours, which was denied by those for the prisoners. The captain of the ship was ordered on board with his papers, and he, together with the crew who accompanied him, were put into irons, and placed on the deck. Jones was ordered to go on board the ship, and examine into her character. It is doubtful, from the evidence, whether it was during the half-hour that he remained in

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

the ship, or after he had returned to the privateer, that a bag of dollars was brought by some of the crew of the privateer from the ship to the privateer. Butler, having learned from the Spanish captain that he had more silver on board, he sent information of this discovery to Pickle and those then on board the ship, with directions to search for and send it to the privateer. Eight boxes were accordingly brought to the privateer, containing 3000 dollars each, which, by Butler's orders, were deposited in the cabin. By orders from the same quarter, the persons of the Spanish captain and his crew were searched for valuables; and five doubloons, and a gold watch, were taken from one of them by Butler, and deposited in the cabin. The captain and crew of the Spanish ship were then sent on board their ship, and ordered to make sail; which they did. It was proved, that when Jones returned from the Spanish ship, he reported to the captain that she was Spanish.

Two or three days after this transaction, the privateer again overhauled this same ship making for Savannah, with a view, as the captain said, to repair the losses they had sustained in the clothes taken from his crew, by those of the Revenge. Butler returned them some of their clothes, and then ordered the Spanish captain to proceed on his voyage, threatening to sink him if he should meet with him again on the American coast; and the better to ensure his departure, he convoyed him from the coast for about two days. Within a day or two after the money was taken from the ship, it was divided amongst the officers and crew, although no direct proof was given, that the prisoners received any part of it. The Revenge put into Charleston, where no proceedings were instituted for condemning the property taken from the Spanish ship. Butler was apprehended and tried at Charleston. The prisoners came on to Philadelphia, where they were apprehended.

It was contended, by Mr. Rawle and Charles J. Ingersoll, for the prisoners, that robbery, not being defined by any statute of congress, the common law cannot be resorted to in order to prove, that the taking in this case amounted to that offence. It was also contended, that a commissioned privateer cannot commit piracy. Upon the merits, it was argued, that the seizure in the first instance, was for the purpose of examination; and of course, that all the acts of the prisoners were then performed in obedience to the lawful commands of Captain Butler, and could not be rendered criminal by the subsequent unlawful conduct of the captain.

WASHINGTON, Circuit Justice (charging jury). All the legal objections urged by the counsel for these prisoners, were examined and decided by the court, in the case of U. S. v. Jones, which was tried twelve months ago; which opinion it will be sufficient to read on this occasion. See [Cases Nos. 15,494 and 15,495]. We pass on, therefore, to the only question which is at all important in this case; and that is, whether the felonious intent with which the prisoners are charged to have spoiled the Spanish vessel, is made out by the evidence.

That an act of piracy, never surpassed in atrocity, has been committed in this case, cannot be denied by any person who has heard the evidence. But since there is no proof, that, in the first instance, any unlawful acts were avowed by Captain Butler, or meditated by his officers and crew, it will not be sufficient, to prove acts of robbery committed by him and his crew generally; to convict the prisoners, it must not only be proved that they participated in the taking, but that they did it feloniously. Whether the first is brought home to all the prisoners, must depend upon the evidence, of which the jury will judge. But should the fact, in your opinion, be sufficiently established, still, you must be satisfied, that the prisoners knew, or ought to have known, at the time they acted, that robbery, and not a seizure as prize, was contemplated by the captain or themselves; and it is in this point of view only, that the orders of Captain Butler can, in any manner, afford a shield to those whose duty it was to obey them. For, he may have been guilty of robbery, and those who executed his orders be innocent, or partakers in his guilt, according to the circumstances of the case. If Captain Butler intended to act within the scope of his commission, he had an authority to bring this vessel to, to examine her papers, her officers and crew; and to take as much time as was necessary to enable him to decide ultimately as to her real character, and as to the conduct which it would become him to pursue. If he concluded that the ship and cargo, or the latter, really belonged to the enemy, or that she had been guilty of unneutral conduct, and was of course good prize, it was his duty to put a prize-master on board of her, and to send her in to some port of the United States for adjudication. It was not regular for him to break bulk, and to take any part of the cargo on board the privateer, unless in a case of necessity, as where he had not a sufficient number of men to spare as many as might be necessary to bring the prize into port. This was not the case with the Revenge. But this irregularity would not, of itself, be sufficient to render the conduct of Captain Butler criminal, if he had in other respects shown that his intentions were honest. So far from this, he gives the most complete proof of the intention with which this seizure was made, by dividing the spoil with his crew, ordering the Spanish vessel from the coast, and after he got to Charleston, taking no steps to obtain a condemnation of the property he had seized. This conduct would be sufficient to establish the charge of piracy against Butler; as much so, as if he had declared, in the first instance, that the seizure

was not as prize, but with a view to plunder.

But, in relation to those who acted under the orders of Butler, the same inference does not necessarily follow. He had a right to command those persons to visit the Spanish ship, to bring away her papers, and if he pleased to go so far, even to tranship her cargo, and to take from the persons of the crew, whatever valuables might be found on them. These orders were not inconsistent with the act of seizing the property as prize, and at most, could only be considered as equivocal. Unattended by other circumstances, to induce a well-grounded suspicion of the honesty of Butler's intentions, the orders were legal, and the prisoners were bound to obey them. If so, the subsequent evidence which the conduct of Butler afforded of the quo animo, with which the seizure was made, cannot be used against these men, to fix the charge of a felonicus taking upon them, notwithstanding it was quite sufficient to criminate him, who gave the orders. The prisoners acted very improperly, in accepting any share of the plunder, before it was regularly condemned; but this would not, of itself, afford direct proof, that they executed the orders of their commander, knowing that they were illegal and criminal. It must, at the same time, be admitted, that connecting all the subsequent events with the original taking, the innocence of the prisoners may well be suspected; and the jury may presume, that they acted under an impression from the beginning, that it was not the intention of Captain Butler to seize this property as prize. It does not appear, that an intention to make a seizure of this character, was ever declared by Butler. The ordering the Spanish vessel from the coast; the division of the plunder; and the secrecy observed in relation to these transactions by Butler and the prisoners, after they landed at Charleston, without a murmur of disapprobation having at any time been heard to escape from the prisoners to the captain; are all circumstances to be weighed by the jury, to prove a felonious intent in the prisoners, at the time they obeyed the orders of their commander. Should you, gentlemen, be of opinion, that this is the fair inference to be deduced from those circumstances. then the prisoners cannot shield themselves under the orders of their captain; and in that case, your verdict ought to find them guilty. But if you cannot conscientiously make such an inference, then it will be your duty tc acquit the prisoners.

Verdict, "Not guilty."

UNITED STATES (JONES v.). See Case No. 7,499.

Case No. 15,497.

UNITED STATES v. JONNSON.

[See Case No. 15,482a.]

Case No. 15,498.

UNITED STATES v. JORDAN et al.

[2 Lowell, 537;[1] 23 Int. Rev. Rec. 9.]

District Court, D. Massachusetts. Dec., 1876.

CUSTOMS LAWS—ILLEGAL IMPORTATIONS — FORFEITURES—REPEALING STATUTES.

1. Section 2 of St. March 3, 1823 [3 Stat. 781], which imposes a forfeiture of double the value of goods illegally imported, upon any one who knowingly receives them, is not confined to goods imported from territory adjoining the United States.

2. Nor is that section confined to cases arising under statutes in operation when that section was enacted.

3. The act of entering goods by a false invoice comes within the definition of an illegal "importation" under that section.

[Cited in U. S. v. 2,419 Sheepskins, Case No. 16,589a.]

4. That section was repealed by the Revised Statutes, which were passed June 22, 1874 [18 Stat. 186], and not before, and then not retroactively; and this case, which was begun May 1, 1874, is not affected by the repeal.

5. Congress appears, in Rev. St. § 5596, to express the opinion that this section had been repealed by some statute before 1874, and they probably had in mind the act of 1866; but this expression of opinion does not overrule U. S. v. Stockwell, 13 Wall. [80 U. S.] 431.

E. R. Hoar and G. P. Sanger, Dist. Atty., for the United States.

B. F. Brooks and F. W. Hurd, for defendants.

LOWELL, District Judge. The eighty-one counts for double values are brought under section 2 of the act of March 3, 1823 (3 Stat. 781), which imposes that penalty upon all persons who shall receive goods, knowing them to have been illegally imported and liable to seizure by virtue of any act relating to the revenue; which is understood, according to the decision in Stockwell v. U. S., 13 Wall. [80 U. S.] 531, to subject the importer himself to a penalty or forfeiture of treble the value of the goods so imported: one as importer, and two as receiver; and the declaration in this action is framed on that theory, which is not now denied by the defendants. But they maintain, in support of their demurrer, that in certain particulars this case differs from Stockwell's, and that these are of vital consequence. The illegality is alleged to have consisted in entering goods by means of fraudulent invoices.

1. The first point taken is, that the act of 1823 only applies to importations from adjacent territory. It is true that the title of the act makes it an amendment of that of 1821, which is exclusively devoted to such importations; but the second section mentions "any act relating to the revenue," and this is too clear to be controlled by the title.

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

Hadden v. The Collector, 5 Wall. [72 U. S.] 107.

2. The second objection is, that the section in question is not prospective, but relates solely to statutes then in existence. Here, again, the language seems to be unambiguous, and to mean that as fast as laws are passed relating to the revenue, which impose forfeitures and permit seizures, this law will apply. The Case of Stockwell is in point, for the law which was said to have been violated in that case, as I understand it, was that of Aug. 30, 1842.

3. The third objection is, that all the illegal acts relied on were done after the importation of the goods, because that was complete when the vessel arrived at her port of destination, and entering goods is no part of the importation. The decisions cited establish beyond question that, for many purposes, such as fixing the date at which a statute raising or lowering duties takes effect upon any goods, the importation or bringing into the United States is consummated when the vessel arrives. If a different meaning is to attach to the word in the act of 1823, it is a subject of regret, because confusion must follow from the use of the same word in different senses in the same set of laws.

I am of opinion, notwithstanding, that it is impossible to confine the section within the strict limits demanded by the defendants' argument. The revenue laws use the words "to import," "to bring in," "to introduce," as synonymous. Thus the act of Aug. 30, 1842, § 19 (5 Stat. 565): "If any person shall knowingly and wilfully, with intent to defraud the revenue, smuggle or clandestinely introduce into the United States;" the act of July 18, 1866, § 4 (14 Stat. 179): "If any person shall fraudulently or knowingly import or bring into the United States," &c.; and there are many others.

Under these statutes, smuggling, or bringing in, or introducing goods, has been held by both the circuit and district courts for this district for a long course of years to be proved by evidence of the secret landing of goods, without paying or securing the duties, which, according to the argument here, would be quite inadmissible, if the importation in the sense contended for had no element of concealment about it. I have never known a case of smuggling in which any concealment on board the vessel was relied on by the government. The gist of the offence is the evasion or attempted evasion of the duties, and they, to be sure, are due when the vessel arrives; but they are not payable until some time after, and it is the default in paying which is the fraud, or in omitting the acts which immediately precede the payment.

These decisions have been acquiesced in by able counsel, and are the law of this circuit at least, and, I doubt not, of all, so far as the statute of 1842 is concerned. Here, then, we see that a bringing on shore without making entry, &c., is part of the importation or introduction of the goods, and makes it illegal.

Under the statute of 1866, it was held by some very able judges, in the cases cited at the bar, that goods could not be said to be illegally imported unless the very act of bringing them within a port of the United States was unlawful. The law of this circuit is otherwise, as I have said; and, in a recent decision by Mr. Justice Strong, at circuit, U. S. v. Nine Trunks [Case No. 15,885], the cases referred to are held to be too narrow. In that case, an importer came over with his goods, packed in trunks, and passed them off for luggage, and procured them to be landed as such; then, becoming alarmed, attempted to make proper declaration of them. The learned judge held not only that the goods were landed without a permit, in the true sense of the law, but that they were illegally imported, in this, that the importer had not prepared himself with the invoices necessary to their entry at the custom-house. It was a clear case of smuggling, under the construction given to the act of 1842; but that statute had been repealed by the Revised Statutes through a misunderstanding, and the decision was, as I have stated, that is to say, that the statute of 1866 should be construed to include a fraud connected with the entry of the goods or an intent not to enter them. That decision, as I understand it, would apply the law to a fraudulent invoice as well as to the absence of an invoice.

Let us look at the history of this section and of the words used in it. The collection act of 1799, § 69 (1 Stat. 678), provides that if any person shall conceal or buy goods, knowing them to be liable to seizure by virtue of that act, he shall pay double the value. The act of 1823 adds the word "receive," and makes the knowledge to be of their having been illegally imported and liable to seizure under any revenue law, and not merely "liable to seizure under this act." It is by no means clear that "and" might not be construed "or" in this connection; but, passing that consideration, it seems clear that this section was intended to enlarge rather than to restrict the operation of section 67 of the act of 1799. I have not been told what illegal importations there could be under the statutes concerning the revenue then in force, unless we give the word an enlarged meaning; because, as was justly said by the defendants' counsel, the non-intercourse and navigation acts are not laws relating to the revenue, and I have not found any possible illegality, excepting as against those statutes, in the mere bringing of goods within the limits of a port of the United States.

By the act of 1799, importers of distilled spirits, wines, and teas, were obliged to make careful report and entry of those articles, for which very minute directions

were given. The articles were then to be inspected, and the inspector was to give a certificate to accompany each package, and to be passed over to every purchaser; and if any one in possession of such articles could not produce a certificate, the goods were liable to seizure; and if, upon the trial, the owner should not prove that the goods were "imported into the United States according to law," and the duties thereon paid or secured, they should be adjudged to be forfeited. Section 43 (1 Stat. 660). I cannot discover from the statute that the words, "imported into the United States according to law," mean, in this connection, any thing else than duly reported, entered, &c., and this not merely as to form, but in substance, that is, by a true report and entry. The defendants argue that this part of the act of 1823 refers merely to importations from adjacent territory, under the act of 1821. If this were so, there is no illegal importation possible in the restricted sense contended for. The act of 1821 provides, that every person coming from any foreign territory adjacent to the United States with merchandise subject to duty shall deliver a manifest thereof at the office of any collector or deputy collector which shall be nearest the boundary line or the road or waters by which the merchandise is brought; and, if he shall neglect or refuse to deliver the manifest, or pass by or avoid such office, the merchandise shall be forfeited. To neglect or refuse to deliver a manifest, or to avoid going to the nearest office, are acts which, according to the argument here, are subsequent to the importation, and therefore there was nothing on which the act of 1823 could operate. But if such neglect or avoidance makes the importation illegal, which this part of the argument admits, then I do not see why the presenting a fraudulent manifest, if that had been mentioned in the statute, as a fraudulent invoice is in the law which is said to have been violated in this case, would not equally relate back, if relation is necessary, and be a solid ground for holding the importation to be illegal.

Finally, there is U. S. v. Stockwell, 13 Wall. [80 U. S.] 531, which is the principal authority in all parts of this case, in which the charge was of receiving goods which had been imported without payment of the duties, to which the remarks already made apply, that the neglect to pay duties must have arisen after the goods were brought within the limits of the port of destination.

4. Another important and difficult question is whether the second section of the act of 1823 was repealed before May 1, 1874, the date of the writ in this action. It cannot be doubted that section 5596 of the Revised Statutes repealed this law; but this action being already on the docket on the 22d June, 1874, when the Revised Statutes were passed, and the repeal being conditional, saving all penalties and forfeitures, and all actions civil and criminal, it is essential to the defendants' case to carry the repeal further back.

They contend that the act of July 18, 1866 (14 Stat. 179), worked a repeal of the section in question; and they have furnished me with manuscript copies of the opinions of the district and circuit courts (Judges Blatchford and Johnson) for the Southern district of New York, in U. S. v. Claflin [Case No. 14,799], where this point is adjudged. As I cannot agree with these judgments, I am bound to give my reasons. The reasoning of the learned judges makes it appear very probable that congress considered section 2 of the act of 1823 to have been repealed by that of 1866. Congress say, in section 5596, that in respect to all statutes of which any part is contained in the revision, they repeal the parts which they have omitted, and that they have omitted only what was already repealed. The repeal is clear, but the reason may be an unsound one. I can recall to mind at this moment two instances, besides this, in which section 5596 repeals laws which had never been repealed or superseded before; and I have no doubt there are many others. U. S. v. Claflin [supra], decides that this expression of opinion by congress has the effect of a retroactive repeal, and binds the judgment of the courts in respect to causes of action arising between 1866 and 22d June, 1874, which had not ripened into a decree on that day. This is the point of difference between us. Congress had an undoubted right to repeal the act of 1823, and to drop with it all causes of action vested in the United States; but an expression of its opinion, not taking the form of a law, is not a precedent which I am to follow against a judgment of the supreme court. In Stockwell's Case the decision was that the section in question was not repealed by the act of 1866. It is said, in the opinion of Johnson, J., above referred to, that the forfeitures in Stockwell's Case had accrued before July 18, 1866, which is true; but as the statute of that date did not save penalties and forfeitures, but only actions and indictments then pending, and as the action against Stockwell was not then pending, the point was properly and necessarily before the supreme court, and was decided. Put in the strongest way for the defendants, the repealing sections of the Revised Statutes, as applied to this statute, read thus: Whereas, the supreme court has decided that the act of 1866 did not repeal that of 1823, and whereas, we think it did, now, therefore, we repeal it, but we save all penalties, actions, &c. Granting, as I have already done, the power of congress to repeal all laws which give penalties and forfeitures to the United States, and this without saving any not yet enforced, still it does seem to me clear that they carefully abstained from doing any thing of the sort in this particular case. What I do not grant, is the power

of congress to bind the court by a mere expression of opinion: it must be by a legislative act, and this they have not attempted.

Judge Blatchford has cited three late cases in the supreme court, in two of which the effect of the Revised Statutes, and in the third that of another statute, is referred to in construing earlier statutes and applying them to cases arising before, but determined after, the repeal: Murdock v. Memphis, 20 Wall. [87 U. S.] 590; Smythe v. Fiske, 23 Wall. [90 U. S.] 374; Bailey v. Clark, 21 Wall. [88 U. S.] 284. Neither of these cases decides that the opinion of congress is to control the courts. The first two appear to me to express the contrary opinion with reasonable clearness, though the point was not in judgment. The last is a case in which congress had said that a certain phrase in a former revenue act should be construed in a certain way favorable to the tax-payer. The court decided that this was the true construction, and added that the act of congress appeared to apply to cases arising before its passage; and they imply, undoubtedly, that congress may make such a declaration. This is precisely what I have already conceded to be within the power of the legislature; namely, to diminish the rights of the United States, though I should doubt very much their right to increase the burdens of the citizens retroactively. The difficulty which I find in this case is, to see that congress has made any such declaration. The general rule that neither congress nor any other legislature in the United States is to exercise the purely judicial power of deciding the state of the law, without a legislative act to take such effect as it may lawfully have, is one of the points upon which I know of no conflict of opinion, and, therefore, do not cite authorities for it.

If I had any right to express a personal wish, it might be that a higher authority shall find my construction of the repealing act to be other than that which I feel bound to affix to it. But in my own mind the point would not be doubtful, were it not for the case of U. S. v. Claflin; and, notwithstanding that decision, I am unable to reach a different conclusion. Demurrer overruled.

This case was compromised soon after the foregoing opinion had been delivered.

UNITED STATES v. The JOSHUA LEVINESS. See Case No. 7,549.

Case No. 15,498a.

UNITED STATES v. The JOSIE et al.

[N. Y. Times, April 11, 1864.]

District Court, S. D. New York. 1864.

COMMERCE WITH INSURRECTIONARY STATES—FORFEITURES—CONSTRUCTION OF STATUTE.

[The act of July 13, 1861 (12 Stat. 255), is to be construed as positively prohibiting citizens or residents alike in the loyal and insurrectionary states from all commercial intercourse and dealing with a view to reciprocity of gains, or in manifestation of feelings of amity and aid towards each other, whether in acts of material support or friendly encouragement to the enemy. Property intended to be used to these ends and the vehicle employed to convey it, either gratuitously or for profit, are alike subject to confiscation. The absolute culpability of the property is independent of all questions of contraband or blockade, or of the intrinsic value or adaptation to belligerent uses of the articles to be interchanged, or the degree of progress made in completing the object of the parties.]

This was a libel of information filed under the act of congress of July 13, 1861, which provides that "all goods and chattels, wares and merchandise coming from an insurrectionary state or section into the other parts of the United States, and all proceeding to such state or section by land or water, shall, together with the vessel or vehicle conveying the same, be forfeited to the United States." The Josie was a small steamer, formerly called the "Eagle." She was captured in an attempt to break the blockade, condemned by the district court of Florida, brought here, and sold at public auction; Joseph Eneas, of this city, becoming her purchaser. He put some repairs on her, put a cargo on board, and cleared her for Havana. Before she left the port, however, she was seized, and these proceedings were commenced against her and her cargo. Her cargo was principally potatoes, apples and cabbages. There was, however, on board, some cases of dry goods and liquors, and a light wagon and harness. The government gave evidence by which they endeavored to show that these goods were the property of a man named J. Howard Wagnon, and that he was a resident of Alabama; while the claimant gave evidence to show that Wagnon was a resident of Nassau, and that the goods were the property of the claimant, paid for by him on Wagnon's order, and to be delivered to him at Nassau, on his paying the price. There was also found on board in the chest of the steward some Masonic books directed to a resident of Charleston, S. C., and a witness was called who testified that he gave them to the steward to carry to their address, and that the steward told him the steamer was going to run the blockade. The steward was not called as a witness by either party, but there was evidence that he had left the vessel after her seizure with custom house officers, and had not been seen since. There was also found in the valise of Craig, the assistant engineer, a small piece of merino cloth for a baby's dress, with a letter addressed to a man named Conley at Montgomery, Ala., unsigned, but stating that the writer had "concluded to send some merino." Craig himself had been living in Florida for some years. He was captured on a vessel coming from there, and taken to Key West, whence by some mistake he was brought here. and was here discharged by the authorities. He testified that he had

shipped on the vessel to go to Havana, and meant to leave her there, and that if he could not have got his wife out from Florida, he should have gone to her if he could; that his parents lived in New Jersey, and that while he was with them a sister of this man Conley applied to him to take a note to her brother, but said nothing about any baby's dress; that his valise was packed by his parents, and sent to him on board the vessel; that he had not opened it, and did not know of the package for Conley until the valise was searched on board the vessel by the custom-house officers, and that no one on the vessel knew of his intention to go farther than to Havana.

The government gave evidence to show that the vessel was fitted to run the blockade, and the claimant gave evidence to show that she was fitted to run among the West India Islands or anywhere on short voyages. The claimant proved the payment by him of the purchase-money for the vessel. The bill of sale of the vessel, signed by the United States marshal of Florida, however, left the name of the purchaser in blank. A custom-house officer testified that one day, on the dock, he met the claimant, and spoke to him about having bought the vessel, and that the claimant said he did not own her. This, however, was positively denied by the claimant. Evidence was also allowed, under the claimant's objection, of statements in reference to the ownership of the vessel by third parties, which were made not in presence of claimant or any of his agents.

The government claimed that the vessel was forfeited on several grounds, viz.: that she was not really owned by claimant, but by residents of the insurrectionary states; that she was not bound, as she purported to be, on a voyage to Havana, Nassau, and back to New York, but was really intended to run the blockade; that she was conveying the liquors and the wagon to residents in the rebel states; that the baby's dress was certainly proceeding thither, and that the conveyance of that by her even to Havana was sufficient to forfeit the vessel. It was urged by the claimant that the evidence showed that he was the only owner of the vessel and the whole cargo, and that she was bound upon the voyage for which she had cleared; that there was no proof that any of the goods were going to the rebel states in the vessel, and no proof that the claimant had any knowledge of the presence on board of either the Masonic books or the baby's dress, and that a vessel could not be forfeited by the presence on board, without the knowledge of her owner or master, of articles which some other person might have put on board with a design to send them ultimately by another conveyance to the rebel states, but that either she must be herself proceeding thither, or must have articles on board known to her owners to be proceeding thither.

The District Attorney and Webster & Craig, for the United States.

Benedict, Burr & Benedict, for claimant.

BETTS, District Judge, after stating the pleadings in the case, thus proceeded:

The determination of this case depends upon a minute tissue of indirect and inferential evidence spread out before the court in extended statements, verbal and written, elaborated and expounded by counsel with great ability and earnestness. Whichever conclusions may be adopted by the court on the multiplex and very dubious reliability of no inconceivable [inconsiderable] portion of the evidence, there is little probability that the parties will be inclined to receive the decision as a finality in the case, it being, moreover, almost a pioneer in this class of prosecutions. On finishing the study of the cause accordingly, I deemed it excusable to forbear the task of collecting, analyzing and collating the mass of proofs furnished in the suit, and vindicating with exactitude the deductions adopted by the court. The course will rather be to declare with perspicuity the result of my views of the case, as it stands before me, and have it abide the ultimate judgment of the higher courts upon the solidity of the considerations which governed the present determination.

I therefore declare: First, that the statute referred to is positively prohibitory to citizens or residents alike, in the loyal and insurrectionary states during the existing war, from all intercommercial intercourse and dealing, with a view to reciprocity of gains, or in manifestation of feelings of amity and aid toward each other, either in acts of material support or friendly encouragement to the benefit of the enemy. The property intended to be used to those ends, and the vehicle employed to convey it, gratuitously or for profit, are alike confiscable, if seized proceeding to effect such purpose. The absolute culpability of the property is independent of all questions of contraband or blockade. If, then, any of the cargo of the Josie was on its way to be delivered within the rebel states, it would fall within the interdiction of the law, without regard to its intrinsic value or adaptation to belligerent uses, or the degree of progress made in completing the object of the parties concerned in the attempt.

Second. I think there is reasonable ground of suspicion, amounting to prima facie proof, arising out of the evidence before the court, that the ownership of the vessel itself was not really and honestly acquired by Eneas, the claimant, nor was it intended that the title should be vested in his name, or that she should be authoritatively controlled by him or any actual loyal owner. This evidence is strengthened by proof of declaration made by Eneas on the subject, by the appearance of the document exhibited as evi-

dence of his title, and other incidental particulars attendant upon the transaction.

Third. I regard the evidence, considered as a totality, as presenting a case of reasonable suspicion that all the goods and property on the vessel when she was arrested had previously been obtained for the use and enjoyment of inhabitants or persons then residing in or belonging to the insurrectionary states, and was, when seized, proceeding to their use and aid.

Fourth. So, also, in my opinion, the proofs, from a reasonable and grave ground of suspicion and uncontradiction, amount to prima facie evidence that the wagon and harness, the liquors procured and shipped on board the vessel, and other items put in her charge, were severally the property of rebels, and were seized in the act of proceeding to sea to the use and aid of residents in the insurrectionary states, with the knowledge of the claimant of the vessel, and furthermore, as before suggested, reasonable cause of belief is created by the proofs that the vessel herself is enemy property, or was placed wholly at his use and benefit by means of the transactions connected with her purpose and dispatch on this voyage.

Fifth. In my opinion, the evidence adduced by the claimant does not so obviate the force of the proofs given on the hearing for the libellant, as to prevent its legal effect of exacting the condemnation of both vessel and cargo.

Judgment of condemnation and forfeiture accordingly ordered.

Case No. 15,499.

UNITED STATES v. JOURDINE et al.

[4 Cranch, C. C. 338.] [1]

Circuit Court, District of Columbia. Sept. Term, 1833.

DISORDERLY HOUSE — EVIDENCE OF GENERAL REPUTATION.

Upon an indictment for keeping a disorderly house and for keeping a bawdy house, the United States cannot give evidence of the general reputation of the house, nor of the general reputation of the defendants.

[Followed in U. S. v. Nailor, Case No. 15,853.]

[Cited in Handy v. State, 63 Miss. 207; Henson v. State, 62 Md. 235.]

The indictment [against Harriet and Henriette Jourdine] had two counts: (1) For keeping a disorderly house. (2) For keeping a bawdy house.

THE COURT (MORSELL, Circuit Judge, contra) decided that the general reputation of the house could not be given in evidence by the attorney of the United States; THRUSTON, Circuit Judge, having changed his opinion since the case of U. S. v. Gray [Case No. 15,251], at May term, 1826.

Mr. Key, for the United States, then offered evidence of the general character of the defendants, who resided in the house, and were the keepers thereof.

Brent & Brice, for the defendants, objected, that as a bawdy house is defined to be a house of ill fame, kept for the resort and commerce of lewd people of both sexes, the character of the keepers is not material. 1 Jac. Dict. tit. "Bawdy House."

THE COURT (MORSELL, Circuit Judge, contra) rejected the evidence.

The defendants were found guilty upon the first count only, and were fined $20, and required to give security in $200 for their good behavior for twelve months, and to stand committed until, etc.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,500.

UNITED STATES v. JUARES.

[Cal. Law J. & Lit. Rev. 106.]

District Court, N. D. California. Nov. 9, 1862.

MEXICAN LAND GRANTS—EVIDENCE TO ESTABLISH —FORGED PAPERS—ABANDONMENT —DESCRIPTION.

1. The existence of the expediente in the Mexican archives with unquestionably genuine signatures, the note and description of the grant in the continuation of Jimeno's Index by Hartnell & Halleck, the entry in the Toma de Razon, and the records in the journals of the departmental assembly, prove, beyond all doubt, that the grant was made—notwithstanding the expediente does not contain the customary borrador, or copy of the titulo, delivered to the party.

2. Where a grant is unquestionably genuine, it will not be invalidated by an accompanying titulo which is forged and fraudulent, where it appears that neither the parties before the court claiming under such grant, nor the original grantee, were implicated in such fraud.

3. Forfeiture of a grant by abandonment cannot be predicated on any failure to occupy and cultivate, occurring subsequently to the acquisition of California by the United States. The rights of the United States and of the claimant remain in their then condition, unaffected by any acts or omissions of the grantee.

4. Quære—whether there can be an abandonment of a grant made "definitely valid" by the approval of the departmental assembly?

5. Where the question is whether a tract of land is sufficiently described to be well defined and intelligible, and the judge has personal knowledge relative to it, he will weigh that personal knowledge in connection with the testimony of witnesses.

[This was a claim by Cayetano Juares for Yokaya, eight square leagues on Russian river, in Mendocino county, granted May 24, 1845, by Pio Pico to Cayetano Juares. Claim filed September 11, 1852, and rejected by the commission November 7, 1854. It is now heard upon appeal of the claimant to the district court.]

HOFFMAN, District Judge. The expediente in this case shows that on the 8th April, 1845, Cayetano Juares petitioned Governor Pio Pico for "eight square leagues, more or less, in the land known as 'Yokaya,' to the north-west of Sonoma, distant thirty

leagues, and bounded by Citizen Fernando Felez on the south, and on the other sides by the unchristianized Indians." The petition was accompanied by a map representing the land solicited, and by a certificate of General Vallejo that the land was vacant, and did not belong to any private person. On the margin of this petition is a decree of the governor, dated May 24, 1845, which is as follows: "That which the interested party requires is granted to him, and for that purpose let the corresponding title be issued." "The governor of the department thus decreed, ordered and signed. Pio Pico." To this petition a note is added, which, however, is not signed, stating that a note of the title has been made in the respective book. To this note succeeds a memorandum, dated May 8th, 1846, stating that the expediente was on that day reported to the most excellent departmental assembly, and ordered to be passed to the committee on vacant lands. This memorandum is signed by Pio Pico, president, and Augustine Olveira, secretary. The report of the committee follows. It is dated May 26, 1846, and contains a proposition for the approval of the grant. On the third of June, 1846, the proposition of the committee is adopted by the assembly. The genuineness of this expediente, and of the signatures to the documents which compose it, is unquestioned. It is found among the records of the former government, duly numbered, and it is entered on the index made by Messrs. Hartnell and Halleck, in continuation of Jimeno's index. The marginal order directing that a title be issued is in the handwriting of Juan Bandini, who was at that time secretary of state. The signature of Pio Pico to the order is undoubtedly genuine.

The order referring the expediente to the committee on vacant lands is in the handwriting of Cayetano Arenas, who often wrote in the office of the departmental assembly and of the secretary of state, and it is signed with the genuine signatures of Pico, the president of the assembly, of Olveira, the secretary. The report of the committee is in the handwriting of and signed by Santiago Aguello, its chairman, and the entry of the approval is in the handwriting of Cayetano Arenas. There is also found in the archives, among the borradors, or rough drafts of orders made by the governor in the month of May, 1845, an entry in the handwriting of Narciso Botello (who was one of the clerks in the office of the secretary of state) of the decree made on the petition of Juares. It is a literal copy of the decree in the margin of the petition, and across it a line is drawn as a check, to show that the order had been entered in the proper book. This book, commonly known as the "Book of Toma de Razon," is also found in the archives. It contains, under date of May 24, 1845, a note, in the usual form, that a title grant was made to Cayetano Juares of the place known as "Yokaya." On recurring to the journals of the departmental assembly, we find the proceedings of that body, with respect to the grant, recorded precisely as in the testimonio, or certificate of approval, contained in the expediente. There is thus produced, in support of this claim, all the evidence which the records of the Mexican government could in any case afford, with the single exception that the expediente does not contain, as is usual, the unsigned borrador, or copy of the titulo delivered to the party.

The existence of the expediente in the archives, with its numerous signatures and handwritings of unquestionable genuineness—the note and description of the grant in the continuation of Jimeno's index—the entry in the Toma de Razon, and the record in the journals of the departmental assembly—prove, beyond all doubt, that a grant was made, on the 24th May, 1845, to Cayetano Juares for eight leagues in the place called "Yokaya." There is also produced the titulo alleged to have been delivered to the claimant. But the signatures to this document present a most suspicious appearance. That of Pio Pico is very unlike his genuine signature at the date of the instrument. The handwriting, too, of the body of the instrument is that of Victor Prudon, by whom the grant produced in the case of G. L. Brown v. The United States was written, and which is undeniably fraudulent. The character of the signatures, and the whole appearance of the document, justifies the conclusion that it is not genuine. But that the grant was made, is, as we have seen clearly proved by evidence the most reliable that is afforded in this class of cases, viz., the official records of the former government.

The fact that the document produced by the party is forged is readily explained, by supposing that the grant issued to him has been lost, and that he has been tempted to manufacture another, of the same import, to replace it. Ignorant, and not scrupulous, alarmed lest the absence of his title papers should be fatal to his claim, it is, perhaps, not to be wondered at that he has accepted the offer of Prudon to supply the missing document, a service which it is well known that person liberally rendered, even in cases where no grant had ever been obtained from the former government. By whom this fraud was procured to be committed cannot now be ascertained. It was certainly not done by those who now represent the rights of the original grantee—nor is it probable that the original grantee was concerned in it; for it appears that Juares had conveyed his entire interest in the grant to M. G. Vallejo before the claim was presented to the board. Rejecting then, the title paper produced by the claimants, as not genuine, there still remains the most clear and indubitable proof that a grant in fact issued to Juares for the land now claimed, and that this grant was approved by the departmental assembly, and

thus became "definitely valid." It was, therefore, private and not public land at the date of the acquisition of the country, and, on the principles laid down by the supreme court, in the Case of Heirs of West, 22 How. [63 U. S.] 315, the title must be confirmed to the representatives of the claimant, unless it has been forfeited by abandonment, or neglect to fulfill the conditions. With respect to the occupation and settlement effected by Juares, there is some conflict of testimony. It is proved, however, beyond any reasonable doubt, that at about the time he applied for the grant Juares sent his brother to the land with cattle and horses, to establish a rancho. Vicente Juares remained upon the land about five months, when he left, but, returning after a short absence, continued to reside there until a party under Fremont, in the early part of 1846, carried off the horses. Vicente Juares states that while he was on the rancho he built two corrals and a small house on the bank of the river. Houses were also put up for the Indians employed on the rancho. When he first went to establish the rancho, Cayetano Juares accompanied him, and remained about eight days, leaving Vicente in charge. He again visited the rancho towards the end of 1845, and again in 1848, after the horses were carried away by Fremont, he came up to look after the cattle. After remaining a few days, he returned to Napa, leaving two vaquerors and Indians on the rancho. They staid about a month, when they returned to Napa. No more cattle appear to have been placed on the rancho, but it is stated by Vicente that the Indians left there during the years 1847 and 1848, and that he went to the rancho in those years to carry beeves to them. They occasionally came to Napa to work for Cayetano, but returned to Yokaya, where they continued to work the fields established by Vicente—planting corn, melons and beans, with seed which Cayetano furnished, to keep them occupied, and to keep up the possession of the place. The testimony of Vicente Juares is corroborated by Julio Carillo, who states that he visited the rancho in June or July, 1845. He found Vicente residing on the rancho, with some civilized Indians, one of whom he recognized as having lived with Cayetano at Napa, and whose name he gives. Vicente had a small house, corrals, horses and cattle on the land.

Jesse Beasley, a witness on behalf of the United States, testifies that he accompanied Carillo on this excursion to Yokaya in 1845, but that he did not see Vicente Juares there, nor any cattle, horses or houses on the land, nor any signs of its occupation. When asked as to the character of Carillo, however, he says that "it is as good as any man's in the county where he lives. He has a high character, and is an honest, upright gentleman; but, in this instance, one or the other of us is mistaken." If this estimate of Carillo's character be correct, and it is not questioned, there is little difficulty in deciding which of the two is mistaken. Carillo testifies that he went to Yokaya in 1844, before the establishment of the rancho; and again in 1845, when Vicente was in the occupation of it, as has been stated. Independently, therefore, of the impossibility of his having made any honest mistake as to the circumstances detailed by him with so much particularity, it is most probable that Beasley is mistaken as to the year in which he went there himself, and that he accompanied Carillo on the excursion of 1844, and not on that of 1845.

The testimony of Barnett, a witness for the United States, is inconclusive. He merely states that he never heard of Cayetano Juares' having sent stock to Yokaya, or that Fremont's party, of which he was one, took horses from that rancho. He admits, however, that the men told him they had obtained some horses from Cayetano—from what rancho he evidently does not know, for he could not have been with the party when the horses were procured, as he learned the fact from the statements of his companions. An attempt was made to show that stock could not have been sent there, as the witness lived on the road, and did not see them pass. But it appears that the other road, which was the best and most traveled, was at the distance of more than twenty miles from the residence of the witness. The evidence of Carillo and Juares is further corroborated by that of William B. Frazer. This witness states that he was on the Yokaya rancho in 1845, and again in March, 1846. He found there a Spaniard named Juares. There was a house, and two places fenced, one a corral, and the other had the appearance of a garden. The garden had some stalks of corn and indications of melon vines. There were horses and cattle on the land. The witness staid there all night, and Juares seemed to be living there with some Indian vaquerors. This was in December, 1845. In 1846 he did not stop, but saw horses and cattle, and the same houses he had seen in 1845, also a number of Indian huts on the plain. The witness further states, on cross-examination, that he was told of the rancho of Juares, in Yokaya valley, before going there, by several persons, whom he names, at Bodega, and that the valley was generally known by that name by the people residing about Bodega and Sonoma.

The above is all the testimony of any importance relating to the occupation of the land. The statements of Vicente Juares are, it will be noticed, corroborated by the testimony of two other witnesses, who swear to facts about which they cannot have been mistaken. Their characters are unimpeached, and I know of no reason for distrusting the statements of either Vicente Juares or Carillo, neither of whom belong to that class of professional witnesses with whom the court is familiar, or for refusing to accept as accurate the estimate of Carillo's charac-

ter given by Beasley. It does not appear that since the occupation of California by the American forces any serious attempt has been made by the grantee to resume the occupation and cultivation of the land. But, under the ruling in the case of Fremont v. U. S. [17 How. (58 U. S.) 542], no neglect can, on that account, be charged to the grantee, as a ground of forfeiture. After that event, "he could do nothing," says the supreme court, "which could, in any degree, affect the rights of the United States to public property," and it has, in several cases, been clearly intimated, if not expressly declared, by that tribunal, that the rights to be passed upon in these cases are those which existed at the time of the acquisition of the country. The forfeiture by abandonment must, therefore, have accrued, if at all, before California was subjected to the American arms—and rights of the United States or the claimant to the land remained in their then condition, unaffected by any acts or omissions of the grantee.

If the testimony in this case is to be believed, and I see no reason to doubt it, there certainly had been no abandonment of his rights by the grantee during the existence of the former government, even if a forfeiture for that cause could now be enforced in the case of a grant made "definitively valid" by the approval of the departmental assembly—a point not yet decided by the supreme court—and any subsequent neglects or delays are, as decided by that court, immaterial.

It is urged that the description of the land is so vague that it cannot be identified. But it appears by the testimony of James Tobin that the valley of Yokaya is a clearly defined piece of land, lying along the Russian river, and bounded on the east, west and south by mountains. The southern boundary of the valley is the northern boundary of the rancho of Fernando Feliz, which we have seen is mentioned in the petition as the southern boundary of the tract solicited. Mr. Tobin adds that the map, though not perfect, is nevertheless sufficient to enable him to identify the tract represented on it as the Yokaya valley described by him. My own knowledge of the country leads me to the same opinion, and a surveyor required to measure off eight square leagues of land in the Yokaya valley, north of the Feliz rancho, would, I am persuaded, have no difficulty in determining its limits with as much precision as is usual in this class of cases.

On the whole, my opinion is, that the grant, having been undoubtedly made by the former government, the grantee's rights have not been forfeited, and the claim must be confirmed.

Case No. 15,501.

UNITED STATES ex rel. WHITE et al. v. JUDGES.

[5 Chi. Leg. News, 137.]

Circuit Court, N. D. Ohio. 1872.

REMOVAL OF CAUSES — REFUSAL OF STATE COURT TO ORDER REMOVAL.

[When all the steps required by the acts of congress have been complied with, and a transcript of the proceedings in the state court has been filed in the federal court within the time prescribed by law, the cause is then pending in the latter court, although the state court has refused to grant an order of removal; and any further proceedings in the latter court will be void.]

This was a petition for a mandamus requiring the removal of a cause commenced in the common pleas of Ottawa county, wherein John Lewis was plaintiff, and said A. J. White et al., the relators, were defendants, to the circuit court of the United States, it being claimed that all the steps required by the statutes of the United States for such removal had been taken, but that the common pleas refused to order such cause removed.

S. F. Taylor, for complainant, Lewis.

Willey, Cary & Terrill and Mr. Sloan, for relators and defendants.

Before EMMONS, Circuit Judge

It appeared, on examination, that an alternative mandamus had already been granted in the case, and partially heard, and this part of the case was not now pressed, but it was intimated by Judge EMMONS that, having had occasion to examine this question, he was clear that according to the true theory of the laws bearing upon this subject, and repudiating entirely the idea that the courts of the two systems, federal and state, were in any sense to be considered foreign or antagonistic to each other, it was competent for the court to grant such a writ, and with the same freedom as if between courts of the same jurisdiction, but both judges concurred that as it appeared in this case that a transcript of the proceedings in the common pleas had been in fact filed in this court within the time prescribed by law (although filed by the defendants), the original case of Lewis v. White [Case No. 8,335] was properly entered and pending in this court, and therefore the court ordered the same to be docketed by the clerk, and that the respondents should file their answer by the first Monday in January, and the cause be proceeded with here, and that all further proceedings in the state court would, by the express terms of the act of congress, be void.

UNITED STATES v. JUDGES OF THE SUPERIOR COURT. See Case No. 1,417.

Case No. 15,502.

UNITED STATES v. The JULIA LAWRENCE.

[6 Am. Law Rev. 383.]

District Court, S. D. New York. 1871.

ADMIRALTY JURISDICTION — TERRITORIAL EXTENT OF JUDICIAL DISTRICTS.

[1. A seizure made on waters of New York Bay below low-water mark, on the Jersey shore, is within the jurisdiction of the district court of the Southern district of New York.]

[Cited in The L. W. Eaton, Case No. 8,612; Hall v. Devoe Manuf'g Co., 14 Fed. 185.]

[2. The actual boundary line of the Southern district of New York is coterminous with that of the state at the time of the creation of the district. The subsequent agreement entered into between New York and New Jersey respecting their boundary line in no way impairs or conflicts with any jurisdiction or power previously possessed by the United States; for congress, in assenting to that agreement, expressly provided that nothing therein should be construed to affect any right of jurisdiction of the United States in and over the islands or waters forming the subject of the agreement.]

This case came up on a question of the jurisdiction of the court. The action was brought to forfeit the ship for a violation of the revenue laws and alleged a seizure of the ship by the collector within this district. It was admitted that the ship, when seized, was attached to a pier on the New Jersey side of the North river, and upon waters of the bay.

HELD BY THE COURT (BETTS, District Judge): That the locus in quo of the seizure will be within the cognizance of this court, irrespective of the territorial boundaries of the state, if the surface of the waters on which she was seized was within the jurisdiction of the Southern district of New York. That the actual boundary line of this district was coterminous with that of the state at the time the district was erected and defined. That the agreement entered into between New York and New Jersey respecting their boundary line in no way impairs or conflicts with any jurisdiction or power previously possessed by the United States, or framed in approval or confirmation of it. On the contrary, congress expressly provided, in assenting to that agreement, "that nothing therein contained shall be construed to impair, or in any way affect any right of jurisdiction of the United States in and over the islands or waters" which form the subject of said agreement. That the United States therefore retain the same jurisdiction over the waters of the bay as they originally possessed on the organization of their courts. That the seizure being made on waters of the bay and below low-water mark on the Jersey shore, the court has full jurisdiction over the case.

Exceptions to the jurisdiction therefore overruled.

Case No. 15,503.

UNITED STATES ex rel. DOUGLASS v. JUSTICES OF COUNTY COURT OF LINCOLN COUNTY.

[5 Dill. 184.] [1]

Circuit Court, E. D. Missouri. 1879.

RAILROAD AID BONDS—LEGISLATION OF MISSOURI —OBLIGATION OF CONTRACTS.

1. Judgment creditors of counties in Missouri are entitled to the levy of a special tax to pay judgments obtained on railroad aid bonds, if the county cannot or does not otherwise provide the means of payment.

2. The act of the general assembly of Missouri of March 8, 1879, known as the "Cottey Act," if applicable to such judgments, is, as to bonds issued prior thereto, in conflict with the provision of the constitution of the United States which prohibits the states from impairing the obligation of contracts.

On demurrer to the return of the respondents to the alternative writ of mandamus. The relator heretofore obtained in this court a judgment against the county of Lincoln upon coupons attached to bonds, of which the following is a copy:

"The County of Lincoln.

"No. ——— In the State of Missouri, $500.00.

"Hereby agrees to pay to the St. Louis and Keokuk Railroad Company, or bearer, the sum of five hundred dollars, in ten years from the 1st day of July, 1870, with interest at the rate of ten per cent per annum, payable semi-annually, on the 1st days of January and July in each year, at the National Bank of the State of Missouri, in St. Louis, Missouri, on presentation and surrender of the proper annexed coupon. This bond is issued under the authority of an act of the general assembly of the state of Missouri, entitled 'An act to incorporate the St. Louis and Keokuk Railroad Company,' approved February 16th, 1857, and in pursuance of an order of the county court of said county, dated August 13th, 1868, to subscribe three hundred thousand dollars to aid in the construction of the St. Louis and Keokuk Railroad, and in further accordance with an amendment to said order, dated June 21st, 1870. This bond shall be countersigned by the agent of said county before the delivery thereof. For the payment of this bond the faith and credit of Lincoln county is irrevocably pledged.

"In testimony whereof, the president of said county court has hereto subscribed his name, and the same is attested by the clerk of said court, and the seal of said court affixed hereto, this 21st day of June, 1870.

"Levi Bickel,

"Presiding Judge of Lincoln County Court, Missouri.

"Attest: F. C. Cake, Clerk."

The bonds were duly countersigned as required.

Upon this judgment, on due application

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

therefor by the judgment plaintiff, an alternative writ of mandamus issued, commanding, inter alia, the county court of Lincoln county, and the justices thereof, "to levy and cause to be collected a special tax upon all of the taxable property subject to taxation in said county of Lincoln, in an amount sufficient to pay and discharge such judgment, with interest and costs, or that they show cause," etc.

The respondents, the judges of the county court, make a return, in which, inter alia, they state that there was no law in force in the state of Missouri, at the date of the issue of the bonds upon which the relator's judgment is founded, authorizing the levy of any special taxes or the drawing of any warrant upon the common fund of the county for the purpose of paying such bonds, and that the collection of the relator's judgment can be enforced, if at all, in conformity to the provisions of the act of March 8, 1879, below mentioned. A return is also made to the effect that, under the revenue laws of Missouri in force from a date prior to the issue of the bonds on which the relator obtained judgment, the county courts have been and are limited to the levy of a tax for county purposes not exceeding one-half of one per cent upon the value of the property within the county subject to taxation, and that the proceeds of this tax are all needed for the ordinary and legitimate expenses of the county government. The relator demurs to the return.

The subscription to the stock of the said railroad company by the county was made August 13th, 1868, and the bonds of the county issued to pay the same are dated June 21st, 1870. The 29th section of the charter of the St. Louis and Keokuk Railroad Company, viz., the act of February 16, 1857, recited in the bonds of the county, is in these words: "Sec. 29. It shall be lawful for the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company; and it may invest its funds in the stock of said company, and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county. Such county court may appoint an agent to represent the county, vote for it, and receive its dividends." This charter contains no other provisions in respect of taxes or the mode of raising the means of paying bonds issued under the authority given by said section 29. But there was then (1857) in force in the state of Missouri general statutes in relation to the powers, rights, duties, etc., of railroad corporations. Rev. St. 1855, cc. 34, 39. These statutes, originally enacted in 1853, authorized the formation of corporations under general laws, and the legislature was also in the habit of granting special charters to railroad companies. The general statutes as to railroad corporations apply to companies organized under special charters, unless otherwise provided. Thus, section 57 of the railroad statutes of 1853, in relation to railroad companies, contained the provision that "all existing railroad corporations within this state, and such as now are or may hereafter be chartered, shall respectively have and possess all the powers and privileges contained in this act, and they shall be subject to all the duties, liabilities, and provisions, not inconsistent with the provisions of their charter, contained in this act."

The act of 1853 was substantially carried into the revision of the General Statutes of 1855 and 1865. Section 30 of said General Statutes of 1855 provides that the county court subscribing or proposing to subscribe to the capital stock of any railroad company duly organized under said law, or any other act, in this state, may, for information, cause an election to be held to ascertain the sense of the tax-payers of said county as to such subscriptions, and as to whether the same shall be paid by issues of county or city bonds, as the case may be, or by taxation. Rev. St. 1855, p. 427. Section 31 provides that, upon the making of such subscription by any county as provided for in previous section, such county shall become, like other subscribers to such stock, entitled to the privileges granted and subject to the liabilities imposed by this act or by the charter of the company in which such subscription shall be made, and may levy a special tax to pay the subscription or bonds. Id.

These provisions are substantially embodied in the revision of the statutes of 1865 (1 Wag. St. p. 305, §§ 17, 18), except that, conformably to the constitution of 1865, it was made necessary to have the sanction of two-thirds of the qualified voters to the proposition to aid railway companies, except (as construed by the supreme court of the state) in cases where special charters granted prior to 1865 gave the right to aid railways without such popular sanction. The provision as to levying taxes (1 Wag. St. p. 305, § 18) is: "That it shall be the duty of the county court making such subscription to issue their bonds or to levy a special tax, to be kept apart from other funds and appropriated to no other purpose than the payment of such subscription; but the total amount of tax levied for railroad purposes in any one year shall not exceed thirty per centum of the subscription made by the county." Section 34 (1 Wag. St. p. 319) gives "all existing railroad corporations within this state, and such as may be hereafter chartered or formed, all the powers and privileges contained in this chapter." By another section (1 Wag. St. p. 306, § 21), any county court which has heretofore—i. e., prior to 1865—subscribed to the capital stock of any railroad in this state, "shall have all the rights and powers to provide funds to pay such subscription as are granted to county courts by this chapter, and

may levy a special tax to pay the interest on their bonds, or to provide a sinking fund to pay the principal." The above provisions, quoted from Wagner's Statutes, were originally enacted in the general railroad act of 1853.

From an early date in Missouri the power of counties to levy taxes for county or general purposes has been limited, and was so limited in 1857, when the charter of the St. Louis and Keokuk Railroad Company was granted, and has been ever since. The constitution of Missouri of 1875, now in force (article 10, § 11), contains the same limitation of the rate of taxation in counties of the class of Lincoln, with this addition: "Said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of said indebtedness."

Some further reference to the course of legislation, general and special, in respect of the power of counties to aid railways by the issue of bonds, is essential to a full understanding of the subject. The first statute in Missouri, says Norton, J., in State v. Macon Co. Ct. [68 Mo. 29], authorizing counties to subscribe for the stock of railways was in 1837, on the charter of the Louisiana and Columbia Railroad Company. Laws 1837, p. 247. The charter authorized the county courts to subscribe for stock without limit or condition of popular vote, and "to issue the notes of the county for such subscription," but contained no provision as to the means of payment. Another railroad charter, passed in 1837, granted the rights, privileges, and immunities granted by the above charter. Laws 1837, pp. 234–247. And in other instances in 1837 the power to subscribe was given in the same language in respect of other railroads, and to issue notes, but no provision was made as to mode of payment. Laws 1837, p. 243, § 16; Id. p. 275, § 16.

In 1849 the Pacific Railroad was chartered. Laws 1849, p. 219. Section 14 of that charter was as follows: "Sec. 14. It shall be lawful for the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company, and it may invest its funds in the stock of said company and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interests and credit of the county. Such county court may appoint an agent to represent the county, vote for it, and receive its dividends; any incorporated city, town, or incorporated company may subscribe to the stock of said railroad company, and appoint an agent to represent its interests, give its vote, and receive its dividends, and may take proper steps to guard and protect the interests of such city, town, or corporation." The same language occurs in the charter of the Missouri and Mississippi Railroad (section 13), granted March 8, 1849. Laws 1849, p. 376. At the same session (1849) another charter was granted with power to counties to subscribe and issue bonds, but containing no provision either as to protecting the credit of the county or as to levying taxes to pay the bonds. Laws 1849, p. 284, § 26. In 1851 numerous special charters were granted to railroad companies, copying the above-quoted section 14 of the Pacific Railroad charter. Laws 1851, p. 320, § 14; Id. p. 371, § 14; Id. p. 438, § 14; Id. p. 486, § 14. So in special charters granted in 1853. Laws 1853, p. 321, § 1; Id. p. 335, § 14; Id. p. 340, § 3; Id. p. 341, § 4; Id. p. 349, § 30; Id. p. 358, § 13; Id. p. 375, § 14. The charter of the Lexington and Boonville Railroad Company (Laws 1853, p. 366, § 13) has the same clause as the Pacific Railroad, with the addition of express authority to levy a special tax, and entitling tax-payers to a certificate of stock for each one hundred dollars of taxes paid. Similar provisions are in the charter of the Missouri Valley Railroad Company (Laws 1857, p. 100, § 20); in that of the Canton, etc., Railroad Company (Id. p. 106, § 20); in that of the La Grange, etc., Railroad Company (Id. p. 114, § 20); in that of the Grand River, etc., Railroad Company (Id. p. 118, § 20); in that of the Weston, etc., Railroad Company (Id. p. 142, § 20). Most of the special charters granted in 1855 contained the substance and generally the words of section 14, supra, of the Pacific Railroad charter. Laws 1855, p. 409, § 15; Id. p. 437, § 14. And there are various other like instances in the charters granted in 1855. It was exceptional where any reference was made to the levy of a tax. So in charters granted in 1857 (Laws 1857, p. 108, § 6); in the charter of the St. Louis and Keokuk Railroad Company, granted February 16, 1857 (Id. p. 132, § 29); and in other instances (Id. p. 155, § 14; Id. p. 166, § 15; Id. p. 170, § 11).

The legislation of the state shows that this course was continued down to the adoption of the constitution of 1865, which required the sanction of a two-thirds vote, but, as previously stated, the supreme court of the state has held that neither the general railroad law of 1853, embodied subsequently in the Revised Statutes of 1855 and of 1865, nor any other legislation, nor the constitution of 1865, affected the power given to counties in special charters to subscribe for stock and issue bonds, and the sanction of a popular vote was not required, unless it was so expressed in the particular special charter.

The act of March 8, 1879, commonly called the "Cottey Act," is as follows:

"Concerning the Assessment, Levy, and Collection of Taxes, and the Disbursement Thereof.

"Section 1. The following named taxes shall hereafter be assessed, levied, and collected in the several counties of this state,

and only in the manner and not to exceed the rates prescribed by the constitution and laws of this state, viz.: The state tax, and the tax necessary to pay the funded or bonded debt of the state, the tax for current county expenditures, and for schools.

"Sec. 2. No other tax for any purpose shall be assessed, levied, or collected, except under the following limitations and conditions, viz.: The prosecuting attorney or county attorney of any county, upon the request of the county court of such county (which request shall be of record with the proceedings of said court, and such court being first satisfied that there exists a necessity for the assessment, levy and collection of other taxes than those enumerated and specified in the preceding section), shall present a petition to the circuit court of his county, or to the judge thereof in vacation, setting forth the facts and specifying the reasons why such other tax or taxes should be assessed, levied, and collected; and such circuit court, or judge thereof, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy, and collection thereof will not be in conflict with the constitution and laws of this state, shall make an order directed to the county court of such county, commanding such court to have assessed, levied, and collected such other tax or taxes, and shall enforce such order by mandamus or otherwise. Such order, when so granted, shall be a continuous order, and shall authorize the annual assessment, levy, and collection of such other tax or taxes for the purposes in the order mentioned and specified, and until such order be modified, set aside, or annulled by the circuit court, or judge thereof, granting the same: Provided, that no such order shall be modified, set aside, or annulled, unless it shall appear, to the satisfaction of such circuit court, or judge thereof, that the taxes so ordered to be assessed, levied, and collected are not authorized by the constitution and laws of this state, or unless it shall appear to said circuit court, or judge thereof, that the necessity for such other tax or taxes, or any part thereof, no longer exists.

"Sec. 3. Any county court, judge, or other county officer in this state, who shall assess, levy, or collect, or who shall attempt to assess, levy, or collect, or cause to be assessed, levied, or collected, any tax or taxes other than those specified and enumerated in section 1 of this act, without being ordered first so to do by the circuit court of the county, or the judge thereof, in the express manner provided and directed in section 2 of this act, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than $500, and, in addition to such punishment, his office shall become vacant; and the method herein provided for the assessment, levy, and collection of any tax or taxes not enumerated and specified in section 1 of this act shall be the only method known to the law whereby such tax or taxes may be assessed or collected, or ordered to be assessed, levied, or collected.

"Sec. 4. The last preceding section shall be construed to extend and apply to the county court of any county, as well as to any judge thereof, and to extend and apply to the county board of equalization, and to any other body holding or exercising any county office or public trust in the county under the constitution and laws of this state.

"Sec. 5. Any county court, or judge thereof, or county treasurer, or county clerk, or other county officer, who shall order the payment of any money, draw any warrant, or pay over any money for any purpose other than the specific purpose for which the same was assessed, levied, or collected, or shall in any way or manner attempt so to do, shall be adjudged guilty of a misdemeanor, and, on conviction thereof, shall be punished as provided in section 3 of this act.

"Sec. 6. The right of appeal to the supreme court of this state, under any of the provisions of this act, is hereby preserved to any and all persons, officers, or parties in any wise affected thereby, as in other cases, and may be prosecuted as in other civil cases.

"Sec. 7. All acts and parts of acts inconsistent with this act, or in any manner whatever conflicting with the provisions of this act, are hereby repealed.

"Sec. 8. The time fixed by law for the assessing and levying of state and county taxes, and for extending the same upon the tax-books in the several counties of this state, being within ninety days from the passage of this act, creates an emergency that demands the immediate enforcement thereof; therefore this act shall take effect and be in force from and after its passage."

Messrs. Overall, Henderson, Shields, Shippen, and others, for relator.

Messrs. Cunningham, Carr, and others, for respondents.

Before DILLON, Circuit Judge, and TREAT, District Judge.

DILLON, Circuit Judge. The act of March 8, 1879, in its application to township bonds issued under the act of March 23, 1868, which in terms authorized and required the levy of a special tax to pay the same, has been considered in the case of U. S. v. Johnson Co. [Case No. 15,489], note, in the Western district, in an elaborate opinion prepared by Krekel, J., in which Judge Treat and myself concurred—all of us having heard arguments upon the question there involved.

I do not propose to enter into any additional discussion as to scope of the provision contained in the constitution of the United States which prohibits the states from impairing the obligation of contracts. The doctrine of the supreme court of the United States on the subject is thus succinctly stated by Mr. Justice Swayne in a recent case: "The remedy subsisting in a state when and

where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to lessen the value of the contract is forbidden by the constitution, and is, therefore, void." Edwards v. Kearzey, 96 U. S. 595.

No one denies this proposition, and it is not controverted by the learned counsel for the respondents. But, conceding it in all its breadth and force, they contend that it is not applicable to the relator's case. Their argument is this: When the bonds were issued, counties in Missouri could only levy for ordinary county purposes, upon the property within the county, a tax not exceeding one-half of one per cent in any one year; that this tax is levied to defray the ordinary expenses of county administration, in the category of which the payment of railroad bonds, or interest thereon, is not included; that there was no act of the legislature of Missouri, either general or special, applicable to the relator's bonds, in force when the bonds were issued, which authorized the county to levy a special tax to pay such bonds, or the interest thereon (in which respect the relator's bonds stand, it is claimed by the respondents, on a different footing from township bonds), and hence the relator has no contract right, so to phrase it, to the levy of a special tax for the payment of his bonds; that he is, therefore, only entitled to the payment of his judgment as a general debt against the county, out of the common county fund raised by the levy of one-half of one per cent for ordinary county expenses. The respondents state, in their return, that they "are satisfied that said common fund is not more than sufficient to meet the ordinary expenses of the county" for salaries, roads, bridges, the support of the poor and of the insane, the cost of jurors, etc. They do not return that they have any special fund out of which the relator's judgment can be paid. It is manifest, therefore, and not denied, if the relator is confined to getting his pay out of the residue of the county fund (raised by the levy of the limited rate authorized for this purpose), after defraying the ordinary and necessary current expenses of county administration, that his prospect of ever getting payment is remote and doubtful.

If the bond creditors of the county have any rights worth pursuing, they must rest upon an obligation of the county to levy an adequate tax to pay the bonds, if the county is unable to pay them in any other mode. This is the vital question in the case, and all that distinguishes it from the case in the Western district of Missouri before mentioned.

Has the relator, then, upon the facts shown in this case, a right to a levy of a tax specifically to pay his judgment obtained in this court upon coupons attached to the bonds of the county, issued, as before stated, in 1870, to the St. Louis and Keokuk Railroad Company, under the charter of that company, approved February 16, 1857? This question we proceed to examine.

Under the decisions of the United States supreme court next cited, the relator would be entitled to the levy of a special tax, if such a tax is necessary, to raise the means to pay his judgment, even if there was no statute in terms giving such a right, provided there were no statute provisions, general or special, regulating, expressly or by implication, such a right. Loan Co. v. Topeka, 20 Wall. [87 U. S.] 660, per Miller, J.; U. S. v. Macon Co. [99 U. S., 582], cited infra; U. S. v. New Orleans [98 U. S. 381], decided by the supreme court of the United States, March 31, 1879.

In this last case, one question was, whether, under an act authorizing a city to issue bonds, but containing no express provision for their payment by taxation, mandamus will lie to compel the city to levy a tax to pay a judgment obtained upon the bonds after their maturity.

The city set up as a defence that there was no legislative authority for the levy of such a tax. The petitioner demurred to this answer, but the circuit court overruled the demurrer and denied the writ, whereupon the petitioner took this appeal. The court below proceeded on the principle that the power of taxation belongs exclusively to the legislative branch of the government, and that the judiciary cannot direct a tax to be levied when none is authorized by the legislature. The supreme court, however, holds, in a careful opinion delivered by Justice Field, that, although the power of taxation is a legislative prerogative, it may be delegated to a municipal corporation, and that, when such a corporation is created, the power of taxation is vested in it as an essential attribute for all the purposes of its existence, unless its exercise is in express terms prohibited. When, therefore, authority to borrow money or incur an obligation to carry out any public object is conferred upon a municipal corporation, the power to levy a tax for its payment or the discharge of the obligation accompanies it, and this, too, without any special mention that such power is granted. It is always to be assumed, in the absence of clear restrictive provisions, that when the legislature grants to a city the power to create a debt, it intends that the city shall pay it, and that its payment shall not be left to its caprice or pleasure. Wherever a power to contract a debt is conferred, it must be held that a corresponding power of providing for its payment is also conferred. The latter is implied in the grant to the former, and such implication cannot be overcome except by express words of limitation. In the present case, the indebtedness of the city of New Orleans is conclusively established by the judgments recovered. Owing the debt, the city had the power to levy a tax for its payment, and it was clearly its duty so to do. The payment was not a matter resting

on its pleasure, but a duty to the creditor, and, having neglected that duty, a mandamus should have been issued to enforce its observance. The judgment of the lower court was therefore reversed, and the cause remanded, with directions to issue the writ in compliance with the petition.

Here the charter of the company (section 29) expressly authorized the county to subscribe for the stock of the company and to issue the bonds of the county to pay therefor, and to take proper steps to protect the credit of the county. This was special authority to create an extraordinary debt, without limitation of amount, by the issue of commercial obligations, which must be promptly met or the credit of the county be dishonored. The statute at the time, as to ordinary county expenses, provided that these must be met out of a fund raised by a levy limited to one-half of one per cent. An opinion of the supreme court of Missouri states that it was not contemplated that interest on railroad bonds should be paid out of the ordinary and current revenues of the county. State v. Macon Co. Ct., cited supra.

How, then, if this be true, was the debt, the large debt authorized to be created by bonds issued to aid railways, to be paid? It is not to be presumed for a moment that it was not intended to be paid at some time, and in some way. If bonds were issued, the only resource in general for their payment would be the levy of a tax for that purpose. It must be supposed that the legislature contemplated this when necessary. The bonds were to be issued "to raise funds to pay for the stock subscribed," says the charter. This could be done only by the sale of the bonds. Who would buy them if it had been declared, as is now contended to be the case by the respondents, that such bonds are not payable out of the ordinary county revenue, or, if so, the amount of this is so limited that, after paying current expenses, no residue for this purpose will ordinarily or ever remain, and that there is no authority to levy a special tax, or any tax whatever, for the purpose of paying them?

Under such circumstances, the doctrine of the supreme court of the United States, as declared in its judgment in the late case of U. S. v. New Orleans [supra], would apply, if there was no express or special authority to levy a tax.

The charter itself, in authorizing the bonds to be issued by Lincoln county, empowered the county "to take proper steps to protect the credit of the county." The credit of the county can be protected only in one way, and that is by paying its obligations. If there is no other way to raise the means to do this, the power to levy a tax for this purpose, according to the doctrine of the supreme court of the United States, is implied, unless, in the general or special legislation of the state, there is something to repel the implication. If there were no other power to levy taxes to pay the bonds, it is plain, under the late decision of the supreme court in the New Orleans case, that it must be deduced, if necessary to pay the bonds, from the power to take steps to protect the credit of the county, or might, if necessary, be deduced even from the power to issue the bonds.

The existence of such a power would seem to have been assumed or contemplated in the legislation of Missouri on this subject. Both prior and subsequent to the enactment of the general railroad law, in 1853, many special charters had been granted to railways, containing authority to counties along their line to subscribe for their stock, and issue bonds to pay therefor, without a vote of the people All this time the general statutes prohibited counties from levying more than a very limited rate of taxation to pay their current expenses. These special charters, thus giving power to counties to issue their bonds in payment of stock in railways, as a rule, with but few exceptions, are silent as to the means of payment. There is, therefore, in general, no means whereby the bonds, or the interest thereon, can be paid, except by taxation—by taxes levied for that purpose.

In the late case of U. S. v. Macon Co. [supra], Chief Justice Waite says: "In U. S. v. County of Clarke, 96 U. S. 211, we decided that bonds issued by counties under section 13 of the act to incorporate the Missouri and Mississippi Railroad Company were debts of the county, and that for any balance remaining due on account of principal or interest, after the application of the proceeds of the special tax authorized by that section, the holders were entitled to payment out of the general funds of the county. In Loan Co. v. Topeka, 20 Wall. [87 U. S.] 660, we also decided that 'it is to be inferred, when the legislature of a state authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference.' ".

When the act to incorporate the Missouri and Mississippi Railroad Company was passed, the power of counties in the state to tax for general purposes was limited by law to one-half of one per cent on the taxable value of the property in the county. Rev. St. 1865, p. 96, § 7; Id. p. 121, § 76. This limit has never since been increased, and the constitution of 1875, which is now in force, provides that this tax shall never exceed that rate in counties of the class of Macon (article 10, § 11). If there had been nothing in the act to the contrary, it might, perhaps, have been fairly inferred that it was the intention of the legislature to grant full power to tax for the payment of the extraordinary debt authorized to an amount sufficient to meet both principal and interest at maturity. This implication is, however, repelled by the special provision for the tax of one-twentieth of one

per cent, and the case is thus brought directly within the maxim, "Expressio unius est exclusio alterius."

The limitation in the constitution of 1875 as to rate of taxation does not, however, apply to past indebtedness. When, therefore, these special charters provided, as they usually did, that the counties might issue bonds and take steps to protect the credit of the county, it was meant that this might be done by the levy of a tax for that purpose, if such a course was necessary to meet the interest and principal of the bonds. But it is contended by the relators that, aside from this view, there is express statute authority, and was when the bonds of Lincoln county were issued, and has been ever since the enactment of the general railroad law of 1853, to levy a special tax to pay such bonds and the interest thereon. This position is denied by the respondents.

It is necessary, in order to reach a correct decision of the question here presented, to examine the history of the railroad legislation of Missouri and the course of judicial decision in the state respecting it. In 1837, the authority was given for the first time to counties to aid in the construction of railways. It was not conferred by general law, but was contained in special charters to railways. Counties were authorized to issue "notes" for these subscriptions, but no means of payment were provided or pointed out. In 1849, the Pacific Railroad was specially chartered, and authority given to counties to subscribe without requiring a vote of the people, and issue bonds and protect the credit of the county; but no express power was given to levy taxes for that purpose. The charter was silent as to taxes. In many special charters granted in 1849, 1851, 1853, 1855, 1857, and down to the constitution of 1865, this provision was in substance contained. In 1853, while the legislature was freely granting special charters to railroad companies, and authorizing the county courts to subscribe for stock therein, without a vote of the people, there was passed a general "act to authorize the formation of railroad companies." Laws 1853, p. 121.

The 29th section of that act is as follows: "It shall be lawful for the county court of any county, and the city council of any city, to subscribe to the capital stock of any railroad company duly organized under this or any other act in this state; and the county court or city council subscribing or proposing to subscribe to such capital stock may, for information, cause an election to be held to ascertain the sense of the tax-payers of such county or such city as to such subscription, and as to whether the same shall be paid by issues of county or city bonds, as the case may be, or by taxation." By the act of January 14, 1860, amendatory of this law, the legislature changed the words "may, for information," into "shall, for information." The act of March 23, 1861, amendatory of this act, requires an election to be held, and prohibits a subscription, unless upon a majority vote. In 1868 the supreme court held that "may" meant "shall." Leavenworth & D. M. R. Co. v. Platte Co., 42 Mo. 171.

Construing all the legislation, the supreme court of Missouri, "by repeated decisions," held that where special charters contained authority to counties to subscribe without a vote of the people, this power was not repealed or affected either by the above act of January 14, 1860, or March 23, 1861, or the provisions of the constitution of 1865. This appears from the opinion of all of the judges in Smith v. Clark Co. (1873) 54 Mo. 58.

This was held, notwithstanding the 56th section of the general railroad act of 1853, which is in these words: "All existing railroad corporations within this state, and such as now are or may be hereafter chartered, shall respectively have and possess all the powers and privileges contained in this act; and they shall be subject to all the duties, liabilities, and provisions, not inconsistent with the provisions of their charter, contained in sections 9, 13–21, 23–40, 42–53 of this act."

This makes "all existing railroad corporations, and such as may be hereafter chartered," subject to the provisions of the general act in respect of subscriptions to railways, unless there is some provision in the special charter to the contrary.

The result was, according to the decisions of the supreme court of Missouri, that if a railroad corporation was organized under the general law of 1853, a popular vote was necessary to enable a county to subscribe for its stock; but if specially chartered, whether before or after the general law of 1853, with powers to counties to subscribe for stock, no popular vote was necessary, unless expressly required in the charter.

It is now contended by the respondents that if it was sound to hold that the general railroad act did not apply to powers contained in special charters giving authority to subscribe for stock, it results that the other provisions of the general railroad act, as to levying special taxes to pay such subscriptions, do not apply to subscriptions made under special charters. The force of this objection is felt. The course of reasoning of Norton, J., in the recent case of State v. Macon Co. Ct. [supra], is intended to demonstrate that holders of bonds issued under the power given by special charters are not entitled to payment out of the general or common fund of the county, because there is, he says, ample provision made for their payment out of a special fund raised by the levy of special taxes for this purpose. The learned judge in the case just cited, after reviewing the legislation of the state on the subject, says: "It thus appears that the fullest provisions have been made by the general assembly for the creation of a fund, distinct from the general expenditure or common fund of a county, out of which to pay

an indebtedness incurred by a county on account of a subscription to stock of a railroad company, or bonds issued in payment thereof, which fund is to be kept separate from all other funds, and to be applied to that identical purpose, and none other. These various provisions of the law have been referred to for the sole purpose of establishing the proposition that, for the payment of such obligations, resort could only be had to the special fund, and that it never was the intention of the legislature that the common fund, raised by taxation to defray the expenses of the county, could be made chargeable with their payment; but, on the contrary, that such latter fund was devised, provided, and intended to be charged with the payment of such ordinary expenses incurred in conducting the county government as has been hereinbefore indicated." State v. Macon Co. Ct., October term, 1878.

The relator in the present case seizes upon and urges this view in support of his claim that he is entitled to the levy of a special tax. On the other hand, the counsel for the county refers us to the language of the chief justice of the United States in the still later case of U. S. v. Macon Co. Ct., October, 1878. It is there said, arguendo: "Our attention has been directed to the general railroad law in force when the Missouri and Mississippi Railroad Company was incorporated, and when the bonds in question were issued, and it is insisted that ample power is to be found there for the levy of the required tax. The power of taxation there granted is, as we think, clearly confined to subscriptions authorized by that act, which require the assent of two-thirds of the qualified voters of the county."

The above observations of Norton, J., and of Waite, C. J., were made in a case where the special charter conferring the power to the county to subscribe contained an express provision as to the amount of special tax which might be levied to pay the bonds. Such a case is distinguishable from one where there is no such provision in the special charter as to taxes, and hence the observations of both of these learned judges should be limited to the special cases respectively before them. It is not necessary in this case for us to enter into the discussion. Our impression is, in view of the silence of the special charters (especially those granted prior to the general railroad law of 1853) on the subject of taxes, that the county courts were not prohibited from using the proceeds of the ordinary taxation to pay interest on debts incurred to aid railroads if the county court should find it necessary to do so, and if there was any available surplus on hand which could be used for such a purpose. The county court might, it would seem, "protect the credit of the county" in this way if they saw fit to do so. Interest due by a county would be a legitimate and current expense of the county. If this is not so, then it results that the bonds authorized to be issued cannot be paid except by the levy of a special tax for that purpose; and authority to levy such a tax would be implied or deduced from the express power to protect the credit of the county. If Judge Norton is right, that railroad bonds, or interest thereon, cannot be paid out of the ordinary revenue of the county, then it results inevitably (unless a county has some special fund on hand) that such bonds, or the interest thereon, cannot be paid at all, unless there is power to levy a tax for that purpose. It would seem to us that on this point the view of the supreme court of the United States, that interest on railroad bonds may, in proper cases, be paid out of the ordinary fund of the county, is correct. We have no doubt that Judge Norton is right in asserting that there is ample provision for the levy of a special tax to pay railroad bonds. The observations of Chief Justice Waite, supra, above quoted, pertain to a particular class of bonds, and must be limited accordingly.

Inasmuch as the provisions of the general railroad law in respect of subscriptions and taxes are declared to apply not only to all railroad corporations then existing, but to such, also, as may be thereafter chartered; and inasmuch as the special charter of the St. Louis and Keokuk Railroad Company of February 16th, 1857, under which the bonds were issued by Lincoln county, contains the power to subscribe for its stock and to issue bonds, and also the power to protect the credit of the county; and inasmuch as there is nothing in this special charter or elsewhere inconsistent with the provisions of the general railroad law in respect of levying special taxes to pay for railroad subscriptions and bonds—our judgment is, those provisions have the same force and effect as if they had been contained in the charter of the company.

The correctness of this conclusion is placed beyond doubt by the practical construction of the legislation by the county courts, by the profession, and by this court. Down to this time special taxes have been levied by counties throughout the state to pay interest on railroad indebtedness, and the right to do this has never before been questioned, so far as the reported decisions show. The federal courts in this state, during the past six years, have issued many writs of mandamus, commanding the levy of special taxes of this character. Every objection which the zeal and the learned ingenuity of counsel representing communities burdened by oppressive debts could present against such writs has been presented, but never until now has this objection been urged. If particular words are alone regarded, and if the scope and purpose of the legislation are overlooked, this objection may find some support, but, after all, it has no real and solid basis.

By the laws in force when the bonds in question were issued, the taxes for their pay-

ment were to be levied by the county court, and the duty to levy the tax might, it was declared by statute, be enforced by mandamus. Rev. St. 1855, p. 429, § 35; Rev. St. 1865; 1 Wag. St. p. 306, § 20; Laws 1853, p. 137, § 34. The duty was a ministerial one, directly devolved by law upon the county court, and no limitations upon its exercise were prescribed. The county court not only had the power, but it was its duty, to levy the tax whenever it was necessary to protect the credit of the county by meeting its obligations.

Such remained the law until the act of March 8, 1879. It may be made a question whether that act was intended to apply to cases where a court of competent jurisdiction, state or federal, had issued a writ of mandamus commanding the levy of a tax to pay a judgment. If it was not intended to apply to such cases, it presents no obstacle to the justices of the county court in rendering obedience to the command of such a writ. If it was intended to apply to cases where such a writ of mandamus has issued from a court of competent jurisdiction, is it invalid as to bonds previously issued because it impairs the obligation of the contract by substantially lessening the value and efficiency of the remedy in force when the debt was created?

It is clear that it falls within the prohibition of the constitution of the United States. When the bonds were issued, the power of the county court was absolute and unconditional, and the duty simply ministerial, and capable of direct enforcement by a writ of mandamus to the justices of the county court. By the recent act the power is taken away from the county court, and it can only act upon the order of the circuit court or judge commanding it to levy such a tax. The recent act has undertaken to convert the duty of levying such taxes from a ministerial into a judicial duty. The creditor has no longer a direct, plain, and adequate remedy against the county court. If that act is valid as to the antecedent obligations, and applies to the judgments in this court, let us see its effect on the rights of the judgment creditor of a county. We must, instead of issuing, as we did previously, a mandamus to the county court directly, commanding it to levy a tax to pay the judgment, now issue a writ, commanding the county court to enter an order, if it is satisfied that there exists a necessity for the levy of the tax, to request the county attorney to present a petition to the state circuit court or judge for authority to levy the same. Suppose that such a writ is permissible, and is complied with by the county court, and then suppose the prosecuting attorney, or circuit court, or judge, does not act. The judgment creditor of this court would then be without further remedy, unless the court should issue a writ of mandamus to the state circuit court or judge, commanding action in the premises. The duty devolved by the enactment in question on the state court or judge is manifestly judicial. How could this court command the state court or judge to issue the order to the county court to levy the tax, since by the act that court, or the judge thereof, is to decide both upon the necessity for such a tax and "that the levy thereof is not in conflict with the constitution and laws of this state?" Suppose the state judge or court refuses to make the order, what is the judgment creditor in this court to do? We asked this question of one of the learned counsel for the respondents. He admitted that this court could not punish the state judge for disobedience, and that the only remedy of the relator was an appeal, under section 6 of the act, to the supreme court of the state. But suppose that court does not act, what, then, can the relator do? The learned counsel frankly answered, "Nothing; that such a case was not supposable." It is too plain for argument that legislation which compels this court to execute its judgments through the agency and by the assistance of the judicial courts of the state is not only impracticable, but, as respects bonds previously issued, is unconstitutional.

Unless the federal courts can execute their own judgments without the intervention, or even against the opposition, of the judicial courts of the state (if it were allowable even to suppose that such opposition would ever be offered), there would soon be none so poor as to do them reverence. Legislation which compels the relator to seek the fruits of his judgment in this court by a resort to the judicial powers of the state courts must be inoperative. As to the past it is inoperative, because it impairs the obligation of the contract by substantially impairing the remedy in force when the contract is made. The mutual independence, within their respective spheres, of the state and national judicial tribunals, is a fundamental doctrine in our systems of jurisprudence. Neither tribunal is dependent on the other. Each executes for itself and by itself its own judgments. The only control of the federal over the state courts is the appellate jurisdiction of the supreme court of the United States in the limited class of cases in which an alleged federal right has been denied by the judgment of the highest court of the state. Each court is alike the court of the people of the state. Neither is foreign to the other. Both are necessary parts of one complete, harmonious system. This court possesses no power or jurisdiction not conferred upon it by the supreme law in the land, viz., the constitution and laws of the United States passed in pursuance thereof.

The federal tribunals were created for wise and necessary purposes, and they cannot refuse to exercise the powers and jurisdiction with which they are clothed without a practical denial of the rights of suitors—rights

which have their origin and their guaranties in the constitution of the United States, and which are valueless unless they can be sustained and enforced by the judicial arm of the government, whenever or wherever or by whomsoever denied. When rights protected by the constitution of the United States are invaded by the legislation of congress or the states, the delicate duty—but still a duty—rests upon the judicial tribunals, which they cannot avoid if they would, so to declare and adjudge.

The present case is one which essentially depends upon the scope, effect, and application of the provision of the federal constitution prohibiting the states from impairing the obligation of contracts. It is a serious matter in any case to pronounce a statute unconstitutional, but where the validity of a statute depends upon whether it conflicts with the constitution of the United States, it is peculiarly a question to be decided by the federal tribunals, for any decision which may be made by the state courts in favor of the statute is subject to review and reversal by the supreme court of the United States. This consideration relieves us of much of the embarrassment which we would otherwise feel in pronouncing the act of the legislature, if intended to apply to such a case as this, to be unconstitutional, and the remaining embarrassment is greatly removed by the further consideration that if we are in error our judgment can be corrected by the supreme court of the United States.

The result is that the act of March 8, 1879, if intended to apply to judgments in this court, is wholly inoperative and void, under the constitution of the United States, as respects county bonds issued prior to its enactment.

Being of opinion that the relator is entitled to the levy of a special tax to pay his judgment, if there be no other funds of the county out of which it can be paid, the demurrer to the return to the alternative writ is sustained, and if the respondents have no further return to make, a peremptory writ will be ordered. Judgment accordingly.

Case No. 15,504.

UNITED STATES v. KALDENBACH.

[1 Cranch, C. C. 132.] [1]

Circuit Court, District of Columbia. July Term, 1803.

INTOXICATING LIQUORS—LICENSES.

The corporation of Georgetown had no power, in 1803, to grant retailing licenses.

Indictment for retailing spirituous liquors without license. The defendant justified under a license from the corporation of Georgetown.

Mr. Morsell, for defendant, contended that the corporation of Georgetown have either an exclusive or a concurrent right to license retailers and ordinary keepers, under the act of Maryland, of 1799, c. 85, § 2.

Mr. Mason, contra. The general law was that the county courts should grant licenses. The corporation of Georgetown made several attempts, and at last, by the act of November, 1799, c. 85, obtained the power to grant licenses; but the power was given to the "Mayor's Court of the Corporation," which was abolished by the act of 27th February, 1801, § 16, and that court was to collect one tax for the state of Maryland, and another, not exceeding five dollars, for the corporation. After the District was separated from the state of Maryland, the tax for that state became improper, and the act of 1799 could not be executed. The act of congress, May 3d, 1802, § 9 (2 Stat. 195), directs that all such licenses shall be granted by the circuit court of the District of Columbia, and the tax shall be applied to the benefit of the county of Washington; and thereby repealed so much of the act of Maryland, of 1799, as gave the power to the corporation of Georgetown.

BY THE COURT, (nem. con.) The fine must not be imposed. The act of congress of 3d May, 1802, cannot be carried into effect so as to collect the taxes, but by the intervention of this court. By that act the power of licensing is exclusively vested in this court.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,505.

UNITED STATES v. KANSAS PAC. RY. CO.

[4 Dill. 367; [1] 2 Cent. Law J. 801; 1 N. Y. Wkly. Dig. 444.]

Circuit Court, D. Kansas. May Term, 1876. [2]

UNION PACIFIC RAILROAD—RIGHT OF GOVERNMENT TO FIVE PER CENT OF NET EARNINGS.

1. Under the act of congress of July 1, 1862 (12 Stat. 489), construing the charter of the Union Pacific Railroad Company and of the other companies therein named, the United States may recover of the companies receiving its bonds, until such bonds and interest are paid, five per cent of the net income earned after the completion of the roads.

2. Such recovery may be had in an action at law.

Demurrer to petition. The defendant, formerly the Leavenworth, Pawnee, and Western Railroad Company, was one of the roads aided by the act of congress of July 1, 1862, and the amendatory act of July 2, 1864 [13 Stat. 356], relating to the Union Pacific Railroad, and other companies therein named. Bonds of the government were delivered to the defendant as provided in said act, amounting in all, as alleged, to $6,303,000, payable in thirty years, with interest at six per cent, payable semi-annually. The de-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

[2] [Reversed in 99 U. S. 455.]

fendant's road is averred to have been completed November 2, 1869, and that since then to the 31st day of October, 1874, the net earnings of the road have amounted to $6,176,602.60, and that five per cent of said net earnings, during said period, amount to $308,830.13. The act of congress of July 1, 1862, provides as follows: "Sec. 6. The grants aforesaid are made upon condition that said company shall pay said bonds at maturity, * * * and all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per cent of the net earnings of said road shall also be annually applied to the payment thereof."

This is a suit at law to recover the said five per cent of the net earnings. The petition alleges the foregoing facts, and a demand and refusal to pay. A demurrer to the petition was filed, under which the following points were made by the defendant, and argued, and submitted to the court at the May term, 1876, before MILLER, Circuit Justice, viz.: (1) That the provision of the act of 1862, set forth in the petition, does not impose any obligation on the company to pay money to the government, but is merely a directory provision, regulating the management of the internal affairs of the company. (2) That if the provision in question does create an obligation binding the company to pay a proportion of its net earnings to the government, such right is of an equitable nature, enforceable only by proceedings for account, and cannot be made the foundation of an action at common law.

The cause was taken under advisement, and at a subsequent day an order was directed to be entered overruling the demurrer, with leave to answer.

J. P. Usher and C. E. Bretherton, for the demurrer.

George R. Peck, U. S. Dist. Atty.

MILLER, Circuit Justice, in directing the entry of an order overruling the demurrer, in substance observed that he had never had any doubt that the demurrer must be overruled, but he had held it up on suggestion of counsel that the argument of the case of Union Pac. R. Co. v. U. S., on appeal from the court of claims, might involve propositions affecting this case. 91 U. S. 72. That was a suit brought by the company against the United States, to recover the one-half of the freight earned by the company for carrying mails, etc., for the United States—the government claiming that all such earnings should go to pay the interest on the government bonds. That case was recently argued in the supreme court of the United States, and nothing was developed touching the right of the government to recover the five per cent of the net income, after the completion of the road, a right given in the original charter of July 1, 1862, and which in this respect has never been repealed or modified. Let the demurrer be overruled.

Judgment accordingly.

[The case was taken on a writ of error to the supreme court, where the judgment was reversed, and the cause remanded for a new trial, Mr. Justice Strong dissenting. 99 U. S. 455.]

Case No. 15,506.

UNITED STATES v. KANSAS PAC. RY. CO. et al.

[4 Cent. Law J. 174;[1] 23 Int. Rev. Rec. 90.]

District Court, D. Kansas. Feb. Term, 1877.

CLAIMS AGAINST UNITED STATES—FRAUDS.

The word "person," as used in the provision of the Revised Statutes of the United States prescribing penalties for the presentation of fraudulent claims against the government, does not include corporations.

On demurrer to plaintiff's petition.

Matt. H. Carpenter, S. W. Johnson, and J. L. Pendery, for plaintiff.

J. P. Usher, C. E. Bretherton, and C. Monroe, for the railroad company.

FOSTER, District Judge. This suit is brought on the relation of John S. Pendery, to recover from the Kansas Pacific Railway Co. and others a large sum of money—$2,287,280—as a statutory penalty or forfeiture for presenting to the treasury department of the United States for payment, and receiving payment thereon, a lot of claims and vouches for transporting troops, munitions of war, and military supplies over the railroad of the defendant company, from the year 1868 to 1875, which claims and vouchers the plaintiff alleges were false, fraudulent, and excessive.

The law under which this suit is brought being a penal statute, it should not be enlarged by implication, but should be strictly construed. [Tiffany v. Bank of Missouri] 18 Wall. [85 U. S.] 409; U. S. v. Clayton [Case No. 14,814]. Under the common law of England, corporations could be indicted for misfeasance and nonfeasance, and the same principle has been recognized by many of the state courts in this country. It being settled, however, that there are no common-law offences cognizable by the United States courts, but only such as are declared so by act of congress, it may be questioned whether the federal courts would follow the English rule on this subject. But that question is not important in this case.

[1] [Reprinted from 4 Cent. Law J. 174, by permission.]

The only point here is, whether or not corporations are included in the word persons, and as such liable to the penalty prescribed in section 3490 of the Revised Statutes, under which this suit is brought. The tendency of modern decisions is to hold corporations liable as to duties and responsibilities, the same as individuals. 2 Dill. Mun. Corp. § 746. But after a careful reading of the law under which this suit is brought, and the act of 1863, from which it is taken, I cannot bring my mind to believe that congress intended to include corporations within the provisions of the act. The whole tenor of the law seems to preclude its applicability to corporations. Section 1 of the act of 1863 (12 Stat. 696) provides, if any person in the land or naval forces of the United States shall do any of the acts therein specified, being the same as prohibited by section 5438 of the Revised Statutes, he may be arrested and held to trial by court-martial, and, if found guilty, shall be punished by fine and imprisonment, etc. Section 3 of said act provides that any person not in the military or naval forces of the United States, * * * who shall do or commit any of the acts prohibited by any of the foregoing provisions of this act, shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs, etc., * * * and every such person shall, in addition thereto, on conviction in any court of competent jurisdiction, be punished by imprisonment not less than one, nor more than five years, or by fine, etc. Now, section 1 of this act is re-enacted in substance in section 5438 of the Revised Statutes, omitting its restriction to persons in the land or naval forces, and making it applicable to every person, whether in the land or naval forces or not, thus doing away with the distinction between such persons as are in the United States service and those that are not, and providing a common punishment for both classes. And section 3 of said act, which provides for a penalty and forfeiture by civil proceedings, is re-enacted in section 3490 of the Revised Statutes, omitting the punishment clause, which is provided for in section 5438.

If possible, in construing statutes, the legislative intent must be ascertained from the words of the act itself; and as the last act does not seem to indicate an intention to enlarge the scope of the act of 1863, but merely to arrange its provisions under different sections and titles, we may well look to the original act for light on this subject. Did section 3 contemplate bringing corporations within its provisions? It would seem not. It provides that every person, not in the military or naval forces, who shall commit the act, in addition to the penalty and forfeiture, may be imprisoned, etc. Section 5438, Revised Statutes, has the same provisions. These statutes evidently refer to such a class as are capable of being employed in the land or naval forces, or in the militia. It is further provided, in section 5 of the first act, that, in a suit to recover this forfeiture and damages, such person may be arrested and held to bail. The same provision is contained in section 3492 of the Revision. These various provisions of the law indicate to my mind that, in using the word person in the act of 1863, and in the Revised Statutes, it was the intention to restrict it to individuals, and not to make it applicable to corporations.

The demurrer to the petition will, therefore, be sustained.

Case No. 15,507.

UNITED STATES v. KAUB.

[23 Int. Rev. Rec. 211.]

District Court, E. D. Alabama. June 7, 1877.

CUSTOMS DUTIES—CLASSIFICATION—LOTTERY TICKETS.

[1. Where decisions of the treasury department under a tariff act have been long in force, and congress reproduces, in hæc verba, the language thus construed, in a later statute, the interpretation thereof will be much aided by reference to such decisions.]

[2. German lottery tickets printed in full abroad, so as to require no additions in writing, were dutiable, either under the designation "all printed matter," contained in Rev. St. § 2504, Schedule M, or, if not included in that description, then as nonenumerated articles manufactured in whole or in part, under section 2516.]

[This was a criminal information against Edward Kaub for importing dutiable articles without paying the duties thereon. The cause was heard on a demurrer to the information.]

W. H. Bliss, U. S. Atty.

H. A. Clover, for defendant.

TREAT, District Judge. Defendant imported through the mails large packets of German lottery tickets without complying with the requirements of the law as to payment of duties, etc. The question is whether such articles are dutiable. A careful reading of the statute (Schedule M, p. 483) will show that they are not within the list of articles therein designated, viz.: Paper and manufactures of paper. The various decisions of the treasury department as to the true construction of the statutes concerning dutiable articles are not conclusive on the courts; yet when such decisions have been long in force, and the language of prior statutes is reproduced in haec verba in later statutes, such treasury rulings lend aid in reaching a true interpretation of the latter acts of congress.

For a long period of time the treasury department had ruled that the true distinction between "printed matter" and "manufactures of paper" depended upon the use to be made of such printed matter, viz.: whether such matter consisted of labels, etc., ready for use

without being filled up by writing, or was to be issued as reading matter, or whether, on the other hand, such matter was partly printed for the purpose of being filled up by writing.

It is fair to infer that congress reproduced the former statutes in the light of such practical construction given to them. Schedule M (page 477) makes dutiable "books, periodicals, pamphlets, blank-books, bound or unbound, and all printed matter, engravings," etc. As these tickets were printed abroad in full, and require no addition thereto in writing, they are dutiable. This view is strengthened by an examination of the free list (section 2505, p. 491), as to books, etc., and crude material for making paper. If these articles did not fall within the description of printed matter, as stated, they might be included, perhaps, within section 2516 as articles manufactured in whole or part, not enumerated, and be dutiable at 20 per cent. ad valorem. Section 2503 imposes duties at rates mentioned in the next section, with exceptions enumerated, the latter paying only 90 per cent. of the enumerated rates. Among those exceptions are "paper and manufactures of paper, . . . books and other printed matter, etc." Hence it is fairly open for construction, whether these articles being printed matter are dutiable at 25 per cent. or 22½ per cent. ad valorem. Section 3082 in using the term "merchandise" includes therein dutiable articles imported, and imposed for its violation, fine or imprisonment or both, the fine being not less than $50 nor more than $5,000. The demurrer is overruled.

Case No. 15,508.

UNITED STATES v. KAZINSKI et al.

[2 Spr. 7; [1] 8 Law Rep. 254.]

District Court, D. Massachusetts. June, 1855.

INDICTMENT—JOINDER OF DEFENDANTS—VIOLATION OF NEUTRALITY LAWS.

1. Two or more persons charged with committing an offence in its nature several, cannot be joined in the same indictment.

2. It is not a crime, under the neutrality law, to leave this country with intent to enlist in foreign military service.

3. It is not a crime to transport persons out of the country with their own consent, who have an intention of so enlisting.

4. To constitute a crime under the statute, such persons must be hired or retained to go abroad with the intent to be so enlisted.

This was an indictment [against Louis Kazinski and others] for violation of the second section of what is commonly known as the neutrality act of 1818 (3 Stat. 447). The section reads as follows: "If any person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States, with intent to be enlisted or entered in the service of any foreign prince, state, colony, district or people, as a soldier, marine or seaman, on board of any vessel of war, letter of marque, or privateer, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding $1,000, and be imprisoned not exceeding three years."

The first count of the indictment charged the defendants with having, "at said district, hired and retained one William Newman and one George Smith to enlist and enter himself, as a soldier, in the service of a foreign prince, to wit: the queen of Great Britain and Ireland." The second count charged the defendants with having, "at Tarpaulin Cove, enlisted and entered themselves, and that each of them did then and there enlist and enter himself to go beyond the limits of the United States, to wit: to Halifax, in the British province of Nova Scotia, as a soldier, in the service of a foreign prince, to wit: the queen of Great Britain and Ireland." The third count was the same, with the exception of the "foreign prince, to wit: the emperor of France." The fourth count charges the defendants with having "entered and enlisted themselves, and each of them did then and there enlist and enter himself to go beyond the limits of the United States, to wit: to Halifax, in the British province of Nova Scotia, with intent of each of said persons, there to be enlisted and entered as a soldier in the service of a foreign prince," &c. The fifth count charged the defendants with having "then and there retained another person, to wit, Joseph C. Vigne and one Jacob Fisher, to go beyond the limits of the United States, to wit, to Halifax, in the British province of Nova Scotia, with intent of the said defendants, that the said Joseph and the said Fisher should be enlisted and entered as a soldier," &c. The sixth count charged the defendants with having "retained certain other persons, to wit, Joseph C. Vigne and Edward Colavel, to go beyond the limits of the said United States, to wit, to Halifax, with intent of him, the said Joseph, and of him, the said Edward, to be there enlisted and entered as a soldier in the service of a foreign prince," &c. The seventh count charged the defendants with having "hired and retained certain other persons then and there, whose names are unknown, to go beyond the limits of the said United States, to Halifax, with intent of them, such other persons, whose names are to the jury unknown, to be enlisted and entered in the service of a foreign prince," &c.

A motion to quash was made by counsel for defendants, on the grounds: 1st. That the second, third and fourth counts charged several distinct and separate offences, which, from their nature, the defendants could be guilty of only severally; that is, each of the defendants committed a crime in enlisting

[1] [Reported by John Lathrop, Esq., and here reprinted by permission.]

himself; and there was no possibility in the nature of things that any other one of the four defendants should be guilty of the crime of the first one's enlisting or entering himself, and so on. And these counts were bad both for misjoinder of the defendants and offences. 2d. That neither of them alleged any offence within the statute, neither of said counts charging defendants with having enlisted himself as a soldier; but the second and third charging them with enlisting to go beyond the limits of the United States as a soldier; and the fourth, that they had entered and enlisted to go beyond the limits of the United States, with intent there to be entered and enlisted. It was also objected to all the counts in said indictment, that they charged no crime, as the purpose of this section of the statute was to prevent only marine expeditions and enlistment for marine service; that the word "soldier" was limited by the following words: "On board a vessel of war, letter of marque or privateer." The three following sections of the same act are evidently limited to naval enlistments, and the sixth was the first section that related to land expeditions, and under that only could an offence of this kind at all be the subject of an indictment.

The district attorney said he was required by the "fee bill" to join all offences and all offenders in the same indictment; that he had no discretion; where he could join, he must join both offences and offenders. It was contended by counsel for defendants that this was merely directory, and the rights of these several defendants could not be disposed of so summarily; that the fee bill, in the first place, did not require the several offences to be in one count in the same indictment; that all the direction to join could mean was offences and offenders that might properly be joined by the rules of pleading.

B. F. Hallett, U. S. Dist. Atty.

John A. Andrew and William L. Burt, for defendants.

SPRAGUE, District Judge, held that the word "soldier," used in this section, was sufficient to extend it to cases of this nature. Ordinarily, the words of limitation following would qualify all the words preceding; but here "soldier" must be taken in its ordinary sense, as one enlisted to serve on land in a land army. That the fee bill was obligatory on the court, and all offences and offenders that might, under the rules of pleading, have been joined formerly, must be joined now. The only question was, whether the offences set forth in the second, third and fourth counts might, by the rules of pleading, be joined? These were offences in which but one could have participated. No one could be guilty of the offence of another person's enlisting himself, which was the offence in these counts charged. Each of these counts charged four persons jointly with an offence which by law is several only, and can under no circumstances be joint. These counts must be stricken out.

The district attorney then entered a nolle prosequi as to these counts. The case of the government was then offered to the jury. The district attorney said that the defendants were charged with having hired or retained certain parties to go beyond the limits of the United States to be enlisted; that he should not hold himself to prove any particular case or act of such hiring or retaining, but give such evidence to the jury as would justify them in inferring such hiring or retaining. As to the word "retain" in the statute, he contended that any holding by consent or by deception, or by force, was sufficient to bring the defendants within this statute. As to the "intent" spoken of in the statute, it would be sufficient to show such intent on the part of the persons here arraigned, without showing the intent of the parties hired or retained by them. The evidence would show that some eighteen or twenty men were by various means inveigled on board a British brig, the Buffalo, at New York, under the representation that they were to be employed as laborers and mechanics at their various trades. Some were told that they were to work on a railroad at Halifax; others, that they were to work on farms. That by these representations they were induced to go on board the Buffalo, in order to take them to Halifax, to enlist for the Crimea; that the whole thing was no better than kidnapping. One of these men was to go to Hartford to work at his trade as a saddler, and did not know the vessel was not bound there till two days out. Some of them doubtless understood they were to go to Halifax, and could enlist if they wished. They were all taken on board the Buffalo, and after being two days out she was obliged to put in at Tarpaulin Cove for water, where they were found and arrested by the revenue cutter James Campbell, and brought to this city.

The witnesses for the government were then called, and evidence was put in at great length, tending to show that various third parties on board the Buffalo were induced to take passage in her and leave the limits and jurisdiction of the United States through the deception of some one, whether of these defendants it did not appear; but no connection was attempted to be made out between these defendants themselves and the parties on board, previous to their departure from New York, and no agency of these defendants was shown in such deception. After this testimony was in, the prosecuting attorney said he should at that point ask an intimation from the court as to the necessity of proving the "intent" of the persons hired and retained on board the Buffalo. He said, if it was necessary to prove the intent of the passengers who were alleged to have been hired and retained to be enlisted, it

would be necessary to show it by the testimony of other persons, for their confession would render the parties themselves, who were hired, liable to the penalties of this same act, and they could not be called to criminate themselves.

The counsel for the defence contended that it was necessary to prove "intent" of the persons alleged to have been retained to be enlisted, but the attorney's construction of the statute was wrong. It was no crime to be hired, no offence against this statute, and the parties themselves who were hired were the proper persons to testify as to their "intent," and this was the only testimony that could be admitted to prove it. The declarations to third persons of the persons hired would not be admissible.

SPRAGUE, District Judge, held that third persons would not criminate themselves by testifying that they were leaving the country with the "intent" to enlist in a foreign service; that for the present the prosecuting attorney could proceed on the supposition that it was necessary to prove such "intent" on the part of those retained. As to the question of the admission of the declarations of these third parties, it would be decided when they were offered. The district attorney then offered testimony to prove that certain passengers on the Buffalo had admitted that they intended to enlist when they got to Halifax, and said they were willing to enter the British army; that afterwards they denied the fact, and would, if placed on the stand, now deny it. It therefore became necessary to prove it by their declarations. He said he wished to introduce such testimony under the sixth and seventh counts, and under the allegation of "persons unknown." He should offer it in regard to all the seventeen on board the Buffalo as steerage passengers. He proposed to connect these defendants with the acts and declaration he offered to prove, but they were offered primarily as proof of intent of the persons hired. He said he could not prove that each knew the others' "intent," but he proposed to prove that each had the "intent" independently.

It was argued for the defence that this testimony was admissible, if at all, only as to Vigne and Colavel; and, as to them, only under the sixth count, where their intent was alleged. Now it was claimed to be admissible as to all the other passengers on the Buffalo, under the name of "persons unknown." Certainly every person on the Buffalo was known. Nothing in regard to their sayings and doings could be admitted under that count; and the moment the testimony was offered in regard to such passengers, as persons unknown, it would appear they were known, and the proof would vary from the allegation. Take, for instance, the name of Fisher, in the fifth count. Could any of his admissions be put in under the seventh count? And yet the prosecuting attorney says the "persons unknown" are the whole seventeen. Then as to the persons named in the sixth count, their "intent" could certainly not be proved under the allegation in the seventh count, for they were evidently not persons unknown, and yet they were part of the seventeen. Then the two persons named in the sixth count are the only ones whose "intent" could be proved under the allegation in the indictment, and that only under that count. Otherwise there would be a variance between the allegations and proof.

Now, as to the testimony by which it is proposed to prove this "intent." It is proposed to prove it by admissions of third parties in regard to what had previously taken place; that is, as to the "intent" they had when they were hired or retained in New York. This was the only place where there was any hiring or retaining proposed to be proved, and the evidence, if admitted, would only go to prove the "intent" of an offence committed, if at all, out of this district, and to prove it by declarations made after the acts, of a previous "intent." Then it was admitted by the prosecuting attorney that the persons whose intent it was proposed to prove, would, if called, testify that they not only had made no such declarations, but they had no such intent as the declarations would seem to imply. Certainly these persons were the best witnesses to their intent. They were here,—they were in the hands of the government. There had been no evidence of any hiring by defendants while at Tarpaulin Cove; consequently, any evidence of the "intent" of these third parties there, would be irrelevant.

SPRAGUE, District Judge, held that for the purpose of showing the intent with which these persons were going to Halifax, on board the Buffalo, their declarations while on board and on their way might be given in evidence, but that this must be confined to declarations made of their intentions while within this district, and that no declarations made here of prior intentions at New York could be given in evidence, and that such evidence would not affect the defendants without proof of a hiring or retaining by them within this district. The evidence offered related only to the persons named in the sixth count. Whether it was admissible under the seventh count need not here be decided.

Evidence was then introduced of various conversations of the third parties on board the Buffalo, while lying at Tarpaulin Cove, showing a willingness of such persons to go to Halifax to enlist in the British army. Defendants were not present at any of these conversations, and there was no evidence of their knowledge of them, or of the willingness of these third parties to go to enlist.

The case for the government was here closed.

SPRAGUE, District Judge. The fifth count

is not sufficient. It does not allege the intent of the persons hired: this is necessary. This second section creates three distinct offences; the second and third are coupled together. They consist in hiring or retaining another person to enlist here, or to go without the limits of the United States with intent to be enlisted. To constitute the offence of enlisting here, it requires the consent of the party enlisting; and so also the hiring or retaining a person to go abroad with intent to be enlisted, requires assent and intent on the part of the person hired or retained. It is to be further observed, that the word "retain" follows the word "hire." We should not expect to find it used in a meaning opposite to that of "hire," and opposite to its own usual signification. Suppose it to be used in the sense of detain, and apply it to the enlisting of men here. It at once becomes impossible. It must be used in a sense that will apply to both. The nearest term is probably "engage," and it is used like the word "retaining," when speaking of retaining counsel. It is an "engaging" of one party by the other, with the consent and understanding of both. The next question arising is, was there any retaining within this district? The hiring and retaining here, and the intent with which they were so hired or retained, must be proved. These parties may have been deceived and betrayed in their supposed voyage to Halifax to obtain work. If the defendants induced them to go, they are not to be excused; but they are liable in some other form,—not in this, if at all.

After reviewing and analyzing the evidence at length, the jury were instructed that there was not sufficient evidence to support a verdict of guilty, and they returned a verdict accordingly, and two of the defendants were discharged. Two of them were held to answer to a similar indictment. In this the point was presented of agency in obtaining these enlistments. The district attorney said he should offer evidence to prove that the defendants employed a man by the name of Kaufman to bring certain persons from New York to Boston, and that those persons, after they came to Boston, went to Halifax and enlisted, and that Kaufman aided and assisted them in so going to Halifax.

SPRAGUE, District Judge, held that these facts, if proved, would not be sufficient. A distinct hiring or retaining by the defendants must be shown. It might be done through agents, but these agents must be shown to be agents for this purpose and acting under the defendants. There is nothing here to show these defendants were not the agents of the persons sent on here under Kaufman. They might have wished the defendants to procure them a passage, or the means of going out of the jurisdiction to enlist. If a captain of a vessel should know that all his passengers were going out of the United States for the purpose of enlisting, or were hired or retained to go, he would not be liable: he is as much the agent of the person hired as the one hiring,—and he might have the knowledge and commit no offence. It would be no crime to obtain a ticket or hire a cab for the person who was hired or retained to go beyond the limits of the United States to enlist. These parties might all be countrymen, and these defendants, possessing the most information, might aid the others and go with them to obtain a passage. This was no crime. They were but the agents of the persons they were advising and assisting. All that was offered to be proved here was, that defendants sent one Kaufman from New York with men to go to Halifax: no proof of the intent of the persons sent on,—no proof of the intent of defendants in sending them. If the agent hired them to go to Halifax, under that state of facts, as soldiers, he alone was liable. Kaufman might have made an agreement with these men to commit highway robbery, if he had chosen, and in that he could not be the agent of defendants. These persons may have employed these defendants as their agent, from their superior knowledge, to assist them in getting to Halifax to enlist. In such a case they would properly be said to "retain" these defendants, not these defendants them.

The jury were thereupon instructed that the evidence offered would not be sufficient to support a verdict of guilty. The jury thereupon returned a verdict of not guilty, and defendants were discharged.

Case No. 15,509.

UNITED STATES v. KEEFE.

[3 Mason, 475.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1824.

SEAMEN—ENDEAVOR TO MAKE REVOLT—JURISDICTION—INDICTMENT.

1. An endeavour to commit a revolt is an offence within the 12th section of the act of 1790, c. 9 [1 Stat. 115], if committed in a foreign port. The section does not confine the penalty to cases on the high seas.

[Cited in Ex parte Byers, 32 Fed. 407.]

2. If in an indictment for an endeavour to commit a revolt, it is averred to be on the high seas, the allegation is not material to be proved; and if the offence is proved to have been committed in a foreign port, it is sufficient.

[Cited in U. S. v. Seagrist, Case No. 16,245.]

Indictment [against Michael Keefe] for an endeavour to commit a revolt on the high seas on board of the brig Prudent, Ellis master. Upon the trial it appeared, that the offence, if committed at all, was committed on board the brig Prudent, while lying in a foreign port; and the question was made, whether under these circumstances the indictment could be maintained.

[1] [Reported by William P. Mason, Esq.]

Mr. Blake, for the United States, cited [U. S. v. Bevans] 3 Wheat. [16 U. S.] 387; [U. S. v. Wiltberger] 5 Wheat. [18 U. S.] 76, 103; U. S. v. Smith [Case No. 16,337]; U. S. v. Hamilton [Id. 15,291].

STORY, Circuit Justice. The present indictment is founded on the 12th section of the crimes act of the 30th of April, 1790 (chapter 9). My opinion is, that it is not necessary to prove that the offence was committed on the high seas in order to bring the case within the reach of that section. It is true, that in the first part of that section certain offences are enumerated, having reference to the high seas. But the clause, on which the present indictment is founded, is a separate and substantial clause, and contains no reference whatsoever to any place, where the offence may be committed. The words are, "or if any seaman shall confine the master of any ship or other vessel, or endeavour to make a revolt in such ship," he shall be liable to the punishment prescribed by the act. Now both of these offences may be committed as well in port as at sea; and the mischiefs may be the same in either place. The words of the statute therefore being general and without any limitation, and the competency of congress to punish such offences as well in port as at sea, not being in doubt, I can perceive no reason for interposing a limitation, where the act has fixed none.

It is true, that the indictment lays the offence to have been committed on the high seas; but unless the jurisdiction is limited to the high seas, that allegation is in this case immaterial. If indeed the offence had been committed in a domestic port, it might have been material, with reference to the jurisdiction, to have averred the place where it was committed; for the offence would then have been triable in the district, wherein it was committed. But whether the offence be committed on the high seas or in a foreign port the jurisdiction equally attaches to this court. The act of congress has provided, "that the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state (meaning any of the United States), shall be in the district where the offender is apprehended, or into which he may first be brought." Act 1790, c. 9, § 8. It is no more necessary to prove, that this offence was committed on the high seas, than in a case of theft, it could be necessary at common law to prove it was committed in the very township in which it is laid in the indictment. 1 Chit. Cr. Law, 200. See, also, Rex v. Athos, 8 Mod. 137, 141. It is sufficient, if proved to be done any where within the county (where alone it is triable), for then it is within the general jurisdiction of the court, which is all the law requires.

The question, as to the construction of this section of the statute, has already been decided by this court, in U. S. v. Hamilton [Case No. 15,291]. And the other point, as to the proof under the indictment, has been decided in the same way by the circuit court of the United States in Pennsylvania, —U. S. v. Smith, Whart. Dig. [Id. 16,345].

Case No. 15,510.

UNITED STATES v. KEEN.

[1 McLean, 429.] [1]

Circuit Court, D. Indiana. May Term, 1839.

FEDERAL COURTS—POWER TO GRANT NEW TRIALS —INDICTMENT—VARIANCE—EVIDENCE—PROOF OF BANK NOTES—AMENDMENT OF VERDICT—JUDICIAL NOTICE.

1. The courts of the United States have power to grant new trials in criminal cases as well in those cases that are capital as in others.

[Cited in U. S. v. Conner, Case No. 14,847; Sparf v. U. S., 15 Sup. Ct. 321.]

[Cited in brief in Bell v. State, 48 Ala. 684. Cited in Bohanan v. State, 18 Neb. 77, 24 N. W. 399; Joy v. State, 14 Ind. 153; People v Cignarale, 110 N. Y. 31, 17 N. E. 135; People v. Dowling, 84 N. Y. 483; People v. Schmidt, 64 Cal. 262, 30 Pac. 815.]

2. There is no constitutional inhibition to the exercise of this power.

3. An instrument may be set out in an indictment according to its legal effect.

4. But if words are used as descriptive of the instrument, though they might have been omitted, yet being stated, must be proved.

[Cited in brief in Com. v. Dale (Mass.) 11 N. E. 536; Com. v. Perry, Id. 538.]

5. A draft signed Jos. Johnson not admissible under a count stating it to be signed Joseph Johnson, president.

6. Bank notes alleged to be inclosed in a letter stolen from the mail, need not be proved by a person who has seen the president and cashier write.

7. Any one who deals in such notes, as cashiers of banks, &c. may prove their genuineness.

8. The proof of a check drawn on the Bank of the United States and circulated as money, comes under the same rule.

9. Where the jury have omitted to find on one of the counts, the court may permit such count to be discontinued.

[Cited in U. S. v. Peterson, Case No. 16,037; U. S. v. O'Fallon, Id. 15,911.]

[Cited in Sargent v. State, 11 Ohio, 474; State v. Phinney, 42 Me. 387.]

10. In such a case the verdict cannot be amended, as in a case of special verdict, so as to enter not guilty on such count.

[Cited in Wilson v. State, 20 Ohio, 30.]

11. The court judicially know that the offence charged in the different counts, is the same, varied so as to meet the proof.

12. And a conviction on any one of the counts, will be a bar to any future prosecution for the same offence.

[Cited in Ex parte Bradley, 48 Ind. 553; Weinzorpflin v. State, 7 Blackf. 192.]

[1] [Reported by Hon. John McLean, Circuit Justice.]

13. In such a case the number of counts, the offence being the same, does not increase or lessen the punishment.

[This was an indictment against William C. Keen upon the charge of robbing the mail. On motion for a new trial.]

Stevens & Eggleston, for the United States.

Cushing, Dumont & Switser, for defendant.

OPINION OF THE COURT. At the last term of this court, the defendant having been previously indicted for stealing a letter, which contained a bank note and a draft, from the mail, he being post master, was tried and found guilty by the jury, of the second, third, fourth and fifth counts in the indictment, but there was no finding on the first count. [Case unreported.] And a motion having been made for a new trial and to set aside the verdict, for irregularity, at the last term, it was continued for argument to the present term.

The first count in the indictment charges the defendant with stealing from the mail a certain letter which "contained two certain bank notes of great value, to wit: of the value of twenty-five dollars; one of which said bank notes was on the Bank of the United States for the sum of twenty dollars, payable at the office of discount and deposit in Charleston, bearing date the second day of November, eighteen hundred and thirty-four, signed by Joseph Johnson, president, and numbered in figures 1689, payable to A. G. Rose or order, and marked with the letter D; and the other said bank note was on the Lumberman's Bank of Pennsylvania, at Warren, for the sum of five dollars, &c." The second count charges that the letter contained "one certain bank note of great value, to wit, of the value of five dollars, which said bank note was on the Lumberman's Bank of Pennsylvania, at Warren, for the sum of five dollars, &c.," "and that the letter also contained a draft drawn by Joseph Johnson on the cashier of the Bank of the United States, of great value, to wit, of the value of twenty dollars, &c." The third count alleged the letter contained the five dollar note as above described; and also a draft on the Bank of the United States for the payment of money, to wit, "for the sum of twenty dollars, &c." In the fourth count the letter is stated to have contained the above described note of five dollars; and also a draft drawn by Joseph Johnson on the cashier of the Bank of the United States of great value, to wit, "of the value of twenty dollars, &c." And in the fifth count the letter is alleged to have contained the above five dollar note and also a draft on the Bank of the United States for the payment of money, to wit, "for the amount of twenty dollars, &c." The draft given in evidence was signed by Jos. Johnson, president, &c, and drawn on the cashier of the Bank of the United States for twenty dollars.

The counsel for the defendant rest their motion for a new trial principally on two grounds: (1) The variance between the draft described in the indictment, and that which was given in evidence. (2) That the draft was not proved to be genuine. And they insist that the verdict must be set aside, as it finds the defendant guilty of four of the five counts in the indictment, omitting the first count, as to which there is no verdict. This case has been elaborately and ably argued, and its importance claims the deliberate consideration of the court.

Before the grounds taken by the defendant's counsel are examined, it may not be improper to notice an objection made by the district attorney, as to the power of the court to grant a new trial in this case. This objection is founded on the fifth article of amendments to the constitution of the United States, which declares that "no person shall be subject, for the same offence, to be twice put in jeopardy of life or limb." It may be remarked that the offence charged in the indictment, though infamous and severely punishable, does not subject the defendant to the loss of life or limb. But it is contended that if this clause in the constitution inhibits the exercise of the power by the court to grant a new trial in a capital case, the same rule should apply in cases of less criminality. That if a new trial in a case punishable with death, put the defendant in jeopardy a second time within the meaning of the constitution, it may well be doubted whether the court should grant a new trial in misdemeanors or felonies which are not punished capitally. The authority referred to in the case of U. S. v. Gibert [Case No. 15,204] is entitled to very great respect. The very learned and eminent judge who presided on that occasion, gave an elaborate and able opinion, that the above article prohibited the court from granting a new trial in a capital case. The principle involved in that decision is of great importance, and if it were likely to be brought before the supreme court, we should decline giving any intimation of an opinion on the subject. But as the question has been argued, although it is not necessary to the decision of the motion before us, we will concisely state our views in regard to it. In England it seems to be settled that in case of felony or treason, no new trial can be granted; but if the conviction appear to the judge to be improper, he may respite the execution, to enable the defendant to apply for a pardon. 1 Chit. Cr. Law, 532; 6 Term R. 625, 638; 13 East, 416, note c; 4 Bl. Comm. 375, 376. But in all cases of misdemeanor after a conviction, new trials may be granted. In 4 Bl. Comm. 335, it is laid down as a "universal maxim of the common law of England, that no man is to be brought in jeopardy of his life more than once for the same offence." The author is treating of the plea of autre fois acquit, or a former acquittal; and the same principle

applies on the plea of autre fois convict, or a former conviction. And there can be no doubt that these pleas, as stated in 2 Hawk. P. C. c. 35, § 1, are founded on the maxim, that no man can be tried twice for the same offence. Some contrariety of opinion seems to have been entertained, whether the verdict of the jury without the judgment of the court would sustain these pleas. Mr. Chitty, in Chit. Cr. Law, 372, says: "As to the sufficiency of the discharge which may be thus pleaded, it must be a legal acquittal by judgment upon trial, either by verdict of a petty jury or by battle." "If the special verdict be found by the petit jury and judgment be given by the court, 'that he go thereof without day,' this will amount to a sufficient acquittal." And Mr. Justice Washington, in the case of U. S. v. Haskell [Case No. 15,321], considered the judgment of the court necessary to a conviction. The same rule is laid down in 2 Hale, P. C. 243, 246, and in Burn, J. P. "Indictment," 11.

It would seem to be clear, if the judgment of the court be necessary to an acquittal, it must be equally necessary in a conviction. Mr. Justice Blackstone, in his Commentaries (volume 4, p. 336), says: "The plea of autre fois convict, or a former conviction of the same identical crime, though no judgment was ever given, or perhaps ever will be, is a good plea in bar to an indictment. And that the verdict of acquittal without judgment of the court, is also a bar." But this general remark must be subject to some qualification. If the court have not jurisdiction or the indictment be defective, the defendant though acquitted or found guilty by the jury, may be again tried for the same offence. That the maxim of the common law which secures an individual against being placed in jeopardy a second time for the same offence, is the foundation of these pleas, is readily admitted; but it is not equally obvious that in cases of felony, new trials have been refused, in England, on the same ground. The maxim was so strongly recommended by the principles of justice that no intelligent people could resist it. It was favorable to life and liberty, and was adopted as a protection to the subject. But if it operated to prevent new trials in capital cases from being granted, it is singular that in some case it has not been adverted to as having this effect. The note of East, in his volume 13, p. 416, states: "In capital cases at the assizes, if a conviction take place on insufficient evidence, the common course is to apply to the crown for a pardon &c.; but I am not aware of a new trial being granted in any instance in a capital case: and upon the debate of all the judges in Tinckler's Case [1 East, P. C. 354], in 1781, it seemed to be considered that it could not be." And there are numerous authorities which show that an inferior jurisdiction cannot grant a new trial on the merits, but only for an irregularity.

Now the rule not to grant new trials in capital cases may have been recommended by a policy to invoke the royal clemency, rather than to give a second trial, where the evidence did not warrant the conviction. This would seem to be a more reasonable supposition, in the absence of facts, than that the rule, which operates against the life of the subject, should be founded on a maxim intended for his protection. The constitution has adopted substantially this maxim of the common law. And it is argued that, with the maxim, its settled construction was also adopted. If this were admitted, it would still be necessary to show that the maxim had been so construed as to prohibit a new trial in a capital case. A construction of the maxim drawn from inference, and which, at least, must be somewhat doubtful, can afford but little aid to a correct understanding of the constitution.

It was formerly held in England that in a capital case the jury could not be discharged; and if discharged the defendant could not be again tried. 3 Inst. 110; Fost. Crown Law, 28. But this law has been relaxed, and it is now settled, both here and in England, that in case of absolute necessity, even in a capital trial, a jury may be discharged and another empannelled to try the defendant. 1 Chit. Cr. Law, 629; 2 Leach, 620; 4 Taunt. 309; 3 Camp. 207; 6 Serg. & R. 577; 18 Johns. 187; [U. S. v. Perez] 9 Wheat. [22 U. S.] 579. Where the court had no jurisdiction, the indictment was defective, or there was a mistrial, courts always exercised the power to discharge the jury, or set aside the verdict; and this was considered no bar to a second trial. But under no other circumstances in capital cases, it is insisted, can a verdict of guilty be set aside and a new trial granted; as another trial would put the defendant in jeopardy a second time for the same offence. Except in the case of U. S. v. Gibert [Case No. 15,204], this position is not sustained; and there are several decisions to the contrary. No case is cited where the verdict of guilty having been set aside, on motion of the defendant, it has been held to bar another trial. The position is not contested but fully admitted, that where the court have jurisdiction, the indictment being good and a legal jury empannelled, the defendant has a right to claim a verdict; and if the jury be discharged unnecessarily, he must stand acquitted. But still this does not meet the question under consideration.

The question is whether on motion of the defendant, the verdict of guilty may not be set aside and a new trial awarded. In 1 Chit. Cr. Law, 630, it is laid down that, in order to let the prisoner into a ground of defence which he could not otherwise have taken, by his consent the jury may be discharged, and that this does not bar another trial. Fost. Crown Law, 31. But, says Mr. Chitty, it does not seem without such consent, the prosecutor has any right to bring

the defendant twice into peril of his life. Fost. Crown Law, 31; 2 Strange, 984; Com. Dig. "Indictment," M. And in Hawk. P. C. bk. 2, c. 47, § 1, it is said "that it seems to have been anciently an uncontroverted rule, and hath been allowed, even by those of a contrary opinion, to have been the general tradition of the law, that a jury sworn and charged in a capital case cannot be discharged, without the prisoner's consent, till they have given a verdict. And notwithstanding some authorities to the contrary in the reign of Charles II., this hath been holden for clear law since the revolution." And again in section 22, of the same chapter: "However, it is settled, that the court cannot set aside a verdict which acquits a defendant of a prosecution properly criminal, as it seems they may a verdict that convicts him, for having been given contrary to evidence, and the directions of the judge." Coke, 14; 1 Keb. 546; 2 Hale, P. C. 310; 4 Bl. Comm. 354. If the jury be discharged, without the consent of the prisoner, in a case where they can be legally discharged only with his consent, he cannot again be put upon his trial. It is presumed this will not be controverted. And if it be admitted it shows that the assent of the prisoner to a proceeding designed for his benefit, takes from him the right, as it manifestly should do, of setting up such proceeding in bar of another trial. If he was in jeopardy, by the first verdict, by his consent that verdict is set aside and annulled; and for every legal objection the verdict and the proceedings which led to it, are as though they never had been.

If there be a right in the court to grant a new trial in a capital case, it is insisted, the same power may set aside a verdict of acquittal and order a new trial. This does not, by any means follow. In the first place the new trial is granted, at the instance of the prisoner and for his benefit. It may be admitted that the new trial could only be granted with the assent of the prisoner. But a new trial after a verdict of acquittal, in a capital case, would be against the consent and the life of the prisoner. This would not only violate the humane policy of the law in criminal cases, but it would be against its settled principles. In the language of Hawkins, above cited, "it is settled that the court cannot set aside a verdict which acquits the defendant." In cases of misdemeanor, it is admitted that both in this country and in England new trials may be granted. And is there any instance since the days of Charles the Second where a verdict of acquittal has been set aside and granted on the merits. If this rule be so general, in this country, as to admit of no single exception, where is the danger of exercising the same power by the court in cases punished capitally. It surely does not follow that if the court may grant a new trial, in a capital case, with the assent and on motion of the prisoner, on a verdict of guilty, that they may do the same thing on a verdict of acquittal, and against the consent and remonstrance of the defendant. And yet, if I understand the argument, it amounts to this and nothing more.

In the case of U. S. v. Fries [Case No. 15,170], the court asserted the power to grant a new trial in a capital case. And this has been done generally in the state courts. 17 Mass. 515; 1 Leigh, 598; 1 Blackf. 395. In Kentucky new trials are often granted in capital cases. They are not reported, as such trials take place in the circuit court, and the right in the court to set aside a verdict of guilty, seems never to have been doubted. And indeed this may be said of Ohio. In the case of People v. Comstock, 8 Wend. 549, the court decided that where the jury had acquitted the defendant, there could be no new trial. This is in conformity with the decisions in England, and also in this country. And in their opinion the court refer to some of the decisions above cited, which show that a new trial cannot be granted in England, on a conviction for felony. In 5 Cow. 39, the court decided that the court of oyer and terminer had power in a criminal case to grant a new trial. The question was, whether, it being an inferior court, it could give a new trial, except for some irregularity. And the court refer to the rule in England, not to grant new trials in cases of felony. They say: "The policy in respect to new trials in criminal cases which the English courts have pursued has never been countenanced by our courts, and would never be tolerated by our people." From this the supreme court of New York seem to think the rule in England, as to new trials, is founded on policy.

The provision in the constitution that "no person shall be subject, for the same offence, to be twice put in jeopardy of life or limb," was designed, as the language clearly imports, for the security of the citizen. It was intended to shield him against oppression and injustice. In the case of People v. Goodwin, 18 Johns. 187, the court inclined to think that this provision was obligatory on the state courts. We think otherwise. It applies to the federal courts, and to the federal courts only. The federal constitution organized a new government, distinct from the state governments; vesting the former with certain powers and imposing certain restrictions on the latter. From this it is clear that the general provisions in the federal constitution can apply only to the government of the Union. Where, in the constitution, restrictions are imposed on the states, or a principle is adopted which is intended to operate upon them, the language is specific.

On general principles, it would seem if the court in the exercise of their judgment, may set aside a verdict, where the indictment is

defective or a mis-trial is had, they may, on the same principle, set aside the verdict of guilty where the evidence is insufficient to convict. It is laid down in all the authorities, that if the court have not jurisdiction, the indictment be defective, or the jury have not been legally summoned, the defendant, though tried, cannot be considered as having been in jeopardy; and why should he be considered as having been in jeopardy, where the verdict is set aside for the insufficiency of the evidence.

The jury judge of the facts and apply to them the law as laid down by the court; and if they, in their verdict of guilty pervert the facts and misapply the law, why should not their verdict be set aside. This may be done, it is admitted, when the offence is not punished capitally, but why may it not be done in capital cases. One would suppose that the severity of the punishment, instead of abridging the rights of the prisoner should rather enlarge them. The court must sanction the finding of the jury by passing sentence of death on the prisoner; and how can they do this when they conscientiously know that neither the facts nor the law warrant his conviction. In favor of life, presumptions arise which seem to relax, and in fact do sometimes relax the rigor of the law. But in the construction of the constitution contended for, this maxim is reversed. The prisoner is found guilty by the jury, and, whether right or wrong he must stand convicted. He claims, under the constitution, a fair and an impartial trial, and he shows gross prejudices against him by the jury, who have convicted him on testimony wholly insufficient; but he is answered that the constitution protects him from being put in jeopardy a second time for the same offence, and that a new trial would violate this provision. In other words, the constitution guarantees to him the right of being hung, to protect him from the danger of a second trial. Whatever may be said theoretically of this constitutional protection, practically, the subject of it can have no very strong reason to appreciate it.

Conceiving as we do that the constitution interposes no objection to the exercise of the power of the court to grant a new trial in a capital case, the reason deduced from the rule asserted, must fall with the rule itself. And we will now examine the points on which the motion for a new trial is founded. And first as to the variance between the draft and the indictment. This is not an indictment for the forgery of this draft. The draft is rather an incident which enhances the punishment, than the foundation of the prosecution. The felonious abstraction of the letter is the principal offence; though to sustain the indictment the draft must be proved as well as the letter. And the question here arises whether this draft was admissible under the indictment. In the third and fifth counts this instrument is described as a draft on the Bank of the United States for the payment of money, to wit, "for the sum of twenty dollars." Is this a sufficient description of the draft. We think it is, and if the draft given in evidence substantially answered this description, we think it was rightfully admitted to go to the jury.

But it is objected that the draft was drawn on the cashier of the Bank of the United States, and not as alleged in these counts, on the Bank of the United States. The court do not perceive the force of this objection. A corporation must act through its officers; it can act in no other manner. The cashier of a bank is its agent, and when a draft is drawn, on the cashier of a bank, in effect as well as in terms, it is drawn on the bank. In the third and fifth counts the draft is not set forth according to its tenor, but according to its effect; and we think it was clearly admissible in evidence, under the above counts. And here the court might rest this part of the case. If the jury have applied the draft to the second and fourth counts, improperly, can such application prejudice the defendant. Is his punishment increased, by a conviction on these counts. The court see and know that the offence charged in the four counts, on which the jury have found, is the same, but varied to meet the proof. There can be but one punishment, and that is neither enhanced nor lessened by the number of counts on which the defendant is found guilty. I confess I entertain strong doubts whether the draft is admissible under the second and fourth counts in the indictment. In these counts it is alleged to have been drawn by Joseph Johnson, and the draft given in evidence was signed by Jos. Johnson, president. It was unnecessary to allege by whom the draft was drawn, as the court have already stated, but having made the allegation, it cannot be disregarded.

It is ingeniously argued that the indictment does not state the name of Joseph Johnson, by way of description, but as a fact, and that under this averment, the proof of the fact that Joseph Johnson did sign the draft is admissible. That the draft is set out according to its legal effect, which effect is shown by proving that Jos. Johnson is the same as Joseph Johnson. How is this rule to be limited If there be no other limitation than proof of the fact, the prosecution may aver the draft was signed by David Johnson, and sustain the averment by giving a draft in evidence signed by Joseph Johnson, accompanied with proof, that it was in fact, signed by David Johnson. This will hardly be contended, and yet if the rule exist, how can it stop short of this. Jos. may mean Joseph, Josephus, Joshua or some other Christian name. There is, at least, some degree of uncertainty as to the name, and this must be explained by the evidence. And this evidence is to be

heard under the averment of the fact that the draft was signed by Joseph Johnson—not that Joseph Johnson signed it by the name of Jos. Johnson. This latter allegation would have avoided any variance. Would this variance have been fatal in a civil action on the draft. In Chit. Pl. 307, it is laid down: "If a contract be described according to its legal effect, it will, in general be sufficient, though it may vary from the precise words of the contract; but a variance, however small in setting out the name, &c., in a bill or note is fatal; and therefore where a note given by the name of Shirtliff and others, was described in the declaration as made by Shutliff and others, the plaintiff was non-suited." In the third and fifth counts this draft is described according to its legal effect. It is represented to be a draft on the Bank of the United States, for the payment of money, to wit, the sum of twenty dollars. But, how is the legal effect of a name to be given. The rule is sensible and of daily application to instruments, but can it apply to names. What is meant by the legal effect of a name. The draft is alleged to have been drawn by Joseph Johnson; but on its face Jos. Johnson appears to be the drawer. Now it is admitted that if the draft had been thus set out by way of description, the variance would be fatal. But can the name be used for any other purpose than that of description,—a description of the person of the drawer. The legal effect of an instrument may be stated without using the words found upon the face of the instrument. But can a name be so stated. Some abbreviations in words, which do not change their import and cannot mislead, may be admitted. But where any uncertainty arises in a name or a word, which is material, that uncertainty must be rendered certain by suitable averments. These lay the foundation for the proof, and give notice to the party interested. I am inclined to think that the draft was not so set out in the second and fourth counts as to make it admissible as evidence. But as before remarked, a verdict of guilty on these counts, does not prejudice the defendant, and cannot afford any ground for a new trial.

We come now to consider the second reason for a new trial, that the draft was not proved to be genuine. It is admitted that some two or three of the witnesses, who were acquainted with this description of paper, considered the draft as genuine, and of the value which it purported to be upon its face. But it seems they had never seen Johnson write, nor had they corresponded with him. And it is insisted, therefore, that they were not competent to prove the genuineness of the draft. Bank notes which circulate as money may be proved to be genuine, by persons who have experience and skill as to such notes. The cashiers of banks, or those who deal extensively in bank notes are often called to prove them. But it is admitted that a private instrument must be proved by some one who has a knowledge of the hand writing of the party, by correspondence or by having seen him write. And it is contended that this draft comes under this rule. If the draft be not technically a bank note, it possesses a great many of the characteristics of a bank note. It was payable by the bank and circulated as money. And no one can doubt, that the Bank of the United States having authorized such drafts to be drawn, was legally bound to redeem them. If the character of the draft be not identical with that of a bank note, it at least comes within the same rule of evidence, as to proving it to be genuine. But it is not necessary to prove a bank note or draft stolen from a letter, under the post office law, with the same degree of particularity as if either were charged to have been altered or forged. In most prosecutions of this kind, the notes or drafts are never recovered, and the only evidence of their genuineness is the opinion of the person who enclosed them. And all that has been required in a case where the bank notes have not been recovered, was proof that they were issued by banks reputed to be good, that the notes appeared to be genuine. Proof of the signature of the president or cashier in such a case, has never, it is believed, been required. Indeed, if this proof were held to be necessary, under such circumstances, a conviction would be impossible. The five dollar note on the Lumberman's Bank enclosed in the letter with the draft, was not produced at the trial, nor was it shown to be in the power of the prosecution to produce it. And yet it was sufficiently proved, if the person who enclosed it was able to state that the note was fair upon its face, appeared to be genuine, and passed as a note of value.

In the case of Rex v. Ellins, Russ. & R. 188, a very late authority, it was laid down in a case similar to the one under consideration, that "where the letter embezzled was described as containing several notes, it was held sufficient to prove that it contained any one of them, the allegation not being descriptive of the letter, but of the offence. And that it was not necessary to prove the execution of the instruments, which the letter is proved to contain." A bank note, draft, or other article of value stated with a letter, need not be described or proved with greater certainty than in a case of common larceny. The article enclosed must be named in the statute, and it must be proved to be what it is represented to be in the indictment. But more than this is not required.

The alleged defectiveness of the verdict remains to be considered. On four of the counts the jury have found the defendant guilty; on one of them there is no finding; and this it is contended renders the verdict

so defective as not to admit of a judgment upon it. If this position be sustainable the verdict must be set aside, and a venire de novo awarded. Where a special verdict finds only a part of the facts, which constitute the offence charged, it is clearly defective, and no judgment can be entered. As if in this case the jury had found the defendant guilty of purloining from the mail a letter, no judgment could have been entered, for he is charged in the indictment, with stealing a letter which contained a bank note and a draft. If these offences are charged in the indictment and the special verdict state evidence which only applies to two of them, the court may adjudge the defendant guilty of the two offences noticed, and enter an acquittal as to the residue. 2 Strange, 842. And this is relied on as an authority in the present case, to give judgment on the four counts embraced by the verdict, and direct not guilty to be entered on the first count.

The suggestion is not without some force, that finding the defendant guilty on the four counts, implies strongly that he is not guilty on the other count. In this view however, the question is not clear of difficulty. The finding of the jury is not special as to the facts, but, it may be said to be partial as it does not include all the counts. And there is no precedent in such a case, for amending the verdict. The finding is full on the four counts, but it is admitted that the first count, on which there is no finding must be disposed of; and if this cannot be done by the entry of not guilty as above suggested, or by a discontinuance, the verdict must be set aside. What injury or inconvenience can result to the defendant from the discontinuance of this count? The objection is urged that if discontinued, he will be liable to be again charged for the same offence. But suppose a new trial shall be awarded, as desired by the defendant's counsel, will he not be liable to be tried on the same count. The condition of the defendant, then, could not be made worse by the discontinuance, but would be made better, by a postponement and an almost certain abandonment of the charge. Indeed, no doubt is entertained by the court, that a conviction on either of the other counts would be a bar to any subsequent prosecution, for the offence, as charged in the first count. The offence alleged in the first count, is substantially the same as is set forth in each of the other counts. The variations are not such as to prevent a conviction on any one of the counts, from being a bar to the offence as charged in all the other counts. But the defendant's counsel insist that he is entitled to a trial on the first count. If a new trial were granted, could not the prosecutor abandon the first count? This will hardly be disputed. Such an abandonment does not operate as a pardon, but is a relinquishment of the prosecution, which implies an admission that it could not be sustained. But the power to discontinue this count under the sanction of the court is denied. And the case of State v. Davis [4 Blackf. 345], lately decided by the supreme court of this state, is referred to as having some bearing on the question. In that case the court decided, and very properly, that it was not error in the circuit court to refuse leave to the prosecuting attorney to enter a nolle prosequi after the evidence had been heard on the indictment. The writ of error was prosecuted to reverse a judgment of acquittal, and the court decided the judgment could not be reversed.

It is urged as a conclusive objection to the discontinuance, that a nolle prosequi after the jury are sworn in a civil case is a retraxit, and that a prosecutor cannot enter a retraxit in a felony. The effect of an entry of a nolle prosequi in a civil case does not seem to have been well settled in the books formerly. In some cases it was held to be a retraxit, which would bar a future suit; but in other cases it was considered a mere agreement to abandon the further prosecution of the particular action or count to which it was applied; and this seems to be the established modern doctrine on the subject. Such a discontinuance, then, constitutes no bar to a subsequent suit, in a civil case. In the case of Minor v. Mechanics' Bank of Alexandria, 1 Pet. [26 U. S.] 62, this doctrine is fully considered as applied to civil cases. The plaintiff in that case brought an action against Minor the cashier and his four securities, in a bond for the faithful discharge of his duties as cashier. They severed in their pleadings, and a judgment was obtained against the four securities before Minor pleaded. And on filing his pleas, the plaintiff discontinued the suit as to him, and the judgment remained against the four sureties. The bond being joint and several, the plaintiff could have sued one or all of the defendants, but he could not sue in the same action a greater number than one, unless all were included. But the supreme court held, as no special objection was stated to this proceeding, at the time, that the judgment was not reversible on a writ of error. In that case, the court say: "In cases of tort against several defendants, though they all join in the same plea, and are found guilty, yet the plaintiff may, after verdict, enter a nolle prosequi, as to some of them and take judgment against the rest. And they observe the reason is said to be, that the action is in its nature joint and several; and as the plaintiff might originally, have commenced his suit against one only, after verdict against several, he may elect to take his judgment against any one of them. But this cannot be done where the contract on which the action is brought is joint, and the defendants do not sever in their pleas."

It is not uncommon in the progress of a cause, either before or after the jury is called, for the plaintiff to ask leave to discontinue one of the counts in his declaration, and

where no objection appears to the discontinuance, it is suffered to be entered. The court however will see that no prejudice is done to the defendant by such an entry. And the same thing, in practice, has not unfrequently been done in a criminal case. The usual course however is, for the prosecutor to inform the court that he asks a conviction under certain counts in the indictment, and abandons the other counts. And on these counts, the jury are instructed to find not guilty. In case of misdemeanor, there would seem to be no substantial objection to a discontinuance of a count in the indictment, which could neither change the issue, nor by any possibility prejudice the defendant.

One good count in the indictment will sustain the judgment though there be several defective counts. This is not the rule in a civil case. The conviction or acquittal of the defendant on the first count, by the jury, could not have increased or lessened his punishment. The court see and know judicially from the counts that the same offence is charged in them all, and that the conviction on one of the counts subjects the defendant to the same punishment as a conviction on all of them. If a distinct offence were charged in the first count, for which a punishment different from that which must be inflicted under the other counts must follow a conviction, there would be more force in the objection to a nolle prosequi. With more reason, it might in such case be contended, that the issue being made on the first count and the case submitted to the jury, the defendant had a right to claim the verdict of the jury. That the prosecutor ought not to be permitted, after the evidence had been heard, to harrass the defendant, by discontinuing the prosecution and commencing it de novo. The court, in permitting a nolle prosequi, will always see that the defendant shall not be prejudiced. In this case, the court not only cannot see any prejudice which can result to the defendant from a discontinuance of the first count, but they cannot but know judicially that the offence charged in the first is the same as those charged in the other counts, and that a conviction on any one of the other counts will be a bar to the offence charged in the first count. They therefore can see no valid objection to the entry of a nolle prosequi on the first count. It is true, no precedent is found for such an entry, under the same circumstances. And from this it is argued that what has never been done the law does not authorize. This, though not a very conclusive argument, is worthy of consideration; but it cannot be safely applied to cases indiscriminately. Many things have been done which were too clear of doubt to be contested, and which have never been reported.

The motion for a new trial was overruled, and the defendant was sentenced to be confined, at hard labor, in the penitentiary of the state, ten years.

Case No. 15,511.

UNITED STATES v. KEEN.

[5 Mason, 453.] [1]

Circuit Court, D. Massachusetts. May Term, 1830.

OFFENCES UNDER CUSTOMS LAWS — OBSTRUCTING CUSTOMS OFFICER—DEFENCES.

It is no defence to an indictment for forcibly obstructing or impeding an officer of the customs in the discharge of his duties, that the object of the party was personal chastisement, and not to obstruct or impede the officer in the discharge of his duties, if he knew the officer to be so engaged.

[Cited in U. S. v. Taylor, 57 Fed. 393.]

[Cited in State v. Maloney, 12 R. I. 254.]

Indictment against the defendant [Shadrick Keen], for forcibly obstructing and impeding one James Gooch, an officer of the customs, and an inspector, in the discharge of the duties of his office, against Act 1799, c. 128, § 71 [1 Story's Laws, 633; 1 Stat. 678, c. 22]; Act March 3, 1815, c. 246, § 3 [2 Story's Laws, 1516; 3 Stat. 232, c. 94]; and Act March 3, 1823, c. 186, § 3 [3 Story's Laws, 1927; 3 Stat. 782, c. 59]. Plea, not guilty.

At the trial it was admitted that Gooch was an inspector of the customs, and known as such by the defendant. Evidence was also before the jury for the purpose of showing, that Gooch, while in the actual discharge of his duty as inspector, in superintending the unlading some goods on board of a vessel in the port of Boston, was, upon some sudden quarrel between the parties, assaulted and struck several times by the defendant.

Mr. Welsh, for defendant, contended, that it was not sufficient that there was an actual obstruction of the inspector in the discharge of his duties, but the assault must be, not for the purpose of personal chastisement, but with intent to obstruct him in his duties.

Mr. Dunlap, è contra.

STORY, Circuit Justice, in summing up to the jury, said:

The court are clearly of opinion that the argument of the defendant's counsel upon the point of law, cannot be maintained. To constitute an obstruction or impediment within the meaning of the act, it is not necessary that the party should intend to obstruct or impede the officer in the discharge of his duties. If the officer is in fact obstructed or impeded in the discharge of his duties by a person, knowing him to be an officer, then engaged in his duties, the case is within the act. It is wholly immaterial that the party has another object in view, to avenge a supposed wrong or affront, or to inflict a personal chastisement. The law intends to protect public officers, while in the discharge of their duties, from all violence and forcible impediments. That is not the

[1] [Reported by William P. Mason, Esq.]

time or place to avenge private quarrels. The security of the revenue, as well as the convenience of merchants, requires that such a protection should exist. The fact of forcible impediment, and not the private intent of the party, if the fact is unjustifiable, constitutes the offence in contemplation of law.

Verdict, guilty.

Case No. 15,512.

UNITED STATES v. KEENE.

[5 McLean, 509.] [1]

Circuit Court, D. Illinois. July Term, 1853.

OFFENSES UNDER POST-OFFICE LAWS — BUYING ARTICLE STOLEN FROM MAILS—EVIDENCE—PRESUMPTIONS.

1. It is an offense under the post office law of 1825, 45th section [4 Stat. 114], to receive or buy any article that has been stolen from the mail, knowing it to have been so stolen.

[Cited in Stockwell v. U. S., 13 Wall. (80 U. S.) 559.]

2. To show that the article has been stolen, the conviction of the individuals who stole it, is sufficient, if the article be identified.

3. When an individual is found in possession of stolen property, and fails to show how he acquired it, or gives inconsistent or contradictory accounts, how he came by it, the presumption of guilt is strengthened.

Mr. Horn, U. S. Dist. Atty.

Gregg & Edwards, for defendant.

McLEAN, Circuit Justice (charging jury). The defendant is indicted for receiving from Daniel Keene a certain article of value known as, and called a land warrant, of the value of thirty dollars, which warrant the said Daniel Keene had before then stolen from the mail of the United States, in said state and district of Illinois, on the route between the town of Fairfield, and the town of Carmi, to wit: On the 30th day of July, 1852; and which warrant the said Edmund Keene, at the time he so received it, knew it had been stolen, as aforesaid, by Daniel Keene, from the mail of the United States. A second count that Daniel Keene, being a carrier of the mail, &c., opened a certain mail of letters, which came to his possession as carrier, in August, 1852, in the state of Illinois, and that the defendant aided, advised, and assisted in opening the same, &c.

The 21st section of the post office act of 1825, provides, that if any carrier of the mail shall steal therefrom any letter or packet of letters, which he was required to carry by post, which shall contain a bank note or other article of value, on conviction shall be fined and punished by confinement to hard labor, &c. The 45th section of the same act provides that, "if any person shall buy, receive, or conceal, or aid in buying, or concealing any article mentioned in the 21st section of this act, knowing the same to have been stolen or embezzled from the mail of the United States, or out of any post office, or if any person shall be accessary after the fact, to any robbery of the carrier of the mail of the United States, &c., every person so offending, shall, on conviction thereof, pay a fine not exceeding two thousand dollars, and be imprisoned and confined to hard labor for any time not exceeding ten years." To authorize a conviction, it must be proved, that the land warrant in question was stolen from the mail by Daniel Keene, and that it was received by the defendant from him knowing it to have been so stolen.

To show the guilt of Daniel Keene, the record of his conviction has been read in evidence. In the indictment he was charged with stealing certain letters on the route from Fairfield to Carmi, in the district of Illinois, containing certain articles of value, known as land warrants, the 30th of July, 1853. This only establishes the guilt of Daniel Keene, of the offense charged in the indictment. The charge was, "stealing a letter containing land warrants." No particular warrant is specified. J. W. Barnwell, assistant post-master at Fairfield, swears that he mailed a letter at that office the 30th of July, 1852, directed to Mr. Wilson, of Shawneetown, in which were enclosed two land warrants, one for one hundred and sixty acres, No. 9,370. Daniel Keene was the carrier of the mail on the route from Fairfield to Carmi. It is proved by Mr. Wilson, to whom the letter was directed, that it was not received, and that the day it should have been received at Shawneetown, no packet was received from Fairfield. It is proved by other witnesses, that the above warrant, shortly after it was mailed, was in possession of the defendant, Edmund Keene. The defendant and Daniel Keene are brothers, the latter being a youth of some sixteen years of age. Some evidence was given to show that the brothers were seen together shortly after the letter was stolen from the mail. And the defendant, at the same time, professed that he had several land warrants to sell. Is the defendant guilty of receiving this warrant, from Daniel Keene, his brother, knowing it to have been stolen from the mail? That he was in possession of the warrant, clearly indentified as having been stolen from the mail by his brother Daniel, is not denied. It is shown to have been the same warrant, which, with another warrant, was mailed at Fairfield the 30th day of July last year. This warrant could only have been taken out of the mail clandestinely by some one who had possession of the mail. The defendant was the elder brother of Daniel, who, it is proved, was young and inexperienced. The account given by Edmund of the manner he procured this warrant, is alleged to be improbable, inconsistent and contradictory. To one person he said he paid two yoke of oxen for it; but afterwards said to the same individual, he gave for the

[1] [Reported by Hon. John McLean, Circuit Justice.]

warrant one hundred and twelve dollars in cash. That he procured this money from Joseph and William Curl, to whom he gave his note. That he borrowed from them one hundred or one hundred and fifty dollars. The warrant, he said, he purchased from Oliver Ward, of White county. Afterwards alleged he had bought it of his brother John Keene. Said he had seven or eight of them. Where a party is found in possession of stolen property clearly identified, it is incumbent on him to show how he acquired the property. This is no hardship, as an honest dealer must always be able to show, especially where the property is peculiar, of whom he obtained it. And if he fail to do this, the presumption of his guilt is greatly strengthened.

The ground assumed in the defense, that the place where the offense is alleged to have been committed, has not been proved, is entitled, it would seem, to but little consideration. It is alleged and proved that the letter containing the land warrant was mailed at Fairfield, directed to Mr. Wilson, of Shawneetown. Now, if you are able to say, from the proof, that this mail route was in the state of Illinois, it is sufficient to support the charge. If you have reasonable doubts of the guilt of the accused, you will acquit the defendant; and if, on the contrary, you find in your minds no such doubts, you will find the defendant guilty.

The jury returned a verdict, that the defendant was guilty.

Case No. 15,513.

UNITED STATES v. KELLERMAN.

[See Case No. 13,846.]

Case No. 15,514.

UNITED STATES v. KELLY.

[3 Sawy. 566.] [1]

Circuit Court, D. Nevada. March 22, 1876.

MAILING QUACK MEDICAL ADVERTISEMENTS — INDICTMENT.

1. Knowingly depositing in the United States mail by the publisher, a newspaper, containing a quack medical advertisement giving information, how and where, articles for the production of abortion and prevention of conception could be obtained, *held*, to be a violation of section 3893 of the Revised Statutes of the United States.

2. Such advertisement as published in the defendant's paper, and set out in the statement of the case, *held*, to give information how, where, and of whom, articles designed to produce abortion, and for the prevention of conception could be procured.

3. It is not necessary that the advertisement should indicate, or the indictment allege, any particular article or thing or its properties.

4. The statute forbids the use of the mails for carrying any advertisement giving information where articles designed for producing abortions and the prevention of conception can be obtained or made; the indictment charged in the conjunctive "obtained and made," and it was held good, and that proof of either would be sufficient.

The defendant [E. D. Kelly], the publisher of a newspaper, was indicted under section 3893 of the United States Revised Statutes, for knowingly mailing a newspaper containing an advertisement giving information where, how, and of whom, articles and things designed for the procuring of abortion and the prevention of conception could be obtained and made. The advertisement was set out in the indictment. It purports to be that of one Doctor W. K. Dougherty. It gives his name, the location and number of his office, and then says: "Established especially to afford the afflicted sound and scientific medical aid in the treatment and cure of all private and chronic diseases, cases of secrecy, and all sexual disorders." After enumerating a number of sexual diseases, he says that "all parties consulting him by letter or otherwise, will receive the best and gentlest treatment and implicit secrecy." Under the heading "To Females," he says: "When a female is in trouble, or afflicted with any of the diseases peculiar to her sex, she should go or write at once to the celebrated female doctor, W. K. Dougherty, at his medical institute, and consult him about her trouble and diseases. All married ladies, whose delicate health or other circumstances prevent an increase in their families, should write or call at W. K. Dougherty's medical institute, and they will receive every possible relief and help. The doctor's offices, consisting of a suite of six rooms, are so arranged that he can be consulted without fear of observation. To correspondents, patients (male or female) residing in any part of the state, however distant, who may desire the advice and opinion of Doctor Dougherty in their respective cases, and who think proper to submit a written statement of such in preference to holding a personal interview, are respectfully assured that their communications will be held most sacred and confidential. If the case be fully and candidly described, personal communication will be unnecessary, as instructions for diet, regimen, and the general treatment of the case (including the remedies), will be forwarded without delay, and in such manner as to convey no idea of the purport of the letter or parcel so transmitted." The defendant demurred to the indictment upon the ground that this advertisement did not contain any of the forbidden matters, and upon other grounds stated in the opinion.

Charles S. Varian, U. S. Atty.

Robert M. Clarke, for defendant.

SAWYER, Circuit Judge. We think, upon examination, that there can be no doubt as to what anybody would understand from this advertisement. In it the doctor has particularly included and pointed out all diseases,

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

private and otherwise, and then he refers to "other troubles." He refers to any occasion why an increase of family should not be desired. It is true he has not used the word "prevent." He has been very cautious; but what, evidently, is the meaning intended to be conveyed? He does not use language so direct as he might possibly have done, but if the advertisement gives the forbidden information indirectly, it is as much within the prohibition of the law as if it were given in direct terms. It appears to us that the information prohibited by law is undoubtedly furnished. No one who desired to find a party with whom to confer as to these remedies, or from whom to receive advice with regard to procuring abortion or the prevention of conception, would have any difficulty in understanding that this party, W. K. Dougherty, had given notice that he could and would give that advice, and furnish those remedies. The language of this advertisement must be understood as its author intended it should be. Chief Justice Shaw thus states the doctrine of intent: "It is a general rule of construction in actions of slander, indictments for libel, and other analogous cases, where an offense can be committed by the utterance of language, orally or in writing, that the language shall be construed and understood in the sense in which the writer or speaker intended it. If, therefore, obscure and ambiguous language is used, or language which is figurative or ironical, courts and juries will understand it according to its true meaning and import, and the sense in which it was intended, to be gathered from the context, and from all the facts and circumstances under which it was used." Com. v. Kneeland, 20 Pick. 206; 1 Bish. Cr. Law, § 914.

"In like manner the form of the libel is immaterial; for if the language is ironical, or is otherwise so framed as not to convey directly the idea meant, yet, if it is adapted to accomplish the evil purpose it is sufficient." 1 Bish. Cr. Law, § 915. Hawkins adds, "that a defamatory writing expressing only one or two letters of a name in such a manner that, from what goes before and follows after, it must needs be understood to signify such a particular person, in the plain, obvious, and natural construction of the whole, and would be perfect nonsense if strained to any other meaning, is as properly a libel as if it had expressed the whole name at large; for it brings the utmost contempt upon the law to suffer its justice to be eluded by such trifling evasions; and it is a ridiculous absurdity to say that a writing which is understood by every, the meanest, capacity, cannot possibly be understood by a judge and jury." Id. It seems to us that this language is particularly applicable to this case. Is it possible to doubt that the language of this advertisement is so framed as to convey, if not directly the idea meant, at least indirectly, or that it accomplishes the evil purposes sought to be avoided by the statute? Is it possible for anybody to read this advertisement and not understand that he can find medicine, advice, and treatment at the place mentioned, for the purposes which are by the statute forbidden? We think that no private party in search of such remedies, and no judge or juror would be at a loss to understand the meaning of this advertisement, however cautiously worded to escape the penalty of the law. Indeed, we think the information prohibited by statute is directly conveyed.

It was further said, in objection to this indictment, that some particular article or thing should be specifically described in the advertisement mailed, and that none is so described. We do not think it necessary that any particular article, or its specific properties, should be indicated in the advertisement. W. K. Dougherty advertises that he will not only give advice, but furnish the remedies to accomplish the forbidden purposes. He does not point out the remedies specifically, and state what they are; and it is not necessary that he should do so. It is sufficient if he advertises that the remedies can be furnished by him, and where and under what circumstances they can be obtained. We think the language used is sufficiently specific to sustain the indictment. This law was not passed without an occasion for it. Usually statutes are not passed to meet an emergency until an emergency arises, or is anticipated in some way. It is not to be expected that a quack doctor will advertise in plain express terms, that he will furnish the means for the prevention of conception, or to procure abortion. Such an advertisement probably never has been, and never will be, published. It is doubtful if any one more specific than this has ever been published. Undoubtedly advertisements of this character have been published for many years, extensively; and to meet this class of cases, among others, the statute was passed. If this advertisement does not fall within the purview of the statute, it may well be regarded as a useless enactment. It will certainly fail to accomplish the purposes intended.

This indictment charges the defendant with mailing a paper which gave information where the remedies or article or thing could be "obtained and made." It is claimed that it is insufficient on that ground, whatever the proof may be. We do not think it necessary to prove the conjunctive. Two cases were cited by defendant's counsel, which were supposed by him to sustain his views, but we do not think his position is sustained by those cases; on the contrary, the authorities cited, properly considered, are against him. "Thus," says Mr. Bishop, "if the charge is that the defendant did such and such things to the disturbance of a public meeting, so much of those specific things must appear in the evidence to

have been done as were necessary to constitute the offense, it not being permissible to show, instead, other acts of disturbance which would have been sufficient had they been alleged." Bish. Cr. Proc. § 234. "And where a statute made it an offense to be a common seller of 'spirituous or intoxicating liquors,' without license, and the defendant was charged with being such common seller of 'spirituous and intoxicating liquors,' it was held that, though proof of the liquor being either spirituous or intoxicating, would satisfy the demands of the statute; yet to meet the allegation of the indictment it must be shown to be both." Id. That is very true in that case. The words spirituous and intoxicating describe the particular liquors—they are descriptive of the liquors, i. e., those liquors were both spirituous and intoxicating. See, also, Bish. Cr. Proc. § 336. The proof of a sale of spirituous but not intoxicating, or intoxicating but not spirituous liquors, would not establish the sale of the kind of liquors alleged, and thus there would be a variance.

In this case the statute makes it an offense to mail a notice showing where, or how, or of whom, or by what means the articles may be obtained or made; but the indictment alleges it in the conjunctive, "where they may be had and made." The proof of either is an offense, and proof of either would be sufficient to support the charge made in the indictment. This, however, is a question of proof which does not affect the decision on demurrer.

We are of the opinion that the indictment is good, and that the demurrer should be overruled.

Case No. 15,515.

UNITED STATES v. KELLY.

[2 Spr. 77;[1] 25 Law Rep. 657.]

District Court, D. Massachusetts. July, 1863.

SLAVE TRADE—FITTING OUT VESSEL—INDICTMENT.

An indictment for aiding in fitting out a vessel for the slave trade, under Act 1818, c. 91, § 3 [3 Stat. 451], must contain an allegation that the vessel was fitted out for that trade by some person other than the defendant, and that that person had the intent to employ her in that trade, and that the defendant did aid and abet such person in so fitting out. It must also aver that the fitting out was done at a port within the United States. It is not sufficient to allege that the defendant had the intent, or that the aiding by the defendant was at a port in the United States.

The defendant was found guilty upon one count in the indictment, the material words of which were as follows:—"Zeno Kelly, of New Bedford, in the district of Massachusetts, merchant, at New Bedford, and within the jurisdiction of this court, on the said first day of July, in the year of our Lord one thousand eight hundred and sixty, he the said Kelly being then and there a citizen of the United States of America, did then and there aid and abet in fitting out, equipping, and otherwise preparing a certain ship and vessel called the ship Tahamaroo, for the purpose of procuring and with intent to employ said ship and vessel in the trade and business of procuring negroes," &c. A motion in arrest of judgment was made. The count was founded on the third section of the act of congress of 1818, c. 91 (3 Stat. 451), against the slave-trade, the words of which are as follows:—"Every person or persons, so building, fitting out, equipping, loading, or otherise preparing, or sending away, or causing any of the acts aforesaid to be done with intent to employ such ship or vessel in such trade or business, after the passing of this act, contrary to the true intent and meaning thereof, or who shall in any wise be aiding or abetting therein, shall severally, on conviction thereof, by due course of law, forfeit and pay a sum," &c. The question was whether the count sufficiently described the offence of aiding and abetting, under the statute.

R. H. Dana, Jr., U. S. Dist. Atty.

The third section is connected with the second. It does not create two offences, one of a principal and the other of an accessory, but creates a misdemeanor, in which all are principals. The true reading of the section is this: it prohibits any person from doing any act or taking part in the fitting out, &c., either as master, owner, or factor, or in any other wise, with an intent, &c. If he fits out, or co-operates in fitting out, being an owner, agent, or factor, he is specifically described; but if he takes part in any other capacity, not that of master, owner, or factor, he is included under the terms "who shall in any wise by aiding or abetting therein," and is equally a principal. The words "aid and abet" in this connection have the force of "co-operating." U. S. v. Gooding, 12 Wheat. [25 U. S.] 476. If a person has a contract by which he has the control of the voyage, and yet is not, in law, either master, owner, or factor, and takes a part in fitting out the vessel, he can be indicted for aiding in the fitting out with the intent, &c. The words "aiding and abetting" are a sufficient allegation that others were concerned with him, as owner, master, or factor, if that be necessary. U. S. v. Mills, 7 Pet. [32 U. S.] 138. Admitting that an intent to employ her in the slave-trade must be alleged on the part of some person having the control, the control is not limited to a master, owner, or factor. The case of a charterer or supercargo having an interest and control would be covered by this count; and if not, such person could not be indicted at all, except as aiding a master, owner, or factor, who had the intent; and if they had not the intent and he had, he could not be indicted. In this case, the jury may have thought that Kelly

[1] [Reported by John Lathrop, Esq., and here reprinted by permission.]

was neither master, owner, nor factor, but had the intent and the power to employ her in the slave-trade; and the owners, and master, and factor, if there were any, may have been innocent. It is sufficiently alleged that Kelly did his acts of co-operation in New Bedford, and the statute does not require allegations or proof of the place where the vessel lay. U. S. v. Gooding, supra; Whart. Prec. 1085.

J. M. Blake and E. L. Barney, for defendant.

SPRAGUE, District Judge. This is a motion in arrest of judgment. The count on which the verdict was rendered is as follows. (The learned judge then read the count as given in the statement of facts.) Does this count set forth a criminal offence, or may all the allegations be true, and yet no offence have been committed? This requires an examination of the statute of 1818 (chapter 91), upon which the indictment is founded. By the second section, no person shall "for himself or any other person, either as master, factor, or owner, build, fit, equip, load, or otherwise prepare, any ship or vessel, in any port or place within the jurisdiction of the United States, * * * for the purpose of procuring any negro," &c. This section subjects the vessel to forfeiture, but creates no criminal offence. By the third section, "every person or persons so building, fitting out, equipping, loading, or otherwise preparing, * * * with intent to employ such ship or vessel in such trade or business, * * * or who shall in any wise be aiding or abetting therein," shall on conviction, &c.

This indictment alleges that the prisoner did at New Bedford, "aid and abet in fitting out, equipping, and otherwise preparing," the ship Tahamaroo, &c. The statute describes only a misdemeanor. And the indictment, although it charges the prisoner only with aiding and abetting, still is designed to charge him with a substantive offence. But that offence is secondary in its character, and cannot have been committed unless the primary offence had been committed, and the indictment must allege the commission of such primary offence.

This was expressly decided in U. S. v. Mills, 7 Pet. [32 U. S.] 138. It being thus indispensable that the indictment should set forth the primary offence which the prisoner is alleged to have aided and abetted, we must inquire what that primary offence is. It is created by the first part of the third section, which says that every person or persons, so fitting out, equipping, or otherwise preparing, with intent to employ such ship or vessel, in such trade, &c.

Here we see that, to constitute the primary offence, two things are necessary. First, that some person or persons should have so fitted out a vessel. Second, that such fitting out should have been with intent to employ her in the slave-trade; that is, that the person so fitting out should have such intent. Does the indictment contain both these requisites? I will consider the latter, that is, the intent, first.

In U. S. v. Gooding, 12 Wheat. [25 U. S.] 460, it was decided that it is not a sufficient description of the offence to allege that the actor fitted out the vessel with intent that she should be employed, &c., but that it must be alleged that it was with intent to employ her, &c. Does this indictment allege that the Tahamaroo was fitted out by any person with intent to employ her in such trade? That is, is it alleged that any actor in the primary offence fitted out this vessel with intent to employ her? So far from it, it is not even alleged that any such actor had any intent whatever. The only intent alleged is that of the prisoner. The indictment says that Kelly aided and abetted in fitting out the Tahamaroo with intent to employ her. This allegation may be true, and yet the primary actors may not themselves have intended to employ the vessel in the slave-trade. They may have only intended that she should be employed by others, or to employ her themselves in some other business. The evidence in this very case shows how this might be. The Tahamaroo was fitted out as a whaler; but it was supposed that after pursuing that business for a while, she was then to engage in the slave-trade. Now it may be that certain persons fitted out the vessel without intending to employ her in the slave-trade, and yet that Kelly aided and abetted in fitting her out with intent on his part so to employ her. He might, for example, have a contract by which he could control her as a charterer, or purchaser, or otherwise. This indictment does not follow the language of the statute which provides that every person so fitting out any vessel with intent to employ her in such trade, &c., and every person aiding and abetting therein, shall be punished. Now, to follow the statute, it is necessary to allege that some person did fit out the Tahamaroo with intent to employ her in the slave-trade, and that Kelly did aid and abet therein; that is, did aid and abet in the commission of the offence just described. I do not mean to say that it is necessary that the indictment should adopt that precise phraseology. It is sufficient if the language be such as clearly alleges the primary offence.

Upon the authority of the case of U. S. v. Mills, above cited, I should hold that the allegation that Kelly did aid and abet in fitting out, necessarily imported and therefore sufficiently averred that the vessel was fitted out by some person or persons; and if that alone constituted the primary offence, it would have been sufficient. But the intent of such person or persons to employ her in the forbidden trade is an essential part of that offence. U. S. v. Gooding, 12 Wheat. [25 U. S.] 472. And that intent is not alleged even by implication, because Kelly may have

had the intent to employ the vessel in the slave-trade, although, as we have seen, the persons whom he aided in fitting her out, may not themselves have intended so to employ her.

I proceed now to inquire whether this indictment contains the other requisite. Does it allege that the Tahamaroo was fitted out in any port of the United States. That this is necessary to constitute the primary offence, is expressly decided in U. S. v. Gooding, 12 Wheat. [25 U. S.] 472. Does this seventh count contain that allegation? It avers that Kelly, at New Bedford, in the district of Massachusetts, and within the jurisdiction of this court, on the said first day of July, * * * did then and there aid and abet in fitting out, equipping, and otherwise preparing a certain ship and vessel called the Tahamaroo. May this allegation be true, and yet the Tahamaroo have been at some place beyond the limits of this district when she was fitted?

Story, J., in delivering the opinion of the court in U. S. v. Gooding [supra], says: "We do not consider that the terms 'aid and abet,' used in this statute, are used as technical phrases belonging to the common law, because the offense is not made a felony, and therefore the words require no such interpretation. The statute punishes them as substantive offences, and not as accessorial, and the words are therefore to be understood as in the common parlance, and import assistance, co-operation, and encouragement."

From this exposition of the terms "aiding and abetting" in the statute, it appears that they do not necessarily import that the aider or abettor must be present at the commission of the primary offence. It seems, therefore, that the vessel might be actually fitted out in one place, and the distinct substantive offence of aiding and abetting be committed in another. Thus the acts which constituted the aiding and abetting may have been done in New Bedford; for example, the prisoner may there have furnished money to the primary actor, or given him information and advice, or shipped seamen, although the vessel was actually in New York and fitted out there. In such case, neither the primary actor, nor any person at New York, would be the agent or instrument of Kelly; and his acts being all done in New Bedford, his offence was committed there, and not at New York, where the vessel actually was. At common law an accessory was indictable in the county where the acts of counselling, procuring, or commanding, which made him an accessory, were done, although the principal offence was committed in another county. And statutes, both in England and in this country, provide for the punishment of an accessory, either in the county where he committed his offence by counselling, procuring, or commanding, or in the county in which the principal offence was committed; thus expressly declaring that the offence of the accessory may be complete in a county other than that in which the principal offence was committed. 1 Archb. Cr. Proc. (by Waterman, 7th Ed.) 73, 74, 80, 250, 251.

If the indictment had alleged that this vessel "being in the port of New York, certain persons did, then and there, fit, equip, and prepare her, with intent to employ her in the slave-trade; and that Kelly, well knowing that said persons were so fitting, equipping, and preparing her, with intent so to employ her, did, at New Bedford, aid and abet them in so fitting" &c, I do not think that it could have been objected that the averment that the vessel was fitted out at New York was inconsistent with the averment that the prisoner did, at New Bedford, aid and abet such fitting out.

I cannot think that the allegation that the prisoner did, at New Bedford, aid and abet the fitting out of the Tahamaroo, necessarily imports that she was fitted out at that place. She might have been either at New York or Havana. There is, therefore, no allegation that she was fitted out in a port of the United States.

Before closing, it is proper to notice an argument founded on the third count in U. S. v. Gooding. It is contended that that count had the sanction of the court, and that the one now before me is like it.

The third count in that case alleged that the prisoner, a citizen of the United States, and residing therein, at the district of Maryland, "and within the jurisdiction of this court, did aid in fitting out, for himself, as owner, in the port of Baltimore, within the jurisdiction of the United States, to wit, at the district aforesaid, a certain other vessel called the General Winder, with intent that the said vessel, the General Winder, should be employed in procuring negroes," &c.

The only objection made to this count was, that it did not "charge any offence to have been committed by any principal, to whom the defendant was or could be aiding or abetting."

The court, in answering this objection, say: "The fifth instruction turns upon a doctrine applicable to principal and accessory in cases of felony, either at the common law or by statute. The present is the case of a misdemeanor; and the doctrine, therefore, cannot be applied to it." The court further say, that in misdemeanors all are principals, and that no question of actual or constructive presence can arise; and that in the case before them, the indictment is, in the third and fourth counts, laid by aiding and abetting in the very terms of the act of congress.

They further discuss the force and effect of those words. In saying that the count was in the words of the statute, the court must have referred only to the words "aiding and abetting." They could have no reference to the allegation of intent, because in the third count the language is with intent that the vessel should be employed, which

the court, when their attention was subsequently called to it in connection with the sixth count, declared to be wholly different from the language of the statute.

Nor was any thing said, in disposing of the third count, of the necessity of its appearing that the vessel was fitted out in the United States, though that was held to be essential when the point was raised on subsequent counts. Perhaps the third count was, in this respect, sufficient. It alleged that the prisoner, at the district of Maryland, did aid in fitting out the vessel in the port of Baltimore.

If the words "in the port of Baltimore" had been omitted, it would have been like the indictment now before me. That is, it would have said that he did, at Maryland, aid and abet in fitting out. Adding the words "at Baltimore," may, perhaps, be considered as qualifying the words "fitting out," and designating the place where that was done. I do not think that the court, in disposing of the third count, intended to decide that it was not necessary that it should appear that the vessel was fitted out in the United States, and with intent to employ her in the slave trade, because it would be inconsistent with their decision on the sixth count, and also with the subsequent decision of the supreme court in U. S. v. Mills, 7 Pet. [32 U. S.] 138.

The truth is, the court, in regard to the third count, confined their attention to the single objection made to it by counsel, and to one aspect of that objection, and are not to be understood to have decided that the count was, in all respects, sufficient.

Judgment must be arrested.

Case No. 15,516.

UNITED STATES v. KELLY et al.

[4 Wash. C. C. 528.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1825.

SEAMEN—ENDEAVOR TO MAKE REVOLT—JOINT INDICTMENT—SEPARATE TRIALS—DISCRETION OF COURT.

1. What constitutes "an endeavor to make a revolt" under the act of congress of the United States? Mere insolent conduct to the master, disobedience of orders, or violence committed on the person of the master, unaccompanied by other acts showing an intention to subvert his command as master, is not sufficient. Mere conspiracy of the crew to displace the master, unaccompanied by overt acts, is not sufficient. Neither is concert among the crew to that end, essential to constitute the offence.

[Cited in U. S. v. Seagrist, Case No. 16,245; U. S. v. Huff, 13 Fed. 636.]

2. The offence may be committed in any kind of vessel.

3. Where many persons are included in one indictment, it is in the discretion of the court to try them separately or together.

[Cited in brief in Com. v. James, 99 Mass. 439.]

This was an indictment for endeavoring to make a revolt. The material facts proved in the cause were, that after the brig Lancaster had left the harbor of St. Thomas on her voyage to Porto Rico, Fowler, being ordered by the mate to do some necessary act, refused obedience to it, and sat down on the deck. The mate took hold of him to compel him to work; he seized the mate by the throat, and, after some struggling, he was overthrown and put into irons. In a little time after, the mate heard a cry of murder forward, and proceeded to the spot, where he found Doyle and Kelly fighting. Doyle immediately warned the captain not to approach, threatening to throw him overboard if he did so, and added, that he would murder some of them before morning. In the presence of the captain he beat the cook, although ordered to desist, and swore that he would throw any person overboard who should attempt to put him into irons. He also was guilty repeatedly of disobedience, insolence to the captain, and of assaulting the mate, which finally consigned him to irons. Duncan refused to obey orders and was insolent to the captain and mate, and swore that he would do no work on board of the brig. To insolence and disobedience of orders, Kelly added a violent assault upon the captain, whom he seized by the throat, and had got him down, when the mate and a passenger coming from below, relieved him from his perilous situation, and finally succeeded in putting him in irons. After his handcuffs were on, he stated to the captain and mate, that the former might thank God he was not killed, and that they had got him under, for. in half an hour longer, he would have shot both of them, and then he would have been master of the brig. All the above acts of insolence, disobedience and violence, took place on the evening of the 24th of December last. So many of the crew, which consisted of six mariners only, being placed in confinement, the captain was obliged to borrow from another vessel in company with him, three sailors, to assist in navigating the brig into port.

The counsel for the defendants insisted: (1) That a revolt, not being defined by the act of congress, by the common, or by any other law, it could not be deemed an offence for which any person could be punished; and that this court had so decided, in the case of U. S. v. Sharp, 1 Pet. [26 U. S.] 118. (2) That to constitute the offence of endeavouring to make a revolt, as defined in U. S. v. Smith [Case No. 16,337], all the crew must be concerned in it, and that in this case, nothing like concert between the prisoners to effect such an object is

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

proved. (3) That the thirteenth section of the old crimes act, whilst it provides for the offence of confining the captain on board of any "ship" or "vessel," drops the latter word in describing this offence; and consequently, it is not punishable, unless it be committed on board of a "ship," whereas this vessel was a "brig."

The District Attorney, for the United States.

Chew & Biddle, for defendants.

WASHINGTON, Circuit Justice, after summing up the evidence, proceeded. The difficulty which the court felt in Sharp's Case was not so much in giving a definition of the term "revolt," as in giving it judicially. The definition which I then suggested, as having previously impressed my mind, seemed to me to partake too much of fancy to be made the ground of a criminal prosecution; and as there was no such phrase to be met with in the common law of England, to which a meaning had been affixed, and to which the court could refer, it seemed to us too much like legislating to give a definition of our own. But as a learned judge of the supreme court of the United States has given a definition of the term "revolt,"—and which we approve of, provided it can, or ought to be given judicially, (which we think very questionable),—we shall, on this occasion, yield to the authority of his opinion; more especially as we understand that another learned judge of the same court has lately given a similar definition in his circuit. Should the defendants be convicted, and be advised by their counsel to take the opinion of the supreme court on this question, which it is high time should be put to rest; the court will place the cause in a train to be carried up to that tribunal.

I proceed then to state to the jury that the offence charged in this indictment, consists in the endeavor of the crew of a vessel, or any one or more of them to overthrow the legitimate authority of the commander of her, with intention to remove him from his command; or, against his will, to take possession of the vessel by assuming and exercising the government and navigation of her, or by transferring their obedience from the lawful commander to one who has usurped his station, or to whom they may transfer their obedience.

This, like most other general definitions, may require, in particular cases, to be explained and qualified; some instances of which are noticed in the case of U. S. v. Smith [Case No. 16,337]. It may therefore be proper to state to the jury, that mere insolent conduct, disobedience of orders, or even violence committed on the person of the master, unattended by other circumstances, will not amount to this offence. Those acts must be coupled with an intent to subvert the authority of the master, and to displace him from his command; which intention is to be discovered from the expressions or the actions of the parties concerned, and from all the circumstances attending the transaction. A mere conspiracy of the crew to make a revolt, will not amount to an endeavour to make it, unless it be followed up by some overt acts tending to that end; nor is concert amongst the crew to make a revolt an essential ingredient in constituting the offence. One or more daring individuals, depending for success on their courage and personal strength, on their popularity with the crew, or on the timidity of their characters, may, by destroying or confining the officers, without concert of the crew, make a revolt, and of course may endeavor to make it; the former necessarily including the latter offence. This was strongly exemplified in the case of U. S. v. Haskell [Id. 15,321], tried here at the October session 1823, in which there was great reason for believing that Smith relied solely upon his own prowess, and would have succeeded, could he have conquered the master, after the severe wounds he had inflicted on him.

The question then for the jury to decide in this case is, whether the acts of disobedience, the insolence, and the violence committed by these men, who formed two thirds of the crew, tended to subvert the authority and command of the captain, and were so intended? As to Kelly, he openly avowed that such was his intention, and you will say, under all the circumstances of the case, whether the same design ought, or ought not, to be attributed to those of the crew who, at or about the same time, acted in open opposition to the authority of the master, and committed acts of violence upon the mate, in enormity little short of that committed by Kelly.

As to the objection that this offence cannot be committed in a vessel of any other description that that of a "ship," there is nothing in it. "Ship" is a general term, and is constantly used as such. Not only nautical men, merchants, and others, but legislators, use terms showing that it is so understood; they all speak of the ship's papers, the ship's husband, shipwreck, &c., whether the vessel referred to has one, two, or three masts.

The jury found a verdict of guilty against all the defendants except Duncan; and there being no chance, as they stated, to agree respecting him, the district attorney entered a nolle prosequi as to him.

In this case, the counsel for the defendants moved that they might be tried separately. This, being a matter in the discretion of the court, was refused; no sufficient reason being stated for the application, and, if granted, would produce a great consumption of time.

The above case was taken to the supreme court upon a certificate of a division of opinion of the judges, as to the definition of the word "revolt," where it was decided. See 11 Wheat. [24 U. S.] 417.

Case No. 15,517.

UNITED STATES ex rel. STOKES et al. v. KENDALL.

[5 Cranch, C. C. 163.][1]

Circuit Court, District of Columbia. July 13, 1837.[2]

JURISDICTION OF COURTS—MANDAMUS TO OFFICER OF UNITED STATES — RETURN — APPEARANCE — POSTMASTER GENERAL — CONTROL BY PRESIDENT.

1. The circuit court of the District of Columbia has authority to issue a mandamus to an officer of the United States, commanding him to perform a ministerial duty required by an act of congress, in which the right of an individual is concerned, if that right is clear, and he has no other legal specific remedy.

2. The court, upon a proper affidavit, will grant a rule to show cause why a mandamus nisi should not issue.

3. If a rule be laid upon a party to show cause why a mandamus should not issue, the court cannot judicially take notice of a letter addressed by the party to one of the judges, stating reasons for declining to appear in court to show cause, &c., and inclosing an opinion of the attorney-general that the court has not jurisdiction to issue the writ.

4. The party to whom a mandamus is directed cannot be permitted to appear without returning the writ.

5. The cases of McIntire v. Wood [7 Cranch (11 U. S.) 504], and McClung v. Silliman [6 Wheat. (19 U. S.) 598], considered.

6. The circuit court of the District of Columbia has jurisdiction in all cases arising under the constitution and laws of the United States, and treaties made under their authority, if either of the parties shall be resident or found within the district.

7. It has all the federal jurisdiction of a circuit court of the United States, and all the jurisdiction of a state court.

8. The executive officers of the United States are personally liable, at law, for damages, in the ordinary forms of action for illegal, official, ministerial acts or omissions, to the injury of an individual.

9. It is not by the office of the person to whom the writ is directed, but by the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined.

10. The postmaster-general, in the discharge of those duties which are prescribed by law, is not lawfully subject to the control of the president.

11. The president's power of controlling an officer in the exercise of his official functions is limited to those functions which are, by law, to be exercised according to the will of the president, and where the order of the president would be a justification in law.

12. A writ of mandamus is as much a means given to the executive to enable him to cause the laws to be faithfully executed, as a common capias ad respondendum, or a fieri facias, or any other writ devised by the judicial power is, to enable him to discharge that duty.

On the 26th of May, 1837, W. B. Stokes, Richard C. Stockton, Lucius W. Stockton, and Daniel Moore filed their petition in the circuit court of the District of Columbia, praying the court to issue a writ of mandamus to Amos Kendall, postmaster-general of the United States, commanding him to credit the petitioners with the amount awarded to them by the solicitor of the treasury of the United States, under an act of congress passed for their relief on the 2d of July, 1836 [6 Stat. 665], and to pay the same to the petitioners, deducting only the amount which shall be justly chargeable against the same. The facts stated in the petition were verified by the affidavit of one of the petitioners.

Upon this petition, on the same day, the court passed the following order: "The United States on the relation of William B. Stokes, Richard C. Stockton, Lucius W. Stockton, and Daniel Moore v. Amos Kendall, Postmaster-General of the United States. Circuit Court of the District of Columbia for the county of Washington. The petition of the relators, and the affidavit of Lucius W. Stockton, one of them, having been presented to the court, setting forth in substance, that the relators having sundry claims upon the post-office department of the United States under contracts made by them with the late postmaster-general, William T. Barry, applied to the congress of the United States for relief in the premises, who passed an act at the prayer of the said parties, which was approved on the 2d of July, 1836, in and by which it was among other things provided, 'that the solicitor of the treasury do examine into and adjust the said claims therein specified, and that the postmaster-general credit said contractors with whatever sum or sums of money, if any, the said solicitor shall so decide to be due to them, on account of such service or contract.' That the said solicitor of the treasury did, in fact, make such decision and award, and did therein and thereby find due to said relators the sum of $161,563.89 for principal and interest. That said Amos Kendall, although notified of the said awards and decisions did omit and neglect for a considerable period of time to carry the said award, and the said act of congress into execution, and did, some time after, partially execute the same by carrying to the credit of the said relators the sum of one hundred and twenty-two thousand one hundred and one dollars forty-six cents ($122,101.46), leaving of the said principal sum, so awarded, the sum of $39,472.47 still due, which has not been credited or paid, although requested. That a correspondence took place between the relators or some of them, and the president of the United States, and a memorial was presented, on their behalf, to the senate of the United States, who proceeding thereupon and upon the reports of the committee of the judiciary, passed a resolution that the postmaster-general is fully warranted in paying, and ought to pay to William B. Stokes and others, respectively, the full amount of the award of the solicitor of the treasury. That said postmaster-general, notwithstanding the premises and other

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Affirmed in 12 Pet. (37 U. S.) 524.]

facts detailed in said petition, still refuses, omits, and neglects to execute the said act of congress, and said awards, by carrying the said sum so withheld, to the credit of said petitioners; wherefore the said petitioners pray the said court to award the United States' writ of mandamus, to be directed to the said Amos Kendall, postmaster-general of the United States, commanding him: (1) That he shall fully comply with, obey, and execute the aforesaid act of congress of July 2, 1836, by crediting the petitioners with the full and entire sum so awarded as aforesaid, in conformity with the said award and decision; and (2) that he shall pay to the said petitioners the full amount so awarded with interest thereon, deducting only the amount which shall be justly charged or chargeable to the said memorialists against the same. Whereupon, on motion of Richard S. Coxe, for the relators, and upon the reading of the said petition and accompanying documents, it is, this 26th day of May, 1837, ordered by the said circuit court, that the said Amos Kendall, postmaster-general of the United States, show cause on Thursday, the first day of June next, if any he has, why the said writ of mandamus should not issue as prayed by said memorialists; and that a copy of this order be served on the said Amos Kendall, postmaster-general as aforesaid."

The rule was served on the postmaster-general, on the day of its date. On the 1st of June, no appearance was entered for him to show cause; but the following letter was addressed by him to the chief judge, which the court decided it could not judicially notice, as he did not appear in court to show cause either personally or by counsel:

"Post-Office Department, June 1st, 1837. Hon. William Cranch, Chief Justice, &c. Sir: In declining to appear before the circuit court of the District of Columbia, for the county of Washington, in obedience to their order of the 26th ult. for the purpose of showing cause why a mandamus should not issue, commanding me, as postmaster-general, to pay Messrs. Stockton and Stokes and others, a sum of money claimed by them to be due from the post-office department, I beg you to be assured that I am not actuated by any want of respect for you and your associate judges, personally or officially, but altogether by high public considerations. Doubting whether any portion of the judiciary of the United States, and much more whether a court established in this district for purposes entirely local could constitutionally inquire into the official conduct of the president, or heads of departments, who are responsible through the process of impeachment, with the view to control them in their ministerial functions, I deemed it my duty to ask the opinion and advice of the attorney-general on the subject. A copy of his opinion I have the honor to inclose. As well for the reasons given by him, as from the conclusions of my own mind, I am constrained to the conclusion that your court possesses no legal or constitutional authority to require the attendance of the postmaster-general in such a case, and that in countenancing the claim by an appearance before them, I should compromit my obligation to preserve, unimpaired, the rights of an independent department of the general government. Very respectfully, your obedient servant, Amos Kendall."

The opinion of the attorney-general, inclosed in Mr. Kendall's letter, is as follows:

"Attorney-General's Office, May 30th, 1837. Sir: It appears by your letter of the 29th instant, and the paper inclosed therein, that application has been made by William B. Stokes and others, to the circuit court of the District of Columbia, for the county of Washington, for a writ of mandamus to be directed to the postmaster-general of the United States, directing him to execute a certain act of congress in the mode specified in such application; and that, in accordance therewith, the court has granted a rule upon the postmaster-general to show cause why such writ should not issue. In answer to your call for my opinion and advice as to the jurisdiction of the court to entertain this procedure, and to issue the writ applied for, I have the honor to inform you, that I am clearly of opinion that no such jurisdiction is possessed by it. In the case of McIntire v. Wood, 7 Cranch [11 U. S.] 504, a similar question was brought up for decision in the supreme court of the United States, upon a division of opinion in the circuit court for the district of Ohio, upon a motion for a mandamus to the register of the land-office at Marietta, commanding him to grant final certificates of purchase to the plaintiff for certain lands in that state. The supreme court decided that the circuit court had no power to issue such a writ; the judges being of opinion, that the power conferred by the judiciary act of 1789 (1 Stat. 73) on the circuit courts to issue the writ of mandamus, is exclusively confined to those cases in which it may be necessary to the exercise of their jurisdiction. They considered the constitutional provisions concerning the judicial power of the United States, broad enough to authorize the delegation to the circuit court, of a power to issue writs of mandamus, in cases where some ministerial act is necessary to the completion of an individual right arising under laws of the United States; but as the acts of congress delegated no such power, the conclusion was inevitable that it could not be exercised. The principle of this decision was recognized in the subsequent case of McClung v. Silliman, 6 Wheat. [19 U. S.] 598, and has never, to my knowledge, been called in question. Unless, therefore, some power, in relation to the writ of mandamus, has been delegated to the circuit court for the county of Washington, beyond that possessed, in such cases, by the

other circuit courts of the United States, the point must be regarded as settled by the highest judicial authority. I have carefully examined the acts of congress organizing the court, and regulating its jurisdiction; but though it possesses some powers not delegated to the other circuit courts, I do not find that it has ever been authorized, in express terms, or by any general power, to issue a writ of mandamus to an executive officer of the United States. In this respect I think its jurisdiction the same with that of the other courts; and consequently it cannot rightfully entertain the procedure referred to. I am, sir, very respectfully, your obedient servant, B. F. Butler."

"Hon. Amos Kendall, Postmaster-General of the United States. The rule to show cause is herewith returned."

The postmaster-general not having appeared to show cause, R. S. Coxe, for the relators, in support of the rule, contended: (1) That the right of the relators was clear. (2) That the writ of mandamus is the proper remedy, and (3) That this court has power and jurisdiction to issue the writ in the present case.

(1) Upon the first point he cited the act of the 2d of July, 1836, "for the relief of William B. Stokes, Richard C. Stockton, Lucius W. Stockton, and Daniel Moore," by which it is enacted, "that the solicitor of the treasury be, and he is hereby authorized and directed to settle and adjust the claims of William B. Stokes and Richard C. Stockton, of Maryland, and Lucius W. Stockton and Daniel Moore, of Pennsylvania, for extra services performed by them, as contractors for carrying the mail, under and by virtue of certain contracts therefor, by them alleged to have been made and entered into with them by William T. Barry, late postmaster-general of the United States; and for this purpose to inquire into and determine the equity of the claims of them, or any of them, for or on account of any contract, or additional contract with the said postmaster-general, on which their pay may have been suspended by the present postmaster-general; and to make them such allowances therefor, as upon a full examination of all the evidence, may seem right according to the principles of equity; and that the postmaster-general be, and he is hereby directed to credit such mail contractors with whatever sum or sums of money, if any, the said solicitor shall so decide to be due to them for and on account of any such service or contract; and the solicitor is hereby authorized to take testimony, if he shall judge it to be necessary to do so; and that he report to congress, at its next session, the law and the facts upon which his decision has been founded." The act then provides, that the solicitor shall not be authorized to make allowances for certain claims particularly specified therein; but which do not affect the present case.

Mr. Coxe then produced the awards of the solicitor of the treasury, of the 12th and 23d of November, 1836, amounting to the sum of $162,737.09, from which the solicitor afterwards made some deductions, leaving still $161,563.89 due; of which the postmaster-general, in obedience to the act, credited the contractors with the sum of $122,101.46, retaining the residue, namely, $39,472.47, which he refused to pay or credit. Also a letter from the postmaster-general to President Jackson, dated December 27, 1836, as follows:

"To the President of the United States. Sir: I have read the letter of Lucius W. Stockton, in behalf of himself and others, informing you of the award of the solicitor of the treasury in their favor, and making the following allegation and complaint, namely: 'The postmaster-general, however, withholds from our credit and pay, a large part of this award, the non-payment of which is exceedingly oppressive to us, and we now conceive ourselves bound in duty to ourselves and our creditors to state the fact to the president, well knowing his determination to see, in all cases, that the laws are carried into effect.' The suspension made by me in the account of those gentlemen which produced their application to congress for relief, amounted to the sum of $122,101.46. The solicitor of the treasury has awarded them under the act for their relief, the sum of $162,727.05. I have directed them to be paid, under that award, and in obedience to the law, the sum of $122,101.46, being the entire amount suspended and referred to congress. The remainder of the award, $40,625.59, is made up of claims which may be divided into three classes, namely: (1) An extension of certain allowances from the 1st of April to the 31st of December, 1835, for alleged extra services, $26,862.00; (2) interest, $6,894.93; (3) the amount of certain claims for extra services, most, if not all of which had been presented to my predecessor, and rejected by him, $6,868.66,—in all, the sum of $40,625.59. In my opinion the act of July 2, 1836, authorized the solicitor to examine and decide upon the claims which had been suspended by me, and no others. Such was my impression when the act passed, and such is believed to have been the intention of those who passed it. In obedience to the mandate of the law I have paid those gentlemen $122,101.46, although I have yet to be convinced that they had the least claim in law or equity to one sixth part of that sum. When the law requires it of me, I shall, with equal promptitude, pay the remaining $40,625.59, although satisfied that not one cent of it is justly due. I beg leave respectfully to suggest, that, inasmuch as congress is now in session, the appropriate resort for the parties complaining is to that body for an explanatory act, which, if it confirm the opinion of the solicitor, I shall implicitly obey. With the highest respect, your obedient servant, Amos Kendall.

"P. S. Since the award was received, and in part executed, a letter has been received from the solicitor reversing his decision on sundry items, amounting to $1,163.16, and reducing the amount awarded by that sum. Mr. Stockton's letter is herewith returned."

This letter was transmitted by the president to Mr. L. W. Stockton, with the following indorsement:

"Washington City, December, 1836. Sir,—On the receipt of your letter of the 26th instant, I lost no time in referring it to the postmaster-general for his report. Having received that report I hasten to forward it to you forthwith. It appearing that there is a difference of opinion between the solicitor and the postmaster-general upon the extent of the reference, under the law, to the solicitor; the postmaster-general having yielded to what he believes to be all that was submitted by the law to the solicitor's decision, and paid the same. But congress being now in session, and the best expounder of the intent and meaning of their own law, I think it right and proper, under existing circumstances, to refer it to that body for their decision. I deem this course proper, as the difference in opinion about the extent of the submission under the law arises between the head of the post-office department, and the solicitor of the treasury; and as it appears that the solicitor has reversed, in part, his decision and award. Yours respectfully, Andrew Jackson.

"Mr. Lucius W. Stockton, acting for himself and others."

Also the memorial of these relators to congress on the 3d of January, 1837, referred by the senate to the committee on the judiciary, with the report of the solicitor, made to congress on the 26th of December, 1836. Also the opinion of Mr. Butler, the attorney-general, of the 31st of October, 1836, confirming that of the solicitor of the treasury as to the extent of the submission under the act of July 2, 1836. Also the report of the committee of the senate made on the 20th of January, 1837, confirming the opinions of the solicitor and the attorney-general as to the extent of the submission, and concluding with the following resolution, which was unanimously adopted by the senate: "Resolved, that the postmaster-general is fully warranted in paying, and ought to pay to William B. Stokes and others, respectively, the full amount of the award of the solicitor of the treasury." Also a correspondence between the postmaster-general and Mr. Grundy, the chairman of the committee of the senate in relation to that report; the message of the president of the United States to the senate of the 15th of February, 1837; and the further report of the same committee, made on the 17th of February, 1837, confirming their former report and the resolutions previously adopted.

From these documents, Mr. Coxe contended that the right of the relators was clear.

(2) The second question is, whether the writ of mandamus is the proper remedy.

Upon this question Mr. Coxe cited the cases of Marbury v. Madison, 1 Cranch [5 U. S.] 162–166; Com. v. Johnson, 2 Bin. 275; the Post-Office Law of March 3, 1825 [4 Stat. 102], and that of July 2, 1836, § 22 [5 Stat. 80], and the previous acts respecting the post office; 2 Davis, Abr. 435; Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 825; Bank of U. S. v. Planters' Bank, Id. 904; Story, Const. p. 626, § 879; Rawle, Const. 156; 1 Burr's Trial, p. 108.

(3) The third question is, whether this court has the power and jurisdiction to issue the writ of mandamus in this case. In considering this question Mr. Coxe referred to the cases of McIntire v. Wood, 7 Cranch [11 U. S.] 504; McClung v. Silliman, 6 Wheat. [19 U. S.] 598; Story, Const. 608–610; and U. S. v. Arredondo, 6 Pet. [31 U. S.] 709.

CRANCH, Chief Judge, delivered the opinion of the court upon the petition for a writ of mandamus. The material facts stated in the affidavit upon which the rule was founded, are substantially as follows: By the act of congress of the 2d of July, 1836 (6 Stat. 665), "for the relief of William B. Stokes, Richard C. Stockton, Lucius W. Stockton, and Daniel Moore," the solicitor of the treasury was authorized and directed to settle and adjust their claims for extra services as contractors for carrying the mail under certain contracts made with them by Mr. Berry, the late postmaster-general; and for that purpose to inquire into and determine the equity of their claims for and on account of any contract with the said postmaster-general on which their pay had been suspended by the present postmaster-general, and to make them such allowances therefor, as upon a full examination of all the evidence might seem right according to the principles of equity; "and that the postmaster-general be and he is hereby directed to credit such mail contractors with whatever sum or sums of money, if any, the said solicitor shall so decide to be due to them for or on account of any such service or contract." The solicitor decided the sum of $161,563.89 to be due to them. The postmaster-general has credited them with the sum of $122,101.46 only, and refuses to credit them with the residue of the sum so decided to be due to them, being $39,492.47.

These facts, not being denied, must, for the present, be taken to be true; and the first question is, whether this court, in such a case, has power and authority to issue a writ of mandamus commanding the postmaster-general to credit the said mail contractors, Stockton, Stokes, and others, with the sum or sums of money decided by the solicitor of the treasury to be due to them for and on account of the services or contracts mentioned in the said act of congress of the 2d of July, 1836 (6 Stat. 665). The duty of

the postmaster-general under that act is clear and absolute, leaving him no discretion. It is a duty, in the execution of which the private rights of individuals are concerned; and the party against whom the right is claimed is resident within this district and county. The right of the relators and the duty of the postmaster-general appearing to be clear and absolute, the question arises, do the laws afford a remedy? If this had been a case against a state officer, arising upon a statute of a state in which the common law of England had been adopted, it would be a clear case for a mandamus, because the relators could not have any other specific remedy, nor any other remedy equivalent to a specific remedy, according to the forms of the common law. But it is suggested that this court has no power to issue a mandamus in such a case, because the other circuit courts of the United States have no such power; according to the decision of the supreme court of the United States in the cases of McIntire v. Wood, 7 Cranch [11 U. S.] 504, and McClung v. Silliman, 6 Wheat. [19 U. S.] 598. To understand the opinions of the supreme court, in those cases, it may be necessary to state the language of the eleventh and fourteenth sections of the judiciary act of 1789 (1 Stat. 73), to which Mr. Justice Johnson, who delivered those opinions, refers. The words of the eleventh section, so far as they relate to this subject, are, "That the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners; or an alien is a party; or the suit is between a citizen of the state where the suit is brought and a citizen of another state." The words of the fourteenth section are: "That all the before-mentioned courts shall have power to issue writs of scire facias, habeas corpus, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." The constitution of the United States (article 3, § 2) provides, that "the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors," &c. The case of McIntire v. Wood [supra], came up to the supreme court of the United States from the circuit court of Ohio, upon a certificate stating that the judges of that court were divided in opinion upon the question whether that court had power to issue a writ of mandamus to the register of a land-office in Ohio, commanding him to issue a final certificate of purchase to the plaintiff for certain lands in that state.

Mr. Justice Johnson, in delivering the opinion of the supreme court of the United States, said: "This court is of opinion that the circuit court did not possess the power to issue the mandamus moved for. Independent of the particular objections which this case presents from its involving a question of freehold, we are of opinion that the power of the circuit courts to issue a writ of mandamus, is confined exclusively to cases in which it may be necessary for the exercise of their jurisdiction. Had the eleventh section of the judiciary act covered the whole ground of the constitution, there would be much reason for exercising this power in many cases wherein some ministerial act is necessary to the completion of an individual right arising under the laws of the United States; and the fourteenth section of the same act would sanction the issuing of the writ for such a purpose; but although the judicial power of the United States extends to cases arising under the laws of the United States, the legislature has not thought proper to delegate the exercise of that power to its circuit courts, except in certain specified cases." Here it is evident that the supreme court do not deny the power of the circuit courts to issue the writ of mandamus in some cases, but say that the power is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. If, then, a case should occur in which a writ of mandamus should be necessary to the exercise of the jurisdiction of a circuit court of the United States, it would seem that that court might issue it. And the supreme court says, further, that "had the eleventh section of the judiciary act covered the whole ground of the constitution," that is to say, (as we understand the opinion,) that if that section had given to the circuit courts cognizance of all cases in law and equity arising under the constitution and laws of the United States, "there would have been much reason for exercising this power in many cases;" "and the fourteenth section," which gives them power to issue all writs necessary for the exercise of their jurisdiction, and agreeable to the principles and usages of law, "would sanction the issuing of the writ for such a purpose." But congress, in giving jurisdiction to this court by the 5th section of the act of the 27th of February, 1801 (2 Stat. 103), "concerning the District of Columbia," has covered the whole ground of the constitution, and much more; with the exception of those cases only in which exclusive jurisdiction is given by the constitution or acts of congress, to the supreme court of the United States, or to the district courts of the United States. With that single exception, this circuit court of the District of Columbia has cognizance of all cases in law and equity, whether arising under the constitution or laws of the United States, or under the adopted laws of Virginia and Maryland, with the only condition that one of the parties shall be resident, or found within the district. The words of that sec-

tion (the fifth section of the act of the 27th of February, 1801), are: "That the said court" (the circuit court of the District of Columbia) "shall have cognizance of all crimes and offences committed within the said district, and of all cases in law and equity between parties, both or either of which shall be resident, or shall be found within the said district; and also of all actions or suits of a civil nature at common law or in equity in which the United States shall be plaintiffs or complainants; and of all seizures on land or water; and all penalties and forfeitures made, arising, or accruing under the laws of the United States." This court, therefore, is in that condition in which the supreme court, in the case of McIntire v. Wood, say, "there would be much reason for exercising this power in many cases wherein some ministerial act is necessary to the completion of an individual right under the laws of the United States; and the fourteenth section of the judiciary act would sanction the issuing of the writ for that purpose."

Here is a case in which a ministerial act is necessary to the completion of an individual right under the laws of the United States. The right of the relators, and the obligation of the postmaster-general are clear and absolute. It is a case in law; and the only appropriate remedy is a writ of mandamus. This is the only judicial tribunal which can take original cognizance of the case and apply the proper remedy. How, then, can this court refuse it? To refuse it would be a denial of justice. If it be a case for a writ of mandamus, the relators are as much entitled to it as any other person would be entitled to a writ of capias in a common action of assumpsit against an individual. If the law gives them a right, it gives them a remedy in some form. The only question, then, is, what is the proper form? There are various writs to bring parties and their cases before the court. The selection of the writ depends upon the nature of the case. Neither an action upon the case, nor of assumpsit, (if it could be maintained,) nor an indictment, could give the relators a specific remedy. Their right might, perhaps, be tried in some such form of action, but it would not give them a specific remedy, nor a remedy which would be certainly adequate to a specific remedy. The proceeding by mandamus is a remedy given by that common law which was in force in Maryland and Virginia on the 27th of February, 1801. and continued in force in this district by the act of congress of that date, and which is still in force here. If a case is made out, in which, according to that law, the proceeding by mandamus is the proper remedy, this court is bound to grant it.

The supreme court, in the case of Marbury v. Madison, 1 Cranch [5 U. S.] 163, say: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury." "One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court. In the third volume of his Commentaries (page 23), Blackstone states two cases in which a remedy is afforded by mere operation of law. 'In all other cases,' he says, 'it is a general and indisputable rule, that where there is a legal right there is also a legal remedy by suit or action at law, whenever that right is invaded.' And afterwards, in page 109 of the same volume, he says: 'I am next to consider such injuries as are cognizable by the courts of common law, and herein I shall for the present only remark that all possible injuries whatsoever that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are, for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right when withheld, must have a remedy, and every injury its proper redress. The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested, legal right. If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case. It behooves, then, to inquire whether there be, in its composition, any ingredient which shall exempt it from legal investigation, or exclude the injured party from legal redress.'" The chief justice then goes on to show that it was not a case of damnum absque injuriâ, and says: "Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which entire confidence is placed, by our constitution, in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy? That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case, is not to be admitted. By the act concerning invalids, passed in June, 1794 [1 Stat. 392], the secretary at war is ordered to place on the pension list all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law, in precise terms, directs the performance of an act in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country? Whatever the practice on particular occasions may be, the theory of this

principle will certainly never be maintained. No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone (volume 3, p. 255) says: 'But injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom, the law, in matters of right, entertains no respect or delicacy, but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice.' By the act passed in 1796 authorizing the sale of the lands above the mouth of Kentucky river [1 Stat. 464], the purchaser, on paying his purchase-money, becomes completely entitled to the property purchased; and on producing to the secretary of state the receipt of the treasurer upon a certificate required by the law, the president of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the secretary of state, and recorded in his office. If the secretary of state should choose to withhold this patent, or, the patent being lost, should refuse a copy of it, can it be imagined that the law furnishes to the injured person no remedy? It is not believed that any person whatever would attempt to maintain such a proposition. It follows, then, that the question, whether the legality of an act of the head of a department be examinable in a court of justice, or not, must always depend upon the nature of the act. If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction. In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule. By the constitution of the United States the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts; and, whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts. But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot, at his discretion, sport away the vested rights of others. The conclusion from this reasoning, is, that, where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear, than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

"If this be the rule, let us inquire how it applies to the case under the consideration of the court. The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the president, according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the president, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and, consequently, if the officer is by law not removable at the will of the president, the rights he has acquired are protected by the law, and are not resumable by the president. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

"The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one, in consequence of which a suit had been instituted against him, in which his defence had depended on his being a magistrate, the validity of his appointment must have been determined by judicial authority. So, if he conceives that, by virtue of his appointment, he has a legal right either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it, must depend on the opinion entertained of his appointment. That question has been discussed, and the opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the president, the seal of the

United States was affixed to the commission. It is, then, the opinion of the court: (1) That by signing the commission of Mr. Marbury, the president of the United States appointed him a justice of peace for the county of Washington, in the District of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years. (2) That, having his legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy. It remains to be inquired whether, (3) He is entitled to the remedy for which he applies. This depends on, (1) The nature of the writ applied for; and, (2) The power of this court.

"1. The nature of the writ.

"Blackstone, in the third volume of his Commentaries (page 110), defines a mandamus to be 'a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes to be consonant to right and justice.' Lord Mansfield, in 3 Burrows, 1266, in the case of Rex v. Barker, states, with much precision and explicitness, the cases in which this writ may be used. 'Whenever,' says that very able judge, 'there is a right to execute an office, perform a service, or exercise a franchise, (more especially if it be in a matter of public concern, or attended with profit,) and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy, this court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order, and good government.' In the same case he says: 'This writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.'

"In addition to the authorities now particularly cited, many others were relied on at the bar, which show how far the practice has conformed to the general doctrines that have been just quoted. This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, 'to do a particular thing therein specified, which appertains to his office and duty, and which the court has previously determined, or at least supposes to be consonant to right and justice.' Or, in the words of Lord Mansfield, the applicant, in this case has a right to execute an office of public concern, and is kept out of possession of that right. These circumstances certainly concur in this case. Still, to render the mandamus a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

"(2) With respect to the officer to whom it would be directed. The intimate political relation subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers pecuniarily irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should, at first view, be considered by some as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive. It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted, to the executive, can never be made in this court. But, if this be not such a question; if, so far from being an intrusion into the secrets of the cabinet, it respects a paper which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim, or to issue a mandamus, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress, and the general principles of law? If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How, then, can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process? It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that

the propriety or impropriety of issuing a mandamus is to be determined. When the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation. But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the performance of which the president cannot lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department.

"This opinion seems not now, for the first time, to be taken up in this country. It must be well recollected that in 1792, an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional; but some of the judges thinking that the law might be executed by them in the character of commissioners, proceeded to act, and to report in that character. This law being deemed unconstitutional at the circuits, was repealed, and a different system was established; but the question whether those persons who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list, was a legal question, properly determinable in the courts, although the act of placing such persons on the list, was to be performed by the head of a department. That this question might be properly settled, congress passed an act in February, 1793 (1 Stat. 333), making it the duty of the secretary of war, in conjunction with the attorney-general, to take such measures as might be necessary to obtain an adjudication of the supreme court of the United States, on the validity of any such rights, claimed under the act aforesaid. After the passage of this act, a mandamus was moved for, to be directed to the secretary at war, commanding him to place on the pension list, a person stating himself to be on the report of the judges. There is, therefore, much reason to believe, that this mode of trying the legal right of the complainant was deemed by the head of a department, and by the highest law officer of the United States, the most proper which could be selected for the purpose. When the subject was brought before the court, the decision was, not that a mandamus would not lie to the head of a department directing him to perform an act, enjoined by law, in the performance of which an individual had a vested interest; but that a mandamus ought not to issue in that case; the decision necessarily to be made, if the report of the commissioners did not confer on the applicant a legal right. The judgment, in that case, is understood to have decided the merits of all claims of that description; and the persons, on the report of the commissioners, found it necessary to pursue the mode prescribed by the law subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension list. The doctrine, therefore, now advanced, is by no means a novel one. It is true that the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute. It is to deliver a commission; on which subject the acts of congress are silent. This difference is not considered as affecting the case. It has already been stated that the applicant has, to that commission, a vested legal right, of which the executive cannot deprive him. He has been appointed to an office, from which he is not removable at the will of the executive; and being so appointed, he has a right to the commission which the secretary has received from the president for his use. The act of congress does not, indeed, order the secretary of state to send it to him, but it is placed in his hands for the person entitled to it; and cannot be more lawfully withheld by him, than by any other person. It was, at first, doubted whether the action of detinue was not a specific legal remedy for the commission which has been withheld from Mr. Marbury; in which case a mandamus would be improper. But this doubt has yielded to the consideration that the judgment in detinue is for the thing itself, or its value. The value of a public office not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the commission, or a copy of it from the record. This, then, is a plain case for a mandamus."

From a consideration of the opinions of the supreme court in the cases of Marbury v. Madison, McIntire v. Wood, and McClung v. Silliman [supra], we can have no hesitation in saying that the relators have made out a case, in which, according to the principles and usages of law, a writ of mandamus is the proper remedy, and that it is necessary to enable this court to exercise its jurisdiction in that case. But although we have shown, as we think, that, even under the opinion of the supreme court, in McIntire v. Wood, this court has power to issue the writ of mandamus, in this case, yet it may possibly be objected that our argument is founded upon inferences drawn from the language of that opinion; which inferences

Mr. Justice Johnson, in the case of McClung v. Silliman, 6 Wheat. [19 U. S.] 598, repudiates. The only point decided in that case was, that "a state court cannot issue a mandamus to an officer of the United States." But Mr. Justice Johnson, in delivering the opinion of the court in that case (page 599), said: "In the case of McIntire v. Wood, decided in this court in 1813, the mandamus contended for was intended to perfect the same claim, and in point of fact, the suit was between the same parties. The influence of that decision on these cases, is resisted on the ground that it did not appear in that case that the controversy was between parties, who, under the description of person, were entitled to maintain suits in the courts of the United Staes; whereas the averments, in the present cases, show that the parties litigant are citizens of different states, and therefore competent parties in the circuit court. But we think it perfectly clear, from an examination of the decision alluded to, that it was totally uninfluenced by any considerations drawn from the want of personal attributes of the parties. The case came up on a division of opinion, and the single question stated is, whether the court had power to issue a writ of mandamus to the register of a land-office in Ohio, commanding him to issue a final certificate of purchase to the plaintiff, for certain lands in the state? Both the argument of counsel, and the opinion of the court, distinctly show that the power to issue the mandamus, in that case, was contended for as incident to the judicial powers of the United States. And the reply of the court is, that though, argumenti gratiâ, it be admitted that this controlling power over its ministerial officers would follow from vesting in its courts the whole judicial power of the United States, the argument fails here, since the legislature has only made a partial delegation of its judicial powers to the circuit courts; that if the inference be admitted, as far as the judicial power of the court actually extends, still cases arising under the laws of the United States, are not per se among the cases comprised within the jurisdiction of the circuit court under the provisions of the 11th section of the judiciary act of 1789 (1 Stat. 73); jurisdiction being in such cases reserved to the supreme court, under the 25th section, by way of appeal from the decisions of the state courts. There is, then, no just inference to be drawn from the decision in the case of McIntire v. Wood, in favor of a case in which the circuit courts of the United States are vested with jurisdiction under the 11th section. The idea is in opposition to the express words of the court, in response to the question stated, which are, 'that the circuit court did not possess the power to issue the mandamus moved for.'

"It is now contended that as the parties to this controversy are competent to sue under the 11th section, being citizens of different states, this is a case within the provisions of the 14th section; and that the circuit court was vested with power to issue this writ under the description of 'a writ not specially provided for by statute,' but 'necessary for the exercise of its jurisdiction.' The case certainly does present one of those instances of equivocal language, in which the proposition, though true in the abstract, is, in its application to the subject, glaringly incorrect. It cannot be denied, that the exercise of this power is necessary to the exercise of jurisdiction in the court below; but why is it necessary? Not because that court possesses jurisdiction, but because it does not possess it. It must exercise this power, and compel the emanation of the legal document, or the execution of the legal act by the register of the land-office, or the party cannot sue. The 4th section of the act under consideration, could only have intended to vest the power now contended for, in cases where the jurisdiction already exists, and not where it is to be courted or acquired by means of the writ proposed to be sued out. Such was the case brought up from Louisiana, in which the judge refused to proceed to judgment; by which act the plaintiff must have lost his remedy below, and this court have been deprived of its appellate control over the question of right."

As far as we can understand this argument of Mr. Justice Johnson, which probably would have been more intelligible if the arguments of the counsel had been reported, he places the decision of the court, in the case of McIntire v. Wood, upon the ground that the controversy between the parties was a case arising under the laws of the United States, which would, per se, have been a good ground of jurisdiction in the circuit courts, if it had been given to those courts by the 11th section of the judiciary act of 1789; but as it was not so given, they had not jurisdiction; and therefore they had not the power to issue the mandamus in that case. And from that decision, he says, as we understand him, it cannot be inferred that, if, in a like case, the controversy should be between citizens of different states (which would be a case in which the circuit court would have jurisdiction under the 11th section of the judiciary act of 1789), the court would have power to issue the writ of mandamus. Whether we have, or have not, however, understood that opinion correctly, we do not deem of much importance in this case, because, as observed before, this court has cognizance of all cases in law and equity, however arising, between parties, both or either of which are resident, or found within this district. Our powers are given by the 3d and our jurisdiction by the 5th section of the act of the 27th of February, 1801. By the third section it is enacted "that there shall be a court in the said district, which shall be called the 'Circuit Court of the District of Columbia'; and the said court and

the judges thereof, shall have all the powers vested in the circuit courts, and the judges of the circuit courts of the United States." The only circuit courts, and judges of the circuit courts of the United Staes, then existing, were those ordained and established by the act of congress of the 13th of February, 1801 (2 Stat. 89), by the 10th section of which they were invested with all the powers theretofore granted by law to the circuit courts of the United States, unless where otherwise provided for by that act. And by the 11th section it was enacted, among other things, that the said courts respectively should have cognizance of all crimes and offences cognizable under the authority of the United States, and committed within their respective districts, or upon the high seas, "and also all cases in law or equity arising under the constitution and laws of the United States, and treaties made, or which may be made, under their authority." "And also of all actions or suits, matters or things cognizable by the judicial authority of the United States, under and by virtue of the constitution thereof, where the matter in dispute shall amount to $100, and where original jurisdiction is not given, by the constitution of the United States, to the supreme court thereof, or exclusive jurisdiction, by law, to the district courts of the United States." It is evident that this section "covered the whole ground of the constitution;" so that, if it had been in force when the case of McIntire v. Wood arose, the decision in that case would probably have been different. Although the act of February 13, 1801, was repealed by the act of 1802, yet the repeal did not in any manner affect the powers or jurisdiction of this court, given by the act of February 27, 1801 (2 Stat. 103). But this court has a jurisdiction still more extensive than that which was given by the act of the 13th of February, 1801; and if the jurisdiction given by the 11th section of that act would have justified the court in issuing the mandamus under the 14th section of the judiciary act of 1789, a fortiori will the jurisdiction given to this court, by the 5th section of the act of the 27th of February, 1801, justify this court in issuing it.

In the opinion of the supreme court in McClung v. Silliman [supra], Mr. Justice Johnson sems to have supposed that it was not sufficient that the writ of mandamus should be necessary for the exercise of its jurisdiction in the mandamus case itself; but that it must be necessary for the exercise of its jurisdiction in some ulterior suit. He says (page 601): "It cannot be denied that the exercise of this power" (meaning the writ of mandamus), "is necessary to the exercise of jurisdiction in the court below; but why is it necessary? Not because that court possesses jurisdiction; but because it does not possess it. It must exercise this power" (that is, issue the writ), "and compel the emanation of the legal document, or the execution of the legal act by the register of the land-office, or the party cannot sue." Although in the case of McClung v. Silliman, the mandamus might have been asked, for the purpose of obtaining a document necessary to the prosecution of another suit, yet it cannot be necessary, in all cases, that the mandamus should be merely an ancillary proceeding, with a view to an ulterior action. In the greater number of cases, the remedy by mandamus is final; and the court must have jurisdiction of the case stated as the cause for issuing the writ, before it can be lawfully issued. The court must possess the jurisdiction before they can exercise it. The court exercises its jurisdiction when it calls the parties before it. If B., a resident of this district, is indebted to A., upon a promissory note, this court has jurisdiction of the case. To enable the court to exercise its jurisdiction in the case, some kind of writ is necessary. A capias is the usual writ. But it is only because it is a "writ necessary for the exercise of its jurisdiction" in that case, that the court is authorized to issue it; for it is not specially given by the 14th section of the judiciary act, which is the only authority for issuing it. But it is one of the writs not specially provided for by statute; and it is a writ agreeable to the principles and usages of law, and necessary for the exercise of the jurisdiction of the court in the given case, and therefore the court may issue it. Cases of mandamus stand exactly on the same footing. The court has no more authority for issuing a capias, than for issuing a mandamus. It surely cannot be that a court can only isue a writ of mandamus because it has not jurisdiction, or for the purpose of creating a jurisdiction which did not exist before. It must be that we have misunderstood the language of the opinion; and we are the more inclined to think so, because, in the next sentence, the judge says: "The 14th section of the act under consideration could only be intended to vest the power, now contended for, in cases where the jurisdiction already exists, and not where it is to be courted or acquired by means of the writ proposed to be sued out." And again, in page 604, he says: "But when in the cases of Marbury v. Madison, and McIntire v. Wood, this court decided against the exercise of that power, the idea never presented itself to any one that it was not within the scope of the judicial powers of the United States, although not vested, by law, in the courts of the general government." By which we suppose we are to understand that, when, in the case of Marbury v. Madison, the supreme court refused to issue the writ of mandamus because it would have been an exercise of original jurisdiction not warranted by the constitution; and when in the case of McIntire v. Wood, the court decided against the exercise of the power, by the circuit court, to issue the writ, because congress had not conferred upon the circuit court all the ju-

risdiction which it was authorized by the constitution to confer, no one supposed that the power was not within the scope of the judicial powers granted to the general government; and we are still left to infer, that if congress had conferred on the circuit courts all the jurisdiction which they might constitutionally have conferred, there could be no doubt of the power of the circuit court to issue the writ, under the power given in the 14th section of the judiciary act of 1789.

As the postmaster-general has not thought proper to appear to show cause why the writ of mandamus should not issue, the court will consider such objections as occur to them as being possible to be suggested. If it should be said that if every neglect of duty by a public officer, by which an individual suffers an injury, is to be the subject of a mandamus, it will become the common mode of redress in such cases, and the officers of government may be harassed; we answer that every public officer who neglects or refuses to perform a mere ministerial duty, whereby an individual is injured, is legally responsible to that individual in some form or other; and a mandamus is one of the mildest forms of action which can be used; as it supposes that the duty may still be performed; and as it does not subject the officer to pecuniary damages, and is one of the best forms in which the right of the supposed injured party may be tried. As it can be used only in cases where a duty is to be performed, and where it is still in the power of the officer to perform it, the cases cannot be very numerous, and the officers will be less harassed by this form of action than by the other usual forms of action which are generally commenced by the severe process of personal arrest. If it be said that a mandamus, commanding the postmaster-general to pay, as well as to credit, the sum awarded by the solicitor of the treasury, would be the means of compelling the United States to pay money by legal process, without previous appropriation by law, the court will take further time to consider, as we have doubts whether the mandamus should now go to that extent.

A doubt has been suggested "whether any portion of the judiciary of the United States, and much more, whether a court established in this district, for purposes entirely local, could constitutionally inquire into the official conduct of the president or heads of departments, who are responsible through the process of impeachment, with the view to control them in their ministerial functions." In answer to so much of this objection as regards the other portions of the judiciary of the United States, we refer to the decision of the supreme court in the case of Marbury v. Madison, as delivered by the late Chief Justice Marshall, and which has been before cited.

With regard to the suggestion that the circuit court, established in this district, is for purposes entirely local, the fact is not so. This court has all the jurisdiction which any other circuit court of the United States can have in its circuit, and much more. It is the court which the legislature of the United States has thought proper to ordain and establish as one of the courts inferior only to the supreme court of the United States, and to which it has confided the administration of those laws on which depends the protection of the lives, the personal liberty, and the property of the president, vice-president, heads of departments, and other officers of the government, foreign ministers and strangers visiting the seat of government, as well as of the citizens and inhabitants of the district. This court has power to call before it every person found in the district, from the highest to the lowest; and it is upon this power that they all depend for that protection which the law extends over them. If there is any officer of government in the district too high to be reached by the process of this court, then there is no legal security here for our lives, our liberty, or our property. If this court cannot "inquire into the official conduct of the president, or heads of departments," "with a view to control them in their ministerial functions," it is not because this court is established in this district "for purposes entirely local."

The suggestion that the president and heads of departments are not responsible, except by impeachment, for the exercise of their ministerial functions, seems to imply that the postmaster-general, like the heads of departments, may shelter himself under the authority or command of the president. But if they can do it, in a case like the present, where the duty is expressly enjoined by an act of congress, this officer cannot do it; for his relation to the president is very different from theirs. They, in the very terms by which their offices were created and their duties defined, are to perform such duties and execute such orders as they shall be required to perform and execute by the president of the United States The secretary of the treasury, however, may possibly stand in a different relation to the president, as his duties are better defined by law, and as there is a direct communication, established by law, between him and the legislature, without the intervention of the president; but still he is bound by the second section of the act of the 2d of September, 1789, "generally to perform all such services, relative to the finance, as he shall be directed to perform." The act does not say by whom he may be thus directed; if by the president; then his relation to the president is the same as that of the other heads of departments. The postmaster-general, however, clearly bears no such relation to the president. We cannot find a word in the law under which he was appointed, or in the various laws respecting the post-office establishment, or in the constitution of the United States, which intimates any connection between him and the president; or any

authority in the president to prescribe his duties, or to control him in the exercise of his official functions. It is true that he is appointed, and therefore may be removed, by the president. But the president, if he has the power to control him, can only do it through his fear of removal. If he should so control him, no act done by him under that control, could be thereby justified. The postmaster-general, in the exercise of the duties of his office, appears to be legally as independent of the president as the president is of him. There can, therefore, be no pretence for avoiding responsibility under any order of the president, nor for showing the irresponsibility which may be supposed to belong to that high officer. In what cases public officers are responsible to individuals for their official acts, or for the neglect of their official duties, is shown very clearly in the opinion of the supreme court of the United States in the case of Marbury v. Madison, already cited.

We have thus endeavored to answer all the objections which have occurred to us as likely to be made; and our opinion upon the whole case, after the best and most anxious consideration, with a desire and determination to do justice between the parties, according to the best of our judgment and ability, is, that the refusal of a public officer, resident in this district, to do a ministerial act which, by law, he is positively commanded to do, whereby an individual is deprived of his right, is a case, either in law or equity, of which this court has cognizance, by virtue of the fifth section of the act of the 27th of February, 1801, "concerning the District of Columbia." That the only adequate remedy, in the case presented to us, is a specific remedy; and that the only specific remedy is a writ of mandamus; which is a writ "agreeable to the principles and usages of law," and is "necessary for the exercise of the jurisdiction" of this court, in the case before us. If this court has not jurisdiction of the case, no court has; and an individual who may have been ruined by the refusal of an officer to perform a ministerial act, positively enjoined upon him by law, will be entirely without redress. Neither an impeachment nor an indictment could restore to him his lost rights; and in an action upon the case he could only obtain judgment for damages, which the officer might be wholly unable to pay.

The court will order a writ of mandamus to be issued, commanding the postmaster-general to credit the relators with the balance remaining due to them according to the award and report of the solicitor, unless the postmaster-general shall show cause to the contrary on or before the tenth day of June instant. The question whether a mandamus shall issue commanding him to pay the balance, may be reserved for further consideration, when the result of the mandamus to credit the balance shall be ascertained.

The mandamus nisi. was accordingly issued and served on the 7th of June.

On the 10th of June, Mr. Key, attorney for the United States for the District of Columbia, stated to the court that Mr. Kendall was preparing a paper to be laid before the court. That he had been unwell, and wished time till the 17th, which the court granted.

Mr. Coxe, for the relators, suggested that an appearance for the postmaster-general should be entered; but the court said they could not permit his appearance to be entered until he had returned the writ.

On the 17th, Mr. Key, in behalf of the postmaster-general, asked for further time until the 24th, and laid before the court the following letter:

"Post-Office Department, June 17, 1837. F. S. Key, Esq., United States District Attorney. Sir—You were kind enough, at my request, to induce the circuit court for this district, to suspend proceedings for a few days in the case of their mandamus against me, as postmaster-general, to give time to prepare my reasons for declining to comply with their command. Every day's inquiry and consideration magnifies the importance of the principles involved in this proceeding, and tends to the conclusion that it necessarily brings into discussion the constitutional and legal powers of two separate and independent departments of the government. As the question interests every executive officer residing within the district, as well as myself, and affects the character of the entire executive department, I have not deemed it right to suffer myself to be governed altogether by my own impulses or opinions, and have taken the advice, as well of my official superior, as of the constitutional law officer of the government in relation to my duty to appear before the circuit court. It is their opinion that an appearance, with the avowed and sole object of contesting the jurisdiction of the court, compromits no principle involved in the controversy, and is a proper mode of resistance to the claims of power set up in this case. You are therefore requested and instructed to appear in the court in my behalf as postmaster-general, distinctly announcing to the court that you do so only for the purpose of contesting their jurisdiction; and that you are expressly instructed not to plead to, argue, or notice as counsel any point or fact in the case which does not affect that question. You are aware that incessant devotion to the subject during the time allowed, has not enabled me to prepare the materials necessary to exhibit the grounds on which I disclaim the jurisdiction of the court over the postmaster-general, or any other executive officer acting in his official capacity. It cannot be the wish of the court to precipitate their action in any case, and least of all in one of high constitutional law affecting their own rights and powers, as well as those of another depart-

ment of the government; and I leave it with you to suggest such further delay as may seem to you, with your present knowledge of the matter, to be necessary to complete the preparation of the case. With high respect, your obedient servant, Amos Kendall, Postmaster-General."

The court granted further time until the 24th of June to return the mandamus. On that day the mandamus nisi was returned, with the following paper, by way of showing cause why a peremptory mandamus should not be issued:

"To the Hon. William Cranch, Chief Justice of the Circuit Court for the District of Columbia. On the 7th instant the undersigned received by the hands of the marshal of the District of Columbia, a writ of mandamus from the circuit court of the district, commanding him to credit Messrs. Stockton and Stokes and others, with a certain sum of money awarded to them by the solicitor of the treasury by virtue of authority alleged to be vested in him by a certain act of congress for their relief, passed on the 2d day of July, 1836, to show cause why he has not so done as commanded. The undersigned is unable to persuade himself that the performance of the act commanded would not, under existing circumstances, involve a violation of the oath he has taken, faithfully to discharge the duties of postmaster-general according to law; and to support the constitution of the United States. Although his opinion of the powers and jurisdiction of this court remains unchanged, yet that respect for the tribunal, which elicited his former communication, duty to himself, and the obligations he is under to vindicate and sustain the institutions of his country, impel him to present the reasons which have induced his present determination. Before he proceeds with that exposition, he begs leave emphatically to disavow all intention or idea of claiming irresponsibility or immunity in the discharge of his official functions, or of shrinking from the most scrutinizing investigation by any legitimate authority, into his actions or his motives. It is his pride to belong to a republic where no man is free from responsibility, however high, and where none is without protection or redress, however low. As a citizen it is his aim to perform his domestic and civil duties with strict regard to morality and law. As a public officer it is his most anxious endeavor to discharge every duty, which may be imposed upon him, with fidelity and zeal; in all capacities to encounter labor with patience, and responsibility without fear. If, in the attitude he now occupies in relation to this court, there is that which every sensitive man would wish to avoid, he is sustained by a consciousness of right, under which circumstances cease to be painful and consequences become indifferent.

"With these preliminary remarks, the undersigned proceeds to give his reasons for declining obedience to the order of the court.

"First reason. It is doubted whether the constitution of the United States confers on the judiciary department of the government authority to control the executive department in the exercise of its functions of whatsoever character. In the division and separation of powers the constitution of the United States uses the following language, namely: 'All legislative powers, herein granted, shall be vested in a congress of the United States.' 'The executive power shall be vested in a president of the United States.' 'The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish.' It gives the president power, by and with the advice and consent of the senate, to appoint 'judges of the supreme court; and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law,' &c., and makes it his duty to 'take care that the laws be faithfully executed.' It is declared that the president, vice-president, and all civil officers of the United States shall be removed from office 'on impeachment for, and conviction of treason, bribery or other high crimes and misdemeanors.' And so careful is the constitution to give the judiciary no control over the executive department, that, instead of subjecting executive officers to the courts for official offences and delinquences, it constitutes a special tribunal, in the senate, for their trial in all cases of impeachment. The plan of the constitution will be more clearly understood, by a brief reference to the history and nature of the executive and judicial powers as they exist in our government. In the country from which the principles of our system of government are measurably derived, the judiciary originally formed a part of the executive power. An exposition of the law is frequently necessary before it can be understandingly executed, and the judges were appointed by the king to give it. When given, he proceeded to carry it into execution. Over that execution the judges had no power; it being effected by sheriffs, another set of officers wholly dependent on the king. To shield the subject from regal oppression the judges were finally made independent of the king, though removable by parliament; but the sheriffs were still left at the monarch's will. The expounding functionary was rendered independent; but the execution was still left to the king. In our system we have followed the modern English model. Our judges, after appointment, are independent of the executive; but our district attorneys, who manage prosecutions, and our marshals, who execute the decisions, orders, and decrees of our courts, are not only appointed by the president, but hold their offices, from day to day, at his will. They are the instruments by which the president 'takes care that the laws be faith-

fully executed,' as expounded by the courts. The sole constitutional function of the judges is to expound the laws. It is the function and duty of the executive to see them faithfully executed. The necessity of a judiciary department arises solely from the impracticability of so framing the laws as exactly to fit every case which may arise in the endless diversity of human affairs. If the laws could be precisely adapted to every case there would be no necessity of a judiciary to expound them. The executive authority could proceed forthwith to carry them into execution. But most general, and some special laws require exposition before they can be understandingly executed. This is the judicial function. It is to declare what the law is and apply it to the case. When that is done the proper function of the judge ceases, and that of the executive commences. The duty of the marshal who is but a part of the executive department, is to execute the law as thus expounded. Many special laws are not susceptible of any exposition. They apply directly to the case, and cannot be made plainer by any court. Nothing is needed, after their passage, but execution. Such are laws which appropriate sums of money to individuals; such are laws which require specific acts of executive officers. The intervention of the expounding function is not necessary in these cases, because it can make them no plainer. All that is to be done is to execute them. The officers who are to perform the duties enjoined are all made dependent on the will of the president, directly or indirectly, that he may, through his power over them, 'take care' that each executes the laws in his appropriate sphere.

"A distinction has been taken between those laws which prescribe special duties to executive officers and those which do not. It is said, the courts may compel the execution of the duties prescribed in the former, but not those prescribed in the latter. No such distinction is to be found in the constitution. It is the duty of the president to 'take care that the laws be faithfully executed;' special laws as well as general; but no such duty is enjoined upon the judiciary. The means furnished to the president, to cause the execution of the special laws, are more immediate and direct than those furnished him for the execution of the general laws. Does a special law require the head of a department to pay a sum of money? The officer, whose peculiar province it is to execute the law, is under the immediate eye of the president, holds office at his will, and may be removed if he refuses. So of the comptrollers, auditors, treasurer, register, commissioners of the land-office, of patents, of pensions, of Indian affairs, and the whole corps of executive officers at Washington. And the same principle embraces all executive officers throughout the Union. The executive power is one; one in principle, one in object. Its object is the execution of the laws. It is not susceptible of subdivisions and nice distinctions as to its duties and responsibilities. To execute the laws, and all the laws, are its duties; and it is responsible for their faithful performance. The practical exercise of executive power is more remote in cases which go before the judicial tribunals; but it is the same in principle. The district attorneys hold their offices at the will of the president, as also do the marshals. It is not the behest of the judge that the marshal executes, but the law, passed by congress, which the judge has merely expounded and applied to the case. It is the one executive power of the republic, the president of the United States, through an officer holding office at his will, which steps in to execute the law when the judge has declared what it is and how it applies to the case. Laws, which require no exposition, are executed without the intervention of the judicial power. Laws which require exposition are executed after that exposition has been given by the judicial power; but in both cases the execution is, or should be, according to the constitution, exclusively the work of the executive. Over cases where the law prescribes special duties to executive officers, as such, in terms so plain as to admit of no exposition, their power does not extend. For instance: the law directs the president to cause $50,000 to be paid to a merchant whose ship has been bought for the naval service. Here no judge could expound the law more clearly than the legislature has done it. The proper function of the judiciary cannot be called into requisition because there is no point upon which it can constitutionally act. Nothing is to be done but to execute the law. The president directs the fourth auditor to state an account; it is revised by the second comptroller; the secretary of the navy issues a requisition for a warrant; the secretary of the treasury issues a warrant, and the matter passes through the offices of the first comptroller, the register, and treasurer. These officers are all made dependent on the will of the president, that through them he may take care that all such laws be faithfully executed. Suppose one of them should be perverse and obstinate, and refuse to execute the law, what would be the appropriate remedy, and who shall apply it? Could the merchant call on the courts to interfere when no expounding of the law is requisite? Or would he rather apply to the president, whose sworn constitutional duty it is to 'take care that the laws be faithfully executed?' Would he not request the president to issue his mandamus to his perverse subordinate, directing him to execute the law; and, if he still refused, to remove him from office and give his place to some one who would do his duty? The law could thus be executed, and the citizen obtain his right. But suppose he goes to the judiciary for their mandamus, what will he ask them to do? Will he request the judge

to expound the law for him? That is not necessary, it is clear enough already; all he wants is the execution of the law. Will he ask the judges to execute the law, or to 'take care that the law be faithfully executed?' That is an executive function with which they have no right to interfere. Yet what else is the object of a mandamus in such a case? What is it but an executive measure; what else but taking the duties of the president out of his hands; what else but the assumption of a power which by the constitution belongs exclusively to another independent department of the government? Let this doctrine be followed out, and to what will it lead? The constitution makes it the duty of the president to 'commission all the officers of the United States,' and the laws impose upon him many specific as well as general duties. The heads of departments have also many duties prescribed by law, special as well as general. We have auditors to settle accounts, comptrollers to revise them, a treasurer to issue checks drawn upon warrants, a register to register accounts and warrants, commissioners of the land-office, of patents, of pensions, and of Indian affairs, all of whom have specific as well as general duties, and all of whom have heretofore looked up to the president as their common superior; the head of the department to which they belong; to whom they are responsible, and whose duty it is to see that each of them faithfully executes the laws in his appropriate sphere. But this doctrine gives a new superior; a superior above the president, the highest representative of the majesty of the people, in this government; a superior who, in theory, may consign them all, from the heads of departments down to the messengers in the offices, to the county jail, if they refuse to regard the mandate of the court, in the performance of their executive functions. Any item in an account, any specific act required by law, whether general or special, which can directly or indirectly affect a private right, (and there can scarcely be an executive act required by law which does not,) may be made the subject of the supervisory power; and the effective and controlling executive of this great republic will not be the chief magistrate elected by the people, but the three judges of the circuit court for the District of Columbia. But which would be the most effective in all such cases, the order of the president, or the mandamus of the judges? The president could at once accomplish the object by the obedience or removal of his subordinate. The judges have no effectual means of executing the law. They might imprison the executive officer, but they could not remove him. Imprisonment might not accomplish the object. The court could not guide his hand nor control his will. If he were conscientious in his refusal, or wished to appear so, no imprisonment, nor pains, nor penalties, could compel him to do an act which in his opinion violated his oath of office. The whole power of the court would be impotent to control an honest man. The inadequacy of the judicial process, and the ample power vested in the president, are conclusive proof that the president and not the court was intended to be the controlling authority in all such cases. So far as regards their execution, no distinction is made by the constitution between special acts and general acts; between private acts and public acts. It is the duty of the president to take care that all alike 'be faithfully executed.' The executive is a unity. The framers of the constitution had studied history too well to impose on their country a divided executive. The executive power was vested in a president. The executive officers are his agents, for whom he is held responsible by the people whose agent he is. The acts of the executive officers are the acts of the president. Constitutionally he is as responsible for them as if they were done by himself, though not morally. So far as regards the execution of the laws, therefore, no distinction can be maintained between acts of the president and those of his subordinate officers. In law they are all acts of the president. When the judiciary attempt to control those acts, they attempt to control the executive power, to assume the functions of the president, to make themselves the executive in the last resort, superior to the executive created by the constitution, and elected by the people.

"Suppose the laws require a specific act of the president himself, involving private rights, which he refuses to perform. The courts have as much law for issuing a mandamus against him, as against any of his subordinates in a like case. It is a 'case' as much as that of which the court has already assumed jurisdiction. The president disobeys their mandamus, and they send an attachment. By whom do they send it? By a marshal holding his office at the will of the president, who can strike their process dead in his hands, by dismissing him on the spot. This fact proves the absurdity of the power assumed. And that which the president can legally do, to protect himself, he can do to protect any of his agents, being always responsible to his country for the proper exercise of his power.

"But suppose the court succeed in arresting the president, and put him in the county jail. Where then is the supreme executive power of this great republic? Transferred from the president's house to the city hall; from the chief magistrate, elected by the people of the whole United States, to three judges of the District of Columbia. The arrest and imprisonment of any executive officer, as such, involves the same principles, and would lead to the same consequences, in a greater or less degree, according to the importance of the station held by him. It is still an attempt to control the executive power; not by confining its head, but by

tying up its hands; or rather by forcing the hands to work, not according to the will of their constitutional head, but in obedience to the will of another department of the government. It is said that if the court has not this power, 'an individual who may have been ruined by the refusal of an officer to perform a ministerial act, positively enjoined upon him by law, will be entirely without redress.' If it were even so, would it justify the court in assuming executive authority in violation of the constitution? It would but prove a defect in our institutions, which it would be incumbent on the people to repair. But it is not so. The idea that courts are the only places where wrongs of all sorts are to be redressed, and judges the only dispensers of right, is an error. Where the inferior executive officer, or even the president himself, refuses to perform his executive duties, there is an obvious mode of redress, without the interposition of the judicial authority. If a subordinate executive officer 'refuse to perform a ministerial act positively enjoined upon him by law,' the injured citizen may appeal to the president, whose duty it is to 'take care that the laws be faithfully executed,' and has power to turn out a perverse subordinate. If the case be so very plain, the president will, at once, enforce the execution of the law, and the citizen will have effectual redress, though 'this court has not jurisdiction.' If the case be not so very plain, the matter may be referred back to congress, to make it plain by further legislation; and thus the citizen would have complete redress, without the aid of the court. There is a process by which the president himself may be reached, for a perverse refusal to execute the laws, or take care that they be executed, and a chief magistrate, who will do his duty, put in his place. Thus are there ample means provided by the constitution to enable the citizen to obtain his rights at the hand of the executive without erecting any court into a supreme controlling power over the president and the whole corps of executive officers. Indeed the court has not, in the constitution and laws, the means to give redress in such cases. Before they can control the president, they must assume the power to appoint their own marshal and execute their own mandates. They must do more. They must proceed to the executive offices; must enter credits with their own hands; must issue warrants; and finally, with their own hands, take the money out of the treasury.

"The very case before the court illustrates the theory of the constitution. The postmaster-general refused to execute a part of the solicitor's award, because he believed it contrary to law. Where did the relators first look for redress? Not to the court, but to the president. The late president deemed the case a proper one for another application to congress for further legislation, and refused to compel an execution of the award. The relators went to one house of congress and procured the passage of a resolution in their favor; but no legislation. The cause was then again pressed upon the late president, whose views of it remained unchanged. It was afterwards pressed upon the present president, who considered the disposition made of it by his predecessor as final, so far as the executive was concerned, unless there should be further legislation. If the president, on either of these three occasions, had looked upon the law as clearly and imperatively commanding the payment of the money, he would have taken care to see it faithfully executed, and the relators would have had complete redress. If they had procured the passage of an explanatory act, or joint resolution, through both houses of congress, sustaining their construction of the law, or requiring payment of the balance of the award, their redress would also have been complete. These obvious constitutional and legal measures were resorted to by them; and it is only when they fail to obtain the interpretation of legitimate authority, that they apply to a court to erect itself into a tribunal of appeal from another independent department of the government. Whether sound, or not, the views here expressed are not peculiar. Mr. Jefferson and Mr. Madison acted upon them when the former held the office of president and the latter that of secretary of state. Mr. Jefferson has left on record his views of the case of Marbury v. Madison, now relied upon by the court to sustain their claim to jurisdiction in this case. The following is a letter addressed by him to George Hay, prosecuting attorney in the case of Aaron Burr, namely:

" 'Washington, June 2d, 1807. To George Hay—Dear Sir: While Burr's Case is depending before the court, I will trouble you from time to time, with what occurs to me. I observe that the case of Marbury v. Madison has been cited, and I think it material to stop, at the threshold, the citing that case as authority, and to have it denied to be law: (1) Because the judges, in the outset, disclaimed all cognizance of the case; although they then went on to say what would have been their opinion had they had cognizance of it. This then was, confessedly, an extrajudicial opinion, and, as such, of no authority. (2) Because, had it been judicially pronounced, it would have been against law; for to a commission, a deed, a bond, delivery is essential to give validity. Until, therefore, the commission is delivered out of the hands of the executive, and his agents, it is not his deed. He may withhold, or cancel it, at pleasure, as he might his private deed, in the same situation. The constitution intended that the three great branches of the government should be co-ordinate and independent of each other. As to acts, therefore, which are to be done by either, it has given no control to another

branch. A judge, I presume, cannot sit on a bench, without a commission, or a record of a commission; and the constitution having given to the judiciary branch no means of compelling the executive either to deliver a commission, or to make a record of it, shows it did not intend to give the judiciary that control over the executive, but that it should remain in the power of the latter to do it or not. Where different branches have to act, in their respective lines, finally and without appeal under any law, they may give to it different and opposite constructions. Thus, in the Case of William Smith, the house of representatives determined he was a citizen; and in the Case of William Duane, (precisely the same in every material circumstance,) the judges determined he was no citizen. In the Cases of Callender and others, the judges determined the sedition act was valid under the constitution, and exercised their regular powers of sentencing them to fine and imprisonment. But the executive determined that the sedition act was a nullity, under the constitution, and exercised his regular power of prohibiting the execution of the sentence, or rather of executing the real law which protected the acts of the defendants. From these different constructions of the same act, by different branches, less mischief arises than from giving to any one of them a control over the others. The executive, and senate, act on the construction that until delivery from the executive department, a commission is in their possession, and within their rightful power; and in cases of commissions, not revokable at will, where, after the senate's approbation, and the president's signing, and sealing, new information of the unfitness of the person has come to hand before the delivery of the commission, new nominations have been made and approved, and new commissions issued. On this construction I have hitherto acted; on this I shall ever act, and maintain it with the powers of the government against any control which may be attempted by the judges in subversion of the independence of the executive and senate within their peculiar department. I presume, therefore, that in a case where our decision is, by the constitution, the supreme one, and that which can be carried into effect, it is the constitutionally authoritative one, and that that by the judges was coram non judice, and unauthoritative, because it cannot be carried into effect. I have long wished for a proper occasion to have the gratuitous opinion in Marbury v. Madison brought before the public, and denounced as not law; and I think the present a fortunate one, because it occupies such a place in the public attention. I should be glad, therefore, if, in noticing that case, you could take occasion to express the determination of the executive, that the doctrines of that case were given extrajudicially and against law; and that their reverse will be the rule of action with the executive. If this opinion should not be your own, I would wish it to be expressed merely as that of the executive. If it is your own also, you will of course give to the arguments such a development as a case, incidental only, might render proper. I salute you with friendship and respect. Thos. Jefferson.'

"Mr. Jefferson was still president at the time this letter was written. He declares that 'the constitution intended that the great branches of the government should be co-ordinate and independent of each other;' that 'as to the acts which are to be done by either, it has given no control to another branch;' that 'the doctrines of that case were given extrajudicially and against law;' that 'their reverse will be the rule of action with the executive,' and that he would 'maintain' his construction of the constitution, 'with the powers of the government, against any control which may be attempted by the judges in subversion of the independence of the executive,' &c. In a letter to Judge Roane, dated September 6, 1819, Mr. Jefferson adverts to this case, and the principles involved in it in the following terms, namely: 'In the case of Marbury v. Madison, the federal judges declared that commissions signed and sealed by the president were valid, although not delivered. I deemed delivery essential to complete a deed, which as long as it remains in the hands of the party, is, as yet, no deed; but it is in posse only; but not in esse; and I withheld delivery of the commissions. They cannot issue a mandamus to the president, or legislature, or any of their officers, the constitution controlling the common law in this particular.' Again, as late as June 12th, 1823, in a letter to Judge Johnson, Mr. Jefferson speaks thus of this case, namely: 'The practice of Judge Marshall, of travelling out of his case, to prescribe what the law would be in a moot case, not before the court, is very irregular and very censurable. I recollect another instance, and the more particularly, perhaps, because it, in some measure, bore on myself. Among the midnight appointments of Mr. Adams, were commissions to some federal justices of the peace for Alexandria. These were signed and sealed by him, but not delivered. I found them on the table of the department of state, on my entrance into office, and I forbade their delivery. Marbury, named in one of them, applied to the supreme court for a mandamus to the secretary of state (Mr. Madison) to deliver the commission intended for him. The court determined at once, that, being an original process, they had no cognizance of it, and there the question before them was ended. But the chief justice went on to lay down what the law would be, had they jurisdiction of the case, to wit, that they should command the delivery. The object was clearly to instruct any other court, having the jurisdiction, what they should do if Marbury should apply to them. Besides the impro-

priety of this gratuitous interference, could any thing exceed the perversion of law? For if there is any principle of law never yet contradicted, it is that delivery is one of the essentials to the validity of a deed. Although signed and sealed, yet, as long as it remains in the hands of the party himself, it is in fieri only, it is not a deed, and can be made so only by its delivery. In the hands of a third person it may be made an escrow. But whatever is in the executive offices is certainly deemed to be in the hands of the president, and, in this case, was actually in my hands, because when I countermanded them, there was, as yet, no secretary of state. Yet this case of Marbury v. Madison is continually cited by bench and bar, as if it were settled law, without any animadversion of its being merely an obiter dissertation of the chief justice.'

"Mr. Jefferson even denied the power of the courts to compel the attendance of the president or heads of departments as witnesses in suits at law, or criminal prosecutions, at whatever distance; on the ground that their constitutional duties in the service of the people of the United States, were paramount to all others. When, in the case of U. S. v. Smith [Case No. 16,342], in New York, a subpœna was issued to some of the heads of departments, they were directed by him to attend to their official duties, and disregard it. When the order of the president was stated in court as the ground of disobedience, a motion was made for an attachment, on the ground that it was insufficient, but the motion failed upon an equal division of the court. In the case of Aaron Burr,[3] a subpœna was issued by the court for the president, which he disregarded and returned. The following are his remarks upon it, in letters to the district attorney, namely: 'The leading principle of our constitution is the independence of the legislature, executive, and judiciary, of each other. And none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the commands of the latter, and to imprisonment for disobedience; if the several courts could bandy him from pillar to post; keep him constantly trudging from North to South, and East to West, and withdraw him entirely from his constitutional duties? The intention of the constitution, that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others; and to none has it given more effectual or diversified means than to the executive. I received late last night your favor of the day before, and now reinclose you the subpœna. As I do not believe that the district courts have the power of commanding the executive government to abandon superior duties, and attend to them, at whatever distance, I am unwilling, by any notice of the subpœna, to set a precedent which might sanction a proceeding so preposterous.' If the courts cannot take the executive officers from their public duties, even to testify in court in criminal cases, much less can they, at the instance of citizens in pursuit of private rights, subject them to mandamus and attachment.

"These authorities are sufficient to show, that the doctrine laid down by the chief justice in the case of Marbury v. Madison, never was recognized as law by the executive authority. They will also screen the undersigned from the imputation of assuming any new ground, when he doubts whether this court, or any other, can 'issue a mandamus to the president or legislature, or any of their officers, the constitution controlling the common law in this particular.' All this reasoning and these deductions the undersigned begs may be understood as applicable solely to the public character and acts of executive officers, and not to their character as citizens, or to their private transactions.

"Second reason. If, according to the constitution, the circuit court for the District of Columbia might be clothed, by law, with the power to issue a mandamus in such a case, no such power has been conferred upon them by the acts of congress. The undersigned is spared the labor of investigating and illustrating this position, by the clear, and, he thinks, conclusive, opinion of the attorney-general, which he transmits herewith, and requests that it may be considered a part of this letter. That opinion reviews the opinion of the circuit court, as delivered by Chief Justice Cranch, and published in the National Intelligencer, and maintains the following positions: (1) That the argument of the court in favor of the jurisdiction claimed by them, is founded on inferences from the language of Judge Johnson, in the case of McIntire v. Wood, which inferences were repudiated by the same judge, and by the judgment of the court in a subsequent case. (2) That there is no substantial difference between the words of the judiciary act of 1789, which the supreme court have twice decided do not give the other circuit courts power to issue a mandamus to an executive officer, and the words of the 5th section of the act concerning the District of Columbia, on which the circuit court rely; and that the jurisdiction of the latter is, therefore, in this respect, no greater than that of the other courts. (3) That no power is to be derived from the act of the 13th of February, 1801, because that act was repealed in 1802, without any exception as to the circuit court of this district. (4) That even if the acts of congress, concerning this court, had given to it, in express terms, a jurisdiction to issue writs of mandamus to an executive officer, to compel him to perform an official act, no such jurisdiction could be exercised consistently with the provisions of the constitution;

[3] [See Case No. 14,692d.]

because such a jurisdiction would be, substantially, an exercise of executive power, which cannot be taken from the president, in whom the constitution has vested it. (5) That the postmaster-general is an executive officer, and equally independent, with the other heads of the executive departments, of any control, in the exercise of his official duties, by the judiciary.

"Third reason. If, by the constitution, congress can clothe the courts with authority to issue writs of mandamus against executive officers, as such; and if they have vested the general power in this court, by law, this is not a case in which that power can be lawfully exercised. It seems to be conceded that a writ of mandamus will not lie to compel any one to do an act, in relation to the performance of which he has any discretion; and to bring this case within that principle, the court say: 'The duty of the postmaster-general, under that act, is clear and absolute, leaving him no discretion.' Is this so? The act does not require the postmaster-general to credit or pay any specific amount. It does not absolutely require him to do any specific act whatsoever. Whether he would be called upon to credit much, or little, or nothing at all, was altogether contingent, depending on the solicitor's award. It was not like a law directing specifically and absolutely the payment of a sum of money, or the performance of a ministerial act, where the law is the only guide. It was necessary for him, in this case, to look at the law, and at the solicitor's award. Of necessity, he must compare them together to ascertain what it was his duty to do. Now, in making that comparison, and acting upon the result, has he no discretion? The authority of the solicitor, by the words of the law, was, 'to settle and adjust' the claims of the relators 'for extra services,' 'under certain contracts made with them by W. T. Barry,' &c., to inquire into and determine the equity of their claims 'for or on account of any contract' with the said postmaster-general, 'on which their pay had been suspended by the present postmaster-general,' and to make them such allowances, &c. The duty of the postmaster-general is prescribed in the following words: 'And that the postmaster-general be, and he is hereby directed to credit such mail contractors with whatever sums of money, if any, the said solicitor shall so decide to be due to them,' 'for or on account of any such service or contract.' The postmaster-general was not required to credit the contractors with all the solicitor might award them, but only so much as he might decide to be due 'for or on account of such service or contract.' What 'service or contract?' Why, the 'service or contract' described in the preceding part of the act, 'extra service;' a 'contract' with W. T. Barry; a contract 'on which the pay had been suspended by the present postmaster-general.' It is such allowances, and such only, that the postmaster-general is directed to credit. Has he no power to examine and decide whether the allowances are of this character or not? Must he not see whether they are 'for or on account of any such service, or contract,' or not? If he have no power to look into that point, why are the words attached to the sentence which prescribes his duty? Why was he not directed absolutely to credit whatever sums of money, if any, the solicitor shall decide to be due to them? But one answer can be given. It was the purpose of congress to limit the power of the postmaster-general to credit and pay, as well as of the solicitor to allow; and, after defining the claims which the latter was authorized to allow, they limited, to the same claims, the power of the former to pay. He was directed to pay the sums allowed 'for and on account of any such service or contract,' and nothing more. Again, there are several provisos to the act, limiting the power of the solicitor. One of them is as follows: 'Provided the said solicitor is not authorized to make any allowance' 'for any suspension or withholding of money, as aforesaid, for allowances or over-payments made, as aforesaid, on the route from Baltimore to Washington, under the contract of 1827.' If, instead of 1827, the year 1831 had been used in this proviso, it would have covered a part of the allowances embraced in the award. Had it done so, and had the award embraced that, or any other allowance prohibited by the provisos, would it not have been the duty of the postmaster-general to refuse the credit and payment? It cannot be doubted. But how could he ascertain whether the allowance was prohibited by the proviso, or not? Could he do it in any other way than by examining the allowance and comparing it with the proviso? If, in his opinion, it were prohibited, he would refuse to pay it; if not, he would pay it. And is there not discretion here? May he not pay, or refuse to pay, according to his opinion of the power of the solicitor to make the allowance?

"On these points, there can be no doubt that the postmaster-general has a discretion. But what is the difference between his right to determine whether the solicitor has transcended his power on specific points, or in his award generally? Had he not a discretion to refuse to pay the whole award, or any part of it, if he honestly believed it to be contrary to law? If, on looking at the law and the award, he found that the solicitor had departed from his authority altogether, it cannot be doubted that he had a right, under the law, and that it would have been his duty to decline carrying it into effect. This is not a case, therefore, where a specific duty is enjoined by law, in the performance of which there is no discretion, such as the payment of a definite sum of money, the registering of a certificate, or the recording of a patent, and consequently it is not a proper case for a mandamus. It seems to be conceded, that under existing

laws a writ of mandamus can be issued by a court only as a means of exercising its jurisdiction, and not for the purpose of obtaining jurisdiction. Let us apply the principle to this case. The jurisdiction of every court must be original or appellate. Original jurisdiction is where, by authority of the constitution and laws, proceedings are originated in the court in the first instance. Appellate jurisdiction is where, by authority of the same constitution and laws, a case is taken out of a lower tribunal into a higher, with a view to a revision of the proceedings of an inferior court. In this case, the circuit court of the district had no original jurisdiction to adjudicate upon the claims of the contractors. There was no mode known to the laws by which they could prosecute those claims in any court whatsoever. Congress created a special tribunal for that purpose. They made the solicitor of the treasury a chancellor for the special object, and clothed him with power to take evidence, and adjudicate upon the claims of the contractors. No other court on earth could have entertained this case. Nor was any appeal from the decision of this special court provided for by the law which created it. Neither the circuit court of this district, nor the supreme court of the United States, nor any other judicial tribunal, had power to bring up the case from the solicitor of the treasury, either before or after his award, and revise his proceedings. No judge could take from or add to the amount of his award; nor has any judge the legal power to say whether that officer decided according to law, or against law. The solicitor's power, in this case, was equal to that conferred on the supreme court of the United States, in cases subjected to its jurisdiction, and above that of the circuit court for the District of Columbia, from which there is an appeal. The solicitor had as much power, under the law which gave him jurisdiction to issue a mandamus to bring before him, for consideration or revision, a case acted on in the district court, or the supreme court, as either of them has to issue a mandamus to bring before them, for consideration or revision, a case decided in his court; and he has as much right to interpose by a mandamus to execute their judgment, as they his. How then do the circuit court get jurisdiction in this case? Not by law; for the law gives them none, either original or appellate. They obtain it by the mandamus, and by that only. It is said that they do not claim jurisdiction to inquire into and revise the solicitor's award. What then does their jurisdiction amount to? What case is this where the jurisdiction is not to inquire into, to revise, to adjudge, but merely to execute? In the ordinary routine of judicial proceedings, the 'case' comes first, the 'suit' follows, and 'judgment' closes the rear. Here it is not a 'case' nor a 'suit' of which the court takes cognizance, but a 'judgment.' It is the judgment and award of another independent court, upon the proceedings of which the law gives neither resort nor appeal to the district court. And if the court do not intend to look into the award of the solicitor, to ascertain whether it be according to law, or against law, what do they mean by calling on the postmaster-general to give his reasons for not carrying it into execution? If they mean any thing by such a call, it must be that they will consider the reasons which may be adduced by him, and decide whether they be sufficient or not. Suppose the postmaster-general were to allege that the solicitor had considered and allowed claims, which he was not authorized to allow by the act of congress, from which he derived his authority. If this were true, it would certainly be a good reason for not paying the award. But could the circuit court inquire into their truth? Whence do they derive the power to inquire or decide whether the solicitor allowed too much or too little; whether he adhered to the law, or transcended the law; whether he awarded to the claimants a just compensation for services actually rendered, or heaped upon them tens and hundreds of thousands without shadow of contracts or pretence of service? Nothing would seem more plain than that the court have no power to call for books and papers, or summon witnesses, or consider statements, with a view of deciding whether the award of the solicitor be right or wrong. If they have no such power, it is palpable that they cannot make any examinations, and come to any decision which can exonerate the postmaster-general from executing the award, however illegal or monstrous may be the allowances which it sanctions. Is not this absence of power to consider that, which may be a good reason for the postmaster-general's refusal to execute the award, the strongest possible proof that the court have no authority to institute their present proceedings? It will be admitted by all, that if the postmaster-general could show that the award was illegal, or corrupt, it would be a good excuse for not carrying it into effect until it could be revised by some superior tribunal. But this court, not being clothed by law with power to consider those points, has no authority to judge of the legality or reasonableness of the postmaster-general's excuses, although they may be such as not only to justify him, but to entitle him to commendation.

"No man will deny that cases may and do arise, in which an executive officer is perfectly justified in refusing to perform a specific act required of him by law. In these cases, he is responsible to his superior, and to congress, but not to the courts. If the postmaster-general were directed by express law to pay $50,000 to a contractor, and should, before doing so, discover that the passage of the act of congress had been

procured by false and fabricated testimony, it would be his duty to refuse payment until the whole subject could be again brought under the revision of congress. Yet the law might be plain and peremptory in its terms, leaving him no discretion. Must not this court, upon the principles laid down by them, grant a mandamus to the claimant? Could they, in such a proceeding, inquire into and revise the act of congress, or would they peremptorily order, and forcibly compel the postmaster-general to execute the law, the fraud notwithstanding? If he had no 'discretion,' and they no power of revision, such must be their decision. Hence it is inferred that the court has no jurisdiction of this case in law, and can only obtain, what they may exercise by their mandamus, —a proof that a writ of mandamus will not lie in such a case.

"Fourth reason. The court have ordered the postmaster-general to perform a legal impossibility. A mandamus is a command to do a specific act. The specific act, ordered to be done in this case, is, to credit the relators with the full amount of the solicitor's award. A credit can only be given by an entry upon some book in which their accounts are lawfully kept. No accounts are kept with contractors in the post-office department, nor has the postmaster-general the custody or control of the books in which they are kept. All the accounts of the post-office department are kept in the treasury department by the auditor created for that purpose, by the act of July 2, 1836 (5 Stat. 80). That officer is appointed by the president and senate; and so far is he from being dependent on the postmaster-general, that his clerks are appointed by the secretary of the treasury. To his office have been transferred, long since, all the accounts, and the books connected with them, formerly kept by the postmaster-general. By adverting to the fact, that the act for the relief of Messrs. Stockton and Stokes, &c., and that to change the organization of the post-office department, passed on the same day, the occasion of this practical discrepancy between them will be understood. The former was drawn with reference to the organization of the department at the time of its introduction into congress. Then, the postmaster-general kept the accounts; and the entries in the books were his entries. He had the legal power and authority to give a credit to the contractors in this case. But this power and authority was taken from him by another act on the day the act for their relief passed. That the act, now in question, was not altered so as to accommodate it to the change, and require the credit to be given by the new auditor, instead of the postmaster-general, was, doubtless, an inadvertence; but it is one which the legislative authority alone can correct. As the law stands, the postmaster-general has just as much authority to make entries in the books of the second, third, and fourth auditors, as he has in those of the auditor created by the act of 1836. Hence the court will perceive that they have ordered the postmaster-general to do that which he cannot lawfully do, —to enter a credit or credits on books of which he has neither the custody nor control.

"These views the undersigned submits to the court with much confidence in their soundness. He thinks it is shown: (1) That it is the function of the executive 'to take care that the laws,' special as well as general, 'be faithfully executed;' and that of the judiciary, to expound such as require it. That to the president of the United States, and not to the courts of justice, belongs the duty of directing and controlling all executive officers in the performance of their official duties; and that, when the courts interpose to control them, they assume an executive function, invade the province of the president, and subvert the constitutional assignment of powers. (2) That congress have not conferred, or attempted to confer, on the circuit court for the District of Columbia, authority to issue a writ of mandamus for the purpose of controlling executive officers in the performance of their duties, whether general or specific. That the postmaster-general is an executive officer; that in the matter, upon which this proceeding has originated, he has acted in that capacity; and that he is not lawfully controllable therein, by a writ of mandamus. (3) That in the case before the court, the postmaster-general had a clear and undoubted discretion, in the exercise of which he is amenable to no judicial tribunal; and that the court, having no jurisdiction of the matter in question, either original or appellate, cannot lawfully court and obtain it by mandamus. (4) That the court have ordered the postmaster-general to do that which he has no lawful power to do; not having official custody or control of the books on which the credits are commanded to be entered.

"In addition to these persuasive considerations, it cannot be forgotten that the power, now asserted, has been slumbering from the birth of the constitution; and now, about half a century from the organization of the government, is for the first time called into requisition. How was it that Marbury, after his right to his commission was so strongly asserted by the supreme court, did not bethink himself of a resort, for redress, to the circuit court for the District of Columbia? Why is it that the numberless claimants, whose accounts have been rejected at the treasury, though asserted by them to be clearly warranted by law, have not applied to this court for its mandamus to compel the auditors and register to give them credits upon their books? Why did not the Bank of the United States, instead of agitating the country, and thun-

dering in the capitol, apply to this court for its mandamus to compel the secretary of the treasury to restore the public deposits which, it was alleged, had been removed from it, in contempt of law, and in violation of the constitution? Have none of these occasions been sufficient to rouse this giant power from its enduring slumber? Are its mighty arms to be flung aloft, for the first time, in vindication of post-office extra allowances, of doubtful legality, and undoubted enormity, which have already been denounced by congress, and condemned by the nation?

"The undersigned desists from a theme, on which it is not pleasant to dwell. It has been his studied effort to avoid, as far as possible, expressions calculated to wound sensibility, or create excitement. The voice of reason alone is worthy of a subject so comprehensive and so grave. If a sentence or a word is to be found, in this paper, which can justly be construed as disrepectful to the court, or personally reproachful to any one, it has escaped through inadvertence, and conveys a meaning which was not intended. Amos Kendall, Postmaster-General. June 24, 1837."

The following is the letter of Mr. Butler, the attorney-general, referred to as part of the answer of the postmaster-general.

"Attorney-General's Office, June 19th, 1837. Sir: I have had the honor to receive your letter of the 7th instant, inclosing a printed copy of the opinion delivered by the chief judge of the circuit court of the District of Columbia, for the county of Washington, upon the application of William B. Stokes and others, for a writ of mandamus, to be directed to the postmater-general of the United States; and requesting me to examine it, and inform you whether I find any thing therein to change the opinion heretofore expressed by me, relative to the jurisdiction of the court over the matter in question. Pursuant to this request, I have examined the paper referred to me, with the attention and respect due to its author, and to the court of which he is the organ; but after the fullest consideration which I have been able to give to the arguments contained in it, I still adhere to the opinion, that the court had no power to issue the writ in question. The case proposed by you in your communication of the 29th ultimo, and now presented, relates to the power of the circuit court of this district to issue a mandamus to the postmaster-general, an executive officer of the United States, for the purpose of compelling him to perform an official act alleged to have been enjoined upon him by a special act of congress passed for the relief of the parties applying for the writ. This act treats, exclusively, of certain claims depending in the post-office department, and growing out of contracts with the department. It refers these claims to the solicitor of the treasury, for settlement; and it directs the postmaster-general to credit the contractors with whatever sum of money, if any, the solicitor shall decide to be due them. The duty, imposed by this law, is, therefore, in every sense, an official duty. It relates to the business of his department; it is imposed on him by his name of office. The solicitor of the treasury has made an award, by which he decides that certain sums of money are due to the contractors; and the postmaster-general has credited them with a part of these sums, but, for reasons satisfactory to his own judgment and sense of duty, has refused to credit the balance, until directed so to do by a further act of congress. The contractors have applied to the late president of the United States, to take order, by virtue of his constitutional duty to see the laws faithfully executed, for crediting the balance; but, being satisfied with the course of the postmaster-general, he declined making any such order, and referred the parties to congress for further legislative directions. The like application has been made to the present chief magistrate, who deemed it inexpedient to interfere with the disposition of the subject made by his predecessor; and the parties now apply to the circuit court of this district for an order, in the form of a writ of mandamus to the postmaster-general, to credit and pay the balance of the solicitor's award; on the ground that this is a mere ministerial act, to the performance of which the applicants have a fixed legal right, under the act of congress, as it now stands, and for which they have no other adequate legal remedy. The court has so far adopted these views as to issue an alternative mandamus, commanding the postmaster-general to give the credit applied for, or to show cause why he has not done so; but it has reserved the question whether the mandamus shall issue to command the payment of the balance, for further consideration, when the result of the first writ shall have been ascertained.

"In my former communication it was shown, that, according to the decisions of the supreme court of the United States, in the cases of McIntire v. Wood, 7 Cranch [11 U. S.] 504, and McClung v. Silliman, 6 Wheat. [19 U. S.] 598, the circuit courts of the United States, out of the District of Columbia, have no jurisdiction, under the laws now in force, to issue a writ of mandamus to an officer of the executive departments; and the opinion was expressed that the acts of congress, organizing the circuit court of this district, and regulating its jurisdiction, though they conferred some powers not delegated to the other circuit courts, did not, in express terms, or by any general grant of power, authorize it to issue a writ of mandamus to an executive officer of the United States; and therefore that its jurisdiction, in this respect, was the same with that of the other circuit courts. The character and effect of the decisions referred to, as to the other circuit courts, and the necessity of proving, before the writ applied for can be issued by the circuit court of

this district, that congress have conferred on it a jurisdiction, in this particular, not possessed by those courts, are fully admitted in the opinion before me; and the court would doubtless have come to the like conclusion with me, had it taken the like view of the acts of congress regulating its jurisdiction. The opinion maintains that the power and jurisdiction conferred on this court are much more comprehensive than those possessed by the other circuit courts, and sufficiently so to include the power in question. To establish this, a comparison is instituted between the acts of congress relative to these courts; and the result of this comparison, aided by inferences and reasonings thereon, drawn from the language of the supreme court, in the cases referred to, is supposed to be in favor of the jurisdiction claimed by this court. The result, in my opinion, is directly the reverse. The power and jurisdiction of the ordinary circuit courts, so far as regards this subject, depends on the following clauses of the 11th and 14th sections of the judiciary act of 1789. The 11th section provides 'that the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law, or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners, or an alien is a party; or the dispute is between a citizen of the state where the suit is brought, and a citizen of another state.' The 14th section enacts 'that all the before-mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.' On these provisions, the supreme court held, in the case of McIntire v. Wood, 7 Cranch [11 U. S.] 504, that the circuit court of Ohio did not possess the power to issue a mandamus to the register of the land office. The power of the circuit courts, under the general words of the 14th section, to issue writs of mandamus, in some cases, was not denied; but it was held that the power was confined exclusively to cases in which the writ might be 'necessary to the exercise of their jurisdiction.' By this was meant, as explained in the subsequent case of McClung v. Silliman, 6 Wheat. [19 U. S.] 598, that the mandamus can only be issued 'in cases where the jurisdiction already exists, not where it is to be courted or acquired by means of the writ proposed to be sued out.'

"The powers and jurisdiction of the circuit court of the District of Columbia, so far as regards the present question, are conferred by the third and fifth sections of the 'Act concerning the District of Columbia,' approved February 27, 1801. The material part of the third section is as follows: 'That there shall be a court, in the said district, to be called the circuit court of the District of Columbia; and the said court, and the judges thereof, shall have all the powers vested in the circuit courts, and the judges of the circuit courts of the United States.' The fifth section is in the following words: 'That the said court,' (the circuit court of the District of Columbia,) 'shall have cognizance of all crimes and offences committed within the said district, and of all cases, in law and equity, between parties, both or either of which shall be resident, or shall be found within the said district; and also all actions or suits of a civil nature, at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land and water, and all penalties and forfeitures, made, arising, or accruing under the laws of the United States.' On the latter of these sections (the fifth) Judge Cranch holds that it confers on the circuit court of the District of Columbia a jurisdiction not given to the other circuit courts, which may be enforced by a writ of mandamus, whenever such a writ is necessary to the exercise of that jurisdiction. This view of the case appears to have been suggested by the following remarks of Mr. Justice Johnson, in the case of McIntire v. Wood: 'Had the eleventh section of the judiciary act covered the whole ground of the constitution, there would be much reason for exercising this power, (the power of issuing writs of mandamus,) in many cases where some ministerial act is necessary to the completion of an individual right arising under the laws of the United States; and the fourteenth section of the same act would sanction the issuing of the writ for such a purpose. But, although the judicial power of the United States extends to cases arising under the laws of the United States, the legislature have not thought proper to delegate the exercise of that power to its circuit courts, except in certain special cases.'

"In order to bring the case within these remarks, Judge Cranch argues that the fifth section, above quoted, has covered the whole ground of the constitution of the United States, and much more, except as to certain cases not material to the present discussion; and that, with such exception, the circuit court of the District of Columbia has cognizance of all cases, in law and equity, whether arising under the constitution or laws of the United States, or under the adopted laws of Virginia and Maryland, with the only condition, that one of the parties shall be resident or found within the district; and that the circuit court of the District of Columbia is, therefore, in that condition, of which Mr. Justice Johnson speaks. He also argues, chiefly on the authority of a part of the opinion of Chief Justice Marshall, in the noted case of Marbury v. Madison, 1 Cranch [5 U. S.] 163, that the act of congress, for the relief of the relators, directs the performance, by the postmaster-general, of a mere

ministerial act; that the right of the relators, and the obligation of the postmaster-general, are clear and absolute; that the refusal of the latter to perform the act, makes a case in law, of which the court has jurisdiction; that the only appropriate remedy is by writ of mandamus; that this writ is, therefore, necessary to the exercise of the jurisdiction of the court; and that the court has not only the power, but is bound, to issue it.

"The whole of this argument rest on the assumption, that if the grant of jurisdiction covers the whole ground of the constitution, it will include the power to issue a writ of mandamus to an executive officer, commanding the performance of an official act, provided the court shall be of opinion that such act is merely ministerial in its nature; an assumption inferred by the court from the above quoted words of Judge Johnson. I shall, hereafter, have occasion to show that the existence of such a jurisdiction, in any of the courts, is incompatible with the distribution of the powers of government made by the constitution, and with the separate and independent authority vested by it in the president; but before entering upon that subject, some objections of a minor, but perhaps not less decisive nature, may be mentioned:

"(1) The above quoted observation of Mr. Justice Johnson was not necessary to the decision of the case of McIntire v. Wood, and the use, now made of it by the circuit court, appears to be repugnant to the opinion of the same judge, in the case of McClung v. Silliman, and to the judgment rendered in the latter case. The existence of this objection is fully admitted by Chief Justice Cranch, in the following remarks: 'But although we have shown, as we think, that, even under the opinion of the supreme court in McIntire v. Wood, this court has power to issue a writ of mandamus in the present case, yet it may possibly be objected that our argument is founded upon inferences, drawn from the language of that opinion; which inferences, Mr. Justice Johnson, in the case of McClung v. Silliman, 6 Wheat. [19 U. S.] 598, repudiates.' Let us see how the objection is gotten over. In the first place it is suggested that, 'the only point, decided in the case of McClung v. Silliman, was, that a state court cannot issue a mandamus to an officer of the United States.' And the remarks of Judge Johnson, repudiating the inferences referred to, are treated as unnecessary to the decision of the cause. If this were so, it might still be replied, that the obiter remarks of the judge who delivered the opinion of the court, repudiating inferences drawn from obiter remarks of the same judge in a former case, are abundantly sufficient to meet an argument founded on such inferences. But I think it will be seen, by comparing Judge Johnson's statement of the facts with subsequent parts of his opinion, that the case presented another point which directly called for the remarks in question. Mr. Justice Johnson says: 'The plaintiff in error, who was also the plaintiff below, supposes himself entitled to a preëmptive interest in a tract of land in the state of Ohio, and claims, of the register of the land-office of the United States, the legal acts and documents upon which such rights are initiated. The officer refuses, under the idea that the right is already legally vested in another, and that he possesses, himself, no power over the subject in controversy. A mandamus is then moved for in the circuit court of the United States, and the court decides that congress has vested it with no such controlling power over the acts of the ministerial officers, in the given case. The same application is then preferred to the state court for the county in which the subject in controversy is situated. The state court sustains its own jurisdiction over the register of the land-office; but on a view of the merits of the claim, dismisses the motion. From both these decisions, appeals are made to this court, in the form of a writ of error.' He then refers to the decision in McIntire v. Wood; says, the influence of that decision on the cases before the court is resisted on the ground that it did not then appear that the controversy was between parties who, under the description of person, were entitled to sue in the circuit court of the United States; and that 'it is now contended that, as the parties in this controversy are competent to sue under the 11th section, being citizens of different states, that this is a case within the provisions of the 14th section, and the circuit court was vested with power to issue this writ, under the description of a writ not specially provided for by statute, but necessary for the exercise of its jurisdiction.' It thus appears that, besides the question concerning the power of the state court, the question whether the circuit court of the United States for the state of Ohio could issue a mandamus to a register of the land-office, to decide conflicting claims to a certificate of purchase; one claimant being a citizen of Ohio, and the other a citizen of another state, was also submitted for decision. The argument of the plaintiff's counsel in support of such a jurisdiction, like that of the circuit court of this district in the present case, was founded on inferences drawn from the language held by Judge Johnson in the case of McIntire v. Wood. The judge notices it at length; rejects, in the most decided manner, the inferences on which it rested; and thus disposes of that part of the case which related to the proceedings before the circuit court.

"Another answer to the anticipated objection is, that the circuit court of this district has cognizance of all cases in law and equity, however arising, between parties, both or either of which are resident, or found within the district; a position constantly insisted on in the opinion, and which I propose to examine under the next head.

"(2) Admitting, for the sake of argument, that the construction, given to the language of Judge Johnson in the cases referred to, is the correct one, and that the argument founded on it is sound in principle, still the present case cannot be distinguished from those decided by the supreme court, because there is no essential difference between the 5th section of the act 'concerning the District of Columbia,' on which the circuit court relies for its claim of jurisdiction over all cases in law and equity, however arising, and the 11th section of the judiciary act of 1789 (1 Stat. 73), which prescribes the jurisdiction of the other courts. The material words of the 5th section, omitting other classes of cases are, that the circuit court of this district shall have cognizance 'of all cases in law and equity, between parties, both or either of which shall be resident, or shall be found within the said district.' Those of the 11th section, omitting value and alternative cases, are, that the circuit courts of the United States shall have cognizance 'of all suits of a civil nature, at common law or in equity, where the matter in dispute is between a citizen of the state where the suit is brought, and a citizen of another state.' Except, that in the other circuit courts it is requisite that one party should be a citizen of the state where the suit is brought, and the other party a citizen of another state; and that in this district, it will be sufficient, if either of the parties be resident or found here; there would seem to be no substantial difference between the two provisions. Indeed, unless the phrase, 'all cases in law and equity,' used in the one case, means something different from 'all suits of a civil nature, at common law or in equity,' used in the other, it is certain that there can be no such difference, and consequently that the power and jurisdiction of the circuit court of this district, in regard to the writ of mandamus, so far as depends upon the 5th section above quoted, are precisely the same with those of the other circuit courts.

"It may be inferred from the opinion of the circuit court, that the former of these phrases was supposed to mean something more comprehensive than the other; and so much more so as to cover the whole ground of the constitution, which it was adjudged in McIntire v. Wood, that the other phrase did not do. No reason is very distinctly assigned for this distinction; but it appears to rest on the use of the word 'cases,' in that clause of the constitution which provides that the judicial power of the United States 'shall extend to all cases in law and equity under the constitution and laws of the United States,' &c. But, according to the supreme court of the United States, and to the opinions of other expositors of the constitution, the word 'case' in this section, means neither more nor less than the word 'suit.' Mr. Justice Story, in his Commentaries (volume 3, p. 507), in answer to the inquiry, what constitutes a case within the meaning of the clause, remarks, that a case, in the sense of this clause, arises when some subject touching the constitution, laws, or treaties of the United States, is submitted to the courts by a party who asserts his rights in a form prescribed by law. In other words, a case is a suit at law or in equity instituted according to the regular course of judicial proceedings; and when it involves any question arising under the constitution, laws, or treaties of the United States, it is within the judicial power confided to the Union. And for this, he cites the decisions of the supreme court, and other authorities. On the other hand, the supreme court held in [Weston v. City Council of Charleston] 2 Pet. [27 U. S.] 464, that the word 'suit' used in the 25th section of the judiciary act, applies to any proceeding in a court of justice, by which an individual pursues that remedy, in a court of justice, which the law allows him. It seems, therefore, to be settled that the words are, substantially, convertible terms; the one referring to the subject-matter of a judicial proceeding, and the other to the proceeding on such subject-matter. The words of the two acts being substantially the same, can there be any difference in their legal effect? And if the words used in the 11th section of the act of 1789 (1 Stat. 73) do not cover the whole ground of the constitution, and therefore do not authorize the issuing of a mandamus to an executive officer of the United States, as an original remedy, as has been adjudged by the supreme court, how, without overruling the decisions of that court, can words of precisely the same import in the 5th section of the act of 1801 (2 Stat. 103) be held to cover that whole ground, and to authorize the issuing of such a writ? It may be admitted that, under the words above quoted from the 5th section, taken in connection with the first section of the same act, which declares that the laws of Virginia and Maryland, as they existed at the date of the act, shall continue and be in force in the parts of the district ceded by those states respectively, the court may lawfully issue writs of mandamus, even as original process, in all cases arising between individuals, both or either of whom are resident, or may be found within the district, in which, by the law of Virginia, or of Maryland, as the case may be, such writs could be issued. If this be so, as I am inclined to think it is, it is because this remedy existed as a part of the adopted local law which is declared to remain in force, and to which, for the purpose of this remedy, the jurisdiction of the circuit court is attached. But it is impossible to acquire any such jurisdiction, in this way, over the officers of the United States in their official capacities, because, in those capacities, they were never subject to the laws of Virginia or Maryland; nor did those laws ever include, nor could they confer any jurisdiction over them, by mandamus or otherwise. Officers of the United States can-

not sue in their names of office, except when expressly authorized so to do, by act of congress; and the like legislative provision is necessary to render them liable, in their official capacities, to the process of the courts. No such provision is found in the act concerning the District of Columbia.

"It is also worthy of remark, that, notwithstanding the strong opinion of Chief Justice Marshall, in the case of Marbury v. Madison, in favor of the right of the applicant to a remedy by mandamus, in any court possessing jurisdiction, no proceeding in the circuit court of this district appears to have been instituted, or to have been thought of, by the parties, or their counsel; although the court then possessed precisely the same power, in this respect, which it possesses now, and though all the parties were residents of the district. This omission, under all the circumstances, proves, very clearly, that the jurisdiction, now claimed, was not then supposed to exist. Instances have, no doubt, frequently occurred, since that period, in which individuals have felt themselves aggrieved by the action of the executive officers, in cases affecting the rights of such individuals, but this appears to be the first application ever made to the circuit court of this district, for a remedy by mandamus.

"After the most careful examination of the various provisions of the act of 1801, 'concerning the District of Columbia,' I find nothing in those provisions to authorize the application of such a remedy.

"(3) In a subsequent part of the opinion, the claim of jurisdiction is defended on another ground. 'Our powers,' say the court, 'are given by the third, and our jurisdiction by the fifth, of the act of the 27th of February, 1801' (2 Stat. 103). And after quoting the third section (copied above), the opinion suggests that the only circuit courts and judges of the circuit courts, existing when the act of the 27th of February, 1801, was passed, were those ordained and established by the act of congress of the 13th of February, 1801 (2 Stat. 89); that the tenth and eleventh sections of that act were far more comprehensive than the act of 1789, organizing the former circuit courts, and covered the whole ground of the constitution; and that if they had been in full force when the case of McIntire v. Wood arose, the decision in that case would probably have been different; and the proposition is advanced, that 'although the act of February 13, 1801, was repealed by the act of 1802, yet the repeal did not in any manner affect the powers or jurisdiction of this court given by the act of 27th of February, 1801.' From the subordinate place assigned to this argument, it does not seem to be much relied on by the court; and, in my judgment, it is wholly untenable. It is true that the act of the 27th of February, 1801, was passed fourteen days after the enactment of the law changing the judiciary system, and establishing the new circuit courts of the United States, and that it gave a more extensive jurisdiction than the eleventh section of the act of 1789; but it is scarcely correct to speak of those courts as in existence on the 27th of February, 1801. The law creating them was passed on the 13th of February, and the nominations were made and acted on between that day and the 3d of March, 1801; but no one of the courts was organized, and probably no one of the judges actually in office on the 27th of February. This, however, is not very important, because the third section of the act of the 27th of February, 1801, concerning the District of Columbia, contains no specific reference to the act of 13th of February; but merely says, 'that the said court, and the judges thereof, shall have all the powers vested in the circuit courts, and the judges of the circuit courts of the United States.' The object of this section evidently was, to define the general powers of the court, and not to enter into the details rendered necessary by the peculiar condition of the district, which was done in the fifth section. Its general powers, and the general powers of its judges, were to be the same with those of the circuit courts, and the judges of the circuit courts of the United States, not as defined in any particular law, but as they should from time to time be vested by law in those courts and judges. This, it seems to me, is the plain meaning of the clause. Consequently, although so long as the act of 1801 remained in force, its provisions formed the measure of the general powers of the circuit court of this district; yet, when it was repealed, and the old provisions of the act of 1789 substituted in its place, those substituted provisions became, thenceforward, the measure of its general powers. This is the general rule of interpretation in such cases, because it is not to be presumed, unless the contrary be expressly declared, that the repealed law shall remain in force in respect to any one of several cases standing on the same ground, and thus produce an unnecessary and anomalous distinction. This rule is especially applicable to the present case. The act of the 8th of March, 1802, repeals the acts of the 13th of February and the 3d of March, 1801, from and after the first day of July, then next, and contains no exception whatever of the court established in this district. The third section expressly declares, 'that all the acts, and parts of acts, which were in force before the passage of the aforesaid two acts, and which by the same were either amended, explained, altered, or repealed, shall be, and hereby are, after the said first day of July next, revived, and in as full and complete force and operation, as if the said two acts had never been made.' Under these circumstances, it seems to me impossible to derive any power from the act of the 13th of February, 1801, and I shall, therefore, omit any

reference to the particular provisions of that law.

"(4) I do this, the rather, because, in my judgment, neither the provisions of that law, supposing them to be in force, nor those of any other law that has been, or can be, passed, under our present constitution, however broad they may be in their terms, can confer on any court of the United States the power to supervise or control the action of an executive officer of the United States, in any official matter properly appertaining to the executive department in which he is employed. In my former communication I did not deem it needful to enter into the exposition of this part of the case. The two decisions of the supreme court, to which I referred, seemed sufficient for my purpose; and for obvious reasons connected with the history of the case of Marbury v. Madison, I purposely refrained from any allusion to that case. The claim of jurisdiction now made by the circuit court, and the course of reasoning by which it is supported, involving, as they do, an assertion of power to direct, not only the postmaster-general, but every other executive officer residing within the district, in the performance of his official duties when they are supposed to affect the legal rights of an individual, compel me to explain the constitutional grounds on which this part of my opinion is founded. The proceedings of the convention which framed the constitution, abundantly prove the earnest desire of its authors to separate the three great departments, the legislative, executive, and judicial, from each other, and to render each independent of the other two. This general object was accomplished, with a few specified exceptions, by the actual provisions of the constitution. It declares that 'the executive power shall be vested in a president of the United States.' In accordance with this fundamental arrangement, it subsequently provides that the president 'shall take care that the laws be faithfully executed.' As a means to the performance of this duty, it gives to the president the exclusive power of appointing, by and with the advice of the senate, the principal officers in the executive departments; it authorizes him to require from them their opinions in writing 'upon any subject relating to the duties of their respective offices.' It secures the appointment of inferior executive officers to the president alone, or to the heads of departments, as congress shall, by law, direct; and according to a construction, coeval with the existence of the government, settled on the fullest deliberation, it also secures to the president the power of removing, at pleasure, either by his own act, or through the agency of the heads of the departments, every officer employed therein. The obvious design of all these provisions, was, to make the president responsible for the faithful execution of the laws, and for the official acts of all the officers of the executive department. Not that he should be liable to impeachment, or other criminal procedure, or to a civil action for every illegal act, or culpable omission of each one of those officers. Their great number, the distance of many of them from the seat of government, and the multifarious character of their duties, render it impossible for any one man to give such attention to their conduct, as to become responsible for them in that sense; and the law, whether prescribed by a constitution, or otherwise, never requires impossibilities; nor that the inferior officer should be exempt from personal responsibility by impeachment, indictment, or civil action, for any culpable act, or omission of duty, even though he may be able to plead, in his excuse, the express direction of the president. But it is possible for the president, through the heads of departments, to give more or less attention to the proceedings of each department, and to take care that the laws concerning it be faithfully executed; and it is agreeable to reason and the rules of law, that where two persons are united in the performance of an illegal act, or in a culpable omission of duty, each, to a greater or less extent, and according to the circumstances of the case, should be personally responsible, although one of them may have an official superiority to the other. This species of responsibility, it was the design of the constitution to fasten upon the president; and hence it vests in him, and in him alone, with a few specified exceptions, the whole executive power of the government. It is true that, within a few years, the doctrine has been advanced, that when the constitution says 'the executive power shall be vested in a president of the United States,' it merely intends to give a name to the department, and not to grant any executive power; and that, on this ground, efforts have been made to prove that the president alone does not possess the power of removal; but it is also true that this doctrine is directly opposed to the natural import of the language used; to the principles on which the power of removal was established by the first congress; to the expositions, then and since, given by the ablest expounders of the constitution; and to the actual course of the government, acquiesced in by all its branches during the whole period of its existence. The system thus ordained by the constitution, whatever diversity of opinion may have existed, or may yet exist, as to its expediency, cannot be varied or interfered with by the legislature or the judiciary. It belongs to the legislature to create the executive departments, to define their powers and duties, to provide the requisite officers, to prescribe their various functions, and to make all other legal provisions which may be necessary and proper to regulate the action of those departments. But when a law is once passed for the government of the executive officer, all that appertains to its execution falls

under the care of the president. It is his province to instruct and command the officer; to remove him if he acts unfaithfully; and to appoint one in his place who will fulfil his duty agreeably to law. No other department of the government can exercise this power of removal; the legislature cannot do it themselves; nor can they devolve it on the judiciary; nor can those two departments combined take it from the president.

"It results from the foregoing principles, that the writ of mandamus cannot be issued by any court of the United States, to any officer, whether principal or inferior, of an executive department, for the purpose of commanding the execution of any law concerning the appropriate executive duties of such officer. This conclusion will be strengthened by a little attention to the history and nature of the writ. From an early period it has been used by the English court of king's bench as a means of enforcing its general supervisory jurisdiction over courts, magistrates, and ministerial officers inferior to that tribunal. By the statute of 9 Anne, c. 20, and 11 Geo. I. c. 4, it was so extended as to afford a remedy for persons entitled to offices, or places, in corporations; and to compel elections, and correct abuses therein, of corporate officers; but we find no instance of its being directed to any officer of the executive departments. In England, it issues from the king's bench alone, because, in that court, the king originally sat in person, and, by fiction of law, is yet supposed to do so; and because the authority to control the inferior jurisdictions is one of the royal prerogatives. It is, therefore, denominated by Blackstone and other writers, 'a high prerogative writ.' And if the judge or officer to whom it shall be directed, in its peremptory form, fails to obey it, he is punishable for his contempt by attachment. During the colonial government, this branch of the king's prerogative extended to the colonies, and was executed through those colonial courts which were invested with a jurisdiction analogous to that of the king's bench; and from them the jurisdiction has been derived to the state courts which succeeded them. Under the fourteenth section of the act of 1789, the supreme court, in aid of its appellate jurisdiction, may issue this writ in all cases where any act, necessary to the exercise of that jurisdiction, shall be omitted to be performed by an inferior tribunal or officer; and the circuit courts of the United States may also issue it in like cases. In these instances the original design of the writ is plainly kept up; the tribunals or officers to which it is issued, are subordinate to the appellate court, which, in these respects, exercises over them a supervisory jurisdiction. The writ, then, necessarily implies a supervisory power, in the court which issues it, over the tribunal or officer to which it is directed. In the cases mentioned, such a power exists; but under the constitution of the United States, it has not been given to, and cannot exist in, any of our courts over the executive departments. The existence of such a power in the judiciary, is repugnant to the whole theory of the constitution; its effectual exertion, if it were practicable, would defeat the president's power of removal; would take away his responsibility for the faithful execution of the laws; and would transfer to the judiciary, in the particular case, the whole executive power; for it is palpable, that if the president, under the belief that the faithful execution of the law will be best secured by not doing a particular thing which is demanded by a third party, so directs the executive officer, and the court, on the application of such party, issues a mandamus, commanding it to be done, and the writ is obeyed, it is the court, and not the president, that exercises the executive power; and the distribution of powers, so carefully fixed by the constitution, is unsettled and overturned But its effectual exertion is not practicable; because the president's power of removal cannot be restrained, and by its exercise he can readily defeat any command which the judiciary may address to the executive officer. To illustrate this, let us suppose that the circuit court of this district issues a peremptory mandamus to the head of any one of the departments, commanding him to execute any particular law concerning his official duties, in a given way, and that the officer refuses obedience, and is attached and committed for the contempt. This is the end of the judicial power in a case of mandamus; but suppose, at this stage of the proceedings, the president interferes, by removing the officer, and appointing a successor, what then becomes of the judicial remedy? The act can only be performed by a person holding the office; the individual, in the custody of the court, no longer holds that office; it has been legally taken from him; and if he were ever so willing to perform the act, he has no longer the ability to do so. The proceeding must then be abandoned, or commenced de novo, against the new officer, to be frustrated, if the president thinks proper, at the same stage, as often as the court shall reach it. If it be said that this is supposing an extreme case, and that the president, from respect to the judiciary, would probably suffer the officer to obey the mandamus, rather than so exercise the constitutional power of removal, the answer is, that the very existence of such a power, whether it be used or not, is fatal to the claim of jurisdiction; and that cases may easily be supposed, in which the president, with the strongest desire to avoid a conflict with the judiciary, may yet have no alternative but to use it. In cases which properly refer themselves to the judiciary, it is rarely, or never, possible to defeat, in this way, the ultimate execution of the judgment of the court. And the fact, that without the consent of the executive department, a peremptory mandamus to an executive officer

must forever remain inoperative, exhibits, in the clearest light, the incapacity of any court to issue such a writ.

"I am aware that those parts of the opinion of Chief Justice Marshall, in the case of Marbury v. Madison, which are quoted at length in the opinion of Judge Cranch, may seem to be repugnant to the conclusion at which I have arrived. In that case (1 Cranch [5 U. S.] 137) applications were made, in December, 1801, by Messrs. Marbury and three other persons, to the supreme court of the United States, for a rule, to Mr. Madison, then secretary of state of the United States, to show cause why a mandamus should not issue, commanding him to cause to be delivered to them, respectively, their several commissions as justices of the peace in the District of Columbia. The application was founded on the following facts. Mr. Adams, whilst president of the United States, and on the 2d of March, 1801, had nominated the applicants to the senate, for the offices of justices of the peace in the District of Columbia; their nominations were confirmed the next day, and the commissions were made out, signed by President Adams, sealed, and left in the department of state. Mr. Jefferson came into office, as president, the next day, and forbade their delivery, and they were accordingly withheld by Mr. Madison. On the return of the rule to show cause, the counsel for the relators was heard ex parte, Mr. Madison not appearing. The case was disposed of, and the application denied, on the ground that the supreme court of the United States had no authority to issue a writ of mandamus, except in the exercise of its appellate jurisdiction; and that so much of the 13th section of the judiciary act of 1789, as purported to empower that court to issue writs of mandamus 'to persons holding office under the authority of the United States,' in original cases, was unconstitutional and void.

"The order of discussion, adopted by the chief justice, was as follows: (1) Has the applicant a right to the commission he demands? (2) If he has a right, and that right has been violated, do the laws of this country afford him a remedy? (3) If they afford him a remedy, is it a mandamus issuing from this court?

"These questions opened all the points in the case; and they are accordingly considered at large; but it is obvious that only the remarks under the third head were necessary to the decision of the cause; and that the elaborate reasoning under the first and second heads, including all the passages quoted in the opinion referred to me, was wholly extra-judicial. Every topic embraced under these heads is therefore open to discussion, not only in the supreme court, but in the inferior courts. The fact that the case was argued only on one side, must also be allowed to diminish still more the weight of these parts of the opinion; and then, also, it must be borne in mind that general expressions are always to be taken in connection with the particular case in which those expressions are used. Chief Justice Marshall himself has claimed the benefit of this latter rule in reference even to that part of the opinion in Marbury v. Madison, which explained, under the third head, the very ground on which the cause was decided. In the case of Cohens v. Virginia, 6 Wheat. [19 U. S.] 264, the counsel for the defendant in error quoted and relied upon some dicta of the court, in the case of Marbury v. Madison. In reply to the argument founded thereon, the chief justice observes: 'It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing, on all other cases, is seldom completely investigated. In the case of Marbury v. Madison, the single question before the court, so far as that case can be applied to this, was, whether the legislature could give this court original jurisdiction in a case in which the constitution had not clearly given it, and in which no doubt respecting the construction of the article could possibly be raised. The court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case. But in the reasoning of the court, in support of this decision, some expressions are used which go far beyond it.' He then explains the particular occasion of the dicta relied on, and the cases to which they were intended to apply, and proceeds as follows: 'Having such cases only in its view, the court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances contradictory to its principle.' He then states the construction given to the passages quoted, and the argument founded on it, and observes: 'To this construction the court cannot give assent. The general expressions, in the case of Marbury v. Madison, must be understood with the limitations which are given to them in this opinion, limitations which in no degree affect the decision in that case, or the tenor of its reasoning.' If the general expressions, contained in the essential parts of the opinion, require to be thus limited, the like caution must be still more necessary, in considering the other parts. On perusing them with care, it will be found that before entering on the discussion of the remedy by mandamus, the chief justice had

decided that the appointments in question became complete by the signing and sealing the commission; that the applicant had, therefore, a vested legal right to the office, and to the commission as the evidence of it, of which the executive could not deprive him; that the secretary of state had received the commission from the president for the use of the applicant; and that he had no more right to withhold it than any other person. His reasoning in support of the remedy by mandamus depends entirely on the conclusion, previously expressed, that the appointment was complete, and the agency of the president and secretary of state in the matter at an end; and it was precisely on this point that President Jefferson dissented, in such strong terms, from the opinion of the chief justice. Speaking of this case, in a letter to Judge Johnson (Jefferson's Correspondence, vol. 4, p. 372), he says: 'The commissions were signed and sealed by him (Mr. Adams) but not delivered. I found them on the table of the department of state, on my entrance into office, and forbade their delivery. Marbury, named in one of them, applied to the supreme court for a mandamus to the secretary of state (Mr. Madison) to deliver the commission intended for him. The court determined, at once, that, being an original process, they had no cognizance of it, and there the question before them was ended. But the chief justice proceeded to lay down what the law would be, had they jurisdiction of the case, namely, that they should command the delivery. The object was, clearly, to instruct any other court having the jurisdiction what they should do if Marbury should apply to them. Besides the impropriety of this gratuitous interference, could any thing exceed the perversion of law? For if there is any principle of law never yet contradicted, it is, that delivery is one of the essentials to the validity of a deed. Although signed and sealed, as long as it remains in the hands of the party himself it is in fieri only; it is not a deed, and can be made so only by its delivery. In the hands of a third person it may be made an escrow. But, whatever is in the executive offices is certainly deemed to be in the hands of the president; and, in this case, was actually in my hands, because, when I countermanded them, there was, as yet, no secretary of state.' The tone and language of this passage may be regretted; but it shows very plainly, when taken in connection with the opinion, the real point on which the controversy turned.

"In this view of the case, it is manifest that the question now presented, namely, whether a mandamus can be issued to the head of an executive department commanding him to perform an executive act which has not yet been commenced, did not arise. The difference between this question, and the question, whether congress can authorize the judiciary to issue a mandamus to an executive officer, to compel the delivery of a paper, in his possession, containing the evidence of a past executive act already fully performed, is too obvious to need remark. The limitations to which the obiter arguments, in the case of Marbury v. Madison, are thus necessarily subject, rescue the present case from their influence, and supersede the necessity of a particular examination of any part of them. There are, however, one or two remarks on the argument of Chief Justice Marshall, which, as they may tend to elucidate the subject, and to prevent misapprehension, ought not to be omitted. He labors to prove that where a vested legal right has been violated by a public officer, or where a specific duty, on the performance of which individual rights depend, is assigned by law to an officer, and he refuses to perform it, the individual, who considers himself aggrieved, has a right to resort to the laws of his country for a remedy; and that the conduct of the officer is liable to be judicially examined. This, if ever doubtful, is now too well settled to be disputed. Actions for trespass, and other actions for damages, against collectors of the customs, officers of the army and navy, and other public functionaries, for official acts or omissions, injurious to the vested rights of individuals, are of frequent occurrence; and it is not to be doubted, that through such actions, any officer of the government, the president included, may be held responsible in damages for the violation of any vested legal right. But these actions are against the officer in his individual character, and do not imply any power, in the judicial tribunals in which they may be prosecuted, to supervise, and control in advance, the official action of the officer. Such a power, however, is implied in the jurisdiction by mandamus; and its compatability with the constitution, when issued to an executive officer for the purpose of compelling him to perform a specific executive duty, is a point not discussed, nor even touched, in the opinion; probably because it was supposed that, if the appointment were regarded as complete, the point could not arise.

"This subject was much considered, in the year 1808, by one of my predecessors in office. In that year an application was made, by Messrs. Gilchrist and others, to the circuit court of the United States for the district of South Carolina, for a rule on the collector of the port of Charleston, to show cause why a mandamus should not issue to him, commanding him to grant clearances for certain ships, detained by the collector, under instructions from the secretary of the treasury, given under the embargo acts. The collector appeared; showed cause by producing the secretary's instructions, and submitted without argument to the decision of the court. The judges, being of opinion that the instructions were illegal, ordered a mandamus to be issued commanding the collector to grant the clearances applied for. Pres-

ident Jefferson, on hearing of these proceedings, referred the subject to the attorney general, Mr. Rodney, who expressed a decided opinion against the power of the court to issue the writ. After stating several reasons, growing out of the limited jurisdiction of the courts of the United States, and the peculiar provisions of the law under which the instructions of the secretary of the treasury had been issued, he concludes as follows: 'It might, perhaps, with propriety, be added, that there does not appear, in the constitution of the United States, any thing which favors an indefinite extension of the jurisdiction of courts over the ministerial officers within the executive department. On the contrary, the careful discrimination which is marked between the several departments, should dictate great circumspection to each, in the exercise of powers having any relation to the others. The courts are, indubitably, the source of legal redress for wrongs committed by ministerial officers, none of whom are above the law. The redress is to be administered by due and legal process in the ordinary way. For there appears to be a material and obvious distinction between a course of proceeding which redresses a wrong committed by an executive officer, and an interposition by a mandatory writ, taking the executive authority out of the hands of the president, and prescribing the course which he and the agents of any department must pursue. In one case, the executive is left free to act in his proper sphere, but it is held to strict responsibility; in the other, all responsibility is taken away, and he acts agreeably to judicial mandate. Writs of this kind, if made applicable to officers, indiscriminately, and acts purely ministerial and executive in their nature, would necessarily have the effect of transferring the powers, vested in one department, to another department. If, in a case like the present, where the law vests a duty and a discretion in an executive officer, a court can not only administer redress against the misuse of the authority, but previously direct the use to be made of it, it would seem that under the name of a judicial power, an executive function is necessarily assumed, and that part of the constitution, perhaps defeated, which makes it the duty of the president to take care that the laws be faithfully executed. I do not see any clear limitation to this doctrine, which would prevent the courts from compelling, by mandamus, all the executive officers, all subordinate to the president, at least, whether charged with legal duties in the treasury, or other department, to execute the same according to the opinion of the judiciary, and contrary to that of the executive. And it is evident that the confusion arising, will be greatly increased by the exercise of such a power by a number of separate courts of legal jurisdiction, whose proceedings would have complete and final effect, without an opportunity of control by the supreme court. So many branches of the judiciary acting within their respective districts, their courses might be different, and different rules of action might be prescribed for the citizens of different states, instead of that unity of administration which the constitution meant to secure, by placing the executive power, for them all, in the same head. What, too, becomes of the responsibility of the executive to the court of impeachment and of the nation? Is he to remain responsible for acts done by command of another department? Or is the nation to lose the security of that responsibility altogether? From these and other considerations, were this branch of the subject to be pursued, it might be inferred that the constitution of the United States by the distribution of the powers of our government to different departments, ascribing the executive duties to one, and the judiciary to another, controls any principle of the English law which would authorize either to enter into the department of the other, to annul the powers of the other, and to assume the direction of its operations to itself.'

"This opinion may be found, at length, in Gilchrist v. Collector of Charleston [Case No. 5,420], and a reply from Judge Johnson, who presided in the circuit court when the mandamus was issued. This paper embraces a full review of most of the objections of the attorney-general, but by no means answers the argument just quoted. The submission, of the collector and district-attorney, is relied on as, at least, excusing the act of the court; and in the case of McIntire v. Wood, 7 Cranch [11 U. S.] 504, it is expressly admitted, by Judge Johnson himself, that the court had no jurisdiction in the matter, except that derived from the consent of the public officers. This is his language: 'A case occurred, some years since, in the circuit court of South Carolina, the notoriety of which may apologize for making an observation upon it here. It was a mandamus to a collector to grant a clearance, and unquestionably could not have been issued but upon a supposition inconsistent with the decision in this case. But that mandamus was issued upon the voluntary submission of the collector, and the district-attorney, and in order to extricate themselves from an embarrassment resulting from conflicting duties. Volenti non fit injuria.' As the Charleston Case is the only one, prior to the present, in which a writ of mandamus has been actually issued, by any of the courts of the United States to an executive officer, its history and result are interesting; and I am happy to find in them so decisive a corroboration of my own opinion.

"(5) But the ground is taken, in the opinion of the circuit court, that the relation of the postmaster-general to the president, is very different from that of the other heads

of departments. 'They' (say the court), 'in the very terms by which their offices are created and their duties defined, are to perform such duties, and execute such orders as they shall be required, to perform and execute, by the president of the United States. The postmaster-general, however, clearly bears no such relation to the president. We cannot find a word in the law under which he was appointed, or in the various laws respecting the post-office establishment, or in the constitution of the United States, which intimates any connection between him and the president; or any authority in the president to prescribe his duties, or to control him in the exercise of his official functions. It is true that he is appointed, and therefore may be removed by the president. But the president, if he has the power to control him, can only do it through his fear of removal. If he should not control him, no act done by him, under that control, could be thereby justified. The postmaster-general, in the exercise of the duties of his office, appears to be legally as independent of the president, as the president is of him.' It was with great surprise that I perused this part of the opinion. The constitution assumes that certain executive departments will be created, but does not attempt to enumerate them; nor was any enumeration necessary; because the very nature of the functions assigned to any particular department, would readily determine its true character. The whole business of the post-office department, and all the official duties of the postmaster-general as its head, are, exclusively, executive; and if the views of the constitution, above taken, be correct, then, whatever may be the language of the acts of congress respecting the department, there exists a most intimate connection between the postmaster-general and the president; and the latter has the same control over the exercise of his official functions, when not prescribed by law, and is subject to the same obligation of taking care that all his duties are faithfully performed, which exist in respect to the other heads of departments. The passage above quoted, is not less repugnant to the practical course of the government. One of the first official acts of President Washington, after entering on the chief magistracy, was to call on the then postmaster-general for an account of the state of his office. 'A perfect knowledge' (says his biographer) 'of the antecedent state of things, being essential to the due administration of the executive department, its attainment engaged the immediate attention of the president; and he required the temporary heads of departments to prepare, and lay before him, such statements and documents as would give this information.' 2 Marshall's Life of Washington, p. 150. The form of this requisition will be found in the late collection of his writings (volume 10, p. 11), and it will be seen, by the note of the editor, Mr. Sparks, that it was addressed, among others, to Ebenezer Hazard, the postmaster-general appointed by the old congress.

"The first law concerning the post-office department, passed after the adoption of the constitution, was the act 'for the temporary establishment of the post-office,' approved September 22, 1789 [1 Stat. 70]. It consisted of only two sections; the last merely declaring that the law should continue in force until the end of the next session of congress, and no longer. The first section was in the following words: 'Be it enacted,' &c., 'that there shall be appointed a postmaster-general; his powers and salary, and the compensation to the assistant or clerk and deputies which he may appoint, and the regulations of the post-office, shall be the same as they last were under the resolutions and ordinances of the late congress. The postmaster-general to be subject to the direction of the president of the United States in performing the duties of his office, and in forming contracts for the transportation of the mail.' This act was continued in force by the acts of August 4, 1790 [1 Stat. 178], March 3, 1791 [Id. 218], and February 20, 1792 [Id. 232], to the 1st of June, 1792, when it gave place to the act of the 20th of February, 1792, 'to establish the post-office and post-roads within the United States,' which fully organized the department, and introduced numerous legal provisions for the government of its concerns. Since 1792 the duties of the postmaster-general have been so far defined by law, as to leave little room for executive direction, and it was not until 1829, that he was regarded as a member of the president's cabinet. But that his office has always been treated by congress, as well as by the president, as an executive department, is shown by the act of 1789, which left all its concerns to the direction of the president; by the act of 1792, and all the subsequent laws, which speak of it as a 'department;' by the power, of appointing postmasters, vested, by law, from 1789 to 1836, in the postmaster-general alone, and still retained by him in all cases where the commissions of the postmaster are under $1,000. An arrangement palpably unconstitutional, unless the postmaster-general be the head of a department; by the practice, of all those who have held the office of president, to require reports from, and to give directions to, the postmaster-general; by the placing of the department on the same footing, in respect to salary and organization, with the other great executive departments; and finally by the introduction of its head into the cabinet council of the president. The relation, then, of the postmaster-general, to the president, is the same as that of the other heads of departments. This relation does not authorize the president to give any direction, to the postmaster-general, contrary to the laws

concerning the department, but it authorizes and requires him to direct the faithful execution of those laws, and to take care that such directions be followed. And as the only coercive power, with which the president is armed by the constitution, is the power of removal, it will be his duty to exercise that power, if he cannot otherwise secure, on the part of the postmaster-general, a faithful execution of the laws. Nor will acts done by the postmaster-general, under the president's direction, be invalid, even though the judgment of the former be opposed to the act, and he be induced, through fear of removal, to execute the president's direction. The defectiveness of the motive will not determine the legal character of the act. If it be within the power of the department, and be conformable to law, it will still be valid. I think, therefore, that this officer is no more subject, in his official action, to the supervision and control of the judiciary, than the head of any other executive department; and that the principles above stated, if sound in respect to any executive officer, must be admitted, when the subject shall be fully examined, to be equally applicable to him. On the other hand, the claim of judicial power set up in the present case, in respect to the postmaster-general, involves the like claim over the official action of every other executive department, and therefore brings into discussion one of the most grave and important questions which has yet arisen in the practical administration of the government. I am, sir, very respectfully, your obedient servant, B. F. Butler."

This communication from the postmaster-general, having been offered to the court as his return to the writ of mandamus nisi,

Mr. Coxe, for the relators, moved the court to quash the return and to issue a peremptory writ of mandamus.

The case was ably argued, on the 26th, 27th, 28th, 29th, and 30th of June, by Mr. R. S. Coxe and Mr. Reverdy Johnson, for the relators, and by Mr. Key for the postmaster-general.

CRANCH, Chief Judge. In his return of the mandamus nisi, the postmaster-general, by way of showing cause why he declines obedience to the command of the writ, contends: (1) That "it is doubted whether the constitution of the United States confers, on the judiciary department of the government, authority to control the executive in the exercise of its functions, of whatsoever character." (2) That "if, according to the constitution, the circuit court of the District of Columbia might be clothed by law, with the power to issue a mandamus in such a case, no such power has been conferred upon them by the acts of congress." (3) That "if, by the constitution, congress can clothe courts with authority to issue writs of mandamus to executive officers, as such, and if they have vested the general power in this court, by law, this is not a case, in which that power can be lawfully exercised;" and, (4) That "the court have ordered the postmaster-general to perform a legal impossibility." The counsel for the relators have moved to quash this return, as being insufficient on its face, and the questions arising upon that motion have been fully, and very ably argued. Although the order, in which the questions are presented in the return, is perhaps the most natural, yet, inasmuch as a decision, against the relators, upon the 4th, 3d, or 2d, of the objections stated by the postmaster-general, would render it unnecessary to give any opinion upon the first, the court, in considering the case will reverse that order, as suggested by the district attorney, and commence with the fourth, which is: "That the court have ordered the postmaster-general to perform a legal impossibility."

The argument, in support of the proposition, is this: "A mandamus is a command to do a specific act. The specific act, ordered to be done, in this case, is, to credit the relators with the full amount of the solicitor's award. A credit can only be given by an entry in some book in which their accounts are lawfully kept. No accounts are kept, with contractors, in the post-office department; nor has the postmaster-general the custody or control of the books in which they are kept. All the accounts of the post-office department are kept in the treasury department by the auditor created for that purpose by the act of July 2, 1836. That officer is appointed by the president and senate; and so far is he from being dependent on the postmaster-general that his clerks are appointed by the secretary of the treasury. To his office have been transferred, long since, all the accounts, and the books, connected with them, formerly kept by the postmaster-general. By adverting to the fact, that the act for the relief of Messrs. Stockton and Stokes, and that to change the organization of the post-office department, passed on the same day, the occasion of this practical discrepancy between them, will be understood. The former was drawn with reference to the organization of the department at the time of its introduction into congress. Then, the postmaster-general kept the accounts, and the entries in the books were his entries. He had the legal power and authority to give a credit to the contractors in this case. But this power and authority was taken from him by another act on the day the act for their relief passed. That the act, now in question, was not altered so as to accommodate it to the change, and requires the credit to be given by the new auditor, instead of the postmaster-general, was doubtless an inadvertence; but it is one which the legislative authority, alone, can correct. As the law stands, the postmaster-general has just as much authority to make entries in the books of the second,

third, and fourth auditors, as he has in those of the auditor created by the act of 1836. Hence the court will perceive that they have ordered the postmaster-general to do that which he cannot lawfully do,—to enter a credit or credits on books of which he has neither the custody nor control."

The words of the act for the relief of the relators, are, "and that the postmaster-general be, and he is hereby directed to credit such mail contractors, with whatever sum or sums, if any, the said solicitor shall so decide to be due to them, for, or on account of, any such service or contract." The act does not require the postmaster-general to enter the credit in any book, or in any account; but that he shall credit them. The substance is, that he, as far as is in his power, shall cause them to have credit for that amount in their account with the United States, or with the department. This objection is not stated by the postmaster-general as a reason why he has not credited them with the amount, but as a reason why this court should not command him to credit them. It is not objected that there is an actual impossibility of his crediting them, but "a legal impossibility;" meaning, probably, that his crediting them now would be of no avail in law, as the settlement of the account was transferred to the auditor. That the change which was made in the post-office department by the act of the 2d of July, 1836, did not create an actual impossibility of his crediting them with the whole amount of the award, is evident from his own letter to the president of the United States, dated December 27, 1836, in answer to the complaint of the relators to the president, in which the postmaster-general says: "In obedience to the mandate of the law I have paid those gentlemen $122,101.46, although I have yet to be convinced that they had the least claim, in law or equity, to one sixth part of that sum. When the law requires it of me, I shall, with equal promptitude, pay the remaining $40,625.59, although satisfied that not one cent of it is justly due." He does not justify himself on account of his legal inability to pay, or to credit the amount.

But it has been stated, in the argument before the court, that the postmaster-general can lawfully pay the amount, although he cannot credit it. The law, which allows him to pay the amount, surely should be construed to allow him to credit it, especially when the act of congress expressly directs him to credit it. The act for the relief of these relators, and the act, "to change the organization of the post-office department," were passed at the same session of congress, and were approved on the same day. So far as they are in pari materiâ, they ought to be construed together, and made to harmonize with each other, if possible. The arrangement of the department, so far as it authorized an auditor to be appointed for the purpose of receiving, auditing, and settling "all accounts arising in the department, or relative thereto, must be considered as qualified by the express direction that the postmaster-general should credit the contractors with the amount of the award; and as reserving to the postmaster-general the power to do what the act expressly requires him to do. The auditor, also, is bound to take notice that by the act "for the relief," &c., the postmaster-general is directed to credit the contractors with the amount of the award; and whenever the postmaster-general, who still continues to be the head of the department, shall credit them with the amount or shall order it to be credited, the auditor will allow the same in auditing and settling their account.

Although the accounting bureau of the department has been removed to the treasury department, yet ample powers are given to the postmaster-general; and by the ninth section of the act of July 2, 1836, "to change the organization of the post-office department," it is made his duty "to control, according to law, and subject to the settlement of the auditor," "the expenses incident to the service of the department;" and "to regulate and direct the payment" of the said "expenses for which appropriations have been made." Among "the expenses incident to the service," are included, no doubt, the expenses of the transportation of the mail, and the amount due to the contractors therefor. These duties imply powers which authorize the postmaster-general to give this credit, or to direct it to be given; and the fact, that the auditor has, upon the authority of such a direction, allowed that part of the award which the postmaster-general has deemed proper to credit, shows that, upon a like authority, he would allow the balance. We therefore think that there is neither a legal, a moral, nor a physical impossibility, on the part of the postmaster-general, to obey the mandate by executing the law. We must, therefore, next consider the third reason assigned by the postmaster-general for not obeying the command of the writ; which is: (3) That "if, by the constitution, congress can clothe the courts with authority to issue writs of mandamus to executive officers, as such, and if they have vested the general power in this court, by law, this is not a case in which that power can be exercised."

The argument, in support of this proposition, is, in substance: (1) That the postmaster-general has a discretion, because the act, for the relief of these relators, does not require him to pay any specific sum; but a sum to be ascertained by comparing the award of the solicitor with the act. That the act does not require the postmaster-general to credit all the solicitor might award to them, but only so much as he might decide to be due, for and on account of such service or contract, as is described in the

preceding part of the act; and the postmaster-general has a discretion to pay or not, according as the allowance shall or shall not correspond with the act. That he is also to look into the award to see that it contains none of the prohibited items; and that he has a discretion to refuse to pay the whole award, or any part of it, if he honestly believes it to be contrary to law. (2) That a mandamus can be issued by a court, only as a means of exercising its jurisdiction, and not for the purpose of obtaining jurisdiction. That this court has no jurisdiction in this case, but what is given by the mandamus.

(1) As to the first branch of this argument, we apprehend that the discretion which will justify a party in refusing to do an act, must be a legal right to do or not to do it according to his will. The obligation of the postmaster-general, under the act, is absolute to credit whatever sum the solicitor should decide to be due for and on account of the service and contract described in the act. The only fact to be decided, out of the act, is the amount which should thus be decided to be due. The award, upon that point, is clear and explicit. The question whether the money claimed and awarded was due for and on account of such service and contract, was as much submitted to the judgment of the solicitor, as the question of the amount due; as to both points, his award is final and conclusive upon all persons. In the language of the postmaster-general: "Congress created a special tribunal for that purpose. They made the solicitor of the treasury a chancellor for the special object, and clothed him with power to take evidence and adjudicate upon the claims of the contractors. No other court on earth could have entertained this case; nor was any appeal from this special court provided for by the law which created it. Neither the circuit court of this district, nor the supreme court of the United States, nor any other judicial tribunal had power to bring up the case, from the solicitor of the treasury, either before or after his award, and revise his proceedings. No judge could take from or add to the amount of his award; nor has any judge the legal power to say whether that officer decided according to law or against law. The solicitor's power, in this case, was equal to that conferred upon the supreme court of the United States, in cases subjected to its jurisdiction, and above that of the circuit court of the District of Columbia, from which there is an appeal;" and, we will add, that the act gives no appellate jurisdiction to the postmaster-general. The award is as conclusive upon him as upon all the rest of the world. The proviso in the act, that the solicitor should not make any allowance for certain enumerated items, was merely directory to the solicitor, and gave the postmaster-general no discretion over the award, or over the duty of crediting the contractors with the amount. The postmaster-general seems to admit that, if the law directed the payment of a certain sum, he would have had no discretion; but id certum est quod certum reddi potest. The award renders that certain which was uncertain when the law was passed; and the duty of crediting the amount of the award is now as absolute as if that amount had been ascertained and stated in the law itself. The discretion which is claimed by the postmaster-general is no other than that discretion which every man has in regard to his own actions. Every man is a free agent. He has the power to do or not to do a particular act; and he decides upon his own responsibility. Neither his discretion nor his decision makes the act lawful or unlawful. Every man must judge, for himself, of his own duty; but he acts at his peril; if correctly, he is justified; if erroneously, he must abide the consequence. We are of opinion, therefore, that the postmaster-general had not such a discretion over the duty enjoined by the statute, as renders it improper that a mandamus should issue in this case.

But it is contended that "a mandamus can be issued by a court only as a means of exercising its jurisdiction, and not for the purpose of obtaining jurisdiction." This proposition is admitted, by this court, in its fullest extent; and the only ground upon which the power of issuing that writ is claimed, is, that it is a writ necessary for the exercise of the jurisdiction of the court, in a case of which it already has cognizance. That case is, that the postmaster-general has refused to perform a duty positively required of him by an act of congress, to the injury of the relators, who have brought their complaint before the court, by affidavit and petition, praying the court to grant them a proper remedy. A rule has been granted them upon the postmaster-general to show cause why a mandamus, which is the only proper and adequate specific legal remedy, should not be issued, commanding him to perform what the statute directs him to do. The postmaster-general has failed to appear upon the rule to show cause. But it is denied that this is a case, because Mr. Justice Story, in his Commentaries on the Constitution of the United States (volume 3, p. 507), says, that "a case, then, in the sense of this clause of the constitution, arises when some subject, touching the constitution, laws, or treaties of the United States is submitted, to the courts, by some party who asserts his rights in the form prescribed by law." In the present case, however, "a subject, touching the constitution and laws of the United States, is submitted to" this "court," by the relators, "who assert their rights in the form prescribed by law." They have done all they could to bring their case before the court. If this is not sufficient to give the court jurisdiction, it would never be in the power of the court to exercise the potential

jurisdiction which is given to it by the statute. When we say, in common parlance, that the jurisdiction is given by a statute, we do not mean that the court has, thereby, actual jurisdiction of any given case, but only that the court shall exercise jurisdiction in such cases when they shall be brought judicially before it. When, therefore, the 14th section of the judiciary act of 1789 gives to the courts power to issue all writs which may be necessary for the exercise of their respective jurisdictions, it is not intended that the court shall have had actual jurisdiction of the particular case, by its having been actually submitted to the court in the form prescribed by law, before it shall have power to issue the writ necessary for the exercise of its jurisdiction; for that writ may be the very form prescribed by law for submitting the case to the court; and if the court could not issue the writ until it had actual jurisdiction, and could not have actual jurisdiction until it had issued the writ, it is evident that the court could never exercise the jurisdiction given to it by the statute. The jurisdiction, mentioned in the 14th section of the act, must, therefore, mean the potential jurisdiction; that is, the jurisdiction which the respective courts may exercise when the cases, described in the statutes giving the jurisdiction, shall arise and be submitted to the courts by means of the writs which, by the 14th section, they have power to issue. This, therefore, is a case of which the court, not only potentially, but actually, has jurisdiction by means of the petition, affidavit, and rule to show cause; and the writ of mandamus is a writ necessary for the exercise of its jurisdiction, in that case, if this court can, by law, issue such a writ to an executive officer of the United States, commanding him to do a merely ministerial act which he is expressly required by an act of congress to do; and therefore this court has power to issue it.

We are then brought to the consideration of the second ground upon which the postmaster-general alleges that this court has no power to issue the writ, namely: That "if, according to the constitution, the circuit court of the District of Columbia might be clothed, by law, with the power to issue a mandamus, in such a case, no such power has been conferred upon them by the acts of congress." For the argument in support of this proposition, the postmaster-general has referred the court to the very able and elaborate opinion of the attorney-general of the United States, which accompanies, and makes a part of, the return to the writ of mandamus; and of which the postmaster-general has given the following epitome, or analysis: "The undersigned is spared the labor of investigating and illustrating this position, by the clear, and, he thinks, conclusive, opinion of the attorney-general, which he transmits herewith, and requests it may be considered part of this letter. That opinion reviews the opinion of the circuit court, as delivered by Chief Justice Cranch, and published in the National Intelligencer, and maintains the following positions: '(1) That the argument of the court, in favor of the jurisdiction claimed by them, is founded on inferences from the language of Judge Johnson, in the case of McIntire v. Wood, which inferences were repudiated by the same judge, and by the judgment of the court in a subsequent case. (2) That there is no substantial difference between the words of the judiciary act of 1789 (1 Stat. 73), which the supreme court have twice decided do not give the other circuit courts power to issue a mandamus to an executive officer, and the words of the 5th section of the act concerning the District of Columbia, on which the circuit court rely: and that the jurisdiction of the latter is, therefore, in this respect, no greater than that of the other courts. (3) That no power is to be derived from the act of the 13th of February, 1801, because that act was repealed in 1802, without any exception as to the circuit court of this district. (4) That even, if the acts of congress, concerning this court, had given to it, in express terms, a jurisdiction to issue writs of mandamus to an executive officer, to compel him to perform an official act, no such jurisdiction could be exercised consistently with the provisions of the constitution, because such a jurisdiction would be, substantially, an exercise of executive power, which cannot be taken from the president, in whom the constitution has vested it. (5) That the postmaster-general is an executive officer, and equally independent, with the other heads of the executive departments, of any control, in the exercise of his official duties, by the judiciary.' "

The attorney-general, in reviewing the opinion of this court, given upon the rule to show cause why a writ of mandamus should not issue, supposes that the court relied much upon the inferences drawn from the language of Mr. Justice Johnson, in delivering the opinion of the supreme court of the United States, in the case of McIntire v. Wood, 7 Cranch [11 U. S.] 504. That language is as follows: "We are of opinion that the power of the circuit courts to issue the writ of mandamus is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. Had the 11th section of the judiciary act of 1789 covered the whole ground of the constitution, there would be much reason for exercising this power, in many cases wherein some ministerial act is necessary to the completion of an individual right arising under the laws of the United States; and the 14th section of the same act would sanction the issuing of the writ for such a purpose. But although the judicial power of the United States extends to cases arising under the laws of the United States, the legislature have not thought proper to delegate the exercise of that power to its cir-

cuit courts, except in certain specified cases. When questions arise, under those laws, in the state courts, and the party, who claims a right or privilege under them, is unsuccessful, an appeal is given to the supreme court; and this provision the legislature has thought sufficient, at present, for all the political purposes intended to be answered by the clause in the constitution which relates to the subject." This is the whole of the opinion upon that point. The case was a case arising under the laws of the United States, it being a motion or a petition for a mandamus to the register of a land-office in Ohio, commanding him to issue a final certificate of purchase, to the plaintiff for certain lands in that state. The inference from the language of that opinion is irresistible, that if the legislature had extended the jurisdiction of the circuit courts of the United States to cases in law and equity arising under the laws of the United States, there might be cases in which it would be proper for those courts to issue the writ, and that the 14th section of the act, which gives to all the courts of the United States power to issue all writs necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law, would sanction the issuing of the writ. But this inference is said to have been repudiated by Judge Johnson himself, in delivering the opinion of the supreme court in the subsequent case of McClung v. Silliman, in 6 Wheat. [19 U. S.] 598. The only substantial difference between the case of McIntire v. Wood, and the case of McClung v. Silliman, which was brought up from the circuit court of the United States for the district of Ohio, is, that in the former, the controversy was between citizens of the same state, and the only ground of federal jurisdiction was, that it was a case arising under the laws of the United States. And in the latter (McClung v. Silliman) it was a case arising under the laws of the United States, "between a citizen of the state where the suit was brought, and a citizen of another state." This last circumstance would have been given the circuit court of Ohio jurisdiction of the case, if it had been one, of which a state court might have had jurisdiction. But inasmuch as a state court had no jurisdiction of cases arising under the laws of the United States, and the 11th section of the judiciary act of 1789 only gave to the circuit courts a jurisdiction concurrent with the courts of the several states, the circuit court of the United States for Ohio, had not jurisdiction under the 11th section of the act, although the character of the parties would have given it jurisdiction, if, from the nature of the subject-matter of the controversy, it had been a case of which a state court could have had jurisdiction. The same objection, therefore, to the jurisdiction of the circuit court of the United States for Ohio, existed in McClung v. Silliman, as in McIntire v. Wood, namely, that there was no existing act of congress which delegated to the circuit courts of the United States cognizance of "cases arising under the laws of the United States." The 11th section of the act of 1789 gives jurisdiction only upon the ground of the character of the parties, not upon the ground of the subject-matter of the controversy; and was only intended to give to parties of a certain description a right to prosecute, in the federal courts, the same causes of action which they could prosecute in a state court. The words "concurrent with the courts of the several states," do not enlarge the jurisdiction of the state courts, but are restrictive of the general words "all suits of a civil nature at common law or in equity," which would, if not thus restrained, have comprehended "cases arising under the laws of the United States." With this exposition and construction of the 11th section of the act of 1789, there is no discrepancy between the opinions of the supreme court in those two cases; and the opinion in McClung v. Silliman, becomes perfectly intelligible.

Mr. Justice Johnson in McClung v. Silliman, 6 Wheat. [19 U. S.] 599, says: "In the case of McIntire v. Wood, decided in this court in 1813, the mandamus, contended for, was intended to perfect the same claim, and, in point of fact, the suit was between the same parties. The influence of that decision on these cases is resisted on the ground that it did not appear, in that case, that the controversy was between parties who, under the description of person, were entitled to maintain suits in the courts of the United States; whereas the averments, in the present case, show that the parties litigant are citizens of different states, and therefore competent parties in the circuit court. But we think it perfectly clear, from an examination of the decision alluded to, that it was wholly uninfluenced by any considerations drawn from the want of personal attributes of the parties. The case came up on a division of opinion, and the single question stated, was, 'whether that court had power to issue a writ of mandamus to the register of a land-office in Ohio, commanding him to issue a final certificate of purchase, to the plaintiff, for certain lands in that state.' 'Both the argument of counsel, and the opinion of the court, distinctly show that the power to issue a mandamus, in that case, was contended for as incident to the judicial powers of the United States; and the reply of the court is, that though, argumenti gratiâ, it be admitted that this controlling power over its ministerial officers would follow from vesting in its courts the whole judicial power of the United States, the argument fails here, since the legislature has only made a partial delegation of the judicial powers to the circuit courts. That if the inference be admitted as far as the judicial power of the court actually extends,' (namely, as we understand it, if the controlling power over ministerial officers would exist as far as the judicial power is actually granted to the circuit courts,) 'still cases arising under

the laws of the United States, are not, per se, among the cases comprised in the jurisdiction of the circuit courts, under the provisions of the 11th section of the act of 1789; jurisdiction being, in such cases, reserved to the supreme court, under the 25th section, by way of appeal from the decisions of the state courts.' There is, then," continues the judge, "no just inference to be drawn from the decision, in the case of McIntire v. Wood, in favor of a case in which the circuit courts are vested with jurisdiction under the eleventh section." The word "then," in that sentence, means "therefore;" and "therefore" means "for the reason aforesaid;" and the reason aforesaid is, that the eleventh section did not give the circuit courts jurisdiction of "cases arising under the laws of the United States;" and the reason, why the eleventh section did not give that jurisdiction, is, that the jurisdiction, thereby given, is a jurisdiction "concurrent with the courts of the several states," and, consequently, could be exercised only in cases of which the courts of the several states previously had cognizance; that the courts of the several states had not, previously, cognizance of cases arising under the laws of the United States; and therefore jurisdiction of those cases is not given to the circuit courts, by that section. The inference, therefore, "drawn from the decision, in the case of McIntire v. Wood," which is repudiated by Judge Johnson, is not the inference that if the legislature had extended the jurisdiction of the circuit courts of the United States to cases in law and equity arising under the laws of the United States, there might be cases in which it might be proper for those courts to issue the writ, and that the fourteenth section of the act would sanction the issuing of it; which is the inference which this court drew, in giving its opinion upon the rule to show cause; and which, we are still of opinion, is a necessary inference from the language of Mr. Justice Johnson in that case, and which is in no manner impugned or repudiated by the same judge in the case of McClung v. Silliman. Again, Mr. Justice Johnson, in the same case (page 601), says: "It is now contended that, as the parties to this controversy are competent to sue under the eleventh section, being citizens of different states, this is a case within the provisions of the fourteenth section, and the circuit court was vested with power to issue this writ under the description of a 'writ not provided for by statute,' but 'necessary for the exercise of its jurisdiction.' The case, certainly, does present one of those instances of equivocal language, in which the proposition, though true in the abstract, is, in its application to the subject, glaringly incorrect." The proposition, which is thus said to be true in the abstract, is this: that as the parties were competent to sue, under the eleventh section, being citizens of different states, the fourteenth section gave the court power to issue the writ of mandamus, under the description of a "writ, not provided for by statute," but "necessary for the exercise of its jurisdiction."

Here it may be proper to observe, that although in this case of McClung v. Silliman, the parties were competent to sue in the circuit court, yet the court had not jurisdiction of the subject-matter, it being a case arising under the laws of the United States. The judge proceeded to say: "It cannot be denied that the existence of this power is necessary to the exercise of jurisdiction in the court below; but why is it necessary? Not because the court possesses jurisdiction, but because it does not possess it." That is, as we understand it, the court has no jurisdiction; and if it can have any, it must be by first obtaining, by means of a mandamus, the document which is the object of the mandamus, and which will enable the party to sue at law. The judge proceeds: "It must exercise this power, and compel the emanation of the legal document, or the execution of the legal act, by the register of the land-office, or the party cannot sue. The fourteenth section of the act under consideration could only have been intended to vest the power, now contended for, in cases where the jurisdiction already exists, and not where it is to be courted or acquired by means of the writ proposed to be sued out." Here, again, the inference, from the language of the judge, is very strong, that in cases where the jurisdiction already exists, the fourteenth section was intended to vest the power of issuing the writ. Again, in page 604, the judge says: "It is not easy to conceive on what legal ground a state tribunal can, in any instance, exercise the power of issuing a mandamus to the register of a land-office. The United States have not thought proper to delegate that power to their own courts. But when, in the case of Marbury v. Madison, and that of McIntire v. Wood, this court decided against the exercise of that power, the idea never presented itself to any one that it was not within the scope of the judicial powers of the United States, although not vested by law in the courts of the general government." If, then, the inference drawn by this court from the decision and language of the supreme court in the case of McIntire v. Wood, is an obvious and necessary inference, and is not impugned nor repudiated in that of McClung v. Silliman, namely: that if the eleventh section had given to the circuit courts, cognizance of all cases in law and equity arising under the constitution and laws of the United States, there would be much reason for exercising this power in many cases, and that the fourteenth section would sanction the issuing of it for such a purpose; and if we show that congress has given to this court cognizance of all cases in law and equity arising under the constitution and laws of the United States, it will follow that there may be cases in which it may be proper for this court to exercise the power; and that congress, by the third section of the act of the 27th of February, 1801 (2 Stat. 103), which

gives to this court the same powers which it had given to the other circuit courts by the fourteenth section of the act of 1789, has given this court the power to issue the writ; and the former opinion of the court, so far as it rested upon the inference drawn from the decision and language of the supreme court in the case of McIntire v. Wood, is fully supported. Under this head, it would, then, be only necessary to show that by the fifth section of the act of the 27th of February, 1801, congress has given to this court cognizance of all cases in law and equity arising under the constitution and laws of the United States. That section, so far as it relates to this question, is in these words: "That the said court" (the circuit court of the District of Columbia) "shall have cognizance of all cases in law and equity between parties, both or either of which shall be resident or shall be found within the said district." These words are comprehensive enough to include "all cases in law or equity arising under the constitution and laws of the United States."

In the case of Cohens v. Virginia, 6 Wheat. [19 U. S.] 379, Chief Justice Marshall, in delivering the unanimous opinion of the supreme court of the United States upon the question of jurisdiction, says: "The jurisdiction of the court, then, being extended, by the letter of the constitution, to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case, of this description, from that jurisdiction, must sustain the exemption they claim, on the spirit and true meaning of the constitution; which spirit and true meaning must be so apparent as to overrule the words which its framers have employed." But it is contended, in the opinion of the attorney-general, which the postmaster-general has made part of his return, that "there is no essential difference between the fifth section of the act" of the 27th of February, 1801, "concerning the District of Columbia, and the eleventh section of the judiciary act of 1789, which prescribes the jurisdiction of the other courts." "The material words," he says, "of the fifth section, omitting other classes of cases, are, that the circuit court of this district shall have cognizance of all cases in law and equity, between parties, both or either of which shall be resident, or shall be found, within the said district. Those of the eleventh section, omitting value and alternative cases, are, that the circuit courts of the United States shall have cognizance of all suits of a civil nature, at common law, or in equity, where the dispute is between a citizen of the state where the suit is brought, and a citizen of another state,—except that, in the other circuit courts, it is requisite that one party should be a citizen of the state where the suit is brought, and the other party a citizen of another state; and that in this district it will be sufficient if either of the parties be resident, or be found here, there would seem to be no substantial difference between the two provisions. Indeed, unless the phrase, 'all cases in law and equity,' means something different from 'all suits of a civil nature at common law or in equity,' used in the other, it is certain that there can be no such difference, and, consequently, that the power and jurisdiction of the circuit court of this district, in regard to the writ of mandamus, so far as depends on the fifth section above quoted, are precisely the same with those of the other circuit courts."

But the attorney-general, in attempting to reduce these two sections to an equation, by striking out from both sides the terms which he deemed equivalent, has overlooked entirely the words, "concurrent with the courts of the several states," in the eleventh section of the act of 1789; which are the very words that constitute the essential difference between the extent of jurisdiction granted in the respective sections. If they had not been stricken out of the equation, that side of it which regards the eleventh section would have been stated thus: "The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the suit is between a citizen of the state where the suit is brought, and a citizen of another state." The other side of the equation (that which regards the fifth section of the act of the 27th of February, 1801, which gives jurisdiction to this court,) would be: "The said court" (the circuit court of the District of Columbia,) "shall have cognizance of all cases in law and equity between parties, both or either of which shall be resident, or be found, within said district." Again; by striking out from both sides of the equation the personal attributes of the respective parties, and thus reducing it to its lowest and most simple terms, the equation will stand thus:—

By the eleventh section of the act of 1789, "the circuit courts" of the United States "shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity."	By the fifth section of the act of the 27th of February, 1801, "the said court" (the circuit court of the District of Columbia,) "shall have cognizance" "of all cases in law and equity."

Here it is evident that the jurisdiction given to the circuit courts of the United States, by the eleventh section of the act of 1789, extends to those cases only of which the state courts then had cognizance. The state courts had then no cognizance of "cases arising under the constitution, the laws of the United States, and treaties made under their authority," nor of "cases affecting ambassadors," &c.

The supreme court of the United States, in the case of Martin v. Hunter, 1 Wheat. [14 U. S.] 334, 335, say: "In the first place, as to cases arising under the constitution, laws, and treaties of the United States: Here the state courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist, in the

state courts, previous to the adoption of the constitution; and it could not afterwards be directly conferred upon them; for the constitution expressly requires the judicial power to be vested in courts ordained and established by the United States." And in page 337, they say: "It can only be in those cases where, previous to the constitution, state tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction." It is true that in the state courts, in the exercise of their ordinary jurisdiction, questions, upon the construction of the constitution, laws, and treaties of the United States, may incidentally arise, and must be decided by those courts; but it does not follow that therefore they have direct jurisdiction of cases in which the cause of action arises under, or for the violation of, a law of the United States. In cases where they have jurisdiction of questions arising incidentally, in causes within their ordinary jurisdiction, provision is made for an appeal, or writ of error, to the supreme court of the United States, under the twenty-fifth section of the judiciary act of 1789. Thus, the supreme court, in the same case of Martin v. Hunter (page 340), say: "But it is plain that the framers of the constitution did contemplate that cases within the judicial cognizance of the United States, not only might, but would, arise in the state courts, in the exercise of their ordinary jurisdiction." And again in page 342, they say: "It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the United States. Yet, to all these cases, the judicial power, by the very terms of the constitution, is to extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively attached in the state courts, which, (as has been already shown,) may occur; it must therefore extend by appellate jurisdiction or not at all." But in the same case, in page 372, Mr. Justice Johnson says "that the real doubt is whether the state tribunals can constitutionally exercise jurisdiction in any of the cases to which the judicial power of the United States extends." However that may be, we think it clear that the concurrent jurisdiction of the state courts, referred to in the eleventh section of the act of 1789, is the ordinary and direct jurisdiction which those courts possessed at the time of passing that act; and that the grant of jurisdiction, by that section, to the circuit courts, is to be measured by the ordinary and direct jurisdiction which the state courts then possessed. That as the ordinary and direct jurisdiction of the state courts did not then extend to cases arising under the constitution and laws of the United States, the jurisdiction of the circuit courts of the United States, given by that section, did not extend to those cases.

The words "all suits of a civil nature at common law or in equity," are sufficiently broad to comprehend "all cases in law and equity, arising under the constitution and laws of the United States," and would have extended the jurisdiction of the circuit courts of the United States to those cases, but for the restraining words, "concurrent with the courts of the several states," provided the parties had been competent to litigate in those courts; for, although congress had power to give those courts jurisdiction of cases arising under the constitution and laws of the United States, whatever might be the character of the parties, yet they had a right to restrict it to cases in which the character of the parties also would enable them to sue in those courts. Thus, in the case of McClung v. Silliman, the circuit court of the United States, although the parties were competent to litigate in that court, had not jurisdiction of the case, because it was a "case arising under the laws of the United States," and the 11th section of the judiciary act of 1789 had not conferred upon the circuit courts of the United States jurisdiction in such cases. Although the parties were competent, yet the subject-matter of the controversy was not within the jurisdiction of the court. But if congress, by the 11th section of the act of 1789, had given to the circuit courts of the United States jurisdiction of all cases arising under the laws of the United States, although they should have confined that jurisdiction to the persons described in that section, the circuit court, in the case of McClung v. Silliman, would have had jurisdiction of the case; for the subject-matter of the controversy, as well as the parties, would have been within the cognizance of the court. That congress claim a right thus to discriminate between persons, in granting jurisdiction of cases arising under the laws of the United States, appears from their having granted it in the case of patents; and of the Bank of the United States; and of the postmaster-general; and of all the officers of the United States, who, under the act of the 3d of March, 1815, c. 782, § 4 (3 Stat. 244), shall sue under the authority of any act of congress. Congress could have given jurisdiction in those cases only on the ground that they were cases arising under the laws of the United States; for the characters of the parties did not furnish a ground, per se, of jurisdiction under the constitution. See Postmaster-General v. Early, 12 Wheat. [25 U. S.] 145, and Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 825. The words, "concurrent with the courts of the several states," therefore, in the 11th section, clearly excluded from the cognizance of the circuit courts, cases in law and equity, arising under the constitution and laws of the United States. There are no such words in the 5th section of the act of the 27th of February, 1801, which gives this court its jurisdiction; nor any other words to qualify or restrict the full force of the words "all cases in law and equity." The argument, therefore, which was

drawn from the similarity of the language of the two sections which have thus been compared, entirely fails.

But it has been contended, in argument, before this court, that the intention of the legislature is the best guide to the true construction of a statute; and that the statute must be construed now as it would have been at the time it was passed; and the attorney-general, in his opinion, admits that this court, when the case of Marbury v. Madison, was decided, "possessed precisely the same power, in this respect, which it possesses now." It was also contended, in argument, that as congress had not thought proper, by the act of 1789, to confer on the other circuit courts of the United States jurisdiction in cases arising under the constitution and laws of the United States, it was not their intention to confer it on this court by the act of the 27th of February, 1801.

If it was intended, by congress, to confer on this court the same jurisdiction only which it had conferred on the other circuit courts of the United States, it is probable they would, instead of enacting the 5th section, have referred to the laws giving that jurisdiction, as they had referred to them in the 3d section, for our powers. But the 5th section has no reference whatever to the jurisdiction given to those courts; and that jurisdiction, if referred to, would have been quite insufficient for the objects for which this court was established. It would have given only the federal jurisdiction, and would not have provided a substitute for the state jurisdiction which had ceased to exist, upon the cession of the territory to the United States. The section, therefore, giving jurisdiction to this court, was to be modelled so as to give the court all the federal and all the state jurisdiction. As there were no jealous rival jurisdictions here, it was unnecessary to discriminate between federal and state jurisdiction. The only judicial power which could be exercised here was the judicial power of the United States. The only concern of the framers of the law was to give jurisdiction in language broad enough to cover the whole ground of federal and state judicial power. The jurisdiction, therefore, which is given to this court, cannot be limited by the terms in which judicial power has been meted out to the other courts of the United States by the constitution. But it may be fairly inferred that congress intended, by the act of the 27th of February, 1801, to give this court jurisdiction of cases arising under the laws and constitution of the United States, because they had, on the 13th of the same month, given that jurisdiction, in express terms, to the other circuit courts, by the 11th section of the act of that date. By that section, it is, among other things, enacted, "that the said circuit courts, respectively, shall have cognizance of all cases in law or equity, arising under the constitution and laws of the United States, and treaties made, or which shall be made, under their authority." "And also of all actions or suits, matters or things, cognizable by the judicial authority of the United States, under and by virtue of the constitution thereof, where the matter in dispute shall amount to four hundred dollars, and where original jurisdiction is not given, by the constitution of the United States, to the supreme court thereof, or exclusive jurisdiction, by law, to the district courts of the United States."

It would have been strange, indeed, if congress should have given this jurisdiction to every other circuit court, and refused it to that of the District of Columbia, where there was no other court to take jurisdiction of those cases; where there was no jealous rival to be offended at the grant of jurisdiction; and where every possible case that can arise is a case arising under the constitution and laws of the United States. And still more strange would it be, if that should be adjudged to be the true construction of the 5th section of the act of the 27th February, 1801, the words of which are so comprehensive that it was not necessary to introduce the words, "arising under the laws of the United States," after the words "all cases in law and equity;" for these words include all cases in law and equity, arising under the general laws of the United States, as well as under those adopted by congress as the laws of this district. That congress had in view the act of the 13th of February, 1801, when they passed the act of the 27th of February, 1801, appears from the terms of the 3d section of the latter act, by which they say, that "the said court and the judges thereof shall have all the powers by law vested in the circuit courts, and the judges of the circuit courts of the United States." Until the 13th of February, 1801, the office of a judge of the circuit court of the United States had never existed. The old circuit courts which were abolished on the 13th of February, 1801, had been always held by a judge, or judges of the supreme court, and the judge of the district court, neither of whom was ever called, either legally, or in common parlance, a judge of the circuit court. The judges of the circuit courts, therefore, to whose powers reference is had in the 3d section of the act of the 27th February, 1801, must have been the new judges whose offices had been created by the act of the 13th of February, 1801. That act was in full force on the 27th of February, 1801, and it is of no importance whether the courts which were thereby ordained and established, had or had not been organized, or whether the judges had or had not been appointed before the 27th of February. The reference, in the third section of the act concerning the District of Columbia, to the circuit courts, and the judges of the circuit courts of the

United States, must have alluded to the powers vested by law in those courts and judges as they were newly organized by the act of the 13th of February; and those powers would be the same, whether the new circuit courts were, or were not organized, and whether the new judges were, or were not appointed before the 27th of February. But, so far as the extent of the powers vested in this court by the act of that date is concerned, it is perfectly immaterial whether the reference in the third section of the act is to the powers given to the circuit courts of the United States by the act of the 13th of February, 1801, or by the judiciary act of the 24th of September, 1789, for the powers are the same; as appears by reference to the 10th section of the act of the 13th of February, which is in these words: "And be it further enacted, that the circuit court shall have, and are hereby invested with all the powers heretofore granted by law to the circuit courts of the United States, unless where otherwise provided by this act."

The act of the 13th of February, continued in full force until the 1st of July, 1802. From the 27th of February, 1801, to the 1st of July, 1802, therefore, there could be no doubt as to the extent of the powers of this court; and the construction of the act of the 27th February, 1801, must be the same now as it was then, unless it has been altered by some act subsequently passed. None has since been passed, in any manner restricting the powers of this court as they then existed. We still have, as we had then, all the powers which were by the 14th section of the judiciary act of 1789, vested in the circuit courts of the United States; which powers have been found abundantly sufficient (with the aid of some small powers given by subsequent statutes,) for the exercise of the jurisdiction given by the 5th section of the act of the 27th of February. But none of our powers are derived from, or dependent upon, the act of the 13th of February, 1801, or the judiciary act of 1789. The 3d section of the act of the 27th of February, 1801, does not refer expressly to any particular act of congress, but to the powers which were then, by law, vested in the circuit courts, and the judges of the circuit courts of the United States; not the powers which had been, at any prior period, or might, at any future time, be vested in those courts and judges; but the powers as they then existed. Our powers were then as well ascertained and fixed as if they had been particularly enumerated and minutely described in the act of the 27th of February, which established this court. No subsequent alteration, or modification, or repeal of the powers of the other circuit courts could affect our powers; and there is nothing in the act of the 27th of February which can justify the assumption that our powers "were to be the same with those of the circuit courts, and the judges of the circuit courts of the United States, as they should, from time to time, be vested by law in those courts and judges." As the act of the 27th of February, 1801, was not in any manner dependent on that of the 13th of February, the repeal of the latter could not affect the former.

The act of the 13th of February was referred to in the former opinion of this court, for the purpose of showing that the cases of McIntire v. Wood, and McClung v. Silliman, would probably have been differently decided, if that act had been in force at the time of those decisions; because those cases were decided upon the ground that congress had not, by the 11th section of the act of 1789, given to the circuit courts of the United States, jurisdiction of cases arising under the constitution and laws of the United States, which jurisdiction had been given by the 11th section of the repealed act of the 13th of February, 1801. Another motive for referring to that act was, to show that congress had given to the other circuit courts, jurisdiction of cases arising under the laws of the United States, at the time when they gave jurisdiction to this court, and thence, to infer that they had conferred the same jurisdiction upon this court. In our former opinion it was said that the only point decided in the case of McClung v. Silliman was, that "a state court cannot issue a mandamus to an officer of the United States." Upon examining the record of that case in the office of the clerk of the supreme court, it appears that there were two cases brought up by writ of error; one of them from the state court, and the other from the circuit court of the United States. The former was decided by the state court in 1815, and the other by the circuit court of the United States in 1821, or 1822. Both causes were argued before the supreme court as one case, and both were decided by that court; so that the question respecting the jurisdiction of the circuit court was decided, as well as that respecting the jurisdiction of the state court. We were led into the mistake by the marginal note of the reporter, as well as by some expressions of the judge. Our mistake, however, did not affect our opinion. We place no reliance on the difference between a case and a suit. If there is any difference, however, the word "case" is more comprehensive than the word "suit." A case must exist of which a court may take cognizance before a suit can be brought upon it.

After reconsidering the former opinion of the court in this case, with all the light thrown upon it by the opinion of the attorney-general, and the argument of the district attorney, we are still of opinion that this court has jurisdiction in cases arising under the laws of the United States, and that the cases of McIntire v. Wood, and McClung v. Silliman, so far from showing that it has not power to issue a writ of mandamus to a

ministerial officer of the United States, afford strong ground of inference that it has the power, because it has that jurisdiction, the want of which was the ground of the decisions in those cases.

1. The court is, then, obliged to consider the first reason assigned by the postmaster-general for declining to obey the mandamus, which is, that it is doubted whether the constitution of the United States confers, on the judiciary department of the government, authority to control the executive department in the exercise of its functions, of whatsoever character. A question of jurisdiction, however suggested, should always be well considered by the court; and in the present case it has become a highly important question, as it involves the construction of the constitution of the United States upon the respective powers and duties of two of the great constitutional departments of the government. Before we proceed to examine the grounds upon which the supposed conflicting powers are respectively claimed, much discussion may be prevented by ascertaining, as exactly as we can, the extent of the powers claimed, and the points conceded on one side and the other. In the first place the judiciary department is understood as disclaiming all right to control any executive officer in the exercise of functions, in the discharge of which he is to use his own discretion, or is legally bound to act according to the will of his superior. The word "control" seems in itself to imply that the party to be controlled has power to exercise his functions, or discharge his duty, in several different ways. It is not the word, therefore, which expresses correctly the kind of power or authority asserted by a court when it issues its mandamus. To "control" properly means to keep under check; to govern; to restrain. A mandamus is a simple command to a person to do an act which he is bound by law to do, and which he has no lawful right to refuse to do. In the present case, the mandamus asked for is a writ commanding the postmaster-general to do an act which a statute positively requires him to do; which he cannot lawfully refuse to do; and in regard to the doing of which he is not bound to act according to the will of any superior officer; the court therefore, in issuing the mandamus, does not attempt to control him in his executive functions. The question, therefore, proposed by the postmaster-general, is not the true question presented in the present case. The abstract proposition, arising upon the case, is, that this court has power to issue a mandamus to an executive officer of the United States, commanding him to do a ministerial official act which he is positively required by law to do; over which he has no discretion, and in regard to which he is not bound, by law, to act according to the will of another, and by his refusal to do which, an individual has sustained, or will sustain, injury. This seems to be the only claim of power which it is necessary for this court to make, in order to support the mandamus in the present case.

On the other side it is admitted by the attorney-general, in his opinion appended to the answer of the postmaster-general, and was also admitted by the district attorney in his argument, "that where a vested legal right has been violated by a public officer; or where a specific duty, on the performance of which individual rights depend, is assigned by law to an officer, and he refuses to perform it, the individual, who considers himself aggrieved, has a right to resort to the laws of his country for a remedy; and that the conduct of the officer is liable to be judicially examined; and that this, if ever doubtful, is now too well settled to be disputed. Actions of trespass, and other actions, for damages against collectors of the customs, officers of the army and navy, and other public functionaries, for official acts or omissions injurious to the vested rights of individuals, are of frequent occurrence; and it is not to be doubted that, through such actions, any officer of the government, the president included, may be held responsible in damages for the violation of any vested legal right. But these actions," (it is said) "are against the officer in his individual character, and do not imply any power, in the judicial tribunals in which they may be prosecuted, to supervise and control, in advance, the official action of the officer." Again, in the opinion of the attorney-general, it is said: "The obvious design of all these provisions," (that the executive power shall be vested in a president of the United States; that he shall take care that the laws be faithfully executed; and that he shall have power to appoint and remove the executive officers,) "was, to make the president responsible for the faithful execution of the laws, and for the official acts of all the officers of the executive department. Not that he should be liable to impeachment, or other criminal procedure, or to a civil action, for every illegal act, or culpable omission of each one of those officers." "Nor that the inferior officer should be exempt from personal liability to impeachment, indictment, or civil action, for any culpable act, or omission of duty, even though he may be able to plead, in his excuse, the express direction of the president. But it is possible for the president, through the heads of the executive departments, to give more or less attention to the proceedings of each department, and to take care that the laws concerning it be faithfully executed; and it is agreeable to reason, and to the rules of law, that where two persons unite in the performance of an illegal act, or in a culpable omission of duty, each, to a greater or less extent, and according to the circumstances of the case, should be personally responsible, although one of them may have an official superiority to the

other. This species of responsibility it was the design of the constitution to fasten upon the president; and hence it vests in him, and in him alone, with a few specified exceptions, the whole executive power of the government." Again, he says: "It belongs to the legislature to create the executive departments; to define their powers and duties; to provide the requisite officers; to prescribe their various functions; and to make all other legal provisions, which may be necessary and proper to regulate the action of those departments. But when a law is once passed for the government of the executive officer, all that appertains to its execution falls under the care of the president. It is his province to instruct and command the officer; to remove him if he acts unfaithfully; and to appoint one in his place who will fulfil his duty agreeably to law."

The attorney-general, also, at the commencement of his opinion, dated on the 19th of June, 1837, states the facts of the case as follows: "The case proposed by you, in your communication of the 29th ult. and now presented, relates to the power of the circuit court of this district to issue a mandamus to the postmaster-general, an executive officer of the United States, for the purpose of compelling him to perform an official act, alleged to have been enjoined upon him by a special act of congress passed for the relief of the parties applying for the writ. This treats exclusively of certain claims depending in the post-office department, and growing out of contracts with that department; it refers these claims to the solicitor of the treasury for settlement; and it directs the postmaster-general to credit the contractors with whatsoever sum of money, if any, the solicitor shall decide to be due them. The duty, imposed by this law, is, therefore, in every sense, an official duty; it relates to the business of his department; it is imposed upon him by his name of office. The solicitor of the treasury has made an award, by which he decides that certain sums of money are due to the contractors; and the postmaster-general has credited them with a part of these sums; but, for reasons satisfactory to his own judgment and sense of duty, has refused to credit the balance until directed so to do by a further act of congress. The contractors have applied to the late president of the United States, to take order, by virtue of his constitutional duty to see the laws faithfully executed, for the crediting of the balance; but, being satisfied with the course of the postmaster-general, he declined making any such order, and referred the parties to congress for further legislative directions. The like application has been made to the present chief magistrate, who deemed it inexpedient to interfere with the disposition of the subject made by his predecessor; and the parties now apply to the circuit court of this district for an order, in the form of a writ of mandamus, to the postmaster-general to credit and pay the balance of the solicitor's award, on the ground that this is a mere ministerial act, to the performance of which the applicants have a fixed legal right under the act of congress as it now stands, and for which they have no other adequate legal remedy."

The admissions, in these extracts, respecting the personal liability of the executive officers, and the power of the legislature to create executive departments and officers, make it unnecessary to refer to the large class of cases in which the courts have decided that executive officers were liable, in actions at law, for injuries done to individuals by such officers, in the erroneous or illegal exercise of their functions, although acting under the orders of their superior officers, whose orders, if warranted by law, they were bound in law to obey.

It being admitted, then, that these executive officers are personally liable at law, for damages in the ordinary forms of action, for illegal, official, ministerial acts or omissions, the inquiry seems to be reduced to the question whether, when it is still in the power of an officer to do the act, the unlawful refusal to do which has already made him liable to an action at law for damages, the court has not power to issue the writ of mandamus, commanding him to do it, instead of a capias to arrest his body for not having done it. What is there in the official character of the officer to deprive the court of this power, or to render it improper in the court to exercise it? Or, in the language of the supreme court of the United States in the case of Marbury v. Madison, we may ask, "If it be no intermeddling with a subject over which the executive can be considered as having exercised any control, what is there, in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid the court to listen to the claim, or to issue a mandamus directing the performance of a duty not depending on executive discretion, but on particular acts of congress and the general principles of law? If one of the heads of the departments commits an illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How, then, can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process? It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case in which executive discretion is to be exercised,

in which he is the mere organ of the executive will, it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation. But where he is directed by law to do a certain act, affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the performance of which the president cannot lawfully forbid, and is, therefore, never presumed to have forbidden, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department."

The force of this opinion, it is suggested, is much impaired by the observations made by Chief Justice Marshall himself, in the subsequent case of Cohens v. Virginia, in 6 Wheat. [19 U. S.] 399, where he says: "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious: the question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in relation to the case decided, but their possible bearing in all other cases is seldom completely investigated. In the case of Marbury v. Madison, the single question before the court, so far as that case can be applied to this" (that is, to the case of Cohen), "was whether the legislature could give this court original jurisdiction in a case in which the constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case; but in the reasoning of the court in support of this decision, some expressions are used which go far beyond it." Here it is evident that the expressions alluded to were used in support of the decision that the legislature could not give original jurisdiction in such a case; and not those used in support of those parts of the opinion of the supreme court, in the case of Marbury v. Madison, which were cited by this court in its former opinion, and which are again cited in this; and which are, therefore, in no manner affected by these observations of the chief justice, further than the maxim, which he lays down, may be supposed to affect the extent of the language used. Whatever odium may be attempted to be cast upon those parts of the opinion of the supreme court in that case, and whether they can be considered as authoritative judicial decisions, binding upon this court, or only as obiter dicta, yet they must be considered as the opinions of six learned judges constituting the highest judicial tribunal of the country to which can be referred the ultimate decision of all constitutional questions, never revoked nor reversed. The sentiments they contain are based on the soundest principles of civil liberty, and have never been answered, and can never be answered, without invoking principles which tend to set the executive authority above the restraints of law. But they are now attempted to be obviated, and we will consider in what manner.

It is premised that, by the theory of our government, the three great departments, the legislative, executive, and judicial, are to be kept so distinct that one cannot exercise any portion of the power which properly belongs to the other. That whatever power is in its nature executive, can be constitutionally exercised only by an executive officer; and whatever power is in its nature judicial, can only be exercised by courts and judges constitutionally established and appointed. It is, then, contended that the constitution, by declaring that "the executive power shall be vested in a president of the United States," and that "he shall take care that the laws be faithfully executed;" and by giving him the power of appointment and removal of all executive officers, has vested "in him and in him alone," with a few exceptions, "the whole executive power of the government." "That the obvious design of these provisions was, to make the president responsible for the faithful execution of the laws, and for the official acts of all the officers of the executive department." "That the executive officers are his agents, for whom he is held responsible to the people, whose agent he is." That "the acts of the executive officers are the acts of the president; that constitutionally he is as responsible for them as if they were done by himself; though not morally. That, so far as regards the execution of the laws, therefore, no distinction can be maintained between the acts of the president and those of his subordinate officers. That in law they are all the acts of the president." That when a mandamus issues from the judiciary to an executive ministerial officer, commanding him to do a merely ministerial act which he is absolutely required by an act of congress to do, which he cannot lawfully refuse to do, and which the president cannot lawfully forbid him to do, it is said "they attempt to control the executive power, to assume the functions of the president, and to make themselves the executive in the last resort; superior to the executive created by the constitution, and elected by the people." This argument rests, almost entirely, upon the force of the word "control;" which, as before suggested, implies an interference

with some right or power of the person to be controlled. To command a person to do what, by law, he is bound to do, and what he has no right to refuse to do, is not to control him in the exercise of any of his functions, but to compel him to execute them. Before it can be shown that such a mandamus as is above described would control the executive in any of its functions, it must appear that the executive has a discretion to do or not to do the thing commanded. If it has no lawful right to judge whether the thing shall or shall not be done, if it has no lawful authority to forbid the officer to obey the law, what function of the executive is interfered with by the mandamus? Will it be said that the officer has a right to refuse to obey the law, and throw himself upon his responsibility to the president? Or, that the president, throwing himself upon his responsibility to the people, has a right to command him to disobey the law? If such things should be done, they must be acknowledged to be violations of the law; and could only be done under a hope that the emergency of the case would palliate, if not justify, the act, and that the offence would be politically pardoned by the people. Will it be said that the officer has a right to refuse obedience to the law, and throw himself upon his personal responsibility in damages to the injured party? This would be a wrong done to the party; and a man can never have a right to do wrong.

But it is contended that the officer is officially responsible to the president alone; and that the president alone has the right to command him to do his duty; and that the court has no right to do that which it is the duty of the president to do, namely, to command the officer to do his duty. This proposition raises the questions, what is the relation between the executive and the judicial departments of the government? What is the line which separates the rights and duties of the one from those of the other? And how far one may tread upon the ground of the other?

The three great departments of this government are only branches of the sovereign power of the nation, each exercising its functions in the name and under the authority of that sovereign power. When the president does an act in virtue of his office, it is the act of the sovereign power. So when the judiciary does a judicial act, it is still the act of the same sovereign power. When a mandamus is sent by a court to an executive officer, it is not the court that commands, but the sovereign power. All commands from the court are issued in the name, and by the authority of, the United States. In each case, it is the whole sovereign power acting by its appropriate organ. The executive and judicial departments are not rivals. They must unite their functions, or the laws cannot be executed. The president is as dependent on the judiciary to enable him to see that the laws be faithfully executed, as the judiciary is on him to enforce its judgments. The moment a litigation arises, whether upon the law or the fact, the power of the president to see that the laws be executed in that case, by any other than judicial process, ceases until the litigation is closed by the judgment of the court, and the sovereign power commands the proper executive officer to execute that judgment. The duty of the president is as obligatory to see the laws executed through the instrumentality of the judicial tribunals, as it is to see them executed when a resort to those tribunals is not necessary. The separation, therefore, of the executive from the judicial power, is not as complete as has been supposed. The executive cannot see that the laws be executed but in the due forms of law. The principles of Magna Charta are quite as obligatory upon our executive as the charter itself was upon the kings of England. Nullus liber homo capiatur, &c., nec super eum ibimus, nec super eum mittimus, nisi per legale judicium parium suorum, vel per legem terræ. No free man shall be seized, &c., nor will we pass upon him, or condemn him, but by the lawful judgment of his peers, or by the law of the land. The words "per legem terræ," Lord Coke says, mean "by due process of law;" and that this chapter is but declaratory of the old law of England. 2 Inst. 50.

In England, the whole sovereign power was, in ancient times, vested, or supposed to be vested, in the king. It was called his realm, his laws, his parliament, his judges, &c. The liberties, recited in Magna Charta, were said to be granted by the king to his subjects; and in the old statutes it is said that the king granteth, or ordaineth, &c.; and even now the statutes are said to be enacted "by the king's most excellent majesty, and with the advice and consent of the lords spiritual and temporal, and the commons," &c. And even when the authority of parliament was well established, only two powers were acknowledged in the government; the executive, and the legislative. The judicial was not known as a separate power; but was, both in theory and practice, a part of the executive. The king, at the common law, by his prerogative, had the power, as chief magistrate of the nation, to erect tribunals of justice; to define their powers and duties; to create offices; and appoint and remove officers; and to appoint judges, and limit the tenure of their office. There could be no contest between the executive and judicial power; for the whole was executive. The king had a control over the whole for the purpose of seeing that the laws were executed; and that power he delegated to his court of king's bench, it being the highest court erected under his authority. The other courts, however, sitting in Westminster hall, are not inferior courts. In these courts, the king, in the eye of the law, is always present,

though he cannot personally distribute justice. 1 Bl. Comm 270. To these courts, therefore, in which the king was supposed to be always present, at least by his judges, it was not necessary that a writ of mandamus should issue. The court of king's bench, in issuing the writ of mandamus, can only be considered as exercising, for the king and in his name, that part of his executive duty which required him to see that the laws were faithfully executed; a prerogative conferred upon him, by the common law, for the benefit of his subjects. The prerogatives of the king were of two kinds: First, those which belong strictly to the person of the king; and, second, such as regarded him in his political capacity only; as the supreme head, and chief magistrate of the nation; as the representative of the sovereignty of the people; as the administrator of the laws, and as the general conservator of the peace of his dominions. This second class of prerogatives passed from the king to his colonies, and was exercised under the charters, or royal governments, which, by virtue of his prerogative, he granted or established in this country; and, at the Revolution, passed from them to the several states as they respectively assumed self-government. The writ of mandamus was founded upon the king's prerogative of seeing that the laws were faithfully executed, and is, therefore, called a prerogative writ. It was one of the means by which he executed that part of his duty. It was, in truth, an executive proceeding through the instrumentality of his court. When the prerogative came to this country, and was received into the colonies as part of their respective laws and systems of government, it was accompanied by the judicial aid of a writ of mandamus, to enable the executive power to see that the laws were faithfully executed. It has been before observed, that the executive power cannot cause all the laws to be executed without the aid of the judicial, because the laws must be executed by due process of law. Thus the bringing of a man before the court is an executive act, but it must be done in due form of law. For this purpose the sovereign power, by means of a judicial tribunal, sends a writ, commanding the executive to take the body of the person and bring him before the court. When the cause is decided and judgment rendered, the same sovereign power sends to the executive another writ commanding him to see that the judgment be executed. Why is not this an interference with the functions of the executive? Because the executive cannot perform its duty of seeing the laws faithfully executed without the intervention of the judicial power. So, the executive cannot execute the same duty, even in regard to a subordinate executive officer, where the rights of a third person are concerned, without the intervention of the judicial power, by means of a writ of mandamus, in cases where that is the appropriate remedy; for the only other power which the executive has to cause the law to be executed in that case, is to remove the officer and appoint another. But this does not execute the law; and if it should be the means of causing the law to be executed, yet, whether that means would be used or not, would depend upon the will of the executive, or upon his opinion of the law, or of the manner in which it ought to be executed; and whatever that opinion might be, it could not be obligatory upon the injured individual; and if that opinion should be against him, the case must still be referred to a judicial tribunal, before the executive would be able to cause the law, in that case, to be executed. A writ of mandamus, therefore, is as much a means given to the executive to enable him to cause the laws to be faithfully executed, as a common capias ad respondendum, or a fieri facias, or any other writ devised by the judicial power, is to enable the executive to discharge that important duty. Surely, the executive cannot complain that the court has furnished him with an additional means of discharging his duty. There is no more interference of the judiciary with the executive, in one case than in the other. Surely the president, upon whom is devolved the high prerogative of seeing that the laws be faithfully executed, will not object to the court's furnishing him with the high prerogative writ which enables him to execute that high prerogative.

When, therefore, we look closely into the nature of judicial and executive power, and see how nearly they are allied; when we see how necessary they are to each other in the discharge of the duties of both departments; when we look into the origin and nature of the writ of mandamus, and find it to be a prerogative writ to enable the executive, by means of the instrumentality of the courts, to exercise his high prerogative of seeing that the laws are faithfully executed; when we see that the executive may not be able to cause the law to be executed, without the intervention of the court; (for if, as the postmaster-general asserts in his answer, "the whole power of the court would be impotent to control an honest man, if he were conscientious in his refusal," surely he would not be coerced by the fear of removal); when we find that the king of England, long before our Revolution, had submitted this part of his prerogative, as well as many other of his executive powers, to his courts; that the right to issue this writ, as well as the writs in the other forms of action, had been delegated to these courts, and that this right came to this country, and was adopted and used by the courts as part of their judicial power, (although it was orginally an executive function,) and thereby became part of the judicial power; when, also, we consider that the court has, confessedly, the power to call the officer before it, in some form of action, to examine into the legality of the manner in which he has discharged his official functions,

in the particular case presented to the court for its consideration, and to render judgment against him for damages, if he has acted illegally, even though he acted under the orders of the president; when we find that a writ of mandamus is often used to enable a party to obtain a specific legal remedy, which he could not obtain by any other form of action, we cannot see why the official responsibility of the postmaster-general to the president, whatever it may be, should prevent the court, at the instance of the supposed injured individual, from inquiring, in this form of action, whether the officer had or had not discharged the duty required of him by law, in relation to that individual. It is true that the postmaster-general has the same right which every other man has, when he has a duty to perform, to decide whether he will perform it or not, or in what manner he will perform it. But then he decides at his peril, and for himself alone. His judgment cannot bind any other person, nor give any validity to his act. The president, also, as between him and his subordinate officer, may decide, for himself, whether the officer has discharged his duty; but that decision cannot bind a third person. Whatever the responsibility may be, between the officer and the president, it is no concern of the injured individual; it is only an official responsibility which does not affect him. And as to the responsibility of the president to the people, it is a mere political responsibility to the public, at the ballot-box, which, if effectual, in fact, as to the president, would afford no satisfaction to the applicant for redress.

But it is said that "the sole constitutional function of the judges is to expound the laws." That if the law is so plain as not to need exposition, there is no case for judicial cognizance, and the law may be executed by the executive, without judicial intervention. Hence, it seems to be inferred, that, as the court, in its former opinion, admitted that the law was plain, this is not a case cognizable by a judicial tribunal. The only answer necessary to this objection is, that it is the duty of the court, not only to expound, but to enforce, the law; that although the law may be plain, and the facts plain, yet if the defendant refuses to obey the law, some sort of judicial process may be necessary to compel him to obey it; and such process cannot be obtained but in due course of law, and in a case brought judicially before the proper tribunal.

Again, it is contended, that, as the court has no power to execute its judgment without the aid of the executive, it has no power to issue the writ. The argument, in favor of this seeming non sequitur, is as follows: "The sole constitutional function of the judges is to expound the laws. It is the function and duty of the executive to see them faithfully executed." "If the laws could be precisely adapted to every case, there would be no need for a judiciary to expound them. The executive authority could proceed, forthwith, to carry them into execution." "The practical exercise of executive power is more remote in cases which go before the judicial tribunals, but it is the same in principle." "Laws which require no exposition are executed without the intervention of the judicial power. Laws which require exposition are executed after that exposition has been given by the judicial power; but, in both cases, the execution is, or should be, according to the constitution, exclusively the work of the executive." "The judges have no effectual means of executing the law. They might imprison the executive officer, but they could not remove him. Imprisonment might not accomplish the object. The court could not guide his hand nor control his will. If he were conscientious in his refusal, or wished to appear so, no imprisonment, nor pains, nor penalties could compel him to do an act which, in his opinion, violated his oath of office. The whole power of the court would be impotent to control an honest man." "The inadequacy of the judicial process, and the ample power vested in the president, are conclusive proof that the president, and not the court, was intended to be the controlling authority in all such cases." "Suppose the laws require a specific act of the president himself, involving private rights, which he refuses to perform. The courts have as much law for issuing a mandamus against him as against any of his subordinates, in a like case. It is a case, as much as that of which the court has already assumed jurisdiction. The president disobeys the mandamus, and they send an attachment. By whom do they send it? By a marshal holding his office at the will of the president, who can strike their process dead in his hands, by dismissing him on the spot. This fact proves the absurdity of the power assumed. And that which the president can legally do to protect himself he can do to protect any of his agents; being always responsible to his country for the proper exercise of his power. But suppose the court succeed in arresting the president, and put him in the county jail; where then is the supreme executive power of this great republic? Transferred from the president's house to the city hall. From the chief magistrate elected by the people of the whole United States, to the three judges of the District of Columbia. The arrest and imprisonment of an executive officer, as such, involves the same principles, and would lead to the same consequences, in a greater or less degree according to the importance of the station held by him." "The idea that courts are the only places where wrongs of all sorts are to be redressed, and the judges the only dispensers of right, is an error. Where the inferior executive officer, or even the president himself, refuses to perform his executive duties, there is an obvious mode of redress, without the interposition of the judicial authority. If a

subordinate executive officer refuses to perform a ministerial act positively enjoined upon him by law, the injured citizen may appeal to the president, whose duty it is to take care that the laws be faithfully executed, and has power to turn out a perverse subordinate. If the case be so very plain, the president will, at once, enforce an execution of the law, and the citizen will have effectual redress; 'though this court has not jurisdiction.' If the case be not so very plain, the matter may be referred back to congress, to make it plain by further legislation. And thus the citizen would have complete redress, without the aid of the court. There is a process by which the president himself may be reached for a perverse refusal to execute the laws, or take care that they be executed, and a chief magistrate, who will do his duty, put in his place. Thus there are ample means provided by the constitution to enable the citizen to obtain his rights at the hand of the executive, without erecting any court into a supreme controlling power over the president and the whole corps of executive officers. Indeed, the court has not, in the constitution and laws, the means to give redress in such cases. Before they can control the president, they must assume the power to appoint their own marshal, and execute their own mandates. They must do more; they must proceed to the executive offices; must enter credits with their own hands; must issue warrants; and, finally, with their own hands, take the money out of the treasury." "The existence of such a power in the judiciary is repugnant to the whole theory of the constitution. Its effectual exertion, if it were practicable, would defeat the president's power of removal, would take away his responsibility for the faithful execution of the laws, and would transfer to the judiciary, in the particular case, the whole executive power; for it is palpable that if the president, under the belief that the faithful execution of the law will be best secured by not doing a particular thing which is demanded by a third party, so directs the executive officer, and the court, on the application of such party, issues a mandamus commanding it to be done, and the writ is obeyed, it is the court, and not the president, that exercises the executive power; and the distribution of powers, so carefully fixed by the constitution, is unsettled and overturned. But its effectual execution is not practicable; because the president's power of removal cannot be restrained; and by its exercise he can readily defeat any command which the judiciary may address to the executive officer. To illustrate this, let us suppose that the circuit court of this district issue a peremptory mandamus to the head of one of the departments, commanding him to execute any particular law, concerning his particular duties, in a given way, and that the officer refuses obedience and is attached and committed for the contempt. This is the end of judicial power in a case of mandamus; but suppose that at this stage of the proceedings the president interferes by removing the officer and appointing a successor, what then becomes of the judicial remedy? The act can only be performed by a person holding the office; the individual, in the custody of the court, no longer holds the office; it has been legally taken from him; and if he were ever so willing to perform the act, he has no longer the ability to do so. The proceeding must then be abandoned, or commenced de novo against the new officer; to be frustrated, if the president thinks proper, at the same stage, as often as the court shall reach it. If it be said that this is supposing an extreme case, and that the president, from respect to the judiciary, would probably suffer the officer to obey the mandamus rather than to exercise the constitutional power of removal; the answer is, that the very existence of such a power, whether it be used or not, is fatal to the claim of jurisdiction; and that cases may easily be supposed, in which the president, with the strongest desire to avoid a conflict with the judiciary, may yet have no alternative but to use it. In cases which properly refer themselves to the judiciary, it is rarely, or never, possible to defeat, in this way, the ultimate execution of the judgment of the court; and the fact, that without the consent of the executive department, a peremptory mandamus, to an executive officer, must forever remain inoperative, exhibits, in the clearest light, the incapacity of any court to issue the writ."

The argument, upon this point, has been thus fully stated, in the language of the return of the mandamus, and of the opinion of the attorney-general of the United States, annexed to it, that its full force may be perceived. It is, in substance, that the court has no power to issue the writ, because the president could defeat its execution by dismissing the marshal who comes to serve an attachment of contempt, which is the regular process to enforce obedience to the mandate; or by dismissing the officer to whom the mandamus is issued after he shall have been committed on the process of contempt; that is, that although the court shall have lawful authority to issue the writ, the president may, by his power of removal, prevent the execution of the lawful judgment of the court. But the president cannot lawfully defeat the execution of those laws which he is bound by the injunction of the constitution itself, and his own solemn oath, to see faithfully executed. If it was only meant to say that the president could thus defeat the execution of the judgment of the court, in a case in which it had not jurisdiction, his right to do it may be admitted; but his power to do so, in a case in which the court had jurisdiction, is no evidence of the want of jurisdiction in the court. It is equally in the power of the president to defeat the execution of every other judgment of the court.

It is true that the court must depend upon the executive power to execute its judgments; but that power is abundantly able, and bound by the most solemn obligations to do so. The supposed imbecility of the court, therefore, does not exist; and if it did, the argument equally applies to every other case of which the court has cognizance. The idea that the president may defeat judicial process, by striking it dead in the hands of the marshal, by dismissing him on the spot, when he comes to serve it upon an executive officer, is not supported by law; for, by the 28th section of the judiciary act of 1789, it is enacted, that "Every marshal, or his deputy, when removed from office, or when the term for which the marshal is appointed shall expire, shall have power, notwithstanding, to execute all such precepts as may be in their hands, respectively, at the time of such removal, or expiration of office." The argument, therefore, raised upon the inability of the court to enforce its judgments, we think, entirely fails.

But it is said, that, "from an early period, the writ of mandamus has been used by the English court of king's bench as a means of enforcing its general supervisory jurisdiction over courts, magistrates, and ministerial officers inferior to that tribunal," "but we find no instance of its being directed to an officer of the executive departments." It is admitted, then, that this court, "in aid of its appellate jurisdiction, may issue this writ in all cases where any act, necessary to the exercise of that jurisdiction, shall be omitted to be performed by an inferior tribunal, or officer." But in all other cases it seems to be denied. The books, it is true, speak of inferior tribunals, but not of inferior officers. Blackstone says: "A writ of mandamus is, in general, a command, issuing in the king's name, from the court of king's bench, and directed to any person, corporation, or inferior court of judicature, within the king's dominions, requiring them to do some particular thing, therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or, at least, supposes, to be consonant to right and justice." 1 Bl. Comm. 110. We do not think it necessary that the person or the officer to whom a writ of mandamus may issue, must be, in any sense, inferior, in point of official relation to the court. Whether there have or have not been cases of mandamus, in England, directed to executive officers, we have not had time to inquire; but we find it stated in 1 Chit. Gen. Prac. p. 802, that, "when it is the duty of an officer of the excise to grant, and he should refuse, a permit to remove wine, the court would compel the delivery of a proper permit" (by mandamus); for which he cites Rex v. Commissioners of Excise, 2 Term R. 381; Rex v. Cookson, 16 East, 376; Rex v. Collector of Customs at Liverpool, 2 Maule & S. 223.

In the case in 2 Term R. 381, 385, speaking of the commissioners of excise, it was said by counsel, and not denied, that "their office, in this respect, is merely ministerial, and they have no discretion." The court, in that case, refused the mandamus only on the ground that the relator had not made out his right to the permit. But we do not think it material to show that writs of mandamus, in England, have been issued to the executive officers of the crown. There is a material difference between those crown-officers and the executive officers of the United States. The king of England is the fountain of all office and honor. He creates the offices, and prescribes, from time to time, such duties as he thinks proper. The officers are exclusively his officers—his agents, to act, in all things, according to his will.

In the United States, by the constitution, all offices are to "be established by law." The president cannot appoint an officer to any office not established by law. The legislature may prescribe the duties of the office, at the time of its creation, or from time to time, as circumstances may require. If those duties are absolute and specific, and not, by law, made subject to the control or discretion of any superior officer, they must be performed, whether forbidden or not, by any other officer. If there be no other officer who is, by law, specially authorized to direct how the duties are to be performed, the officer, whose duties are thus prescribed by law, is bound to execute them according to his own judgment. That judgment cannot lawfully be controlled by any other person. He is the officer, not of the president who appoints him, but the officer of the sovereign power of the nation. He is the officer of the United States, and so called in the constitution, and in all the acts of congress which relate to such officers. He is responsible to the United States, and not to the president, further than for his fidelity in the discharge of the duties of his office, unless the president is, by express law, authorized to assign him duties over and above those specially prescribed by the legislature. Such an officer is the postmaster-general. As the head of an executive department, he is bound, when required by the president, to give his opinion, in writing, upon any subject relating to the duties of his office. The president, in the execution of his duty, to see that the laws be faithfully executed, is bound to see that the postmaster-general discharges, "faithfully," the duties assigned to him by law; but this does not authorize the president to direct him how he shall discharge them. In that respect, the postmaster-general must judge for himself, and upon his own responsibility, not to the president, but to the United States, whose officer he is. The president himself, although called by the postmaster-general, in his answer, "the highest representative of the majesty of the people, in this government," is but an officer of the United States, the head of one of the departments into which the sov-

ereign power of the nation is divided; and, as that is the executive department, he may, with propriety, be called the chief magistrate of the United States. The officers of the United States being thus specially charged, by law, with duties independent of executive control,—duties which they are bound to execute according to their own judgment, stand on ground different from that occupied by the English executive officers, whose offices are created, and whose duties are assigned, by the king. These have no positive, specific, legal duties to perform which can be the subject of mandamus; they are the mere agents or servants of the king, and responsible only to him; all their acts being subject to his will. No definite right of a third person can grow out of duties of that description, where every act of the officer is subject to the control of his superior. If an application should be made to the court of king's bench, for a mandamus to such an officer, commanding him to do some official act, the answer would be that the officer has no will of his own; that he can act only as he shall be directed by the king. If the king has not ordered the thing to be done, the officer is not bound to do it. If the king has ordered it, he is competent to enforce his order. There is no analogy, therefore, between the executive officers of the king of England, and the executive officers of the United States, in regard to the nature and foundation of their respective duties, so far as regards the proceeding by mandamus; and the fact, if it be a fact, that there are no English cases of mandamus against the officers of the crown, affords no reason why a mandamus should not issue against an executive officer of the United States.

In the former opinion of this court, given upon the rule to show cause, it was suggested "that the relation between the postmaster-general and the president of the United States, was different from that which subsisted between the president and the other heads of departments, in this, that they, in the very terms by which their offices were created and their duties defined, are to perform such duties, and execute such orders, as they shall be required to perform and execute by the president of the United States." "The postmaster-general, however," (it was said,) "bears no such relation to the president. We cannot find a word in the law under which he was appointed, or in the various laws of the post-office establishment, or in the constitution of the United States, which intimates any connection between him and the president; or any authority in the president, to prescribe his duties or control him in the exercise of his official functions." We were not certain, at that time, that the postmaster-general could be considered as the head of an executive department, within the meaning of the constitution. We are now, however, inclined to think that he is; and that, therefore, there is that connection between him and the president which results from the right of the president to call upon him for his opinion in writing upon any matter appertaining to the duties of his office; and from the president's power of appointment and removal.

With the exception of the circumstance that the postmaster-general is to be considered as the head of an executive department, we think our former opinion as to the duties of his office, and his official relation to the president, is correct. The doubt, respecting its being an executive department, was, perhaps, reasonable, considering that the first law, in 1792, was "An act to establish the post-office and post-roads within the United States," in which it is not called a department. It authorizes the postmaster-general to appoint "an assistant," and "deputy-postmasters." The postmaster-general was to receive all the revenues and pay all the expenses. That act was followed by the act of the 8th of May, 1794, having the same title. This act contains the same provisions as those of the last, and does not call it a department. This was followed by the act of March 2, 1799, entitled "An act to establish the post-office of the United States." This act speaks of those who may be employed "in any of the departments of the general post-office." It also directs that the postmaster-general shall superintend the business of the department in all the duties that may be assigned to it. It is not, afterwards, in the act, called a department, but it speaks of copies "under the seal of the general post-office;" and of the regulations "of the post-office." This was followed by the act of the 30th of April, 1810, entitled "An act regulating the post-office establishment," which uses the same expressions in the same way, and speaks of debts due "to the general post-office." Thus stood the law until the act of the 3d of March, 1825, entitled "An act to reduce into one the several acts establishing and regulating the post-office department." The body of the act uses the terms "post-office establishment," "general post-office," "the said department," and "the department," but the terms "post-office department," are not used in the body of the act. By the act of the 2d of March, 1827, $2,000 were added to the salary of the postmaster-general, making it $6,000 per annum. Thus the matter stood until the act of the 2d of July, 1836, entitled "An act to change the organization of the post-office department; and to provide more effectually for the settlement of the accounts thereof;" which, throughout the body of it, calls it "the post-office department," and which, for the first time since the year 1792, introduced the agency of the president into the department by giving him the appointment, with the advice and consent of the senate, of all deputy-postmasters whose commissions amount to $1,000 annually. The first act (September 22, 1789), under this government, respecting the post-office, was tempora-

ry, and merely provided for the appointment of a postmaster-general, referring, for his powers, to the regulations established by the congress of the confederation, and declaring "the postmaster-general to be subject to the direction of the president of the United States, in performing the duties of his office, and in forming contracts for the transportation of the mail." This act was continued from session to session until the act of 1792, when the office was removed from all control of the president; and in all the subsequent acts until 1836 there seems to have been a marked anxiety to keep it out of his hands, probably fearing, or foreseeing, the great addition it would make to his patronage. And when, in 1813, the president wished to have a mail sent from the head-quarters of the army to any particular post-office, it was deemed necessary to obtain an act of congress to enable him to direct the postmaster-general to do it. Although the word "department" had crept, incidentally, into the acts of 1799 and 1810, yet it was not generally considered as being one of the executive departments, until so called in the act of 1825; and it was not until his salary was raised to $6,000 that he was admitted into the cabinet in 1829. There was nothing in the earlier acts respecting the post-office which could indicate an intention to create a new executive department, except the power given to the postmaster-general to appoint "an assistant," and "deputy-postmasters," a power which congress could not constitutionally vest in him, unless he were the head of a department. It required, therefore, a critical examination, and a comparison of the constitution with the acts of congress, to discover that it was such a department as is contemplated by the constitution.

This investigation of the several acts of congress, respecting the post-office, affords some ground of excuse for having, at first, doubted whether the postmaster-general was the head of a department, within the meaning of the constitution; and at the same time shows that the relation in which he stands to the president, so far as regards the president's right to control him in the discharge of his official functions, is very different from that of the secretaries, who are bound by law to act according to his will. Indeed, it is admitted, in the opinion of the attorney-general, that the president can control him in his official functions, only "when not prescribed by law." The court, therefore, is confirmed in its opinion, before expressed, that the postmaster-general, in the faithful discharge of those duties which are prescribed by law, is not lawfully subject to the control of the president. The president's power of controlling an officer in the exercise of his official functions, is limited, we think, to those functions which are by law to be exercised according to the will of the president; and where the order of the president would be a justification in law. In such cases only can the president withdraw the officer from the jurisdiction of the court and cover him with the mantle of his own responsibility. Whenever that is the case, or whenever the officer himself has a legal discretion, and can plead that discretion, as a justification for refusing to do the thing sought to be commanded, this court disclaims all power to issue the writ. In the case of Martin v. Mott, 12 Wheat. [25 U. S.] 31, the supreme court says: "Whenever a statute gives a discretionary power to any person, to be exercised by him, upon his opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."

The argument upon this part of the case seems to apply rather to the form of the action, than to the ultimate responsibility of the officer; to the preventive rather than to the retributive, powers of the court. To this point we would apply the language of the supreme court of the United States in the case of Osborn v. U. S. Bank, 9 Wheat. [22 U. S.] 843: "It is admitted that the privilege of the principal is not communicated to the agent; for the appellants acknowledge that an action at law would lie against the agent, in which full compensation ought to be made for the injury. It being admitted, then, that the agent is not privileged by his connection with his principal, and that he is responsible for his own act, to the full extent of the injury, why should not the preventive power of the court also be applied to him? Why may it not restrain him from the commission of a wrong which it would punish him for committing?" "Will it be said that the action of trespass is the only remedy given for this injury? Can it be denied that an action on the case, for money had and received to the plaintiff's use, might be maintained? We think it cannot; and if such an action might be maintained, no plausible reason suggests itself to us for the opinion that an injunction may not be awarded to restrain the agent, with as much propriety as it might be awarded to restrain the principal, could the principal be made a party. In the regular course of things the agent would pay over the money immediately to his principal, and would thus place it beyond the reach of the injured party, since his principal is not amenable to the law. The remedy for the injury would be against the agent only; and what agent could make compensation for such an injury? The remedy would have nothing real in it. It would be a remedy in name only, not in substance."

Upon the whole, then, I am authorized to say, that it is the unanimous opinion of the court, that this court has jurisdiction and power to issue the writ of mandamus in this case. It is a jurisdiction which this court has not sought, but it is one which it cannot shun; and we say, in the language of the late Chief Justice Marshall, in delivering the

opinion of the supreme court in the case of Cohens v. Virginia, 6 Wheat. [19 U. S.] 404: "It is most true that this court will not take jurisdiction, if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty." And we will add, that we feel a consolation in knowing that our judgment may be subjected to the supervision of a higher tribunal. Let the peremptory mandamus be issued.

On the 13th of July, the peremptory mandamus having been ordered, the court adjourned to Monday, the 14th of August, on which day, the mandamus having been served on the 19th of July, Mr. Coxe, for the relators, moved for an attachment against the postmaster-general, for not obeying the writ; and Mr. Key, for the postmaster-general, moved the court to quash the mandamus, because it was issued on the 17th of July, after the postmaster-general had, on the 15th of July, sued out a writ of error to the judgment of the court, rendered on the 13th, awarding a peremptory mandamus; and had given an appeal-bond in the penalty of $500, with sureties approved by the chief judge, and filed a copy of the writ of error.

Mr. Coxe contended, that a writ of error would not lie in such a case as this; that it lies only in cases where judgment has been rendered for damages or costs under the statute of 9 Anne, c. 20; which statute applies only to cities, boroughs, and corporations. Dean & Chapter of Dublin v. Dowgatt, 1 P. Wm. 348; 1 Brown, Parl. Cas. 73; 3 Brown, Parl. Cas. 505; Wheelwright v. Columbian Ins. Co., 7 Wheat. [20 U. S.] 534; that the appeal-bond ought to have been sufficient to cover the whole debt claimed, and that a bond for $500 only could not be a supersedeas. The order for a peremptory mandamus is not such a final judgment as will justify a writ of error. Wallen v. Williams, 7 Cranch [11 U. S.] 278; Catlett v. Brodie, 9 Wheat. [22 U. S.] 553.

Mr. Key, contra. The writ of error was a supersedeas to the judgment, awarding a peremptory mandamus; the writ, therefore, was improvidently issued, and ought to be quashed. This court cannot quash the writ of error. It is a supersedeas whatever may be the amount of the bond. Catlett v. Brodie, 9 Wheat. [22 U. S.] 553. The defendant is a public officer. This is a proceeding against him as such, to compel him to do an official act. The money is safe in the treasury of the United States, or in the custody of the law. It is only necessary to give bond to cover the costs.

THE COURT (THRUSTON, Circuit Judge, absent) refused to quash the mandamus, considering the writ of error and bond as a supersedeas, and refused, therefore, to grant an attachment for not obeying the writ.

Judgment affirmed by the supreme court. 12 Pet. [37 U. S.] 524.

[For subsequent proceedings, see Cases Nos. 13,479, 13,480, and 15,518.]

Case No. 15,518.

UNITED STATES ex rel. STOCKTON v. KENDALL.

[5 Cranch, C. C. 385.] [1]

Circuit Court, District of Columbia. March Term, 1838.

MANDAMUS—WRIT OF ERROR—AFFIRMANCE—MANDATE—RETURN TO MANDAMUS—PAYMENT — INTEREST.

1. Upon the affirmance, by the supreme court of the United States, of the judgment of the circuit court awarding a peremptory mandamus, and upon receipt of the mandate of the supreme court, commanding "that such further proceedings be had in the court below as, according to right and justice and the laws of the United States, ought to be had," the court will not issue an attachment against the defendant for contempt in not obeying the former peremptory writ of mandamus, which was superseded by the writ of error, but will issue an alias writ of peremptory mandamus.

2. It is a sufficient return of a writ of mandamus to certify that the thing commanded has been done, although not by the defendant personally.

3. When the mandamus is to credit a certain sum of money, it is a sufficient obedience to the writ to credit that sum without interest.

A writ of error having been issued to the judgment of this court in March term, 1837, awarding a peremptory mandamus in this case [Case No. 15,517], and the judgment having been affirmed, the following mandate was received from the supreme court. "United States of America, ss.: The President of the United States of America: To the Honorable the Judges of the Circuit Court of the United States, for the District of Columbia, Holden in and for the County of Washington; Greeting. Whereas lately, in the circuit court of the United States for the District of Columbia, before you, or some of you, in a cause between the United States, at the relation of William B. Stokes, Richard C. Stockton, and Daniel Moore, plaintiffs, and Amos Kendall, postmaster-general of the United States, defendant, on petition for a writ of mandamus, wherein the said circuit court, on the 13th day of July, in the year 1837, made the following order for a

[1] [Reported by Hon. William Cranch, Chief Judge.]

peremptory mandamus, viz.: 'Whereas' &c. (reciting the order at full length), 'as by the inspection of the transcript of the record of the said circuit court, &c. fully and at large appears. And whereas at the present term of January, in the year of our Lord, one thousand eight hundred and thirty-eight, the said cause came on to be heard before the said supreme court, on the said transcript of the record, and was argued by counsel; on consideration whereof, it is adjudged and ordered by this court, that the judgment of the said circuit court be, and the same is hereby affirmed with costs. March 12th. You therefore are hereby commanded, that such further proceedings be had in said cause, as according to right and justice, and the laws of the United States ought to be had, the said writ of error notwithstanding.' Witness, &c."

Whereupon, Mr. Coxe for the relators, moved the court for an attachment against Mr. Kendall, for not having obeyed the peremptory writ of mandamus issued by this court, on the 13th of July, 1837, which writ this court had adjudged to be superseded by the writ of error.

THE COURT, however, refused now to issue an attachment for that cause, but on the 30th of March, 1838, directed an alias peremptory writ of mandamus to be issued, returnable on the 3d of April.

CRANCH, Chief Judge, thought that eight days should have been allowed for the return.

On the 3d of April, the peremptory writ of mandamus was returned with the following indorsement in the handwriting of the postmaster-general. "Post-Office Department, April 3d, 1838. Having communicated the awards of the solicitor of the treasury, referred to in the within writ, to the auditor of the treasury for the post-office department, who has the legal custody of the books on which the accounts of this department are kept, I have received from him official information, that the balance of said awards, viz. thirty-nine thousand four hundred and seventy-two dollars, and forty-seven cents, ($39,472.47) has been entered to the credit of the claimants in said books. Amos Kendall, Postmaster-General."

On the 4th of April, Mr. Coxe moved the court to quash this return of the peremptory mandamus, and to issue an attachment of contempt against the postmaster-general: (1) Because the return does not certify perfect obedience to the writ in this, that the postmaster-general has not certified that he has credited the relators, or caused them to be credited with the balance of the awards. (2) Because he has not certified that he has credited the relators with the interest upon that balance from the time it ought to have been paid until the time of giving the credit for the balance. Osborn v. U. S. Bank, 9 Wheat. [22 U. S.] 337; Thorndike v. U. S. [Case No. 13,987].

But THE COURT (nem. con.) overruled the motion: (1) Because the return substantially certifies that the credit has been given according to the command of the writ; and, (2) because the postmaster-general has not been commanded to credit the interest; and this court cannot, in this cause, compel him to credit it, so as to charge the United States with it, or to make him personally liable for it; or to bring him into contempt for not crediting interest upon the award, or any part of it.

CRANCH, Chief Judge. The question is, whether the postmaster-general has substantially done what he was commanded to do. The petition for the mandamus complains that the postmaster-general refused to pay or credit the petitioners the residue of the sum awarded by the solicitor of the treasury, being $39,472.47, or to pay or credit the interest upon such balance so withheld; wherefore they pray that a writ of mandamus may issue to the postmaster-general commanding him: (1) "That he fully comply with, obey, and execute, the aforesaid act of congress of July 2, 1836 [5 Stat. 80], by crediting your petitioners with the full and entire sum so awarded as aforesaid in their favor by the solicitor of the treasury as aforesaid, in conformity with said award and decision." (2) "That he shall pay to your petitioners the full amount so awarded, with interest thereon, deducting only the amount which shall be justly charged or chargeable to your memorialists against the same."

The act of congress of the 2d of July, 1836, enacts, that the postmaster-general "be, and is hereby directed, to credit such mail contractors with whatever sum or sums of money, if any, the said solicitor shall so decide to be due to them for or on account of any such service or contract." The rule to show cause was in conformity with the prayer of the petition for the mandamus, namely, to show cause why the postmaster-general should not be commanded, first, to comply with the act by crediting the petitioners with the full and entire sum so awarded, in conformity with the said award and decision; and, secondly, that he should pay the full amount so awarded, with interest thereon, deducting only the amount which shall be justly charged or chargeable to the said memorialists against the same.

The court, however, awarded the mandamus only upon the first branch of the prayer; because the act of congress did not require the postmaster-general to pay, but only to credit the contractors with the amount of the award; and because the court doubted its authority, in this form of proceeding, and upon the facts stated in the petition, to go into an investigation of the general account between the contractors and the department, which they must have done before they could say what amount should be justly charged or chargeable to the

memorialists against the amount of the solicitor's award.

The order of the court for the mandamus nisi recites the substance of the act of July 2, 1836, and of the award of the solicitor of the treasury; the payment of $122,101.46, and the refusal of the postmaster-general to pay or credit the residue, being $39,472.47; the petition for the mandamus; the rule to show cause, and the postmaster-general's failure to show cause, &c.; and then directs the mandamus nisi to be issued, commanding the postmaster-general to "credit such mail contractors with the full amount of money so awarded and decided by the said solicitor of the treasury to be due to said mail contractors, according to the true intent and meaning of the said award and decision, or that he show cause to the contrary," &c. The mandamus nisi has the same recitals, and commands the postmaster-general fully to comply with, obey, and execute, on his part, the aforesaid act of congress of July 2, 1836, "by crediting the said mail contractors with the full and entire sum so awarded and decided as aforesaid to be due to them, by the said solicitor of the treasury, according to the true intent and meaning of said award and decision, so that complaint be not again made to the said circuit court, and that you certify perfect obedience to, and due execution of, this writ, to the said circuit court, on Saturday the 10th of June, instant; or that you do, on that day," show cause to the contrary. The peremptory mandamus contains similar recitals; and that the mandamus nisi had been issued and served, and that no good cause had been shown, &c., and commands the postmaster-general "that he do forthwith and without delay, immediately upon the receipt of the writ, credit said mail contractors, as he was before commanded; and that he certify perfect obedience to, and full execution of said writ to this court, on the second Monday of August next," &c.

On the 12th of November, 1836, the solicitor of the treasury notified the postmaster-general that he awarded, in part, the sum of $110,140, and on the 23d of November, 1836, that he awarded the further sum of $52,597.09, from which he afterwards deducted $1,163.16 for an error, leaving the sum of $51,433.93 to be added to the amount awarded on the 12th of November; making an aggregate sum of $161,573.93. Of this sum the postmaster-general credited the contractors with the sum of $122,101.46, and refused to credit them with the residue of the award, being the sum of $39,472.47, which sum was withheld by him from the 23d of November, 1836, until the same was passed to their credit by the auditor of the treasury for the post-office department on or about the 3d of April, 1838. Of the sum thus last awarded by the solicitor of the treasury, the sum of $6,893.93 was for interest upon certain items of current pay due to the contractors quarterly, according to their contracts, and withheld by the postmaster-general, in order to reimburse the department for moneys supposed to have been improperly credited by the preceding postmaster-general for extra services, but which the solicitor of the treasury decided to have been correctly credited.

The aggregate of the sums upon which the solicitor thus allowed interest is $133,569.56. Of this sum the postmaster-general credited the contractors with $122,101.46 immediately after the award, leaving unpaid only $11,468.10 of the amount, which the solicitor decided should bear interest; and this is the only part of the detained balance of $39,472.47, which, according to the principles of the award, should (if any should) bear interest from the 23d of November, 1836, till the 3d of April, 1838. Of the residue of that balance, a part, namely, $6,893.93, consists of interest, and the residue of allowances for extra services, upon which the solicitor did not allow interest. If, therefore, the terms of the mandamus, which commands the postmaster-general fully to comply with, obey, and execute, on his part, the act of congress of July 2, 1836, "by crediting the said mail contractors with the full and entire sum so awarded and decided, as aforesaid, to be due to them, by the said solicitor of the treasury, according to the true intent and meaning of the said award and decision," can be construed to mean that he should credit the contractors with the entire sum so awarded, and interest thereon, according to the true intent and meaning of the award, the sum of $11,468.10 would be the only sum which, according to that intent and meaning, would carry interest. But I think the mandamus cannot be so construed. It contains no command to credit interest; and it gives no notice to the postmaster-general that interest would be required to be credited. The act of congress only requires him to credit "whatever sum or sums of money, if any, the said solicitor shall decide to be due." It says nothing of interest. The mandamus commands him to do only what the statute requires him to do. We cannot consider him in contempt for not doing more. We have now no means of knowing the state of the general account of the contractors with the department. The solicitor had no authority to settle that account; he was only to decide what allowances should be made upon certain items claimed by the contractors.

We do not know that advances may not have been made by the department to the contractors which would render it improper to allow them interest upon any of the allowances made by the solicitor, other than those upon which he has allowed interest; and that interest is stopped upon the sum of $122,101.46, paid shortly after notice of the award, leaving, as before observed, the sum of $11,468.10 only to carry interest,

if the state of the general account of the contractors with the department will justify it, of which, as before said, we have not the means of judging, even if we had authority so to do, in this form of proceeding, and in this stage of it.

Upon the whole, I am clearly of opinion, that the postmaster-general has substantially complied with the command of the peremptory mandamus, and that he cannot be considered in contempt for not crediting interest upon the balance of the award, or upon any part of it. And of that opinion was the whole court.

[For subsequent proceedings, see Cases Nos 13,479 and 13,480.]

Case No. 15,519.

UNITED STATES v. KENDRICK.

[2 Mason, 69.] [1]

Circuit Court, D. Massachusetts. May Term, 1820.

PERJURY — CERTIFICATE UNDER FISHERY BOUNTY LAWS.

An indictment for perjury cannot be sustained on the seventh and ninth sections of the act of July 29, 1813, c. 34 [2 Story's Laws, 1350; 3 Stat. 49, c. 35], granting a bounty to vessels engaged in the fisheries, unless the certificate required by the seventh section be sworn to by the same person, (whether owner of the vessel or his agent or representative,) who signs the certificate. If the owner signs the certificate and the agent swears to it, the case is not within the statute.

Indictment against the defendant [Edward Kendrick] for perjury, founded on the ninth section of the act of July 29, 1813, c. 34 [2 Story's Laws, 1350; 3 Stat. 49, c. 35], granting a bounty to vessels engaged in the fisheries. The fifth and sixth sections of the act provide for the allowance and payment of the bounty. The seventh section enacts that the owner or owners of every fishing vessel, &c. his or their agent or lawful representative shall, previous to receiving the allowance made by the act, produce to the collector who is authorized to pay the same, the original agreement made with the fishermen employed on board of the vessel, "and also a certificate to be by him or them subscribed, therein mentioning the particular days on which such vessel sailed and returned on the several voyages or fares she may have made in the preceding fishing season, to the truth of which he or they shall swear or affirm before the collector aforesaid." The ninth section declares that any person who shall make any false declaration on oath or affirmation, required by this act, being duly convicted, shall be deemed guilty of perjury, &c. The indictment alleged (and so the fact appeared at the trial,) that the certificate was signed by Theophilus Crowell, the owner of the vessel, and that the oath was taken by the defendant as agent of the owner.

[1] [Reported by William P. Mason, Esq.]

Mr. Prescott, for defendant, objected that under these circumstances the indictment was not within the contemplation of the statute.

Mr. Blake, U. S. Dist. Atty., argued e contra.

STORY, Circuit Justice. It is the decided opinion of the court that this indictment cannot be sustained upon the statute. The seventh section manifestly supposes and requires that the oath should be taken by the same person who signs the certificate, whether it be signed by the owner or his agent or representative. It surely cannot be supposed that one person is to be sworn to the truth of another person's certificate. Here the certificate is signed by the owner, and the oath is taken by the defendant, who is stated to be agent of the owner. The grossest frauds might be committed if this practice were allowed to prevail, for a stranger might swear to the facts from an innocent belief of their existence from the certificate of the owner, and the owner might fraudulently sign the certificate and escape the penalty of the act. The objection is fatal.

UNITED STATES (KENRICK v.). See Case No. 7,713.

Case No. 15,520.

UNITED STATES ex rel. WARDER v. KENEDY.

[4 Cranch, C. C. 592.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

ACTION ON ADMINISTRATION BONDS — RETURN OF NON EST OR NULLA BONA.

No creditor can maintain an action against the administrator of his debtor, upon his administration bond, before a non est returned upon a capias ad respondendum against the administrator, or a fi. fa. returned nulla bona, or other apparent insolvency. The Maryland act of 1720, c. 24, § 2, is in force in the county of Washington.

Debt, on administration bond. Breach assigned in not paying a debt due by the intestate to Walter Warder, ascertained by arbitrators mutually chosen by the said Walter Warden and the defendant [F. X. Kenedy], as administrator [of W. L. Kenedy]; and in not making an inventory of the estate of his intestate; and in not rendering any account thereof, as required by law.

By the Maryland law of 1720, c. 24, § 2. it is enacted, "that it shall not be lawful for any creditor to prosecute any administration or testamentary bond, for any debt or damage due from or recovered against any deceased person's effects, before a non est inventus on a capias ad respondendum be returned against the executor or administra-

[1] [Reported by Hon. William Cranch, Chief Judge.]

tor; or a fieri facias returned nulla bona by the sheriff; or such other apparent insolvency or insufficiency of the person or effects of such executor," &c., "as shall, in the judgment of the provincial court, render such creditor remediless by any other means than suing the bond, on penalty of being condemned in full costs;, and the defendants may give this act," &c., "in evidence without special pleading."

Upon a general demurrer to the declaration it was objected, by Mr. Redin, for defendant, that there was no averment in the declaration that a non est inventus had been returned against the defendant, who was a resident of this county; nor a fieri facias returned nulla bona; or any other apparent insolvency or insufficiency of the defendant, as required by the Maryland statute of October, 1720, c. 24, § 2.

W. L. Brent, contra: That the act of 1720, c. 24, was repealed by the act of 1798, c. 101, § 2, the former being inconsistent with the provisions of the latter act, contained in subchapter 5, § 5; Id. subc. 6, § 13; Id. subc. 8, §§ 9, 14; Id. subc. 10, §§ 4, 9; and Id. subc. 12, § 5.

Mr. Redin, in reply, contended that there was no inconsistency in the provisions of the two acts.

THE COURT, being of that opinion, and that the act of 1720 still remained in force, rendered judgment upon the demurrer for the defendant (nem. con.).

Case No. 15,521.

UNITED STATES v. KENNAN.

[1 Pet. C. C. 168.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1815.

REPLEVIN — WHEN MAINTAINABLE — CONTRACT — JOINDER OF PARTIES.

1. Parker agreed in writing, to furnish certain goods to the commissary general of the United States, manufactured and about to be made, for the purpose of paying a debt due by him to the commissary general, and to Robert Earp. The action of replevin, cannot be maintained by the United States, for the goods manufactured by P. as by the contract, no interest appears to have vested in the United States, and if it had vested, R. E. is equally interested in the goods, and ought to have been joined in the suit.

[Cited in brief in Com v. City of Pittsburg, 34 Pa. St. 508.]

2. A. agrees to pay a sum of money, or do a certain act, for the use of B. and C. A suit for this contract cannot be supported in the name of either of the parties only, but in the name of B. and C. jointly.

Replevin for one hundred and sixteen pieces of kerseys. The title of the United States, was founded on an agreement, bearing date the 15th February, 1815, substantially as follows: "Thomas Parker agrees to furnish the commissary general of the United States, with a sufficient quantity of gray and white kerseys, part of which are now finished, and the materials for the remainder are now on hand; to pay the debt due the commissary, and the notes held by Robert Earp, altogether amounting to 7,000 dollars and upwards; and my stock in trade, on hand, is hereby appropriated and set apart for the payment of these engagements." These kerseys, being in the possession of Kennan, are claimed by Redman, under a subsequent assignment made by Parker. On the same day, a notice, signed by Robert Earp, was sent to Kennan, in the following words: "You are required not to deliver any part of the stock of Parker in your possession, except in compliance with the assignment made this day, for my use, by Parker; a copy of which is herewith delivered."

J. R. Ingersoll and Mr Hopkinson, for defendant contended that the United States had failed to prove property in these goods; and if they had proved it, still they could not maintain this suit, without joining Robert Earp, he being a tenant in common in the same, under the agreement.

Mr. Chauncey, for the United States.

WASHINGTON, Circuit Justice. This cause turns upon a question of property. The foundation upon which the claim of the United States is rested, is the agreement of the 25th of February, 1815, between Thomas Parker and the commissary general, whose name even is not mentioned in it. There is nothing relied upon, but conjecture, to connect the United States, in any manner, with this transaction. It is not stated in the agreement, that the commissary general contracted as an agent of the United States, or on his own private account; which he might well do, and his title be used as a mere description of the person. It is not stated, that the consideration passed from the United States, or was intended for their use. The only interest which distinctly appears in the agreement, different from that of the commissary general is that of Robert Earp; who it would seem, together with the commissary general, was a creditor of Parker. The assignment, however, is made to the commissary general, in whose name the suit might have been brought. But if it appeared that this contract was made for the benefit of the United States; it appears also, that it was made for that of Robert Earp; and consequently, the suit could, upon no principle, be maintained, for the whole of the property in the name of the United States. If an agreement be made with A., to pay money, or to do any act for the use of B. and C., the suit may be maintained in the name of A., but certainly not in the name of C. or B., singly. So far as there is any evidence given in this cause, of property in the goods in question, it proves it to be exclusively in Earp. The name of the com-

[1] [Reported by Richard Peters, Jr., Esq.]

missary general is not stated, nor does it appear that he knew of, or had any agency in making this contract. It was written by Earp; he alone appears in the transaction, from beginning to end; and the notice of the 25th of February to the defendant, is signed by him; in which he distinctly claims the goods mentioned in the assignment, as his own property.

Upon the whole, the court has no hesitation in directing a verdict to be found for the defendant.

Verdict for defendant.

Case No. 15,522.

UNITED STATES v. KENNEALLY.

[5 Biss. 122.] [1]

District Court, N. D. Illinois. April, 1870.

COUNTERFEIT UNITED STATES NOTES—WITNESSES SUMMONED BY UNITED STATES FOR ACCUSED — PROCESS — BAD CHARACTER.

1. On an indictment for having in his possession, with intent to utter, counterfeit United States treasury notes, the accused may show that he received them accidentally or in ordinary course of business.

2. Good character may be shown as evidence of his intention; and absence of such evidence is a strong circumstance to show that he has no such evidence to produce.

3. It is the duty of the court, on application of the prisoner, showing that he is unable to send for his witnesses, to summon them at the expense of the government.

4. The prosecution cannot give evidence as to the character of the accused unless he opens the door by introducing evidence of character himself.

5. The fact that the accused, when arrested, made no explanation of the manner in which he got the counterfeit money, nor any assertion of innocence, is a circumstance which may be considered by the jury against him.

Indictment [against James Kenneally] for having in his possession, and with intent to utter and pass, certain counterfeit notes of the United States government.

J. O. Glover, U. S. Dist. Atty., for the Government.

BLODGETT, District Judge (charging jury). The evidence in the case, on the part of the prosecution, is very short. It is simply to the point that the prisoner was arrested by the sheriff of Peoria county; that when called upon to deliver over any counterfeit money which he had in his possession, he took from his pocket the roll of bills exhibited before you, and identified as counterfeit.

When a man is arrested with counterfeit money in his possession, knowing it to be counterfeit, he cannot establish his innocence by vague hypotheses or theories, or speculative statements in relation to his intentions and the manner in which he came by it. But he may relieve the charge thus placed upon him by proof of former character, showing that he would not be likely to be engaged in that class of business, or that he obtained the money in due course of business, supposing it to be genuine. Every man in the community, in business, is liable to receive counterfeit money. We infer that every honest man is able to show such facts in regard to his character and conduct as are sufficient to rebut any evidence of guilty intention. The absence of evidence of that character is to be taken as at least a strong circumstance to show that the person accused has no such evidence to produce.

It is the duty of the court, on the application of a prisoner, to send for witnesses, wherever they may be had, within the jurisdiction of the court, and at the expense of the United States government, if the prisoner proves that he is poor, and unable to bear the expense himself.

The prosecution, in cases like this, are not allowed to give evidence of the general bad character of the accused unless he opens the door first by introducing evidence of character himself. It is not competent for the prosecution to show, as a make-weight in the case,—as a part of the evidence for the prosecution in making out a prima facie case,—that the accused is a person of bad character. The law, in its leniency, presumes every man to have a good character until the contrary is shown, but for the purpose of rebutting any presumption of guilty intention raised by circumstances not clearly explained otherwise, the law allows every person accused of crime to introduce evidence of character, which should, and always does, go far for the purpose of rebutting the presumption of criminal intent.

There are two counts in this indictment: the one, having them with intent to pass; the other, with intent to sell; and it is for you, with the testimony before you, to say what is the fact in the case. The testimony is in a very compact form. With reference to the defense set up, that this man Connor persuaded the defendant to accept these notes at the time, there has been a great deal said by counsel. You are all aware that that there has been no testimony offered bearing on that assertion. The man was a competent witness to have been brought here on the part of the defendant. The court would have allowed a rigid and thorough examination if there was any circumstance going to show there was anything to justify a suspicion of that kind.

When arrested, the prisoner made no pretext to the officers of having obtained the money in the manner in which his counsel and he himself now allege. Honest men, arrested on a criminal charge, generally, at the first blush, state the truth in reference to the manner in which they are entrapped—if they are entrapped—into the circumstances

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

which make against them. This matter has been commented on by counsel, and I merely call your attention to it.

If you are satisfied from the proof that the prisoner is guilty, say so. If not guilty, say so. It is no part of your province to fix the punishment. That is to be fixed by the court

Verdict, guilty.

For authorities upon the rule stated as to admitting evidence of the character of the accused, see 3 Greenl. Ev. § 25, and note 4. Consult U. S. v. Durling [Case No. 15,010].

Case No. 15,523.

UNITED STATES v. KENNEDY.

[1 Cranch, C. C. 312.] [1]

Circuit Court, District of Columbia. June Term, 1806.

FORESTALLING MARKET—INDICTMENT.

An indictment will not lie for forestalling the Georgetown market contrary to the by-law.

Indictment [against M. Kennedy] for forestalling Georgetown market contrary to by-law of Georgetown.

Verdict, guilty.

By the by-law, the penalty is ten dollars and to "be recoverable as in cases of small debts by warrant, one half to the clerk of the market, the other to the use of the corporation."

Judgment arrested.

FITZHUGH, Circuit Judge, absent.

Case No. 15,524.

UNITED STATES v. KENNEDY et al.

[3 McLean, 175.] [2]

Circuit Court, D. Illinois. June Term, 1843.

COMPETENCY OF WITNESS — RELIGIOUS BELIEF — CREDIBILITY—TRESPASS—PLEADING AND PROOF.

1. A witness to be competent must believe in God, and in rewards and punishments.

2. If these are inflicted in this life, according to his faith, he is competent.

3. But in such case he may be less under that high moral influence, which is supposed to result from a belief in a state of rewards and punishments in the life to come. This may go to his credibility.

4. In trespass, where a day is laid in the declaration, and from such day to the commencement of the action, divers trespasses were committed, one trespass, but not divers, may be proved prior to the day named. But divers may be proved within the time laid.

At law.

Mr. Butterfield, for the United States.

Mr. Arnold, for defendants.

OPINION OF THE COURT. This action is brought against the defendants [Kennedy and Clyburn] for trespass upon the public lands. The jury being impannelled, William H. Adams was called as a witness; and being asked whether he believes in the existence of a God, and in a future state of rewards and punishment, answered that he believed in a God, and that all offences were punished in this life, and not in the next. The witness having answered the question, without objection, it will be received. But, it may be proper to remark, that the modern practice is, not to interrogate the witness as to his religious belief. Formerly, the witness was examined on this point, either before or after he was sworn. But it is now proved by witnesses, who may have learned the views of the witness on this subject from his own declarations. And this seems to be more reasonable and more conformable to the spirit of our institutions.

However highly the witness may appreciate character, and however strongly he may detest the crime of perjury, from the infamy attached to it, still the law requires a higher obligation to operate upon the conscience of the witness. He must believe in a Superintending Providence, who punishes crime. This presupposes a belief in a future state. The authorities are divided on the point whether, if the rewards and punishments, according to the belief of the witness, are to be inflicted in this life, he is competent. Com. v. Bacheler, 4 Am. Jur. 81. In Hunscom v. Hunscom, 15 Mass. 184, the court held that mere disbelief in a future existence went only to the credibility. Contra, Atwood v. Welton, 7 Conn. 66. In the case of Omichund v. Barker, Willes, 545, 1 Atk. 21, where the subject was largely discussed, it was held, that the belief of a God, and that he will reward and punish us according to our deserts, is essential; but whether the rewards and punishments are limited to this life, or the next, is not material. At least this view is sustained by the weight of authority. The individual who believes that a bad act will be punished in this life, and a good one rewarded, by God, cannot be said to act free from that moral influence of hope and fear which the law contemplates as the best security against punishment. This influence will operate more strongly, when referred to the future than the present life. And it would seem, as stated in some of the authorities, that a disbelief in a state of future rewards and punishments should go to the credibility of the witness, and not to his competency. 1 Greenl. Ev. §§ 368–370.

The witness was sworn, and also D. Kinsey, who proved that the defendants, at different times, and for a series of years, were in the practice of cutting timber on the public land, and using it for their own purposes.

It was made to appear that the pre-emption law of 1838 embraced the case of the defendant Clyburn, but he took no step dur-

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Hon. John McLean, Circuit Justice.]

ing the continuance of the law to perfect his title. He is, therefore, liable to an action of trespass after the expiration of the pre-emption law. The declaration laid the trespass from 1st of October to the time of bringing the action. And THE COURT held, that a single trespass might be proved anterior to the time laid, but not divers. That divers trespasses might be proved within the time laid.

The jury found for plaintiffs, &c. Judgment.

Case No. 15,525.

UNITED STATES v. KENNEDY.

[4 Wash. C. C. 91.] [1]

Circuit Court, D. Pennsylvania. April Term, 1821.

SLAVE TRADE—INDICTMENT OF MASTER.

1. Indictment against the master of a vessel for serving on board a vessel employed in transporting a slave from the island of St. Thomas to Cuba, contrary to the act of congress of the 10th of May, 1800 [2 Stat. 70].

2. The object and intention of the law is to prevent the transportation of slaves from one foreign country to another for the purpose of traffic; and the jury must decide if that was the present case.

3. The master serves on board of his vessel, and is therefore, if guilty, properly charged by the indictment.

Indictment for serving on board a vessel employed in transporting a slave from the island of St. Thomas, to the island of Cuba; contrary to the act of the 10th of May, 1800. See 3 [Bior. & D. Laws] 382, § 2 [2 Stat. 70]. This section declares that "it shall be unlawful for any citizen of the United States, or other person residing therein, to serve on board any vessel of the United States employed or made use of in the transportation or carrying of slaves from one foreign country or place to another, and any such citizen or other person, voluntarily serving as aforesaid, shall be liable to be indicted therefor; and, on conviction thereof, shall be liable to a fine not exceeding two thousand dollars, and be imprisoned not exceeding two years."

The evidence of the only witness much relied upon in support of the prosecution was, that the defendant took on board, at St. Thomas, a negro boy, which he stated to the witness he had received from the lady with whom he boarded, to carry to Cuba to her brother, for the passage of whom fifteen dollars had been paid him. That after their arrival at St. Jago, the defendant told the witness he had been compelled to sell the negro boy to a Mr. Clark, for three hundred dollars. Some evidence was given that the landlady at St. Thomas was spoken of as his mistress, and that it was said, at St. Jago, that the boy had been taken into the country to Mr. Clark, his master. Some opposing testimony was given on the part of the defendant, and the credit and general character of the witness relied upon to support the prosecution, was strongly attacked.

WASHINGTON, Circuit Justice (charging jury). The opinion of the court as to the true construction of the act of congress on which this prosecution is founded is, that it is confined to the transportation of slaves from one foreign country to another, for the purpose of traffic. It must be admitted, that the expressions of the second section of the law are sufficiently broad to comprehend the case of a mere transportation; although there is no evidence that a traffic in slaves was contemplated. But when we take into view the obvious policy of the various laws on this subject, the title of this law and the particular phraseology of the third section, which differs from the second only in the circumstance that the one relates to a service on board of a vessel of the United States, and the other to a service on board of a foreign vessel so employed; we are satisfied, that the legislature did not intend to go farther than to prohibit our citizens from engaging in a traffic in slaves, between one foreign country and another. This point was decided in this court in the case of The Tryphenia. [Case No. 14,209.]

It is objected by the counsel for the defendant that the second section speaks of slaves in the plural number, and that the offence charged in this indictment being for the transportation of a single slave, the case is not within the act of congress; and 1 Bl. Comm. 88, was relied upon. As this objection, if a valid one, appears upon the indictment, it will be unnecessary for the court to notice it in this stage of the trial. Should the defendant be convicted, his counsel can move that point in arrest of judgment.

It is next contended in behalf of the defendant, that as he commanded the vessel, he cannot be said to have served on board of her. We think there is no foundation for this objection. The master is the servant of the owner, and may, under this act of congress at least, be said to serve on board of his vessel; if he is not included under these general expressions, there is no other part of the act which embraces his case.

If then the jury should be satisfied that this negro boy was a slave at St. Thomas, and was carried to the island of Cuba for the purposes of sale, or that he was in fact sold by the defendant; then it is the opinion of the court that you should find him guilty; but not otherwise As to the credit to be given to the witness examined in support of the prosecution, you must judge.

Verdict, not guilty.

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

Case No. 15,526.

UNITED STATES v. KENTON.

[2 Bond, 97.] [1]

Circuit Court, S. D. Ohio. Feb. Term, 1867.

INTERNAL REVENUE LAWS — INTERPRETATION — "CATTLE BROKER" — LICENSES — FARMER PURCHASING AND SELLING STOCK.

1. In a suit by the United States to recover a fine for pursuing the business of a cattle broker, without having procured a license, it must appear that the person sued dealt in cattle or hogs as his principal business.

2. Occasionally buying and selling such stock, in connection with his main pursuit as a farmer, does not bring him within the operation of the statute requiring a person following the business of a cattle broker to obtain a license.

3. The term "business," as used in the statute, must be limited in its meaning to the main or principal occupation of an individual, and can not extend to selling or buying as merely incidental to another pursuit.

4. A farmer purchasing stock to consume the products of his farm, though with the intention of selling it, is not a cattle broker within the statute.

5. Revenue laws should be rigidly enforced, but not strained to embrace acts not fairly within their scope.

R. M. Corwine, U. S. Dist. Atty.

R. C. Fulton, for defendant.

LEAVITT, District Judge (charging jury). The United States prosecute this suit to recover of the defendant [Simon P. Kenton] the pecuniary fine imposed by the internal revenue laws, upon the allegation that he has pursued the business of a cattle broker without having procured a license for that purpose. There seems to be no controversy as to the facts, and I shall not therefore detain the jury by reciting them. They are doubtless fresh in the recollection of the jury.

The only question in the case is, whether upon the evidence before the jury the defendant is a cattle broker, within the scope and words of the statute, and liable to the fine claimed by the United States for pursuing that occupation without a license for that purpose. This is the first and only case before this court, in which the construction of the statute relating to this subject has been under consideration. Nor have any decisions of other courts been referred to as authorities for the guidance of this court. I shall state, in a few words, the views I entertain upon this question. The statute on which this proceeding is based, provides that any person whose business it is to buy or sell or deal in cattle shall be deemed a cattle broker, and shall procure a license therefor from the proper collector of the revenue, and failing to do so, shall be liable to the fine prescribed by the statute.

The question under consideration turns mainly on the force and effect to be given to the word "business," as used in the statute. The district attorney claims that the proof shows the defendant was a dealer in cattle, and comes within the statute as a cattle broker, or one pursuing the business of dealing in cattle. The counsel for the defendant strenuously oppose this view, claiming that although the defendant dealt to some extent in cattle, it was not his business within the meaning of the law.

The evidence is clear that the defendant, being a farmer, did occasionally buy and sell cattle and hogs. But to bring him within the spirit and scope of the statute, and justify the jury in returning a verdict against him for the fine claimed, they must be satisfied that dealing in stock was his main pursuit or occupation, and that he was in the true sense of the word a cattle broker. A single transaction, or even a series of transactions, incidental to his principal occupation as a farmer, would not bring him within the scope of the law on which the claim of the United States is based. It certainly was not the intent of the law that every act of dealing in cattle or hogs should require a license. There is a class of men in the community, who for profit or gain devote themselves to dealing in stock, and who pursue it as the main business of their lives, and rely on it for their livelihood. They are a professional class, whose business or occupation is well known to the public, and they are the persons required by the statute to procure and pay for a license to pursue their occupation. As a class their calling is as distinct and well known as that of a banker or broker, whose business, as announced to the public, is the loaning of money and the purchase of securities or stocks for the purpose of profit. But it can not be claimed that an individual who, occasionally, as he may have opportunity, loans money, or purchases and sells stocks, thereby becomes a banker or a broker, and is under the necessity of obtaining a license from the government.

If, therefore, the jury find from the evidence that the defendant dealt in cattle or hogs, as incidental to his main occupation as a farmer, or with the purpose of feeding the stock purchased with the products of his farm, in preference to sending the products to market, he can not be regarded as one following the business of a cattle broker within the meaning of the statute.

The case is submitted to the jury with the single additional remark, that although all laws for raising revenue to meet the demands of the government, being necessarily stringent and somewhat severe in their requirements, should have a fair and reasonable construction, and while it is the plain duty of courts and juries to enforce the law in all proper cases, to the end that the government may secure its legal claims, and all frauds be brought to light and punished, they should avoid such action as may excite unnecessary public prejudice and hostility to the entire revenue system. And in this con-

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

nection, I may remark that it is not expedient to give too much encouragement to informers, who for the mere greed of gain, and not from any just or patriotic motive, assume that position.

Case No. 15,527.

UNITED STATES v. KERSHNER et al.

[1 Bond, 432.] [1]

Circuit Court, S. D. Ohio. Feb. Term, 1861.

POSTMASTERS' ACCOUNTS—APPLICATION OF BALANCES—OFFICIAL BONDS—LIABILITY OF SURETIES—LIMITATION OF ACTIONS.

1. Where a postmaster in a quarterly return shows a balance in his hands, the postmaster-general may apply the balance reported in a subsequent return to the extinguishment of the previous balance

2. And where, in an account current continued for years, the postmaster-general thus makes the application of balances reported by a postmaster, any deficiency on final settlement due from the postmaster will be chargeable to and appear in the last quarterly account of the postmaster; and unless two years have elapsed from the return of the last quarterly account to the time of bringing suit on the postmaster's bond, the sureties in the bond are not protected from liability by the provision of the act of congress requiring suit to be brought within two years, or in case of neglect so to sue, the sureties not to be liable.

At law.

Stanley Matthews, U. S. Dist. Atty.

King & Thompson, for defendants.

LEAVITT, District Judge. This is an action of debt, brought by the United States against Isaac Kershner, as the principal, and William Mills and Elihu Thorn, as sureties, in the official bond of said Kershner, as the late postmaster at Yellow Springs, in this state. The breach assigned is the non-payment by Kershner of the sum of $499.35, which, it is averred, he owes the United States for moneys officially received by him. Kershner does not appear or make any defense to the action; but his sureties, Mills and Thorn, have pleaded, first, the general issue; and secondly, a special plea, in which it is averred that Kershner, as postmaster, "was at all times for more than two years next before the commencement of this action, in default in not accounting for and paying over to the plaintiff the moneys found due and owing from him as such postmaster, agent, and depository of the post-office department." The plaintiff takes issue on the last-named plea, by a replication denying that the default of Kershner, as postmaster, occurred two years before the institution of this suit.

The only evidence in the case is a duly certified transcript from the books of the auditor of the post-office department, showing the state of the postmaster's account, and exhibiting a balance of $499.35 due from him on March 31, 1859, at which date the account closed and the balance was struck. The first item of charge against Kershner in this account is for a balance due for the quarter ending June 30, 1853; and from that date he is regularly charged with the quarterly balances accruing against him until December 31, 1858, which is the last date in the debit side of the account. The account is carried on continuously from the date of the first entry to the close of the account, when the balance was finally ascertained. The credit side of the account is made up of various sums paid by the postmaster between September 22, 1855, and March 31, 1859. On the part of the sureties, it is insisted that the account current shows that Kershner was in default for a part of the quarterly balances charged against him as postmaster for two years or more prior to the commencement of the suit; and that by the neglect of the postmaster-general to bring suit for such balances within two years after they accrued, the sureties are released from their liability. They rely on sections 31 and 3 of the act of congress of March 3, 1825 [4 Stat. 102], "to reduce into one the several acts establishing and regulating the post-office department." Section 31 makes it the duty of a postmaster to render his accounts, and pay over to the postmaster-general the balance by him due, "at the end of every three months," and failing to do so the postmaster-general is required to bring suit against him. And section 3 of said act, after making it the duty of the postmaster-general to take bond, with approved security, from the postmaster, contains the following proviso: "That if the default shall be made by the postmaster aforesaid at any time, and the postmaster-general shall fail to institute suit against such postmaster and said sureties for two years from and after such default shall be made, then and in that case the said sureties shall not be held liable to the United States, nor shall suit be instituted against them."

The only question in this case arises on the construction to be given to the proviso just quoted. And this involves the inquiry, at what period is the postmaster to be regarded as in default. The present suit was instituted on January 3, 1860; and it is insisted by the district attorney, that as the account current between the United States and the postmaster exhibits an unbroken series of charges against, and credits to, the postmaster from the date of the first item to the close of the account when the final balance was struck, each payment made by the postmaster in the order of time in which it was made, is to be applied to the extinguishment of the preceding quarterly balance against him, and the residue, if any, to be credited to the account of receipts for the quarter within which the payment was made. Upon this principle, it will be readily seen that where a payment is made, sufficient in amount to satisfy a prior quarterly balance against the postmaster, the

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default will be extinguished, and by the operation of this principle the defaults will all be thrown on the last quarter of the account. And hence it will result, that unless the default appearing in the last quarter of the account is of two years' standing, the sureties can not claim the protection of the statute.

On the other hand, it is contended that the legal liability of the postmaster for any quarterly balance against him accrued at the expiration of the quarter; and, that if during the period included in the account current, two years or more elapsed between the reported quarterly balance and the date of the next payment, the statute applies, and the sureties are exonerated. An inspection of this account shows clearly on what principle it was kept by the post-office department. It exhibits continuous items of charge and credit during the whole official term of the postmaster, the balance showing the whole amount of the deficit when he ceased to hold the office. And in accordance with the construction given to the statute by the post-office department and its established usage in keeping its accounts with postmasters, sureties have not been regarded as exonerated from liability, unless two years or "more had elapsed after the ascertainment of such balance before it was claimed by suit." The mode of keeping the accounts of postmasters and the principle on which the liability of sureties is to be tested, now insisted on as required by a just construction of the statute, would not only result in great practical inconvenience, but in the loss of large sums due the government for which sureties are liable in good faith and according to their legal obligations.

But, clearly, the statute does not require a construction which will lead to these results. In no proper sense of the term does it appear, from the account now before the court, that the postmaster was in default for two years prior to the commencement of this suit. It is true an inspection of the account shows, that as to the first item of charge, being a balance of $10.91 for the quarter ending June 30, 1853, it was not liquidated until September 22, 1855, being a period of more than two years; but it was fully discharged on that day, together with all the quarterly intermediate receipts charged to the postmaster. This default being thus extinguished, the sureties can claim no protection from liability on that account. For the eight quarters succeeding September 22, 1855, the quarterly deficits were small, and were fully extinguished by the credits to the postmaster during the years 1857 and 1858. It appears, however, that after applying the quarterly receipts with which the postmaster was charged for the year 1858, and a part of the year 1859, and extinguishing all the previous deficits, there was a balance against the postmaster on March 31, 1859, of four hundred and ninety-nine dollars, and thirty-five cents, which is claimed in this action. But, as this suit was commenced on January 1, 1860, it is apparent that two years had not elapsed after the occurrence of the default before suit brought; and, as a consequence, the statute which is relied upon by the sureties of the postmaster, as their defense in this action, does not apply.

The case of Jones v. U. S., decided by the supreme court of the United States in 1849 —7 How. [48 U. S.] 681—is decisive of the question now before this court. That was a suit against a surety in the official bond of a postmaster, who set up in a special plea, as his defense, that sundry defaults were made by the postmaster in failing to pay over money received by him while in office, which were permitted to remain unclaimed by suit for more than two years. On the trial of the case in the circuit court for the Eastern district of Virginia, the district attorney requested the court to instruct the jury in reference to the account between the United States and the postmaster, "that subsequently to any default at the end of a quarter, without any direction by him (the postmaster), or by the postmaster-general, as to the application of any payments by the postmaster, they should be applied in the first instance to extinguish each successive default in the order in which it fell due; and, if by such application of said payments, the jury shall believe from the evidence that all the defaults which occurred two years before the institution of the suit were extinguished within two years after the same were respectively committed, that the act of congress, which limits the institution of suits against the sureties of a postmaster to two years after the default of the principal, has no application to this case, and can not in any degree affect the plaintiff's right to recover in this action." This instruction was given by the court below, and affirmed by the supreme court as correct. In behalf of the sureties, instructions were asked in the court below, to the effect that payments made by the postmaster should be applied to satisfy charges against him for receipts during the quarter within which the payments were made; and that, if there were balances due for previous quarters, payments afterward made could not be applied to their extinguishment; and that if such balances were permitted to remain two years without being sued for, the sureties were discharged from all liability. These instructions, in the judgment of the supreme court, were properly refused by the court below.

It will thus be seen, that the case of Jones v. U. S. [supra], involved the precise question presented in this case. In that, as in this case, there was a continuous account between the post-office department and the postmaster, commencing with the first quarter of his official term and ending with his removal from office, showing the debits and credits in the order of time in which they

occurred, and exhibiting the final balance against the postmaster, for which suit was brought against him and his sureties within the period of two years. In that case the court, after reviewing the numerous authorities on the subject of the appropriation of payments made by a debtor, distinctly affirm the decision in the case of Kirkpatrick v. U. S., 9 Wheat. [22 U. S.] 724, in which Judge Story affirms the law to be, "that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notions of justice. It is certainly too late for either party to claim a right to make an application after the controversy has arisen, and a fortiori at the time of the trial." And in the same case, the same learned judge further says, that "in long running accounts, where debits and credits are perpetually occurring and no balances otherwise adjusted than for the purpose of making rests, we are of opinion that payments ought to be applied to extinguish the debts according to the priority of time."

In the case before this court, there is no pretense that the postmaster in making payments gave any directions as to their application, and he must therefore be presumed to have concurred in the application made by the post-office department. And the payments were applied in strict conformity with the law as held by the supreme court. Now, it is apparent, that if section 3 of the act of 1825, before cited, is to receive the construction contended for by the counsel for the sureties in this case, it would not only interfere essentially with the prompt and efficient action of the post-office department, but would result greatly to the injury and annoyance not only of the principal in the official bond of the postmaster but also of the sureties. It would require the auditor of the department to state a formal balance against the postmaster at the end of each quarter, which could not be extinguished by payments subsequently made in the absence of special instructions so to apply them; and if no such instructions were given, and any of these quarterly balances remained unliquidated without suit, the effect would be to exonerate the sureties from liability for any part of the defalcation of the postmaster. Remarking upon such a construction of the statute, the supreme court say, in the case of Jones v. U. S., that it "would interpose in the way of a debtor obstructions to the voluntary payment of his own debt, and compel the creditor to resort to a reluctant, dilatory, and expensive litigation for its recovery;" and they say again: "We can not, therefore, approve an interpretation of the act of congress like that assumed in the defense, which would require that quarterly balances should at all events, and in opposition to the will of the parties justly inferred from their conduct, remain open and unsatisfied, to become the subject of future contest." And in another part of their opinion the court, in reference to the mode of keeping these accounts adopted by the post-office department, say: "By this application (of payments subsequent to a quarterly balance) any balance which may have existed at the end of a previous quarter was extinguished and sometimes overpaid, and the account thus brought down to a final balance. To this mode of application no just objection can be perceived." And again: "The payments being made generally and without any appropriation by the debtors who were thus liable, it was the undoubted right of the creditor to apply them to any sums antecedently due."

In the conclusion of their opinion, the supreme court adopt the language of Judge Hopkinson, in the case of Postmaster-General v. Norvell [Case No. 11,310], which is very direct and explicit on the question under consideration, and is as follows: "The application of the moneys received in a subsequent quarter to the payment of the debt or balance antecedently due, being perfectly correct and lawful, it follows that no part of the default for which suit is brought accrued two years before; on the contrary, all the balances antecedent to the last quarter were extinguished by the successive payments, and the final balance falls on the last quarter."

Upon this construction of the act of congress, thus authoritatively given, it is apparent, in the account before the court, that there was no default of two years' standing prior to the commencement of this suit, and, consequently, that these defendants as sureties are not protected by the statute. Judgment is therefore rendered for the balance stated in the account, with interest from December 31, 1858.

Case No. 15,528.

UNITED STATES v. KESSLER.

[Baldw. 15.] [1]

Circuit Court, D. Pennsylvania. Oct. 23, 1829.

PIRACY—ROBBERY ON HIGH SEAS—FOREIGN VESSELS — JURISDICTION OF UNITED STATES COURTS—TESTIMONY OF ACCOMPLICE.

1. The defendant was indicted for robbery and piracy on the high seas, on board a brig called L'Eclair, a foreign vessel, belonging exclusively to French owners, and sailing under the French flag. *Held*, that under the acts of congress of the United States, this court has no jurisdiction to try and punish the offence.

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867; Bernhard v. Creene, Id. 1,349; U. S. v. Lewis, 36 Fed. 450.]

[Cited in People v. Tyler, 7 Mich. 214.]

2. Whether the offence was committed within or without a marine league of the coast of the

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

United States, is of no importance to the question of jurisdiction.

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867; Waring v. Clarke, 5 How. (46 U. S.) 481; U. S. v. Seagrist, Case No. 16,245; The Hungaria, 41 Fed. 111.]

3. Testimony of an accomplice, how to be regarded.

[Cited in U. S. v. Reeves, 38 Fed. 410; U. S. v. Ybanez, 53 Fed. 540.]

[Cited in Com. v. Price, 10 Gray, 475; Com. v. Savory, 10 Cush. 539.]

The indictment [against Henry Kessler] contains four counts: The first charges, in substance, a robbery from the captain of the vessel called L'Eclair; second, stealing the same property from and out of the vessel belonging to certain persons unknown; third, with piratically running away with the vessel and with the goods, &c. belonging to persons unknown. The fourth lays the running away with the vessel and stealing the goods to have been within a marine league of the coast of the United States.

Mr. Dallas, for the United States.

Defendant is charged with a piracy; that is, a felony committed on the high seas. Piracy is of two kinds: (1) General piracy by the law of nations; (2) particular, created by the acts of congress. The defendant does not fall within the first description. He is indicted as a citizen of the United States, for violating the laws of the United States. (1) These laws are co-extensive with the national country of the United States, which extends a marine league from the coast; (2) with the flag of the United States; (3) over the persons of the citizens of the United States, wherever they may be. There are two acts of congress applicable to this case: That of 15th of March, 1820, § 3 (3 Story's Laws, 1798 [3 Stat. 600]); that of 30th of April, 1790, § 8 (1 Story's Laws, 84 [1 Stat. 113]).

Mr. Dallas gave a full account of the facts of the case which will be given in evidence. He proceeded to the examination of the witnesses on the part of the United States. In the course of the examination of John Battiste, who was on board of the vessel, he was about to detail all the circumstances of the transaction, the manner in which the vessel was taken possession of by the crew, and what there was done by them in the prosecution of this design.

Mr. Brewster, for defendant, objects to any evidence in relation to the murders mentioned by the district attorney in opening the case. He said that there are three bills of indictment found against the defendant: (1) For murder, containing three counts; (2) for piracy, with four counts; (3) for a misdemeanour. The murder, if any was committed, constitutes a distinct and substantive charge, for which the defendant must answer on the trial of the indictment for that offence.

Mr. Dallas replies, that he has a right to give in evidence all that took place on board of the vessel.

(THE COURT. One of the charges now on trial is, that the defendant piratically and feloniously ran away with the vessel. To prove this the acts which accompanied it may be given in evidence; it must be shown, not only that he did run away with the brig, but that he did it piratically and feloniously; and this can be shown only by the circumstances attending the transaction. How did he run away with the vessel? For what purpose? How did he get possession of her? How take her from those who had the lawful possession of her? Was it by violence, or otherwise? with the consent, or against it, of the master? The manner of their taking possession is of the very essence of the charge. Suppose the crew had assaulted and confined the captain, and then taken the vessel, could it be argued that this was a distinct offence in itself, and therefore could not be given in evidence?)

The evidence was admitted. Before the termination of the examination of this witness, the court adjourned. The district attorney and the counsel for the prisoner, agreed that the jury might separate; the court gave no order or opinion on the subject, but left it entirely between the counsel.

The testimony given by several witnesses, on the part of the prosecution, being closed, Mr. Brewster, for defendant, said that he had no evidence to offer. He stated his ground of defence: (1) That the evidence has not made out a case of general piracy, but that the defendant, if guilty of any thing, is guilty of a piracy, made so by the acts of congress. (2) That the power to define and punish piracy, given to congress by the constitution, does not extend to any vessel under any flag but that of the United States, although the offender be a citizen of the United States; that this being a French vessel, and the defendant a mariner on board of her, he had, for the time being expatriated himself, and if guilty of any offence, can be punished only by the laws of France; that there is no evidence that the defendant is a citizen of the United States; that the vessel was not scuttled, nor the robbery committed within a marine league of the coast of the United States, and if they were, yet the acts of congress do not make such acts piracy; that the indictment is imperfect and insufficient; there is no averment that the vessel was American; it is necessary to aver that the defendant is an American citizen, and that the owners were Americans.

Mr. Dallas, for the prosecution.

As to the marine league, the original act being done on the high seas, common to all nations, cannot divest the owners of their property, or give security for the perpetrators of the crime. The ownership remained when the vessel was brought within the jurisdiction of the United States; they were di-

vested of their property by scuttling the vessel, and not until then; and this was done within the marine league. Like the case of stealing in one county and taking the goods into another; every detention is a fresh taking. The act of congress on which this indictment was framed, was passed 15th of May, 1820, § 3 [3 Stat. 600], subsequent to the decisions of the supreme court, and was meant to embrace the cases before omitted as offered by those decisions. This law has a more comprehensive phraseology than the law of 1790; "any person in and upon any ship or vessel;" that part of the indictment which relates to running away with the vessel is founded on the act of 1790. If the fact can be established that the crime was committed within a marine league of our coast, there can be no doubt of the jurisdiction; this is within the territorial limits of the United States. Vatt. Law Nat. bk. 1, c. 21, p. 204, §§ 288, 295; Id. bk. 2, c. 7, § 84; 1 Azuni, Mar. Law, 204; Church v. Hubbart, 2 Cranch [6 U. S.] 234; The Ann [Case No. 397]; 3 Story's Laws, 1798 [3. Stat. 600]; Act 1820; Palmer's Case, 3 Wheat. [16 U. S.] 630. I agree that the general words of the law of 1820 must have some limitation and restriction, to places and persons over which the legislative power of the United States extends. Foreign territory and foreign vessels, as an extension of that territory, are beyond our legislation, but American citizens are subject to it wherever they are. Vatt. Law Nat. bk. 2, c. 8, §§ 107, 108, 111. It is true that this reasoning may make the defendant amenable to another jurisdiction, but cannot throw off this. [U. S. v. Palmer] 3 Wheat. [16 U. S.] 610, 630, 641; [U. S. v. Klintock] 5 Wheat. [18 U. S.] 144, 147, 152; [U. S. v. Pirates] 5 Wheat. [18 U. S.] 184, 192, 195; U. S. v. Furlong, Id. 197, 198; U. S. v. Holmes, Id. 412.

Mr. Brewster, for defendant.

There are four counts in the indictment; in some of them defendant is not stated to be a citizen of the United States. The charge is for piracy, not robbery or murder. Piracy is not a common law offence, or punishable by the courts of common law. 7 Dane, Abr. 88, art. 6, § 2; 1 Browne, Civ. and Adm. Law, 461; Vatt. Law Nat. bk. 1, c. 23, § 280; 4 Bl. Comm. 71, 73; Act March, 1819; 3 Story's Laws, 1739 [3 Stat. 510]. The piracy is charged under the acts of congress. It is admitted that the vessel was altogether French, sailing under the French flag. As to the marine league. If the vessel was French, the offender was out of the jurisdiction of the United States, as much as if the crime had been committed at Bourdeaux; but the vessel was not within fifteen miles of the shore until dark; at dark they took their course for the light-house. As to bringing the property within the United States; it is not like the case of taking it from one county to another; the principle does not apply to the case of carrying the stolen goods from one state to another. The vessel was a distant floating colony of France. 1 Story's Laws, 86; Act April, 1790, § 16 [1 Stat. 116]. Thus if the act was done within the United States, it should be punished as a larceny, as within the body of a county, not as a piracy on the high seas. As to state rights, 6 Dane, Abr. 359, § 18. As to the admiralty jurisdiction, Id. 356, art. 11, §§ 13–16. The United States have a jurisdiction within the limits of any state or over offences committed within the body of any county of a state, only on the subjects specially mentioned in the constitution. The acts of congress contemplate no piracy unless it is committed on the high seas, or on board of some public vessel, or a vessel owned by citizens of the United States. The words "any person" and "any vessel" are used in every section of the act of 1790,—section 2, treason; section 18, perjury; section 20, bribery. Palmer's Case, 3 Wheat. [16 U. S.] 610; U. S. v. Howard [Case No. 15,404]; 7 Dane, Abr. 93, § 11, 92, 9; Vatt. Law Nat. bk. 1, c. 23, §§ 281, 289; Id. bk. 2. c. 8. Defendant by enrolling himself as one of the crew of the vessel submitted himself to the laws of France regulating its commerce. The act of 1825 was intended to meet the decision in Wiltberger's Case [5 Wheat. (18 U. S.) 76]. If congress had intended to change the law as given in Palmer's Case by the supreme court, they would have been equally clear and explicit in doing it. The Pirates, 5 Wheat. [18 U. S.] 186, 195. Judge Johnson says, that Palmer's Case covers the case of an American as well as a foreigner on board a foreign vessel. Holmes's Case, 5 Wheat. [18 U. S.] 416. As to citizenship of defendant, 1 Caines, 59; Coxe, Dig. 432, § 224. If defendant has committed any offence it is against the law of France. Such cannot be punished here. Chief Justice Tilghman so decided in the case of a murder committed in Ireland. As to the facts, the evidence is insufficient for a connected conviction. U. S. v. Ross [Case No. 16,196]; U. S. v. Vogle, 2 Dall. [2 U. S.] 347; Phil. Ev. 79.

Mr. Dallas replied: The acts of April, 1790, of March, 1819, and May, 1820, were passed to meet the decision in Howard's Case [supra], which, for the first time, denied the jurisdiction of the courts of the United States of a general piracy. There are no words in the act of 1820 to restrict the construction as in the act of 1790. Why enact the law of 1820, if it is the same with that of 1790? There has been no decision on the law of 1820; it is now to be decided for the first time. Replies to Mr. Brewster's observation on the facts and evidence of the case.

The court adjourned.

HOPKINSON, District Judge (charging jury). It is a matter of much anxiety and regret to me, and I doubt not to you, that we are deprived of the aid of the learning and experience of the presiding judge of this court,

in the trial of this cause; and if any arrangement could have been made by which the numerous and important questions of law that have been agitated, could have been reserved for his opinion, and, if necessary, carried to the supreme court, it would have been very agreeable to me. But the same law which authorizes a single judge to hold this court, makes it his duty to do so whenever required. The defendant has put himself on his trial before us, and he has a right to your judgment and mine on his whole case. Our course is a plain one. We must render that judgment honestly and fearlessly, according to our own consciences and true opinion; and, doing this, we shall be acquitted of any wrong, even if we fall into error, and stand justified to ourselves and our country.

In the indictment now submitted to you, Henry Kessler, the prisoner at the bar, stands charged with four distinct offences; and your verdict, governed by the evidence and law of the case, will decide whether he is guilty or innocent of all or any of them. It is put beyond all doubt that a fearful crime has been committed, which, indeed, has seldom been exceeded in deep malignity and reckless cruelty. It is our duty, nevertheless, to inquire, with a deliberate and just impartiality, whether the defendant was an actor in the bloody scene, what part he took in it, and whether we have a warrant and authority to bring him to an account for it. The first inquiry will be determined by the evidence you have heard; and the second, by the law of the land, to which we all owe an implicit obedience.

The indictment contains four counts: The first, in substance, charges that the prisoner, upon the high seas, with certain persons unknown, on board of a brig or vessel called L'Eclair, made an assault upon the master of the said brig, put him in fear, and robbed him of certain goods and moneys belonging to him. The second count charges the robbery to have been of the goods, effects, and moneys of persons unknown, and committed within a marine league of the coast of the United States. The third charges the prisoner with piratically and feloniously running away with the said brig, and with certain goods, moneys, and effects belonging to persons unknown. The fourth and last count charges the running away with the vessel and the stealing of the goods to have been done within a marine league of the coast of the United States.

It appears that in November last (1828), the brig L'Eclair was in the port of Philadelphia, when the defendant, with five other persons, shipped on board of her as mariners. There were besides on board, the captain, a mate, and a young Frenchman. The vessel sailed from Philadelphia for Goree, in Africa, where she arrived, and remained about a month. She sailed from Goree to Cayenne, and arrived safely there; and remained there about six weeks. At this place the mate, who sailed with her from Philadelphia left her and another was taken in his place: but all the other persons who went out in her, were on board when she sailed from Cayenne. For the occurrences that happened after the vessel left Cayenne, including the horrible transactions which have brought the prisoner to the bar, we are compelled to rely on the testimony of John Battiste who was cook and steward of the brig, and is the only witness produced to give an account of them.

Before I call your attention to the circumstances and facts testified by this witness, it will be well to explain to you the rules of law by which his credibility may be tested. John Battiste was on board the brig when the enormities were committed; he received, by fear and compulsion, as he says, a part of the plunder; he made no discovery of the crime on his arrival in the United States, but appropriated the money he had received to his own use, telling a falsehood as to the manner in which he had obtained it; and disclosing what he now has sworn to be the truth, only on being arrested and charged with the crime. Still we are hardly authorized to say he is an accomplice; he has made no such confession, nor is he charged as such in the bill before us. If, however, his evidence is to be considered as that of an accomplice, which is putting it in its worst light, it does not follow that it is to be disbelieved. The law, founded not only on good policy but on good sense also, admits such evidence to be competent, and then endeavours by certain wholesome and reasonable restrictions to guard the innocent from injury from witnesses in such suspicious circumstances. It is certainly true that when a witness is admitted to be competent, his credibility rests entirely with the jury, who may therefore convict upon the testimony of an accomplice, though unsupported by any other proof, and if they conscientiously believe him, it is their duty to do so. This, however is seldom the case; and it is usual for the court to advise a jury not to regard the evidence of an accomplice unless he is confirmed in some parts of his evidence by unimpeachable testimony. But you are not to understand by this that he is to be believed only in such parts as are thus confirmed, which would be, virtually, to exclude him, inasmuch as the confirmatory evidence proves of itself those parts it applies to. If he is confirmed in material parts, he may be credited in others; and the jury will decide how far they will believe a witness, from the confirmation he receives by other evidence; from the nature, probability and consistency of his story; from his manner of delivering it, and the ordinary circumstances which impress the mind with its truth.

The credit which shall be given to the evidence of John Battiste, is unquestionably of primary importance in the decision of this cause. It is from him only we have the details of the awful crimes which sacrificed three unoffending victims to avarice and cru-

elty, and of the part taken by the several actors in this bloody tragedy. He avers his ignorance of this conspiracy, he denies any participation in it, and pretends that his acquiescence was owing to menaces and fear of his own life. On the other hand, we find him receiving, reluctantly, he says, his share of the plunder; coming off from the vessel in apparent good fellowship with the murderers and robbers. He comes with them all to Brooklyn, a considerable town, opposite to New York; he goes into that city with the present prisoner; he comes on to Philadelphia, and proceeds to Cape May, the place of his residence, never giving the slightest hint of the crimes he had seen committed, nor taking a step to have the offenders brought to justice. On the contrary, he sits himself down quietly to enjoy his portion of the plunder; he buys land, and makes other purchases with the money, and in short appropriated it to his own use, as if it were honestly his own. In addition to this, he told a falsehood to those who inquired how he obtained so much wealth, saying he got it from his sister in the West Indies. All this weighs heavily upon him; and for the part he really took in the murder and robbery, if he took more than he has avowed, he must answer not only to the justice of this country, but to a more awful tribunal hereafter. Notwithstanding all this, he may have told the truth to you, and under circumstances and with corroborations which will entitle him to belief. At most, the circumstances I have alluded to against him, only prove him to have been a full accomplice in the crime; but it is often only from such witnesses, and sometimes the worst, that great crimes are discovered and punished. How, then, is this witness corroborated by other unimpeachable evidence? His account of the men on board; the manner and place of their shipping; of the voyage, cargo, and other facts less important, all appear to be strictly correct. He is further confirmed by an overwhelming fact in this business. This brig sailed from Cayenne in March last; and from that time we have heard nothing of her except from John Battiste. Had she perished at sea, with all her crew, we should not see Battiste and Kessler here. If the vessel was lost and the men saved, it would have been easy for the defendant to have given some proof of the fact. But none has been attempted. The vessel is gone, and the men are here. Again; a pair of pantaloons, sworn to belong to the captain, not only by Battiste, but by two most respectable witnesses, are traced to the possession of the defendant; and he was bold and callous enough to wear them as his own. Add to these the money he had, in considerable quantities, consisting of peculiar foreign coins, the same as those plundered from the vessel; and last of all, his admission that he helped to throw the captain overboard, and that in this Battiste had told the truth. Assuredly these are corroborations of a strong character of the evidence of John Battiste; and the more so, as the prisoner has not attempted, by a particle of evidence, to repel or explain any of these circumstances, nor to contradict any part of Battiste's evidence.

With these remarks, the evidence of J. Battiste is left to the jury; and they will judge of it as it has or has not produced belief on their minds. You are to be reasonably satisfied of its truth, before you will found your verdict upon it; and you will make up your opinion on all you have seen and heard in the course of this trial. If, then, you shall believe that the prisoner took the part attributed to him in the transactions of the 4th March, 1829,—a day, he said, he should never forget,—it cannot be questioned that he is a principal in the crime, although he did not strike any of the mortal blows; he was present, aiding and abetting the actual murderers; and you may presume, from the manner in which he rendered his assistance, and his whole deportment at the time of the murder and subsequent to it, that he was a party to the whole conspiracy and design. If, indeed, he acted under terrifying menaces, and a real and well grounded fear of his life had he refused, he will stand excused, but his peril should be violent and clearly proved.

The matter of fact being left entirely to you upon the whole evidence, some important and highly interesting questions of law have been argued in this case, on which it was the duty of the court to give an explicit opinion. It is alleged on the part of the defendant, that there is no proof that he is a citizen of the United States, and that it is in full proof that the brig on board of which the crimes charged in the indictment were committed, was a foreign vessel; that she was wholly owned by French subjects, and was at the time sailing under the French flag. It is then said, that the case presented to you is one in which a foreigner has committed an offence on board of a foreign vessel, and that such a case is not cognizable by the courts of the United States—and so is the law. This argument or inference is founded on the assumption of two facts, which must be settled by you before you receive the conclusion: First, is Henry Kessler a citizen of the United States? This you will decide by the evidence. It appears to me to be hardly susceptible of a doubt. You have had an account of his father residing in New Jersey, since he (the father) was seven years old; of his grandfather living there; of his father and grandmother still living there; of an aunt residing in this city; and no intimation that they had ever been out of this country. Not one of these persons has he produced upon the subject of his birth and citizenship. Such circumstances at least throw the burthen of proof upon him, or leave him to the conclusion every one will drawn from them. The next question of fact is, was the brig

L'Eclair a foreign vessel, belonging exclusively to French owners and sailing under the French flag? You will remember the evidence on this point; it was clear and uncontradicted in proving that she was altogether owned by French subjects, and sailed under the flag of France; and indeed this fact is conceded by the district attorney. If such shall be your understanding of these two facts, then the case is not that of a foreign subject committing an offence on board of a foreign vessel, but of a citizen of the United States committing an offence on board of a foreign ship. The question of law here presents itself—is this an offence under the acts of congress of the United States, and has this court jurisdiction to try and punish the offence? Happily it is not a new question, but has more than once passed under the solemn consideration of the supreme judicial tribunal of our country. The difficulties and doubts, therefore, in which it may once have been involved, are removed by an authority of the highest respectability in itself, and which this, as a subordinate court, is bound to obey.

The first, and as it has been truly called, the leading adjudication on the interesting question now before us, was made in Palmer's Case, reported in 3 Wheat. [16 U. S.] 610. This case came to the supreme court, certified from the circuit court of Massachusetts, where certain questions occurred upon which the opinions of the judges of the circuit court were opposed. Eleven questions were in this manner brought up to the supreme court, where they were argued with much care, and solemnly decided. The third and fourth questions only are material to our purpose. The third is, whether the crime of robbery committed by persons who are not citizens of the United States, on the high seas, on board of any ship or vessel, belonging exclusively to the subjects of any foreign state or sovereignty, or upon the person of any subject of any foreign state or sovereignty not on board of any ship or vessel belonging to any citizen or citizens of the United States, be a robbery or piracy within the true intent and meaning of the eighth section of the act of congress of the 30th April, 1790, and of which the circuit court of the United States hath cognizance to hear. try, determine and punish the same. It will be perceived that this question embraces that before this court, on the supposition that the defendant is not a citizen of the United States.

The next question equally embraces it, on the supposition that he is a citizen of the United States. It is as follows: whether the crime of robbery committed on the high seas by citizens of the United States on board of any ship or vessel not belonging to the United States, or to any citizens of the United States, in whole or in part, but owned by, and exclusively belonging to, the subjects of a foreign state or sovereignty; or committed on the high seas, on the person of any subject of any foreign state or sovereignty, who is not at the time on board of any ship or vessel belonging in whole or part to the United States, or to any citizen thereof, be robbery or piracy within the said eighth section of the act of congress aforesaid, and of which the circuit court of the United States hath cognizance to hear, try, determine and punish the same.

Nothing can be more distinct and unequivocal than the terms in which these questions are propounded, and they so clearly describe the case of the defendant, be he a citizen or an alien, that the answer given to them by the court must decide his case, so far as it depends upon the acts of congress referred to. The opinion of the courts on these questions was delivered by the chief justice in his accustomed luminous and exact manner. He says: "The question whether this act extends further than to American citizens, or to persons on board American vessels, or to offences committed against the citizens of the United States, is not without its difficulties." He then remarks upon the universality of the words of the section, which are of unlimited extent: " 'Any person or persons' are broad enough to comprehend every human being." The chief justice then goes into a clear, rational and satisfactory argument to show from various parts of the act the inconveniences and the absurdities that would follow the adoption of the full and literal meaning of the words used; that some limitation must be put to them, and was intended by the legislature. He concludes: "The court is of opinion that the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, or persons within a vessel belonging exclusively to subjects of a foreign state, is not a piracy within the true intent and meaning of the act for the punishment of certain crimes against the United States." The certificate of the court conforms to this opinion; and was transmitted to the circuit court of Massachusetts as the settled law of our country. This judgment was rendered on the 14th of March, 1818. In the April following, an indictment came on to be tried in this district, in which it became necessary for Judge Washington to refer to the law of Palmer's Case [supra], and declare what had been settled by it. He says, the question arose whether robbery on the high seas committed on board a foreign vessel amounted to piracy, within the true intent and meaning of the eighth section, and was cognizable by the courts of the United States. He repeats that the general and unqualified expressions of the section would cover such a case, but says: "Upon the whole it was decided that a robbery committed by any person on the high seas, on board of a ship belonging exclusively to a foreign state, or to the subjects thereof, or upon the person of a foreign state, in a vessel belonging exclusively to subjects of a foreign state, is not

piracy within the true intent and meaning of the eighth section of that law." He adds: "Although the offence of robbery is the only one stated in this decision, yet there can be no doubt but that all the other acts of piracy enumerated in the section are included in the same principle." In another part of this opinion the learned judge says of Palmer's Case: "That case decides that the act of piracy must be committed on board of an American vessel." U. S. v. Howard [Case No. 15,404].

Two years afterwards this question came again under the notice of the supreme court, in the case of U. S. v. Klintock, 5 Wheat. [18 U. S.] 144. The indictment charged the defendant, a citizen of the United States, with piracy committed on the high seas, in a vessel belonging to persons unknown. The facts were, that the defendant was a citizen of the United States, and the vessel was owned without the United States. The defendant was found guilty generally: his counsel moved in arrest of judgment on various grounds, one of which was, that the act of 30th of April, 1790, does not extend to an American citizen entering on board of a foreign vessel, committing piracy upon a vessel exclusively owned by foreigners. The opinion given in Palmer's Case was here reviewed, and if any mistake or misconception had occurred in it, it would now have been corrected. The opinion of the court is again delivered by the chief justice, and he intends to explain, more clearly, if possible, the meaning of the court in Palmer's Case. He says the opinion and certificate given in that case, apply exclusively to a robbery or murder committed by a person on board of any ship or vessel belonging exclusively to subjects of a foreign government. To amplify the import of these words, the court say, that to bring the person committing the murder or robbery within them, the vessel on board which he is, or to which he belongs, must be at the time in point of fact, as well as right, the property of the subjects of a foreign state, who must have at the time, in virtue of this property, the control of the vessel: she must at the time be sailing under the flag of a foreign state, whose authority is acknowledged. "This," says the chief justice, "is the case which was decided; we are satisfied that it was properly decided."

At the same session of the supreme court the case of U. S. v. Holmes and others was decided, and the opinion of the court delivered by Judge Washington. [5 Wheat. (18 U. S.) 412.] Various questions are here submitted for the judgment of the court. The Case of Klintock is referred to as the settled law, and the judge says: "It makes no difference whether the offender be a citizen or not. If it be committed on board of a foreign vessel by a citizen of the United States, or on board of a vessel belonging to the United States by a foreigner, the offender is to be considered pro hac vice, and in respect to this subject, as belonging to the nation under whose flag he sails." That is, the national character of the offender is nothing; the jurisdiction is decided by the character of the vessel.

But an act of congress was passed on the 3d of March, 1819, which appears to me to have an important bearing on this question. It will be recollected that the decision of Palmer's Case took place in March, 1818. After which, and the decision in Howard's Case, which occurred in the April following, and in these points is substantially the same with Palmer's, the courts of the United States had cognizance of piracies, only (1) when committed on board of American vessels; (2) when committed by persons on board of a vessel not belonging to any foreign power, but in the possession of men acknowledging obedience to no government or flag whatsoever; but our courts had not cognizance of piracies as "defined by the law of nations," which is robbery committed on the high seas; forcibly and feloniously seizing, taking and stealing a vessel from her master, with the goods on board; and other acts of the same description, without any regard to the national character of the vessel. To supply this defect in the law of 1790, or rather to try whether it was a defect or not, the fifth section of the act of March, 1819, was enacted.

When congress passed this act, it must be presumed, and was doubtless the fact, they had the opinion of the supreme court in their view, by which the offence of piracy had been restricted as we have seen. By the fifth section of this act of March 1819, it is enacted: "That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the laws of nations, and such offender or offenders shall, afterwards be brought into, or found within the United States, such offender or offenders shall, upon conviction thereof, before the circuit court of the United States, for the district into which he or they may be brought, or in which he or they shall be found, be punished with death."

Here then was an act enlarging the jurisdiction of the courts of the United States in the punishment of piracies greatly beyond the limits assigned to it by the supreme court, in their construction of the act of April, 1790; and if the fifth section of the act of 1819 were now in force, it cannot be doubted it would cover the offence charged upon the present defendant, for assuredly the crimes committed on board the brig L'Eclair, amounted to piracy under the laws of nations. Congress, however, had felt the force of the reasoning of the court in Palmer's Case; and may have doubted the policy or propriety of extending their penal law beyond their own vessels, leaving it to other nations to do the same with theirs; and therefore declared, that this act should be in force only until the end of the next session of

congress; and what did they do after making this experiment for one year? They continued, by the act of 15th May, 1820, all the sections of the act of 1819 for another term, except this fifth section which was suffered to expire; and the third section of the act of May, 1820, was enacted, under which some of the counts of this indictment have been drawn and presented. In this third section it will be found that congress have gone back, in their description of piracy, to the use of the general expressions, "if any person" shall commit the crime of robbery in or upon "any ship or vessel," employed in the eighth section of the law of April, 1790; well knowing the limited construction the court had put on these words, not only in Palmer's Case, but in Klintock's and Holmes's, both of which were decided before the law of May, 1820, and during the session of congress at which it was passed; and they abandoned the attempt to give their courts jurisdiction of piracies "as defined by the laws of nations." Further to this point: In March, 1825, congress again legislated on the subject of offences committed on board of vessels, without an attempt to correct the error, if it were one, of the supreme court, or to extend the jurisdiction of the court in such cases beyond the limits assigned to them by the supreme court. Indeed they rather recognise the principle, that the character of the vessel, and not of the offender, shall decide the question of jurisdiction.

In the fifth section it is enacted, "that if any offence shall be committed on board of any ship or vessel belonging to any citizen or citizens of the United States, while lying in a port or place within the jurisdiction of any foreign state or sovereign, by any person belonging to the company of the said ship," the offence shall be cognisable and punishable by the circuit court of the United States. We see here that neither the national character of the offender, nor the territorial jurisdiction of the place where the offence is committed, is regarded, but solely the national character of the vessel to which the offender belongs, and on board of which the offence is committed. It is also worthy of notice that two of the sections of this act, the fourth and fifth, are introduced to meet two defects in the existing law which had been detected by judicial examination. If then the supreme court, by the principle they have adopted, have subjected us to danger and opprobrium, by making our country a refuge for abandoned criminals, it cannot be denied that the congress of the United States must participate in this reproach, for not correcting the law, when they have the power to do it; or rather for giving those principles an acquiescence, if not a direct approval.

It has been argued by the district attorney, that if the law of 1820 is the same with that of 1790, why enact it at all? Why not leave the subject to the provisions already in full force? It is an obvious defect in this argument that it takes broader premises than belong to our question. These laws may be the same in the particulars material to the point we are to decide, that is, the true signification of certain forms of expression, but may differ in other matters. We now only speak of the eighth section of the first act, and the third section of the last, which relate to piracy, for in other respects the laws embrace wholly different subjects of criminal legislation. These two sections do not differ in the phrases on which the construction of the supreme court was passed; and it would introduce a strange and intolerable confusion and incongruity in the administration of justice, if the same words were admitted to have one meaning in the first act, and another in the second, both legislating on the same subject. If a man indicted for piracy under the law of 1790, could not be convicted if the offence were committed on board of a foreign vessel, he might be convicted and capitally punished for the same act, committed in the same circumstances, if indicted under the law of 1820. Nay, what would be done when, as in the present case, some of the counts are founded on one of these acts, and some on the other? It may be remarked, that in the last act the reference to offences punished with death, if committed in the body of a country is omitted; and other differences will be found between the two sections. What effect these differences will have upon the law of 1790, on the points in which they occur, we need not now inquire. On this question of construction of the general words in the law of 1790, it is not amiss to remark, that it is distinctly admitted that if in this case all was foreign, the offender as well as the flag, the prosecution would fall. But the words of the act, in their full and literal meaning, as a common reader would understand them, would certainly embrace such a case; so that the only difference between the supreme court and the district attorney is, that they draw their limits rather closer than he is now willing to do. They differ in the measure, not in the principle; both find it necessary to narrow the broad import of the terms of the act, but they would do so in different degrees and by a different scale.

To pursue the intention and meaning of the third section of the law of 1820 a little closer, let us bring its operative descriptive words, and those used in the eighth section of the act of 1790 together, and on a comparison see whether we can be allowed to say that by one of them it was intended to describe an offence committed only on board of an American vessel, and by the other to describe an offence committed on board of any vessel, American or foreign. By the act of 1790, if any person commit upon the high seas, &c. murder or robbery, or if any captain or mariner of any ship or vessel shall

piratically run away with such vessel, or any goods, &c., every such offender shall be deemed and adjudged a pirate. By the act of 1820, if any person shall upon the high seas commit the crime of robbery in or upon any ship or vessel, or the lading thereof, such person shall be adjudged a pirate. The description in the first act is rather more general than in the second, using the words of the definition of piracy by the laws of nations, that is, robbing on the high seas, referring to no vessel of any description. The supreme court had decided that congress had a right to define piracy, as they had done in the law of 1819, by a reference to the laws of nations, that is "as defined by the laws of nations." We cannot therefore presume that they dropped this definition in 1820, from a doubt of its propriety, and that they intended to cover exactly the same ground by the terms "shall commit the crime of robbery on the high seas," especially as the same court had solemnly adjudged that these terms were not so comprehensive. If they had so intended, they would have said so explicitly, knowing that the court had decided that such expressions would not reach a robbery committed by a citizen or foreigner on board of a foreign vessel, although such would be piracy by the laws of nations, and was included in the definition adopted in the act of 1819. Had it been the intention of the legislature to retain in the act of 1820, as they have done, the words descriptive of the offences which they had used in 1790, but to repudiate the restricted construction put upon them, it would have been easily done by adding to the words "ship or vessel" whether belonging to an American citizen or not.

We cannot overlook that the act of 1790 makes the commission of murder or robbery on the high seas, piracy, punishable by that act. The law of 1820 speaks of robbery only, omitting murder. It follows, that if the description of the offence in the latter act is to have the larger construction contended for, while the former remains subject to the restriction imposed upon it, our courts will have cognizance to try and punish a robbery committed by an American citizen on board of a foreign ship, but not a murder. Can any reason be assigned why congress should make this distinction? We may readily imagine good cause, founded not only on national policy but on strict justice, why congress should finally determine to leave the law as the supreme court had pronounced it; and to decline the trial and punishment of crimes committed in a foreign vessel, that is, within and under a foreign jurisdiction. If we adopt the broad construction of the law of 1820 which its terms import, we must try and punish not only an American citizen, but a foreigner also, for offences committed on sea in a foreign vessel. It is easy to see that this might get us into difficulties with other nations, who may not choose that we should hang their subjects by the mode of trial and sentence of our tribunals, for offences on board their own ships under their authority and protection. They may choose to be themselves the judges of the guilt of the accused, and of the measure of the punishment. On the other hand, how might our proceeding affect our own citizens? Take the case before you: suppose this defendant, after a full and fair trial, should convince this jury of his entire innocence and be by them acquitted. He would, on a fundamental principle of our criminal law, think himself out of jeopardy and absolved from all further responsibility on this account. Under this belief he goes to France, with or without his means of defence; he is there arrested and brought to trial. Would the courts of that country pay any regard to your judgment in relation to a crime committed in one of their vessels on the person and property of their subjects, and more especially if the offender also was one of their subjects? Questions and difficulties of this sort are avoided by confining our cognizance of offences on the high seas to our own ships, leaving other nations to take care of their own.

On this part of the case it is my opinion that those counts of this indictment which are founded on the act of the 30th of April, 1790, fall directly under the decisions of the supreme court giving a construction to that act; and therefore, if you shall believe, as is indeed conceded by the district attorney, that the offences charged in these counts were committed on board of a vessel belonging exclusively to subjects of a foreign state, sailing under the flag of a foreign state, whose authority is acknowledged, it is not piracy within the true intent and meaning of that act, and this court hath no cognizance to hear, try, determine and punish the same. As to the counts which are founded on the act of May, 1820, it is my opinion that the general descriptive terms of the offence used in this act, must be taken and understood with the same limitations given by the supreme court to the same or similar expressions in the act of April, 1790; and therefore, that if the offences charged in these counts were committed on board of a vessel belonging exclusively to subjects of a foreign state, whose authority is acknowledged, it is not piracy within the true intent and meaning of the act of May, 1820, and this court hath no cognizance to hear, try, determine and punish the same.

The district attorney has made another effort to get this case within the jurisdiction of the courts of the United States; and we must agree that any effort to bring such atrocities to punishment is commendable. The second count of the indictment lays the piratical and felonious stealing of the goods, moneys, &c. from and out of the brig L'Eclair, to have been done within a marine league of the coast of the United States; and

the fourth charges that the defendant, with other persons, within a marine league of the coast of the United States, piratically did run away with the said brig, and with certain goods, moneys and effects, &c. The first step to warrant a conviction on these counts is to establish the facts asserted in them, that is, that the offences charged were actually committed within a marine league of the coast of the United States; and this it is incumbent upon the prosecution to show. The point of time taken by the district attorney is that when the brig was scuttled and abandoned by the crew, taking with them their plunder. Was she at that period within a marine league of our coast? The only witness who testifies upon this subject is John Battiste, who said, on his first examination that it was about three miles from the shore, or it might be more. He afterwards said it was about three miles, which may mean more or less; and finally declared he knew nothing about it from his own observation or knowledge, but spoke only from having heard John Mansfield say, they were about three miles from the shore. What light is given to this part of the case, by the accounts, detailed in a very confused way to my mind, of the direction in which the brig sailed off and on along the coast for several hours before she was left, you may be able to discover. It appears to me to be altogether imperfect and unsatisfactory. But admitting that the brig was within the marine league of our coast, when she was scuttled, does that maintain the charge, to wit, that the moneys and effects were piratically stolen; or that the moneys and effects were piratically run away with. It does not appear so to the court. The goods were stolen when they were taken into the possession of the robbers, and divided between them on the 4th of March, more than a month before they came on our coast. The vessel was run away with at the same time, when she was taken out of the possession of her lawful officers, and her course changed from that she was pursuing. All this was fully accomplished long before she approached our coast. The crime was complete, and nothing was done to add to it, after the arrival at the American shore. I cannot agree to the argument of the district attorney, that jurisdiction is given by bringing the stolen property within the territorial limits of the United States. This is the law as between two counties of the same state, but has been held not prevail in the case of stolen property brought from one of the United States to another.

It is my duty to go on one step further on this subject; you will remark that this point becomes important to the prosecution only on account of the foreign ownership of this brig. Had she been American, then the crime being committed on the high seas it would have been immaterial whether it was within or without the marine league of the coast, either of this or any other country; but it is argued, that although we may not have jurisdiction of an offence committed on the high seas on board of a foreign vessel at a greater distance than three miles from the shore, yet if it be within that distance we obtain a right to try and punish it. I am not of this opinion. The jurisdiction of this court is derived wholly from the acts of congress on this subject. The description of the place to which or over which it extends is the high seas. If then the space within the marine league is not comprehended within this description, this court has no jurisdiction over it; if it be comprehended, as it certainly is, then it is so because it is a part of the high seas, in all respects, and to all purposes the same as any other part of the high seas. Nothing is added to the jurisdiction of the courts of the United States by reason of the offence having been committed within this distance of their coast; nothing is taken from it by reason of its having been committed within the jurisdictional limits of a foreign government, within a marine league of the shore, if done on the high seas, which are held to be any waters on the sea coast, without the boundaries of low water mark. It follows from these principles that if this court has no power under the act of congress to try and punish this offence committed on board of a foreign vessel on the ocean, it acquires no such power because she was within a marine league of our coast when the offence was committed. The principle on which nations claim this extension of their authority and jurisdictional rights for a certain distance beyond their shores, is to protect their safety, peace and honour from invasion, disturbance and insult. They will not have their strand made a theatre of violence and bloodshed by contending belligerents. Some distance must be assumed. It varies by different jurists from one league to thirty; and again, as far as a cannon will carry a ball. Such limits may be well enough for their object, but would be extraordinary boundaries of the judicial power and jurisdiction of a court of law.

It is my opinion that whether this offence was committed within or without a marine league from the coast of the United States is of no importance to the question of the jurisdiction of this court to hear and determine it. The case, gentlemen, is now left with you to be decided according to your judgment and conscience on the fact and the law. I have given you distinctly, I hope, my opinion of the law of the case, and such observations upon the most prominent facts as I have supposed may be of some service to you in your deliberations on them.

On Saturday morning the jury returned a verdict of "Acquitted for want of jurisdiction."

Case No. 15,528a.

UNITED STATES v. KIE.

[7 West Coast Rep. 6.]

District Court, D. Alaska. May Term, 1885.

INDIAN COUNTRY—ALASKA—OFFENSE AGAINST INDIAN—JURISDICTION OF DISTRICT COURT.

The territory of Alaska is not "Indian country," within the meaning of that term as used in the acts of congress; and, consequently, the district court of the district of Alaska has jurisdiction to try an Indian for an offense committed by him against another Indian in such territory, prior to the act of March 3, 1885 [23 Stat. 385].

Motion to discharge the defendant.

McALLISTER, District Judge. A motion has been made for the discharge of the prisoner, on the ground that the evidence before the court shows that the crime was committed by an Indian on the person of another Indian in the territory of Alaska; and it is claimed by counsel for the prisoner that Alaska is Indian country, and that this court has no jurisdiction over an offense committed by an Indian against another Indian in "Indian country." As the crime charged in the indictment was committed, as is alleged, in September, 1884, the recent act of congress, approved March 3, 1885, which act gives to the court jurisdiction over crimes committed by an Indian, against another Indian within any territory of the United States, and within or without an Indian reservation, this late act, not being retroactive, cannot apply to the present case, and the law in regard to "Indian country," as contained in the statutes on the day that this crime is alleged to have been committed, must govern the decision of the question now before the court.

The evidence shows that the prisoner, Charles Kie, is an Indian of the Stickeen tribe, that he is charged with having killed his wife Nancy, an Indian of the Chilcat tribe, at the town of Juneau, within this territory. The question, therefore, which the court is now called upon to decide is whether or not the territory of Alaska is "Indian country." If it is Indian country, then the prisoner, who is an Indian, and stands charged with having committed a crime against the person of another Indian within this territory, is most certainly entitled to the benefit of the law passed by congress in regard to "crimes committed by an Indian against the person or property of another Indian in the 'Indian country.'" And the Revised Statutes, by section 2146, expressly exclude from the jurisdiction of the United States the case of a crime committed in the "Indian country," by one Indian, against the person or property of another Indian, and consequently this court would not have jurisdiction to try the indictment. If, on the other hand, this territory has not been declared by law to be Indian country, and the court should so hold, the law passed by congress for the government of such country would, therefore, not be in force here, and this court, sitting as a territorial district court, and administering the laws of this territory, would appear to have jurisdiction to try the prisoner for the offense with which he stands charged.

The law in regard to "crimes committed in the Indian country by an Indian against another Indian" is, as I read it, as follows: Title 70 of the Revised Statutes relates to crimes against the United States, and in chapter 3, which speaks of crimes arising within the maritime and territorial jurisdiction of the United States, it provides that "every person who commits murder * * * within any fort, arsenal, dock yard, magazine or in any other place or district of country under the exclusive jurisdiction of the United States * * * shall suffer death." Title 28 of the Revised Statutes relates to Indians, and the subtitle of chapter 4 is "Government of Indian Country." It includes many provisions regulating the subject of intercourse and trade with the Indians in Indian country, and imposes penalties and punishment for various violations of them. Section 2142 provides for punishment of assaults, with deadly weapons and intent, by Indians upon white persons, and by white persons upon Indians; section 2143 for the case of arson, in like cases; and section 2144 provides that "the general laws of the United States defining and prescribing punishments for forgery and depredations upon the mails shall extend to the Indian country." The next two sections are as follows:

"Sec. 2145. Except as to crimes, the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

"Sec. 2146. The preceding section shall not be construed to extend to [crimes committed by one Indian against the person or property of another Indian, nor to] any Indian committing an offense in the Indian country who has been punished by the local law of the tribe, or to any case when by treaty stipulations the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

That part of section 2146 placed within brackets was in the act of the 27th of March, 1854, c. 26 (10 Stat. 270), was then omitted by the revisers in the original revision, and restored by the act of the 18th of February, 1875, c. 50 (18 Stat. 318), and now appears in the second edition of the Revised Statutes. It may be assumed, for the purposes of this opinion, that the omission in the original revision was inadvertent, and that the restoration evinces no other intent on the part of congress than that the provision should be considered as in force, without interruption, and not a new enactment of it for any other purpose than to correct the er-

ror of the revision. Section 2145, Rev. St. therefore, extends the general laws of the United States as to the punishment of crimes committed in any place within their sole and exclusive jurisdiction, except the District of Columbia, to the "Indian country." But section 2146 expressly excepts from its operation "crimes committed by one Indian against the person and property of another Indian in the Indian country." Therefore, if the crime with which the prisoner stands charged was committed in the Indian country, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, which laws were extended to the Indian country by section 2145, are not applicable; as section 2146 expressly excepts from its operation the case of a crime committed in the Indian country by one Indian against the person or property of another Indian.

The provisions now contained in sections 2145 and 2146 of the Revised Statutes were first enacted in section 25 of the Indian intercourse act of 1834 (4 Stat. 733). Prior to that, by the act of 1796 [1 Stat. 469], and the act of 1802 [2 Stat. 139], offenses committed by Indians against white persons and by white persons against Indians were specifically enumerated and defined, and those by Indians against each other were left to be dealt with by each tribe for itself, according to its local customs. The policy of the government in that respect has been uniform, as was said by Mr. Justice Miller, delivering the opinion of the court in U. S. v. Joseph, 94 U. S. 614, 617: "The tribes for whom the act of 1834 was made, were those semi-independent tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized state or territory, and, in regard to their domestic government, left to their own rules and traditions, in whom we have recognized the capacity to make treaties, and with whom the government, both state and national, deals, with a few exceptions only, in their national or tribal character, and not as individuals." As I understand the law, as declared by congress, if this territory is "Indian country," this court has no jurisdiction, the prisoner being an Indian and charged with having committed a crime against another Indian in this territory. He therefore comes within the provisions of section 2146, and, if he is punished, it must be by the laws, manners, and customs of his tribe.

But, is the territory of Alaska Indian country? Has it been so declared by law? There are several able opinions on this question by Judge Deady, in Sawyer's Reports. In the first of these cases, the case of U. S. v. Seveloff [Case No. 16,252], that learned judge held that "Alaska was not Indian country, so declared by law; * * * that, because a country is inhabited or owned, in whole or in part, by Indians, that it is not therefore an Indian country; * * * that the act of 1834, the Indian intercourse act, cannot be held to have extended itself or migrated over Alaska upon its cession by Russia to the United States; * * * that, if congress should think it desirable that any provision of the Indian intercourse act should be in force in Alaska, it can so provide beyond doubt." And, in March, 1883, congress did legislate in regard to the matter by amending section 1 of the Alaska act of July 27, 1868 (15 Stat. 240), by the act of March 3, 1873 (7 Stat. 530), so as to extend over the territory of Alaska sections 20 and 21 of the intercourse act of 1834; and the territory, so far as the introduction and disposition of spirituous liquor is concerned, became what is known as "Indian country." In the case of Water v. Campbell [Case No. 17,264], decided in 1876, the same learned judge held that Alaska was not "Indian country," in the technical sense of that term, any further than congress has made it so, and referred to U. S. v. Seveloff [supra], and In re Carr [Case No. 2,432]. Again, in the case of U. S. v. Stephens [12 Fed. 52], which was decided in 1882, the court refers to it from decisions to the effect that Alaska is not "Indian country," except in so far as sections 20 and 21 of the intercourse act of 1834 have made it so. If, therefore, this territory is "Indian country," it must be because congress has so declared it; but I do not find that congress has, in the various laws passed for the government of this country, anywhere declared Alaska "Indian country." On the contrary, congress, by amending the Alaska act of 1868 by the act of March, 1873, and making two sections of the Indian intercourse act of 1834 applicable to Alaska, has so legislated in regard to the matter, that the natural and plain inference and meaning to be gathered from the various statutes is that Alaska is "Indian country" for the purposes of section 20 and 21 of the act of 1834, but is not "Indian country" in any other sense. 14 Op. Attys. Gen. contains, at page 327, a letter from the honorable attorney general to the secretary of war, under date of November 13, 1873. This letter, it will be observed, was written after the two above-mentioned sections had been made applicable by the amendment of March, 1873. The attorney general said, in answer to the direct question "as to whether or not the territory of Alaska was embraced within the term 'Indian country,'" that in his opinion, Alaska is to be regarded as "Indian country" as to this matter, namely, the introducton of sprituous liquors, to which sections 20 and 21 of the act of 1834 apply. Then, in September, 1878, the same question was submitted to the attorney general by the secretary of the treasury (16 Op. Attys. Gen. 141); and the the attorney general, in his answer, says: "In the opinion of my predecessor, dated in 1873, an answer to the inquiry whether the territory of Alaska was embraced within the term 'Indian country,' he holds that, as to the provisions of sections 20 and 21 of the

intercourse act, which were made applicable by the amendment of March, 1873, Alaska is to be regarded as 'Indian country'; but it will be observed that he limits his opinion to these two sections, and does not hold that, in the general use of the term, Alaska is to be treated as 'Indian country,' and be subjected to all the laws which have been made in relation to such country. * * * The provisions of the act of 1834 are not in terms extended over the territory of Alaska. When two sections of the same statute are expressly made applicable to a certain people by extension, it must be inferred that there was no intention, on the part of congress, to extend more than those two sections. Alaska cannot be considered merely as an Indian country. It is inhabited, to a limited extent, by white persons, whose rights, property, and religion, which were guarantied by the treaty between the United States and Russia, should be protected by the United States, and the whole territory cannot be subjected to the rules applied to 'Indian country' until, at least, congress should expressly render it subject to them." The article of the treaty referred to reads as follows: Article 3 of the convention between the United States of America and his majesty the emperor of Russia for the cession of the Russian possession in North America to the United States, concluded at Washington, March 30, 1867, provides that: "The inhabitants of the ceded territory, according to their choice reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of the uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and privileges of citizens of the United States, and shall be maintained and protected in the enjoyment of their liberty, property, and religion. The uncivilized native tribes will be subject to such laws and regulations as the United States may from time to time adopt in regard to aboriginal tribes of that country."

The above authorities certainly are strongly against this being Indian country. The cases referred to in Sawyer's Reports—commencing with U. S. v. Seveloff, decided in 1872, before sections 20 and 24 were made applicable, and extending to 1882, when U. S. v. Stephens was decided—are all to that effect. The opinions of the attorneys general are also directly in point. These authorities hold substantially that Alaska is not "Indian country," because congress has not declared it so; that the act of 1834 did not extend itself, proprio vigore, over Alaska, on its cession to the United States; that, congress having made two sections of the act of 1834 applicable, it must be inferred that there was no intention to extend more than those two sections; that the country is inhabitable by white persons whose rights, property, and religion are guarantied by treaty; that the act of 1834 was a local act, and contained no provision by which it should in the future be extended in any direction.

Counsel for the prisoner rely to a great extent on the case of Ex parte Crow Dog, 109 U. S. 556, at page 561 [3 Sup. Ct. 396], where the court defines "Indian country." This case was decided at the October term of the supreme court, 1883, Mr. Justice Matthews delivering the opinion of the court. The question of jurisdiction was deemed by congress to be of such importance to the prisoner and the public, as to justify a special appropriation for the payment of the expenses incurred on his behalf in presenting the case to the supreme court of the United States. Congress, therefore, on the 3d of March, 1883 (22 Stat. 624), appropriated $1,000 for his defense. The facts are as follows: The prisoner Crow Dog, an Indian of the Sioux tribe, murdered another Indian of the same tribe, called Spotted Tail, on the Indian reservation in Dakota. He was convicted before the First judicial district court of Dakota, and the judgment was affirmed on a writ of error, by the supreme court of the territory. A petition for a writ of habeas corpus was made to the supreme court of the United States, and that court held that the district court of Dakota was without jurisdiction to find or try the indictment against the prisoner, and that the conviction and sentence were void. The court held that the offense was committed in "Indian country," but the argument in support of the jurisdiction of the district court was to the effect that, admitting that the offense was committed in "Indian country," section 2146, Rev. St., was not applicable, because it had been repealed by the operation and legal effect of the treaty with the different tribes of the Sioux Indians, of April, 1868, and an act of congress of February, 1877; but the direct point decided in the case was that "neither the provisions of the treaty with the Sioux Indians, that if bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent, and notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws, nor any other provision in that act, nor the provision in article 8 of the agreement in the act of February, 1877, that they shall be subject to the laws of the United States, nor any other provision in that agreement or act, operated to repeal the provisions of Rev. St. § 2146, which except from the general jurisdiction of courts of the United States over offenses committed in 'Indian country,' crimes committed by one Indian against the person or property of another Indian." Therefore, this case is not a direct au-

thority on the question now before us, as there is also no doubt that, if this is "Indian country," section 2146 is applicable. The Case of Crow Dog is, however, most valuable for its discussion of the question as to what constitutes Indian country. At pages 560 and 561 [109 U. S., and page 396, 3 Sup. Ct.], Mr. Justice Matthews says: "The first section of the Indian intercourse act of June 30, 1834 (4 Stat. 729), defines the 'Indian country' as follows: 'That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purpose of this act, be taken and be deemed to be the Indian country.' Since the passage of that act great changes have taken place by the acquisition of new territory, by the creation of new states, and by the organization of territorial governments; and the Revised Statutes, while retaining the substance of many important provisions of the act of 1834, with amendments and additions since made regulating intercourse with the Indian tribes, has, nevertheless, omitted all definition of what now must be taken to be 'Indian country.' Nevertheless, although the section of the act of 1834, containing the definition of that date has been repealed, it is not to be regarded as if it had never been adopted, but may be referred to in connection with the provisions of its original context, which remain in force, and may be considered, in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country when it is spoken of in the statutes. It is an admitted rule in the interpretation of statutes that clauses which have been repealed may still be considered in construing the provisions that remain in force. This rule was applied in reference to the very question now under consideration in Bates v. Clark, 95 U. S. 204. It was said in that case by Mr. Justice Miller, delivering the opinion of the court, that it follows, from this, that all the country described by the act of 1834 as 'Indian country,' remains Indian country as long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of congress. In our opinion, that definition now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been acquired since the passage of the act of 1834, and notwithstanding the formal definition in that act has been dropped from the statutes, excluding, however, any territory embraced within the extreme geographical limits of a state, not excepted from its jurisdiction by a treaty or by statute, at the time of its admission into the Union, but saving, even in respect to territory not thus excepted, and actually in the exclusive occupancy of Indians, the authority of congress over it under the constitutional powers to regulate commerce with the Indian tribes, and under any treaty made in pursuance of it. U. S. v. McBratney, 104 U. S. 621. This definition, though not now expressed in the Revised Statutes, is implied in all those provisions, most of which were originally connected with it when first enacted, and which still refer to it. It would be otherwise impossible to explain these references, or give effect to many of the most important provisions of existing legislation for the government of 'Indian country.'"

Now, does the above description of what constitutes Indian country, enlarge or extend the original description in the act of 1834? When the court refers to the act of 1834, resurrects it, as it were, it certainly is for the purpose of showing what was "Indian country," as described by that act. The Revised Statutes have omitted all definition of what must now be taken to be "Indian country." The court, therefore, refers back to the first section of the act of 1834. and the description therein contained. The court also refers to Mr. Justice Miller's definition in Bates v. Clark, 95 U. S. 204, as follows: "All the country described by the act of 1834, remains Indian country, so long as the Indians retain their original title to the soil, and ceases to be Indian country, whenever they lose that title, in the absence of any different provision by treaty or by act of congress." And the court then say: "In our opinion, the above definition applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been acquired since the passage of the act of 1834 and notwithstanding the formal definition in that act has been dropped from the statutes." This second definition by the court, in which they adopt Justice Miller's definition as the foundation, would possibly seem, from its language, to extend the description of "Indian country," contained in the act of 1834; but it will be observed, on careful reading, that it does not go further than Justice Miller's definition, and his definition is expressly limited to the country described in the act of 1834. Therefore, if Alaska was embraced within the description of "Indian country," as contained in the act of 1834, and if the definition of what is now to be considered "Indian country" in Ex parte Crow Dog, is limited to the description in the act of 1834,—if this is so, then the Case of Crow Dog is to be considered rather as an authority against Alaska being "Indian country." It will be remembered that the case of U. S. v. Seveloff [Case No. 16,252] is a direct authority to the effect

that the act of 1834 defining the limits of the "Indian country" was not extended over Alaska.

Counsel for the prisoner also refer to the remarks of Mr. Justice Matthews in Ex parte Crow Dog, 109 U. S. 57 [3 Sup. Ct. 396], where the learned judge, speaking of the injustice of making Indians amenable to our laws, says: "It is a case where the law is sought to be extended over aliens and strangers, over the members of a community separated by race, by tradition, by the instincts of a free, though savage, life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others, and not for them; which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the tradition of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge, by the maxims of the white man's morality."

The above remarks are, no doubt, deserving of most careful consideration, and they apply with equal force to the case now before us. It no doubt has been the policy of the government to leave an Indian, who commits a crime against another Indian, to be punished by the laws, manners, and customs of his tribe. The remarks of Justice Matthews certainly should receive all the consideration that counsel claim for them, but they cannot change the law; and, however great a hardship it may be to put this prisoner on his trial, and try him, as Justice Matthews remarks, "not by his peers, nor by the customs of his people, nor the law of his land, but according to the law of a social state of which he can have but an imperfect conception, and which is opposed to the traditions of his history, and to the strongest prejudices of his savage nature;" however great a hardship this may be,—the remedy is with the lawmaking power. It is the duty of this court to administer the law as it is laid down. Prior to 1873, when congress amended the Alaska act of 1868, a law was greatly needed in regard to the introduction of spirituous liquors. The district court of Oregon had held that this territory was not "Indian country," and that the law prohibiting the introduction of liquor in such country was not in force here. The court further said: "If congress desires that this or any other provision of the intercourse act should be in force in Alaska, it can so provide beyond doubt." And congress did so provide the next year, by making this territory "Indian country," as far as the introduction of liquor was concerned. In the case now before us, if congress think proper, they can extend the first section of the intercourse act of 1834 over Alaska, as they have already extended sections 20 and 21 of that act, and by so doing make this "Indian country," and thus extend over the Indians—the "uncivilized native tribes," as they are spoken of in the treaty—the provisions of section 2146, which excepts them from the jurisdiction of our laws, as far as crimes against each other are concerned.

It has been strongly urged in the argument that, if there is any doubt in regard to this question, the court should decline jurisdiction, and counsel refer to Mr. Justice Matthews' language, where he says, speaking of the territorial district court of Dakota, and of the advisability of holding that territory to be "Indian country": "The nature and circumstances of this case strongly reinforce this rule of interpretation. It is a case involving the judgment of a court of special and limited jurisdiction, not to be assumed without clear warrant of law. It is a case of life and death. It is a case where, against an express exception in the law itself, that law, by argument and inference only, is sought to be extended over aliens and strangers." It is also urged on the court that the remarks of Justice Matthews, when he speaks of what is now to be considered as "Indian country," should control the decision of this court. In my judgment, the Case of Crow Dog [supra], and the case at bar are not parallel cases. The remarks of Justice Matthews, when he speaks of "Indian country," are most general, while, on the other hand, as I have before stated, there are four decisions of the United States district court of Oregon, in which that most learned and able judge distinctly holds that Alaska is not "Indian country." Therefore, as far as this court is controlled in the decision of this question by decided cases, those decisions of Judge Deady, which are directly on the question, and which certainly are of the highest authority, should, in my judgment, have far more weight with the court in determining this question than the remarks and general language of Justice Matthews, when considering whether or not the territory of Dakota was "Indian country."

Again, the fact that the Revised Statutes have omitted all definition as to what is now "Indian country" is important in considering this question. It would seem as if it was a definite term, especially when, to find what constitutes such country, you have to refer back to the original act of 1834. Prior to 1862, section 20 of the intercourse act of 1834 contained the words "an Indian in an Indian country"; but by the act of February 13, 1862 (12 Stat. 339), the words "any Indian under the charge of any Indian superintendent or agent" were substituted. This would seem to show that the term "Indian country" was

no longer expressive, was not definite enough to be continued in the statutes. That certain districts of country are to be considered as "Indian country" there can be no doubt. The opinion in Ex parte Crow Dog defines such country, though possibly in a general way. But can it be said that, in the absence of any precise definition defining such country; considering, also, that the term has been dropped from the Revised Statutes, and that the words "Indian country" were also dropped from section 20 of the act of 1834, and the words "Indian agent" substituted; considering, also, that the only definition is that contained in the first section of the act of 1834,—can it, then, be said that this territory, which was not embraced within the definition in the first section of the act of 1834 (as was distinctly held by the district court of Oregon), is, notwithstanding, "Indian country"? If it is, it must be because the definition by the court in Ex parte Crow Dog, as to what is now "Indian country," has so extended the original definition that the territory of Alaska is now included. In my opinion, the definition of the court in Crow Dog's Case does not extend the original definition; and, as Alaska was not included in that, it is not "Indian country," so declared by law.

The motion to discharge the prisoner on the ground that this court has no jurisdiction is therefore denied.

[NOTE. Subsequently the charge to the jury was delivered stating the difference between murder of the first degree, murder of the second degree, and manslaughter, and the difference commented upon. Case No. 15,528b. The jury returned a verdict of guilty of manslaughter, and the prisoner was sentenced to a term of 10 years' imprisonment and a fine of $100. The cause was taken to the circuit court on a writ of error. The district court was then directed to allow the plaintiff to move for a new trial, and if, on the hearing of the same, it did not appear that Kie was present, to grant the same, but otherwise to deny the motion, and give judgment against him. 27 Fed. 351.]

Case No. 15,528b.

UNITED STATES v. KIE.

[7 West Coast Rep. 15.]

District Court, D. Alaska. May Term, 1885.

TRIAL FOR HOMICIDE—PROPRIETY OF CHARGE.

[On a trial for homicide, defendant is entitled to the benefit of any reasonable doubt as to any of the elements constituting murder in the first or second degree or manslaughter.]

Indictment for murder. [A motion to discharge the prisoner, upon the ground that the court had no jurisdiction, was denied. Case No. 15,528a.]

McALLISTER, District Judge (charging jury). The prisoner at the bar, Charles Kie, was indicted by the grand jury of this district, and thereby charged with the crime of murder, by purposely and of deliberate and premeditated malice, killing one Nancy, on the 1st day of September, 1884, by inflicting mortal wounds with a knife, in and upon the body of the deceased, of which wounds it is alleged she instantly died. To the indictment found by the grand jury, the prisoner has pleaded not guilty, and you are, under your oaths and the instructions of the court as to the law, called upon to decide, from the evidence, by your verdict, as to his guilt or innocence of the crime charged against him. The duty you are to perform is the most important and sacred of any that falls within the province of jurors, important not only to the prisoner but also to the protection, safety, and well-being of the people of this territory. In cases of the nature of the one now under consideration, jurors are by law made judges of all the facts given in evidence, as well as of the credibility of the witnesses who testify. On your deliberation you will be careful not to take into consideration any fact or circumstance you may have heard without the walls of this court room. Consider only the evidence adduced during the progress of this trial, that justice may be done to the people of this territory and to the prisoner.

Under the indictment, if, in your opinion, from the evidence you are justified in so doing, you can find the prisoner guilty either of murder in the first degree, murder in the second degree, or of manslaughter. Murder in the first degree, murder in the second degree, and manslaughter are by the laws of this territory defined as follows: "If any person shall purposely, and of deliberate and premeditated malice, kill another, such person shall be deemed guilty of murder in the first degree." "If any person shall purposely and maliciously, but without deliberation and premeditation, kill another, such person shall be deemed guilty of murder in the second degree." "If any person shall, without malice, express or implied, and without deliberation, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, voluntarily kill another, such person shall be deemed guilty of manslaughter."

In order to make the killing either murder or manslaughter, it is requisite that the party die within a day and a year after the stroke received or the cause of death administered. In order to make the killing murder in the first degree, it must have been done purposely, and of deliberate and premeditated malice. In order to make the killing murder in the second degree, it must have been done purposely and maliciously, but without deliberation and premeditation. In order to make the killing manslaughter, it must have been done without malice, express or implied, and without deliberation, upon a sudden heat of passion, caused by provocation apparently sufficient to make the passion irresistible. The statute also provides that there shall be some other evidence of malice than the mere proof of killing to-

constitute murder in the first degree; and deliberation and premeditation, when necessary to constitute murder in the first degree, shall be evidenced by poisoning, lying in wait, or some other proof that the design was formed and matured in cool blood, and not hastily, upon the occasion. Deliberation is that act of the mind which examines and considers whether a contemplated act should or should not be done. Premeditation is when the intention to do an act has been formed before the attempt to execute it.

Therefore, gentlemen, if you find that the prisoner committed this crime purposely, and of deliberate and premeditated malice, and that the malice is shown by other evidence than the mere proof of the killing, and that the deliberation and premeditation are shown by proof that the design was formed and matured in cool blood, and not hastily, upon the occasion, as if by poisoning or lying in wait, you will find the prisoner guilty of murder in the first degree. If you find that the prisoner committed this crime purposely and maliciously, but without deliberation and premeditation, you will find him guilty of murder in the second degree. If you find that the prisoner committed this crime without malice, express or implied, and without deliberation, but upon a sudden heat of passion, caused by provocation apparently sufficient to make the passion irresistible, you will find him guilty of manslaughter. If you find, gentlemen, that the deceased did not come to her death within the time above stated at the hands of the prisoner, you will find a verdict of not guilty. If you have any reasonable doubt as to the guilt of the prisoner, or to any of the elements that constitute murder in the first degree, you will find him not guilty of murder in the first degree; and if you have any reasonable doubt as to any of the elements that constitute murder in the second degree, you will find him not guilty of murder in the second degree; and if you have any reasonable doubt as to any of the elements that constitute manslaughter, you will find him not guilty of manslaughter. In other words, gentlemen, the prisoner is entitled to the benefit of any reasonable doubt as to any of the elements that constitute any of the crimes above named.

In the event of your agreeing upon a conviction of the prisoner, you will state, in your verdict, if he is guilty of murder in the first degree, murder in the second degree, or guilty of manslaughter. If he be not guilty of any of the offenses mentioned, your verdict will be not guilty. In determining the credibility of witnesses, you can take into consideration their appearance and deportment when testifying, the probability of the truth of their statements, independently of or in connection with other evidence adduced, their friendly or hostile feelings toward the prisoner, to what extent they are contradicted, as well as their means of knowledge, and you can judge of and test their credibility according to your best knowledge of the laws governing human action. You will carefully consider all the circumstances of the case as detailed in the evidence, and apply to them the principles of law I have given to you. Your deliberations should be calm and serious, and you should not be influenced by prejudice or passion. The case is submitted to your careful deliberation.

[NOTE. The jury returned a verdict that the prisoner was guilty of manslaughter, and he was accordingly sentenced by the court to 10 years' imprisonment and a fine of $100. The case was taken to the circuit court on a writ of error, and this court was directed to allow the plaintiff to move for a new trial, which motion must be granted if it should appear that Kie was not present at the trial, but otherwise to deny the motion, and give judgment against him. 27 Fed. 351.]

Case No. 15,529.

UNITED STATES v. KIERMAN.

[3 Cranch, C. C. 435.] [1]

Circuit Court, District of Columbia. May Term, 1829.

ASSAULT—POINTING GUN.

Cocking and raising a gun and threatening to shoot a person is an assault in law, although there should be no attempt to shoot or injure the person.

Indictment [of Hugh Kierman] for an assault, by cocking a gun and threatening to shoot Henry Jackson.

Mr. Coxe, for the defendant, prayed the court to instruct the jury that it was not an assault in law, unless there was an attempt to shoot or injure the witness.

THE COURT (nem. con.) said that if, under all the circumstances, the act indicated an intention to shoot or injure the witness, it was an assault, although the attempt was not actually made.

Case No. 15,530.

UNITED STATES v. KIMBALL.

[Cited in U. S. v. Jarvis, Case No. 15,469. Nowhere reported; opinion not now accessible.]

Case No. 15,531.

UNITED STATES v. KIMBALL.

[7 Law Rep. 32; 1 West. Law J. 399.]

District Court, D. Massachusetts. April 8, 1844.

OFFENCES AGAINST POSTAL LAWS—STEAMBOAT OR RAILROAD PASSENGER CARRYING LETTER.

1. If a passenger in a railroad car or steamboat carry a letter without the knowledge or consent of the owner of the car or steamboat, or any of his agents or servants, such owner is not liable to the penalty provided by the act of congress of 1825, § 19 [4 Stat. 107].

[1] [Reported by Hon. William Cranch, Chief Judge.]

2. The person who sends such letter by such passenger is not liable to the penalty provided in the twenty-fourth section of the said act, unless the owner of the car or steamboat is liable to the penalty provided by the nineteenth section.

3. The setting up of a post by railroad car or steamboat is not setting up a footpost, within the meaning of the statute of 1827, § 3 [4 Stat. 238].

[1] [This was a proceeding against the defendant for conveying or causing to be conveyed, over a post route, for hire, a letter to William Smith, Esq., from Boston to New York, on the 21st of February. The said William Smith, Esq., is a man of straw, made up for the purposes of the suit. The information against the respondent contains six counts, alleging the offence of carrying the letter to the said Smith in so many different ways.

[Franklin Dexter, U. S. Dist. Atty., in opening the case for the prosecution, read the several provisions from acts of congress which he considered applicable,—such as the third section of Act March 3, 1823, making the navigable waters within the United States post routes; second section of Act July 7, 1838 [5 Stat. 283], making every railroad a post route; section 19, c. 275, Act March 3, 1825 [3 Story's Laws, 1985 (4 Stat. 107, c. 64)], prohibiting the carrying of letters out of the mail in any vehicle, and making the owner of the vehicle liable, on any post road, or road parallel thereto; and section twenty-fourth, same statute, extending the penalty to any person who shall procure the owner of such vehicle to carry a letter out of the mail, or aid him to do so, etc.; and also section 3, c. 218, Act 1827 [3 Story's Laws, 2066 (4 Stat. 238, c. 61)], prohibiting the establishing a private horse or foot post on any post road, or on any road parallel thereto. In reference to the act of 1825, Mr. Dexter suggested that it was not necessary that the owner of the vehicle should know that the letters were conveyed on it, to make him liable. The mere fact that a letter was so carried in his vehicle, with or without his privity, rendered him answerable. Having stated the law on his side, Mr. Dexter next put in the written admission of the respondent, that on the 21st of February he advertised in the newspapers to carry letters from Boston to New York, via Providence and Stonington, for six and a quarter cents each; that he kept an office in State street, Boston, for the purpose; that he sent the said letter to the said Smith, by a person who went to New York by the Stonington route, which he admitted to be a post route; that the said person was not paid for carrying the said letter; that he was not in any way connected with the railroads, or post office department; that this messenger was not informed this letter was paid for, unless the stamp of the respondent on said letter was information that the letter had been paid for.

[R. Fletcher and A. H. Fiske appeared for the respondent, and the latter gentleman opened the defence. The principal grounds relied on by him were as follows: That the prohibitory laws of congress on the subject are unconstitutional. In article 1, § 8, of the constitution, power is given to congress "to establish post offices and post roads" simply. It contains no prohibition, or clause giving to congress any exclusive regulation of post roads. By the articles of confederation, the continental congress had the "sole and exclusive right to establish post offices and post roads," and if the framers of the constitution had intended to continue this exclusive right in congress, they would have continued to use the language by which that right was established in the articles of confederation which they had before them. The carrying of letters by private enterprise did not impede, obstruct, or prevent the government from exercising the business of mail carrier, unless it did so by reducing the revenue of a department established for that purpose. But the constitution had not provided, that the department should be a source of revenue, or that it should support itself from its income for carrying letters, etc. It would be otherwise if the constitution had given to congress the power to "regulate" post offices, etc., as it has given it the power to "regulate" commerce, etc. Nor did the constitution make it imperative on congress to establish post offices and post roads. It only allowed the government to engage in the business in common with the states, or individuals. This is the substance of the constitutional argument.

[But, supposing the legislation of congress to be constitutional, Mr. Fiske contended that the facts admitted did not render the respondent liable. First, he had carried no letter himself; second, the owners of the railroads did not know that they were carrying any letters out of the mail, and in all penal cases the accused cannot be charged unless he does the penal act knowingly. Then, if the unconscious carrier cannot be guilty, the accessory to his carrying the letter cannot be reached. Finally, railroads are neither horse nor foot roads. They were means of communication which were not in existence when the law was passed, and that law cannot be enlarged so as to embrace what had never been dreamed of at the time of its enactment. It was plainly a casus omissus, and there was no remedy for the government but to pass new laws on the subject.] [2]

SPRAGUE, District Judge. This is an information to recover a penalty for an alleged violation of the post-office laws. The first, second and third counts charge, that on the

[1] [From 1 West. Law J. 399.]

[2] [From 1 West. Law J. 399.]

21st of February last a railroad car conveyed a letter on a post road, whereby the owners incurred a penalty of fifty dollars, and that the defendant procured and assisted in such conveyance, and thereby forfeited the sum of fifty dollars. It is admitted that the defendant on the day alleged sent a letter from Boston to New York by a person who went as a passenger in the car, and who received no compensation for conveying the letter, but that the defendant had received compensation therefor, and his stamp indicating that fact was upon the letter. The person who carried the letter had no connexion with the owners of the car or any of their agents, except as a passenger. The owners had previously advertised that they would not take passengers who should convey letters, contrary to law, and enjoined all persons in their employment not to receive the same. And neither the owners nor their agents had any knowledge of the conveyance of said letter. The nineteenth and twenty-fourth sections of the statute of 1825, c. 275 [3 Story's Laws, 1990, 1993 (4 Stat. 107, 109)], are relied on to sustain the prosecution.

Two propositions are laid down by the learned counsel for the government. (1) That under the nineteenth section it is not necessary that the act should be done with the knowledge or consent of the owner of the vehicle in order to subject him to the penalty. (2) That it is not necessary that the owner should be liable, in order to make any person subject to the penalty for procuring or assisting in the doing of the forbidden act. The first question is, would the owners of the car be liable to the penalty? The case is that of a passenger carrying a letter; and the proposition contended for necessarily goes to the extent, that if a passenger in a railroad car take a letter, either as an act of kindness or for hire, and carry the same concealed about his person or in his baggage, and without the consent or knowledge of the owner of the vehicle, such owner is subject to a penalty. He is a common carrier, and as such compellable to take passengers and their baggage. The law has made no provision requiring them to make known to the owner the fact of their taking letters, and if he might make it a condition that their persons and property should be searched, it would be so onerous and vexatious, and so inconsistent with the genius of our government and the feelings of the people, that it could not be practically enforced. Here was perfect innocence of intention, and not even a neglect of duty. The infliction of penalties under such circumstances would not be consonant to the general principles of jurisprudence or natural equity, and it is not to be supposed that the legislature intended to do so, unless such purpose be clearly expressed. I do not think it is so by this statute. The nineteenth section prohibits the doing of a certain act. This implies an actor. The vehicle is but the instrument. The actor is the owner, and he is forbidden to convey letters. This, I think, means the conveying of letters as such, and not the conveyance of passengers who may have a letter concealed. This construction was adopted by the learned judge of the United States for the Southern district of New York, in the case of U. S. v. Adams [Case No. 14,421]. The second proposition contended for is, that the defendant may be liable under the twenty-fourth section, although the owners of the vehicle are not liable. That section provides that every person "who shall procure and advise, or assist, in the doing or perpetration of any of the acts or crimes by this act forbidden, shall be subject to the same penalties and punishments as the persons are subject to who shall actually do or perpetrate any of the said acts or crimes." This section, standing by itself, is wholly inoperative. It refers to and rests upon other provisions forbidding certain acts or crimes. In the case before us it must be coupled with the nineteenth section, and then two actors are contemplated, one who does the forbidden act, and another who procures or assists the doing thereof, and the latter is to be subject to the same penalty as the person is subject to, "who shall actually do the act," and to no other. Now if there be no person who has done the forbidden act—no one subject to a penalty therefor, how can another be subject to the same penalty for having procured or assisted the doing thereof?

The fourth and fifth counts are founded on the third section of the statute of 1827, which enacts that no person shall set up any foot or horse post for the conveyance of letters or packets upon any post road. The fifth count applies only to the distance between Court street, and the depot of the Providence Railroad, which does not appear to be a post road. The sixth count applies to the railroad, and over which, being a post road, it is admitted that the defendant did set up a post for the conveyance of letters. But was it a foot post as alleged in the information? The conveyance was by railroad cars—and that that is not a foot post according to the usual and ordinary acceptation of language is manifest. But it is urged, that it is within the mischief designed to be suppressed; and that there can be no doubt that the legislature intended to prohibit the setting up of any and all posts by individuals—and that this must be deemed to come within the description, and may more properly be called a foot than a horse post. It was also urged, in relation to the twenty-fourth section, that although there might be some difficulty in the particular phraseology used, yet that the general purpose and object of the statute is plain, and should be carried into effect. Here lies the stress and difficulty of the case. Since the passing of the post office laws new modes of conveyance have been established, and a condition of things arisen not then known or contemplated. And the question

is, whether new acts in contravention of the general spirit and policy of the laws, can be brought within any of its prohibitions, and subjected to a specific penalty. However willing the court might be to attain that end, it cannot strain or force the language used beyond its fair and usual meaning. We are not authorized, upon our notion of the general policy and purpose of the statute to inflict penalties, which the terms thereof according to their ordinary acceptation do not create. We cannot doubt that the mischief of regularly conveying letters by railroad is quite as great as carrying them by a man on foot or by horses. But is the court therefore authorized to say, that a person travelling in a railroad car is a man travelling on foot, or that a train of railroad cars moved by a steam engine may constitute a foot post?

There are several cases which have been decided in the courts of the United States, in which it would seem that the terms used in revenue and other acts, might more easily have been brought to create liabilities and forfeitures, in furtherance of the evident purposes and policy of the statute, than in the present case—and yet the court declined giving them such extended construction. Sugar dissolved in water was held not to be "sugar," so as to be subject to duties as such. U. S. v. 112 Casks Sugar, 8 Pet. [33 U. S.] 277. Loaf sugar which had been "crushed" and then imported, held not to be loaf sugar under the statute imposing a duty on that article. U. S. v. Breed [Case No. 14,638]. Worsted shawls with cotton borders, or worsted suspenders with cotton straps—held not to be manufactures of wool, or of which wool is a component part, although worsted is made of wool. Elliot v. Sturtevant, 10 Pet. [35 U. S.] 150. This also was under a revenue act. Driving living fat oxen across the lines to the enemy in time of war held not to be a transportation of them. U. S. v. Shelton, 2 Wheat. [15 U. S.] 120. In this case the court say, "that the mischief is the same affords no good reason for construing a penal law by equity, so as to extend it to cases not within the correct and ordinary meaning of the expressions of the law." In U. S. v. Breed [supra] it is said, that it defeats the general policy of the act is no ground for constraining construction. So also that "a wide door will be opened for the admission of frauds" upon the revenue is no reason for different practical constructions of the acts of congress. U. S. v. 200 Chests of Tea, 9 Wheat. [22 U. S.] 443, 444. A whaling voyage held not to be a foreign voyage, so as to require bond to be given to bring home the crew, although admitted to be within the mischief to be prevented and the policy to be promoted. Taber v. U. S. [Case No. 13,722] and it is there said: "The language (of a statute) is not to be employed to cover a case standing upon similar grounds, if the ordinary interpretation of the terms would not reach it." Again in Adams v. Bancroft [Id. 44] the court say: "Laws are never construed beyond the natural import of the language, and duties are never imposed upon the citizens upon doubtful interpretations; for every duty imposes a burden on the public at large, and is construed strictly, and must be made out in a clear and determinate manner from the language of the statute."

I shall instruct the jury: (1) That if a passenger in a railroad car or steamboat, passing over a post road or route, carry a letter without the knowledge or consent of the owner of the car or steamboat, or any of his agents or servants, such owner is not liable to the penalty provided by the nineteenth section of the act of 1825, c. 275 [3 Story's Laws, 1990 (4 Stat. 107, c. 64)]. (2) That such knowledge or assent are not to be presumed from the facts admitted in this case. (3) That the person who sends such letter by such passenger is not liable to the penalty provided by the twenty-fourth section of said act, unless the owner of the car or steamboat is liable to the penalty provided by the nineteenth section of said act. (4) That the setting up of a post by railroad car or steamboat is not setting up a foot post, within the meaning of the third section of the statute of 1827, c. 218. [3 Story's Laws, 2066 (4 Stat. 238, c. 61)].

Verdict for the defendant.

Case No. 15,532.

UNITED STATES v. KING.

[Cited in U. S. v. Lee, Case No. 15,585. Nowhere reported; opinion not now accessible.]

Case No. 15,533.

UNITED STATES v. KING.

[4 Ben. 476; [1] 13 Int. Rev. Rec. 12.]

District Court, E. D. New York. Jan., 1871.

INTERNAL REVENUE — ILLEGAL ASSESSMENT — CAPACITY OF A DISTILLERY.

1. Where the producing capacity of a distillery had been determined by a survey, in accordance with section 10 of the act of July 20, 1868 (15 Stat. 129), and the assessor subsequently, without any new survey being held, determined that the producing capacity was greater, and assessed the distillery accordingly, and a suit was brought on the distiller's bond to recover the excess of the assessment above that which would have been otherwise assessed.

2. The assessment was void, and the excess could not be recovered.

3. Under that section, when the capacity of a distillery, as determined from the original survey, is sought to be changed by the government, it can only be done by a new survey, directed by the commissioner of internal revenue.

At law.

BENEDICT, District Judge. This action is brought upon a distiller's bond to recover the

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

sum of $9,032.35, being the alleged balance of taxes on the distilled spirits manufactured by the defendant [Oscar] King, in the months of November and December, 1869, claimed to be still due and unpaid.

The assessment lists show that the taxes assessed against this distiller, for the period in question, amounted to $21,420.34, of which the balance now claimed, $9,032.35, remains unpaid, and the case turns solely upon the validity of the assessment made by the assessor. This assessment was arrived at by computing the quantity of spirits produced at 80 per cent. of the producing capacity of the distillery, as estimated by the assessor upon a fermenting period of 48 hours, instead of a fermenting period of 72 hours, which last period was the period fixed in the distiller's notice, and was also the period according to which the producing capacity of the distillery was originally estimated and determined by survey, in accordance with the provisions of section 10 of the act of 1868. 15 Stat. 159.

No other survey of the distillery was ever made in the manner required by section 10; but the assessor, without any new survey, thereafter determined the fermenting period to be 48 hours, and assessed the taxes claimed accordingly, without reference to the existing survey, and without reference to the actual amounts of spirits produced. Upon these facts, several questions have been raised, of which it is necessary to consider but a single one. It is contended by the defendants that the assessment is illegal, for the reason that, according to section 10, when the capacity of a distillery, as determined from the original survey, is sought to be changed by the government, it can only be done by a direction from the commissioner of internal revenue to the assessor, to proceed with the aid of some competent and skillful person to be designated by the commissioner, to make a new survey and a new estimate and determination of the producing capacity of the distillery, and a new report thereof to the commissioner, whereas in the present case the assessor acted alone in changing the capacity of the distillery, without the aid of any person designated by the commissioner, and without making any new survey or report.

This point appears to be well taken. The last clause of section 20 refers to the survey provided for in section 10, as the estimate and determination of the producing capacity of the distillery, and basis on which the computation is to be made of taxes due. And section 10 expressly provides for the correction or revision of a survey, and declares that it is to be made in like manner with the original survey.

This provision I consider imperative and as determining the method and the only method by which the producing capacity of a distillery can be changed by the government. The intention appears to be to confer upon the commissioner of internal revenue, the power at any time to institute proceedings for the correction and revision of the survey of a distillery, and to limit the power of the assessor in such case to the making of a new survey and report, with the aid of some competent and skillful person designated by the commissioner. No such new survey was here made; but the assessor alone, without any other survey or report, and without reference to the producing capacity of the distillery, as estimated and determined by the existing survey and report, assessed the taxes sued for. Section 20 does not authorize such an assessment.

Nor is this difficulty cured by the instructions of the commissioner of internal revenue put in evidence, among other reasons, because those instructions, when examined, show an express direction to have a new survey held and report made, as prescribed by sect. 10.

The mode prescribed by law for the correction or revision of the estimated producing capacity of the defendant's distillery not having been followed, the original survey and report furnished the only legal basis upon which the tax could be assessed, and that amount, as the evidence shows, has been paid, with the exception of a small balance of $32.20. For that amount, conceded to be due, the government is entitled to judgment. The rest of the demand must be disallowed.

Case No. 15,534.

UNITED STATES v. KING.

[1 Cranch, C. C. 444.] [1]

Circuit Court, District of Columbia. Nov. Term, 1807.

HIGHWAY ROBBERY — WHAT ARE HIGHWAYS — INDICTMENT AND SENTENCE.

1. No road in Virginia is a highway within the statute which takes away the benefit of clergy in certain cases, unless it be a public road laid out according to law, no evidence of which can be received but the record.

2. Upon an indictment at common law, the court may pass sentence under a statute.

Indictment [against Thomas King, a negro slave] for highway robbery of John Graham, and taking from him his watch.

Upon the trial, Mr. Simms and Mr. Swann, for the prisoner, called for evidence of the place being a highway.

Mr. Jones, for the United States, offered to prove by parol evidence, that it has been long used as such, and to prove by the records of this court, that this court has appointed an overseer of the road. If there is a record of the opening of the road, it must be in Fairfax county, in Virginia, out of our jurisdiction. If there should be a fault in the laying out of the road, if the viewers or petitioners did not proceed exactly according to law, yet it would be a highway. Highway means only common way,—communis strata; a river is a highway. If an individual lays out a road

[1] [Reported by Hon. William Cranch, Chief Judge.]

through his own land, from town to town, as a highway, it is a highway. 1 Hawk. P. C. c. 76, § 1.

Mr. Swann and Mr. Simms, in reply. By the act of Virginia of November 27, 1789, § 1, p. 46, the benefit of clergy is taken away from robbery in or near about a highway. It must mean something more than a common way. It must mean a road on which a man has a right to travel, and the obstruction of which may be prosecuted as a nuisance. It cannot be a road opened only by private agreement. In 1 Hawk. P. C. p. 367, § 3, it is said that an old way cannot be altered nor a new way laid out without the king's license, nor are the inhabitants obliged to keep watch in the new way, nor to make amends for a robbery therein committed. All public roads must appear on record; no road is a highway but a public road laid out by authority of the county court. The indictment charges the robbery to be in the highway. That cannot be a highway which any individual can lawfully shut up.

THE COURT (DUCKETT, Circuit Judge, absent) decided that no road in Virginia can be said to be a highway within the meaning of the act, unless it be a public road laid out according to law, and that no evidence but the record can be allowed to prove it to be such a public highway.

Verdict, guilty of the robbery, but not in a highway.

THE COURT sentenced him to be burnt in the hand and whipped with one hundred stripes. This sentence was passed under the Virginia act of assembly of 17th December, 1792, p. 190, § 34.

Case No. 15,535.

UNITED STATES v. KING.

[5 McLean, 208.] [1]

Circuit Court, D. Ohio. April Term, 1851.

COUNTERFEITING—PRESUMPTION FROM POSSESSION OF TOOLS—INDICTMENT AND PROOF—INTENT.

1. On a charge of counterfeiting coin, proof of the fact that a quantity of spurious coins, with tools and instruments for the manufacture thereof, was found in the defendant's possession, will warrant the presumption of his guilty agency, unless negatived by other facts in the case.

2. On an indictment under the section of the act of congress [4 Stat. 121], providing a penalty against any one who shall falsely make, forge, or counterfeit any silver coin, &c., it must appear that it was the intention of the party, in making such coin, fraudulently to pass them as genuine.

3. If it appear that the counterfeit coins were made for any other purpose, though that purpose may not be defensible in a moral aspect, the party is not guilty of the offense contemplated by the statute.

[Cited in U. S. v. Otey, 31 Fed. 70.]

[This was an indictment against Henry King.]

[1] [Reported by Hon. John McLean, Circuit Justice.]

Mr. Mason, U. S. Dist. Atty.

Stanbery & Norton, for defendant.

LEAVITT, District Judge. The defendant is charged with the offense of making certain counterfeit coins of the United States. The law on which the indictment is framed provides a penalty against any one who shall falsely make, forge, or counterfeit, any silver coin in the resemblance and similitude of any silver coin of the United States, or any foreign silver coin, made current by law. It is not necessary to detain the jury by re-stating the evidence at length. The material facts are, briefly, as follows: Some time in the year 1850, some of the police officers of the city of Cincinnati, visited the rooms occupied by the defendant, in that city. In one room there was a chest, in which were found, at the bottom, and interspersed with the sheets and articles of clothing which it contained, a number of counterfeit coins, consisting of American half dollars and dimes. Some moulds made of plaster, intended for the manufacture of coins, were also found in the chest, and in the room; but these were not complete, and had never been used. The witnesses also discovered, behind a curtain in the same room, a galvanic battery, and some other articles, apparently designed to be used by a showman. The half dollars, six or eight in number, were stuck or glued together, in the manner in which they are used by exhibitors of magical performances; and thus arranged, the mass is called the magical ball or ring. Neither the room or the chest was locked when the officers entered to make the search. The defendant, and a man whose name is Freely, were in the room when the officers entered, and during the examination. When the officers made known the object of their visit, Freely remarked, that there was no counterfeit coin there, that he knew of; and when found, said the defendant had nothing to do with it. The trunk and its contents were claimed by the defendant as his property, who said, when the coins were found, that he was getting up a public exhibition, and that they were intended for use in that way. There is no proof that the defendant passed, or attempted to pass, any counterfeit coin.

On the part of the defense, it is in evidence, that the defendant has lived about three years in Cincinnati, during the greater part of which time he was in the employ of Mr. Farnum, who is engaged in the manufacture of hose. It also appears that the defendant was in the habit of giving occasional public exhibitions of magical performances. Three witnesses state, that they have been present at some of the defendant's performances, in which he used the magical ball or ring, before described. One witness—a distinguished professor of magic—states, that it is usual for those engaged in that business, to use counterfeit dimes or other coins, to avoid the losses to which they are liable from the use of genuine coins. Several witnesses—some of whom

have been well acquainted with the defendant for ten or twelve years—testify to his general good character.

These being the material facts in evidence, it will be for the jury to decide, whether the charge in the indictment is sustained. To justify a verdict of guilty, the jury must be satisfied that the defendant made, or aided in making, one or more, of the counterfeit coins described in the indictment. And it may be remarked, that the guilty agency of the person charged, in the manufacture of spurious coins, may be satisfactorily made out, without positive proof of the fact. Circumstances may be adduced, sufficient of themselves, to justify a presumption of such agency. The possession of a quantity of false coins, upon the person, or the premises of the party implicated, warrants the inference that he made them. And this inference is greatly strengthened by proof, that instruments or tools, designed for the manufacture of such coins, were found in the possession of the accused person. But this presumption of guilt may be negatived by evidence showing that the false coins, though manufactured by him, were made for an innocent purpose, or a purpose not rendering the act criminal under the provisions of the statute on which the prosecution is based. It will, therefore, be a proper inquiry for the jury, if the evidence satisfies them that the defendant made the coins in question, whether there was the guilty intent to pass them as genuine. The intent with which an act is done, gives it its true legal character, and in general, is a necessary element of crime.

In this case it is insisted that if the defendant made the spurious coins, it was not for the purpose of fraudulent utterance, but to aid him in his performances as a professor of magic. If the jury shall come to the conclusion, from the evidence, that this was the defendant's purpose in making the coins, it is very clear, their verdict must be one of acquittal. The penalty of the statute on which the indictment is framed, is denounced against any person who shall falsely make or counterfeit the coin of the country. The use of the word falsely in the statute implies, that there must be a fraudulent or criminal intent in the act. And the statute contemplates no other intent, in the act of making, as necessary to constitute the crime, but that of disposing of, or passing the spurious coin, as true and genuine. If made for any other purpose—though that purpose is not a justifiable or defensible one in a moral aspect—the party does not incur the legal guilt contemplated by the statute.

It is true beyond all question, that the coin of the country should be scrupulously guarded by law. The social and commercial interests of any people, are involved in its preservation from adulteration and forgery. And it is competent for congress, by suitable enactments, to protect the sacredness of the metallic currency of the country, by a provision that shall punish the act of counterfeiting it, for any, even an innocent purpose. But the existing law checks, does not reach such a case.

The jury returned a verdict of not guilty.

Case No. 15,536.

UNITED STATES v. KING.

[Wall. Sr. 13.] [1]

Circuit Court, D. Pennsylvania. May 12, 1801.

DEBTS DUE UNITED STATES—PRIORITY—DISCHARGE IN BANKRUPTCY.

1. Debts due to the United States are not barred by a bankrupt's certificate.

[Cited in U. S. v. Herron, 20 Wall. (87 U. S.) 262.]

2. The United States have a preference in the payment of custom-house bonds, only in cases of notorious insolvency, such as assignment of the debtor's property, absconding, &c.

[Cited in brief in Field v. Geohegan, 125 Ill. 69, 16 N. E. 914; Jackson v. Davis, 4 Mackey, 198.]

This was an action of indebitatus assumpsit for moneys had and received to the use of the United States. It was an amicable suit, and the case was this. The United States had obtained judgments against the partnership of Johnson & Daniel King on certain custom-house bonds, and issued executions, which were levied on a cargo of wines from Cadiz, in the hands of the defendant [James King]. He claimed these wines under an assignment and bill of sale, from the house of Johnson & Co. antecedent to the judgments. The question was, whether, under certain acts of congress, the executions should have priority of the assignment; it being agreed, that if they had, the defendant would pay the amount from the proceeds in his hands. On the trial, which was long, the following points arose, and were ruled by the court unanimously:

1. Mr. Rawle, for the United States, offered as a witness, Johnson, one of the house of Johnson & King, and now a certificated bankrupt, to prove, that at the time when he and his partner, Daniel King, made the assignment of the wines in question to James King, the defendant, for a debt due to him by the partnership, to wit, on the 15th May, 1799, the house was in insolvent circumstances.[2]

Mr. Ingersoll, for defendant, objected to the witness on two grounds: (1) Because

[1] [Reported by John B. Wallace, Esq.]

[2] By certain acts of congress, hereinafter referred to, the United States have a preference of payment in case of debtors becoming insolvent, &c., and the point on this trial to be made out by the United States was, that at the time of assignment to James King, in payment of his debt, the house was insolvent; in which case it was contended, that by the acts of congress, the debts due on bond at the custom-house to the United States, had preference, and would overreach the assignment to James King.

it was the interest of Johnson, the bankrupt, that the United States should recover the amount of their judgments out of the property assigned to James King; for that as against the United States, he could not plead his certificate in bar of an action for these moneys; the United States, as Mr. Ingersoll contended, not being barred by the bankrupt law; whereas he could plead it against James King. He had therefore a direct interest in shifting his creditor by paying the debt due to the United States out of this fund, and defending himself as against King, by his certificate. (2) He maintained in the second place, that it was inadmissible evidence from Johnson, because, being party to the deed of assignment made to the defendant on the 15th May, 1799, it was not competent for him to prove the insolvency of the house at the time, and thereby defeat the security which he and his partner had given for a bona fide debt. On this point, he cited 1 Term R. 296. Mr. Rawle, contra, cited 3 Term R. 33, and 7 Term R. 601.

Mr. Rawle, for the United States, on the first objection, cited the sixty-second section of the bankrupt law [of April 4, 1800] which enacts, "that nothing contained in this law shall in any manner affect the right of preference to prior satisfaction of debts due to the United States, as secured or provided by any law heretofore passed, nor shall be construed to lessen or impair any right to, or security for, money, due to the United States, or to any of them." [1 Story's Laws, 750; 2 Stat. 36.] Sixty-third section. "And that nothing contained in this act shall be taken or construed to invalidate, or impair, any lien existing at the date of this act, upon the lands or chattels of any person who may become a bankrupt." [1 Story's Laws, 750; 2 Stat. 36.] He argued that the United States were bound by the certificate under the bankrupt law, as any other creditor was, as against the person and future effects of the bankrupt. That the sixty-second section was intended only to preserve to the United States in case of a bankruptcy, that preference of payment from the fund in the hands of the assignees, which by several acts of congress had been secured to them in case of insolvency, assignment to trustees by the debtor, attachment, or state bankruptcy, before the passing of the bankrupt law of the United States. See [Act Aug. 4, 1790 (1 Story's Laws, 147; 1 Stat. 169, § 45); Act May 2, 1792 (1 Story's Laws, 243; 1 Stat. 263, § 18); Act March 3, 1797 (1 Story's Laws, 465; 1 Stat. 515, § 5)],—by which acts, debts due to the United States for duties, or from revenue officers, are first to be paid, in cases of insolvency, assignment, &c. He contended, that the collector, whose duty it was to recover the duties, had no election to proceed against the bankrupt or the assignees; but was bound to call on the assignees, and claim the whole debt, out of the fund in their hands; and this was the construction most beneficial for the United States. Upon the other supposition, instead of having a preference, they would be in a worse condition than a common creditor: for if not barred by the certificate, then they would be unable to come in under the commission, upon the effects assigned, and be put to their remedy against the person of the bankrupt, stripped of every means of payment; and must, nine times in ten, lose their whole demand. The king, he said, was not bound by the statutes of bankruptcy, because not named; and therefore an extent served on the property of the bankrupt, will bind from the teste of the writ, and till actual assignment by the commissioners: but the king is bound by an actual assignment; because the property is then actually vested in another. Cooke, Bankr. Law, 392; Id. (Ed. 1786) 246. See W. Jones, 202; 2 Show. 480. An assignment, then, on the supposition that the United States are not bound, will divest the property; and instead of a preference, they will have to look to the bankrupt, without property, and deprived of the means of future acquirements. The thirty-fourth section enacts, "that every such bankrupt shall be discharged from all debts by him or her due or owing at the time of becoming bankrupt, or which might be proved under the commission, and may plead his certificate in bar," &c. [1 Story's Laws, 744; 2 Stat. 30.] The terms here used, are universal; they discharge him from all debts; and unless the debts of the United States are specially and clearly excepted, he ought not to be held liable. As to those words in the sixty-second section: "That nothing in the act should be construed to lessen or impair any right to, or security for money due to the United States, or any of them,"—he considered them not as designed to exclude the bankrupt from the benefit of his certificate as against the United States, so far as respected his person and future effects, but merely to express by way of caution, that, however in respect to the debts or securities for debts of private creditors, the provisions of the act might tend to lessen or impair their rights, yet in regard to moneys due to the United States, or to securities for such moneys, they should remain in full force, to their full amount against the bankrupt's property in the hands of the assignees. He observed, that the legislature would, in all probability, have used a very different form of expression, if the intention were different from that which he assumed as the true construction. They would have said expressly, "that nothing in the act should be construed to exonerate the person or effects of the bankrupt from debts due or owing to the United States."

Mr. Ingersoll, for defendant, said that no expressions could have been devised, more comprehensive or significant, than those used in the concluding sections of this act, to exempt and except out of all its provisions, the liens, preferences and contracts between the United States and the bankrupt. The words

are, "that nothing in the act shall be taken or construed, to lesson or impair any right to, or security for money due to the United States, or any of them." If this act is construed so as that the debtor be discharged under the certificate, in his person and future effects, from demands of the United States; would not this be to lessen the security for the money due to the United States? The security for the money is the person and property of the debtor, and his future acquisitions. These are all taken from the United States, if it be held, that they are bound by the act. The consequence which it is supposed must flow from this construction, namely, that the United States will be in a worse condition than the other creditors, if not within the act, as thereby, the property will be assigned, and their remedy lie only against the person and future effects of the bankrupt, will not exist. The assignment, as to their debts, will not destroy their preference; for this act expressly reserves to the United States the right of prior satisfaction given by any former law. So that debts due to the United States must be first satisfied, before the general creditors, or the assignees, can take under the assignment; and the property will be liable in the hands of the assignees.

TILGHMAN, Chief Judge. We regret that so important a question should be brought up for determination, in the course of a trial, upon an objection to a witness. It must, however, receive an answer. Upon the best consideration which the circumstances will permit us to bestow on the point, we are of opinion, that debts due to the United States are not within the provisions of the bankrupt law; but that the debtor, his lands and effects, present and future, are liable to actions and remedies for the recovery, as before the passing of that act. The sixty-second section of the law seems decisive. The consequence is, that the witness must be rejected, for it is plainly his interest that the United States should recover in this action against James King, the moneys due on the judgments and executions against himself and partner. For, as against James King, (whose debt against the house will be revived) he may plead his certificate in bar; but should the United States fail to recover the debt in this way, his person and future effects may be made liable to their suit on the judgments.

THE COURT gave no opinion on the other objection to the witness.

The question of fact litigated on the trial, was, whether the house of Johnson and King was insolvent on the 15th May, 1799, when the assignment of the wines was made to James King the defendant, in satisfaction of a precedent debt to him, for goods and moneys advanced to the house. On the part of the United States, it was asserted, that the house was in failing circumstances in the fall of 1798, and became insolvent, and stopped business in the course of the winter. That this assignment was made to the father of one of the partners on the 15th May, 1799, after the date of the custom-house bonds to the United States, on which judgments had been obtained, and for which the executions had been levied on the wines in question.

Mr. Rawle, for the United States, cited the several acts of congress which provide, that in cases of insolvency, &c. debts due to the United States, shall be first paid. See [1 Stat. 169, § 45; Id. 263, § 18; Id. 515, § 5; 2 Stat. 676, § 65]. By this last act, which seems to embrace the former provisions, and to define them, it is enacted, that where any bond for the payment of duties shall not be satisfied on the day it may become due, the collector shall, forthwith, cause a prosecution to be commenced for the recovery of the money, &c. "And in all cases of insolvency, or where any estate in the hands of the executors, administrators or assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States, on any such bond or bonds, shall be first satisfied; and any executor, administrator, or assignee, or other person, who shall pay any debt due by the person or estate from whom, or for which, they are acting, previous to the debt or debts due to the United States from such person or estate being first duly satisfied and paid, shall become answerable in their own person and estate, for the debt or debts, &c. and actions may be commenced, &c. and the cases of insolvency mentioned in this section shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof, for the benefit of his or her creditors, or in which the estate and effects of an absconding, concealed or absent debtor, shall have been attacned by process of law, as to cases in which an act of legal bankruptcy shall have been committed."

Several witnesses were examined on the part of the United States, who proved that in the fall of 1798 the house was greatly embarrassed, their notes at the bank protested, and renewed again by the same endorsers on small payments; previous to the assignment for some months, they made no purchases, and there remained on hand of goods at that time, but an inconsiderable stock. They met with very great losses at sea, and from the whole evidence, it was pretty clear that the house was insolvent on the 15th May, 1799, when the assignment to the defendant in payment of his debt, was made. However, until the 1st June following, they continued to pay debts; and actually paid off, after the assignment, debts to the amount of near 8,000 dollars; but on the 1st June, 1799, they applied to their creditors for and obtained a letter of license, &c.

On the part of James King the defendant, it appeared, that he was a bona fide creditor

to the amount of his assignment: it did not appear that he knew the house was actually insolvent, when he took the assignment: though he knew of their difficulties, and might reasonably apprehend his debt to be in danger, unless secured.

Mr. Rawle, for the United States, stated that the only question for the jury was, whether the house of Johnson and King, were solvent or insolvent, on the 15th May, 1799, the date of the assignment. If insolvent, then, he maintained the assignment was void as against the debt of the United States; being in destruction of their preference in such case, under the acts of congress; and from the whole evidence, said it was very clear that on the 15th of May, 1799, they were unable to pay their debts, and had been so ever since.

Rawle cited the following cases: Cockshot v. Bennett, 2 Term R. 763, that a subsequent promise, founded on a prior fraudulent consideration, was not good. 3 Term R. 551; 4 Term R. 167; 6 Term R. 146, where debts secured to particular creditors, in breach of confidence, and general rights of other creditors, who came into friendly accommodations with the debtor, were held void.

Ingersoll & Hallowell, contra, for defendant, argued, that admitting it could be ascertained with certainty, the house at that period stood debtor beyond its ability to pay; yet it was a misconstruction of the acts of congress, from thence to conclude, that all payments, assignments, and bona fide transfers of the debtor, were to be over-reached, in favour of the preference given to the debts of the United States. That congress never intended to interpose a preference as against other creditors who received satisfaction from the debtor in the course of trade and business, and before the debtor had become notoriously insolvent; by assignment of his effects to trustees for the benefit of his creditors; or had committed an act of bankruptcy, or his property was attached, or some other decided, and unequivocal act of inability to pay, was manifested. The consequences of a different construction, they alleged, would be pernicious in the highest degree. As to the general right of a debtor, to prefer a particular creditor in such case, they said there was no doubt, and cited 8 Term R. 528, where an assignment to trustees to pay particular creditors was held to be valid.

TILGHMAN, Chief Judge (charging jury). At common law, a debtor, though insolvent, may prefer a creditor. He may assign all, or any part of his effects in satisfaction of a bona fide debt, in exclusion of all other creditors. The bankrupt laws, and particular statutes, however, in particular cases, have interfered in favor of the general creditors, or some particular description of debts; and taken from the debtor his right of preference. In this case, the right of the defendant under the assignment, as against the United States, is not affected by the bankrupt law. But it has been contended, that the special acts of congress giving to debts due to the United States upon bonds for duties, a preference of payment in cases of insolvency of the debtor, will avoid the assignment: because at the time of the assignment, as it now appears from the evidence, the house was unable to pay its subsisting debts.

We are clearly of opinion, that it is not every case of actual insolvency, which is within the words or intent of the acts of congress. Traders in business, and continuing so, may be really insolvent: they may be so unknown to themselves, and frequently unknown to mankind. It would be productive of the greatest injustice, and serve to embarrass and check mercantile transactions, if the right of a creditor to retain his payment, or transfer of property in payment, as against custom-house bonds, was to depend upon a future scrutiny on the part of the United States, into the actual condition of the debtor's affairs, at the time of the payment, sale or assignment: it would lead to inextricable difficulties. Our opinion is, that the act of the 2d March, 1799, in its terms and meaning, only gives a preference as against other creditors, on custom-house bonds, after a notorious act of insolvency; as where the debtor has assigned for the benefit of his creditors; where he has absconded, and his property is attached. &c. In the case before us, although when the assignment was made, it is probable the house was really insolvent, yet no act of bankruptcy had been committed; no assignment made to any one creditor of all the effects; no attachment had issued; no transfer made to assignees for the benefit of all, or any particular creditors;—the house continued in business, and, though greatly embarrassed, paid debts until the 1st June. The defendant does not appear to have been privy to, or an agent in any fraud; but received the wines as a security for a bona fide debt: this, therefore, is not a case of insolvency within the acts of congress, under which the United States can claim a preference, so as to avoid the assignment made to the defendant.

The jury found a verdict for the defendant.

Case No. 15,537.

UNITED STATES v. The KITTY.

[Bee. 252.] [1]

District Court, D. South Carolina. Feb. 1, 1808.

SLAVE TRADE—REMISSION OF FORFEITURES.

Forfeiture under the act of congress prohibiting the importation of negroes after January 1, 1808, may be remitted by this court in cases of extreme hardship.

[Cited in Furniss v. The Magoun, Case No. 5,163.]

BEE, District Judge. This suit is instituted by Captain McNeil of the revenue cut-

[1] [Reported by Hon. Thomas Bee, District Judge.]

ter Gallatin, against the schooner Kitty, for a breach of the first and seventh sections of the act of congress passed 2d March last, entitled "An act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States after the 1st of January, 1808." It appeared in evidence, that the Kitty sailed from Charleston on the 19th November, 1806, bound to the coast of Africa. She arrived there on the 1st January following, at which time her crew consisted of the captain, two mates, one steward, and seven seamen. The second mate and one seaman died in February; another seaman died in August following. The steward ran away, and the first mate was discharged as an incorrigible drunkard; so that, in the month of August, the captain only and five of the crew remained. At this time they had purchased no more than thirty-two slaves; and such was the scarcity of provisions on the coast, that, till the beginning of November, they were threatened with famine. In July, the captain was taken ill, and continued so till the vessel sailed In August, the ship's papers were seized by the governor, and detained for a fortnight. In September a report of war with Great Britain obliged the vessel to run up the river to avoid being captured. In October, only two of the crew were fit for duty, and the vessel was so leaky as to be three weeks under repair; provisions for their return could not be procured till November; on the 16th of that month she sailed, and on the 16th January, 1808, was seized in Stono Inlet, near Charleston, by the captain of the revenue cutter. The libel prays condemnation of the vessel, as coming within the act of congress. The owners contend that this case, though within the letter, is not within the spirit of the act.

I have considered the evidence and circumstances of this cause with attention. It is not denied that the voyage was a legal one in its inception, and continued so for nearly fourteen months afterwards. The act by which the trade was made illegal was not passed till a long time after this vessel sailed; and there is no proof that knowledge of it ever reached the captain, till his return. But if the act had been known to him, unavoidable accident and invincible necessity prevented his sailing sooner. As it was, he might have got here in six weeks, which the prosecutor himself allowed to be no uncommon passage; but head winds and a winter's passage detained him a fortnight longer. If ever there was a case of hardship, occasioned by no fault of the party, this is one; and it is justly and humanely observed by Sir William Scott (1 C. Rob. Adm. 221) that "laws which would not admit an equitable construction, applicable to the inevitable misfortunes or necessities of men, or the exercise of a fair discretion under difficulties, could not be framed for human societies." By this principle I shall be guided in the present case, more especially as the act of congress upon which the suit is grounded expressly gives the court a discretionary power in extreme cases, of which this is surely one. I, therefore, dismiss the suit, but order that all the costs be paid by the claimant; for Captain McNeil, in this seizure and prosecution, did no more than obey a positive law, the directions of which he would have been criminal in neglecting.

Case No. 15,538.

UNITED STATES v. KNAPP.

[MS.]

District Court, S. D. New York. Sept. 27, 1849.

FEDERAL JURISDICTION — LARCENY AT MILITARY POSTS—GENERAL VERDICT.

[1. Jurisdiction to legislate over territory ceded by a state to the United States for a military post, as in the case of West Point, N. Y., becomes exclusive by force of the cession alone, and is in no wise impaired by a reservation to the state of a right tc send process within the limits of the territory in pursuit of fugitives.]

[2. Therefore a larceny committed at West Point is punishable by the United States courts under the crimes act of 1790, par. 16 (1 Stat. 116).]

[3. On a general verdict of guilty, the evidence will be applied to any sufficient count in the indictment, and the remaining counts will be wholly disregarded.]

[This was an indictment against Frederick Knapp.]

Before BETTS, District Judge.

The prisoner was indicted for stealing several pieces of gold coin and other articles, the property of one Mahon, and the stealing of like articles, the owners of which are unknown. The indictment averred, in four counts, that the offense was committed at West Point, and, in two of them, in a certain building there, called the "Dragoon Barracks." It averred, in one count, that West Point was under the sole and exclusive jurisdiction of the United States; in another, that it was under the jurisdiction of the United States; in the third, that the building was under the sole and exclusive jurisdiction of the United States; and in the fourth, that it was under the jurisdiction of the United States. The testimony proved the money was stolen out of a chest or drawer of Mahon, in the dragoon barracks at West Point, and the jury found the prisoner guilty of the larceny. The cession of West Point, including the locus in quo, was shown from the statutes of New York, with the reservation of a right for process issued by the state authority in civil or criminal cases, to be executed on the tract. A motion to quash the indictment is made, because it is not proved that the place where the offense was committed was under the exclusive jurisdiction of the United States; and because the conviction is general, the United States attorney refusing to elect any count of the indictment under which he claimed any conviction; and

because the evidence did not apply to two of the counts at all.

The main point intended to be raised, as to the authority of the United States, under this grant of jurisdiction, to take cognizance of the offense, is already disposed of by the cases cited. Com. v. Clary, 8 Mass. 72; U. S. v. Davis [Case No. 14,930]; and Story, Const. § 1220. See, also, Whart. Cr. Law, 59. The jurisdiction to legislate over the territory becomes exclusive in the United States by force of the cession, and is no way limited by the reservation on the part of the granting state, or recession to the state by the United States of a privilege to send process in pursuit of fugitives, within its limits. The offence charged in the indictment is accordingly punishable under the crimes act of 1790, par. 16 (1 Stat. 116). There is no legal inconsistency between the counts. The allegation that the place was within the jurisdiction of the United States does not conflict with one that it was under its exclusive jurisdiction. A mere variation or surplusage in the statements and charges does not vitiate an indictment. On a general verdict of guilty the evidence will be applied to any sufficient count in the indictment, and the remaining counts will be wholly disregarded, and judgment will be rendered conformably. Whart. Cr. Law, 618, 619; U. S. v. Furlong, 5 Wheat. [18 U. S.] 184.

The motion in arrest of judgment is accordingly denied, judgment pronounced against the prisoner, and he is sentenced to pay a fine of $50, and be imprisoned three months from the date of the conviction.

Case No. 15,539.

UNITED STATES v. KNIGHT et al.

[3 Sumn. 358; [1] 1 Law Rep. 257.]

Circuit Court, D. Maine. Oct. Term, 1838.[2]

IMPRISONMENT FOR DEBT — ADOPTION OF STATE LAWS—GOAL LIBERTIES—ESCAPE.

1. The act of congress of 1800, c. 4 [2 Stat. 4], is not that, by which the liberties of the gaol yards allowed to debtors imprisoned on execution issuing from the courts of the United States are now regulated.

2. The act of 1828, c. 68 [4 Stat. 278], has adopted the state laws on the subject of gaol liberties, then existing in the states, under the words of the third section, which declare, "that writs of execution and other final process issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon shall be the same, &c., as are now used in the courts of such state," &c., &c.

[Cited in Hathaway v. Roach, Case No. 6,213; Re Freeman, Id. 5,038; Campbell v. Hadley, Id. 2,358.]

3. Quære, whether, at the common law, it is an escape of a debtor imprisoned on execution, for the sheriff to allow him the liberties of the gaol yard; or whether the sheriff is bound to keep him in salvâ et arctâ custodiâ within the walls of the gaol itself?

This was an action brought on the 15th day of September, 1838, on a bond given to the United States on the 30th day of January, 1838, for the liberties in the gaol yard in Portland, in Maine district. Plea, the general issue, with liberty to give special matter in evidence. The condition of the bond, after reciting, that Jacob Knight and Benjamin Knight have been, and now are, imprisoned in the prison in Portland, in Maine district, by virtue of an execution issued against them, on a judgment obtained against them by the United States, at the district court, &c., for the sum of $8,462.36 principal, and $61.79 for interest, &c., and costs of suit taxed at, &c., proceeds as follows; "Now if the said Jacob Knight and Benjamin Knight, from the time of executing this bond, shall continue true prisoners in the custody of the gaoler, within the limits of the gaol yard, until they shall be lawfully discharged, and shall not depart without the exterior bounds of said gaol yard, until lawfully discharged from said imprisonment according to the laws of the United States in such cases made and provided, and commit no manner of escape, then the said obligation shall be void; otherwise to remain in full force."

The parties agreed upon a statement of facts as follows: "On the 30th day of January last past (1838), the said Jacob and Benjamin were committed to the gaol in the city of Portland on an execution, issued on a judgment in favor of the said United States against said Jacob and Benjamin, whereupon the said Jacob and Benjamin as principals, and the said Isaac and Edward, as sureties, gave the bond declared on in this suit. That said Jacob and Benjamin continued to remain within the limits of the town of Portland, exclusive of the islands, and did not depart therefrom up to the time of the commencement of this suit, nor have they since departed therefrom; but neither the said Jacob or Benjamin, from the time of the execution of said bond, nor afterwards, at any time, lodged in the night time within the walls of said gaol, but remained at large within the limits of said town of Portland, exclusive of the islands belonging to the same, both day and night. If, upon the foregoing facts, the court are of opinion that the condition of said bond has been broken by the said Jacob and Benjamin, and that they have made an escape, then the said court are to render judgment, to be entered as of said October term, and as on a verdict rendered for the said United States. And if the court be of opinion, that the obligation of said bond has not been broken, then judgment to be rendered in manner aforesaid for the said defendants. And each party reserve to themselves the right to a writ of error to reverse any such judgment as may as aforesaid be rendered by said court in the case. A copy of the records of the court of sessions for the county

[1] [Reported by Charles Sumner, Esq.]

[2] [Affirmed in 14 Pet. (39 U. S.) 301.]

of Cumberland, hereunto annexed, may be referred to as a part of the facts of this case."

To this statement was annexed the following document:

"At a court of general sessions of the peace, for the county of Cumberland, begun and holden at Portland, in said county, on the last Tuesday of May, A. D. 1787, being the 29th day of said month [justices present: Enoch Freeman, Esq., William Thompson, Esq., John Lewis, Esq., Edmund Phinney, Esq., Robert Southgate, Esq., John Frothingham, Esq., Isaac Parsons, Esq., William Gorham, Esq., George Pierce, Esq., David Mitchell, Esq., Samuel Freeman, Esq., Richard Codman, Esq., Samuel Small, Esq., Daniel Davis, Esq., Joshua Fabyan, Esq., John Dean, Esq., Peter Noyes, Esq.],[3] the court took into consideration the establishment of proper boundaries of the gaol yard in said county, and determined the same as follows, viz.: Beginning at the bottom of Love lane at low-water mark, thence up said lane, including the houses on each side thereof, to the northerly side of Back street, thence down said Back street, including the houses on both sides thereof, to King street, from thence down said King street, including the houses on both sides thereof, to low-water mark, thence by low-water mark to the first bounds, including all the grounds and buildings within the aforesaid limits.

"At a court of general sessions of the peace, for the county of Cumberland, begun and holden at Portland, in said county, on the third Tuesday of October, being the 16th day of said month, A. D. 1798 [present the following justices, viz.: William Thompson, William Gorham, John Lewis, Isaac Parsons, Robert Southgate, Josiah Thatcher, Samuel Merrill, Benjamin Dunning, William Widgery, Paul Little, Ichabod Bonney, Josiah Pierce, Andrew Dunning, George Lewis, Peter T. Smith, John Greenwood, William Martin, Stephen Longfellow, Samuel P. Russell, Ammi R. Mitchell, Stephen Purrington, John Dean, Enoch Perley, Elisha Williams],[3] the committee, appointed to consider suitable limits for the gaol yard, report, as their opinion, that the limits or bounds of the town of Portland, exclusive of the islands, be fixed and determined as the boundaries of said gaol yard. Their report is accepted, and the said limits fixed and determined as the bounds of said gaol yard accordingly

"Recorded by Samuel Freeman, Clerk.

"At a court of sessions, begun and holden at Portland, in and for the county of Cumberland, on the second Tuesday of September, being the 10th day of said month, A. D. 1822 [justices present: Hon. Woodbury Storer, chief justice, Phineas Ingalls, William Hasty, Peleg Chandler, and Secomb Jordan, associate justices],[3] the court having, with much deliberation, attended to the subject of the limits of the gaol yard, which was under consideration at their last March term, as is fixed and established by the court of sessions, October term, A. D. 1798, are of opinion, that, inasmuch as the laws relating to imprisonment of debtors have lately been revised by the legislature and undergone a material alteration, that the rights of individuals and the public will be as well secured, and the convenience of the citizens and the public essentially promoted by an extension of the bounds of the gaol yard. It is, therefore ordered, by the court, that from and after the day of passing this order, the bounds of the gaol yard be extended over the whole county, and to the exterior limits thereof; which are hereby fixed and established as the bounds of the gaol yard for the said county of Cumberland. And the clerk of the court is directed to publish the foregoing order, for the information of the citizens of said county, in each of the newspapers printed in the town of Portland. September 14th, 1822.

"Recorded by William T. Vaughan, Clerk."

Mr. Deblois, for defendants, commenced by saying, as preliminary to his argument, if the defendants had committed a breach of the bond, that it was not from intention, but ignorance; and that they had been led into error by the marshal, who, when he committed them, had stated to them, that they were entitled to the same liberties of the yard, as persons committed under process from the state courts.

(1) By the statute of 1784, c. 41 (1 Gen. Laws Mass. p. 177), the court of sessions is authorized to fix the limits of the prison liberties; and by an order of the court of sessions of 1792, they were fixed at the interior limits of the town of Portland. By the act of congress of January 6, 1800, persons imprisoned on process issuing from the courts of the United States, are entitled to the same privileges of the yard or limits of the prison as persons confined on process from the state courts. A breach of the bond cannot be committed while the prisoner remains within the limits. And it is contended, that as the law was in 1800, when the act passed, giving the prison liberties, no distinction was made between night and day; and that a prisoner, who has the liberty of the yard, remains a true prisoner, so long as he does not depart from the interior bounds of the gaol yard. Such is the condition of the bond. The bond itself makes no distinction between night and day; and it is contended that the law does not. To this point he cited the argument of Mr. Story, counsel in Bartlett v. Willis, 3 Mass. 86, and the authorities there referred to; the acts of the legislature of Massachusetts, Jan. 27, 1811; 3 Laws Me. p. 259 (Act Feb. 26, 1822), extending the gaol limits to the limits of the county; Steere v. Field [Case No. 13,350].

[3] [From 1 Law Rep. 257.]

(2) When the United States use the state gaols for the confinement of their prisoners, we are to look to the state laws and regulations, to determine what and where the gaol is. If the state enlarges or reduces its prison, it is enlarged or reduced for prisoners confined under the authority of the United States. And if the state should remove the prison from the town of Portland to any other town, and establish her prison limits, the United States prisoners must follow it; and, so long as they remain within the prison, in its new location, there will be no escape. And where the United States allow their prisoners the benefit of the prison rules, they allow them precisely as they are allowed by the state to those confined under the authority of the state. When these liberties are enlarged or contracted by the state for state prisoners, they are enlarged or contracted for those of the United States. Neither the act of 1800, nor any other act of the congress has undertaken to define what the privileges of the yard are, but merely directs, that persons confined under process from their courts, shall have "like privileges of the yard or limits as persons confined on like process from the state courts." This principle is not repugnant to the doctrine of the supreme court, in the cases of Wayman v. Southard, 10 Wheat. [23 U. S.] 1; and U. S. Bank v. Halstead, Id. 51, in which it is decided, that the process acts of the United States adopted the state practice, as it was at the time of the passage of the acts only; and did not adopt, prospectively, changes which the states might afterwards make. The commitment of a debtor on execution is one of the modes of proceeding in a suit; but the mode of detention, after commitment, the greater or less degree of restraint imposed on the prisoner, are left by the United States to the states, with the single condition, that they shall be the same as is practised with respect to persons confined on like process under state authority. Serg. Const. Law (2d Ed.) 169; Reed v. Fullum, 2 Pick. 158; Beers v. Haughton, 9 Pet. [34 U. S.] 331; Randolph v. Donaldson, 9 Cranch [13 U. S.] 76; 3 Pet. [28 U. S.] 220.

(3) If there has been an escape in this case, it is only because the debtors have not been confined within the walls of the prison during the night time. The limits of the prison yard, in 1800, when the act of congress was passed, were the limits of the town of Portland, inclusive of the islands; and it is agreed, that the debtors have not passed beyond these limits. If imprisonment within the prison walls during the night time was not necessary at common law, as it is contended, notwithstanding the decision of Bartlett v. Willis, then, it is clear, there has been no escape. And if the principle contended for is correct, that by the true construction of the act of 1800, connected with the compact by which the United States have the use of the state prisons, what constitutes the prison and what constitutes imprisonment, or, what it is to remain a true prisoner, is to be determined by the law and practice of each state for the time being, then it is clear there has been no escape.

(4) As a matter of fact, prisoners, committed under process from the United States courts for debt, have not been confined in this state within the walls during the night time, so that if there is an escape in this case, there has been in every case of a commitment for debt. This practice is urged as a proof of the opinion of the profession on the point.

(5) The manner in which persons may be discharged from imprisonment, is entirely regulated by the laws of the United States, and the state insolvent laws are entirely inoperative here. The act of the Maine legislature of 1830, c. 195, abolishes all imprisonment for debt, and all gaol limits, and requires persons arrested for debt to make a disclosure and take the poor debtors' oath in six months, or go into close prison. This, it is contended, is an insolvent law, and cannot apply to debtors arrested under process of the United States courts, and, more especially, debtors of the United States. They can be discharged only in conformity with the act of congress of May 8, 1792, § 1 [1 Stat. 275]. The prison limits for persons committed under the authority of the United States, are now those last established by the state; but whether these, or the limits as they were in 1800, is immaterial to this case. The debtors have not been beyond the limits as established in 1800.

Mr. Howard, U. S. Dist. Atty. The process act of the United States of 1792, governs the proceedings in a suit before the commitment on execution; but the act of 1800 applies after. The process act of 1828, it is contended, is not more extensive in its operation, than the act of 1792. Neither of these acts applies, after a debtor has been committed on execution. Glenn v. Humphreys [Case No. 5,480]; Wayman v. Southard, 10 Wheat. [23 U. S.] 1; Ogden v. Saunders, 12 Wheat. [25 U. S.] 213; Beers v. Haughton, 9 Pet. [34 U. S.] 59. The act of 1800 allows to debtors committed under process from the courts of the United States, the same privileges and liberties of the prison yards as were enjoyed by those committed under process from the state courts at that time. It is contended, that, by the settled law of Massachusetts at that time, a person committed for debt, who had the liberty of the yard, was guilty of an escape by being out of the prison in the night time. The liberty of the yard was allowed only in the day time. Bartlett v. Willis, 3 Mass. 26; Clap v. Cofran, 7 Mass. 98. As it is admitted by the agreed statement of facts, that the debtors in this case have continued at large within the limits during the night as

well as the day time, this disposes of the case, if the principle we contend for is correct.

The relaxations of the laws in favor of imprisoned debtors, introduced by the states subsequent to the passage of the act of 1800, could not be adopted by that act, and they have not been by any act since passed. It is an established principle, that the United States do not adopt the laws or regulations of the states by anticipation. When they adopt them, they adopt them as they exist at the time. This is settled with respect to the process acts. A power is given to the court to vary them so as to confirm the subsequent change in the state practice; but until they are so varied by the courts, they remain unchanged. The thirty-third section of the judiciary act [1 Stat. 91] is not inconsistent with this principle, as that is merely the statement of a principle of universal law, an adoption of the lex loci, which the court would have applied without any legislative enunciation of the principle. Wayman v. Southard, 10 Wheat. [23 U. S.] 1.

It is contended, that the state law for the imprisonment of debtors, as it existed in 1800, continues to be a law for debtors imprisoned on process from the courts of the United States; that every act, which would be an escape, according to the law of the state in 1800, is an escape now notwithstanding any changes since introduced by the state in favor of persons imprisoned under that authority. The United States do not adopt the varying regulations with respect to imprisonment, any more than they do the changes which are made in the course of judicial proceedings.

The process act of 1822 [Laws 1820-23, p. 877] does not apply to proceedings after the debtor is committed. If, however, it be conceded that the rules relating to imprisonment, vary for debtors committed under process from the United States courts according to changing legislation of the state, then the act of the legislature of Maine of 1830, c. 195, will govern this case. That requires the debtor to go into close prison at the end of six months after commitment, unless before that time he takes the poor debtors' oath, or pays the debt. During the six months he is under no restraint, there are no prison limits, and the only gaol for debtors, by this act, is the gaol itself. The prisoner must be within the walls of the prison.

Before STORY, Circuit Justice, and WARE, District Judge.

STORY, Circuit Justice. This cause involves the consideration of some important questions, as to the adoption of the laws of the states in regard to writs of execution, and the right to the gaol liberties by imprisoned debtors, which do not seem hitherto to have undergone any direct adjudication. The principal question is, whether, in the present case, the imprisoned debtors, having obtained the privileges of the gaol yard, by giving the bond in controversy, have been guilty of an escape by being without the walls of the gaol in the night time, although they have always remained by day and night within the limits of the gaol yard. Now, the solution of this question depends mainly upon another. What laws of the state upon the subject of gaol liberties have been adopted by congress to regulate the rights of debtors imprisoned on mesne or final process from the courts of the United States? The argument of the defendants' counsel substantially turns upon this: that the state laws, for the time being, upon the subject of gaol liberties, and the rights of imprisoned debtors, are adopted by congress. The argument of the district attorney, on the other hand, insists, that the act of congress of 1800, c. 4, is the only act regulating the subject, and that adopts the state laws then in force, and none that were subsequently passed. If the argument of the district attorney be well founded, then, as the state of Maine continued to be a part of Massachusetts until March, 1820, the act of Massachusetts of 1784, c. 41, is that, by which the court must be governed on the present occasion; and, indeed, upon any other ground, it is admitted, that the present suit is unmaintainable.

Let us now proceed to a brief survey of the legislation of congress, so far as it touches the present subject. The act of 1789, c. 21, provided, that the forms of writs and executions, except their style and "modes of process," in the courts of the United States, in suits at common law, should be the same, in each state respectively, as were then used or allowed in the supreme courts of the same. The particular words of the act, it having expired, need not be cited. Then came the act of 1792, c. 36, which provided, "that the forms of writs, executions, and other process, except their style, and the forms and modes of proceeding in suits, in those of common law, shall be the same as are now used in the said courts respectively, in pursuance of the act entitled, &c. &c. (the act of 1789, c. 21), except so far as may have been provided for by the act to establish the judicial courts of the United States; subject, however, to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same." Three days prior to the passing of this last act, congress, by another act (the act of the 5th of May, 1792, c. 29), provided, "that persons, imprisoned on executions issuing from any court of the United States, for satisfaction of judgments in any civil actions, shall be entitled to like privileges of the yards or limits of the respective gaols, as persons, confin-

ed in such gaols for debt on judgments rendered in the courts of the several states are entitled to, and under the like regulations and restrictions." This act being temporary, was continued for a short period by the act of May, 1794, c. 34; and that was succeeded by another temporary act, the act of May, 1796, c. 38 [1 Stat. 482]; and within a few months after this last act expired, the act of the 4th of January, 1800, c. 4 (which has been alluded to), was passed, and is still in force. That act provided, "that persons imprisoned on process issuing from any court of the United States, as well at the suit of the United States, as at the suit of any person or persons in civil actions, shall be entitled to like privileges of the yards, or limits, of the respective gaols, as persons confined in like cases on process from the courts of the respective states are entitled to, and under the like regulations and restrictions."

There is no other act of congress, which, in terms, refers to the subject of gaol liberties; and it has been contended (as has been already stated) that this is the sole act which does, in fact, regulate the subject, so far as respects the national legislation. If this be so, I should have little difficulty in acceding to another part of the argument, and that is, that the act adopted only the state laws then in force, and did not adopt, prospectively, the future legislation of the states. Hitherto, the judicial construction of the acts of congress, which have adopted state laws, touching writs and processes, and the proceedings thereon, has uniformly been, that they applied to the state laws then in force. To this effect, are the decisions in Wayman v. Southard, 10 Wheat. [23 U. S.] 1, and U. S. Bank v. Halstead, Id. 51; and Beers v. Haughton, 9 Pet. [34 U. S.] 311. I must confess, that I entertain very serious doubts, whether congress does possess a constitutional authority to adopt prospectively state legislation on any given subject; for that, it seems to me, would amount to a delegation of its own legislative power. And I think my doubts strengthened by what fell from the supreme court, on this point, in Wayman v. Southard, 10 Wheat. [23 U. S.] 1, and U. S. Bank v. Halstead, Id. 51. At all events, I should not be disposed to give such a construction to any act of congress, unless it was positively required by its words and its intent; which, it seems to me, cannot be affirmed of the act of 1800.

The difficulty, which I have, is of a very different nature; and that is, whether the act of 1800 alone is applicable to the case of the gaol liberties. But passing by that point for a moment, let us see, how the case would stand upon the Massachusetts act of 1784, c. 41. That act, in the eighth section, provided, "that the courts of the general sessions of the peace shall fix and determine the boundaries of the gaol yards, to the several gaols appertaining, in their respective counties." And in the same section it further provided, "that any person imprisoned for debt, either upon mesne process or execution, shall be permitted and allowed to have a chamber and lodging in any of the houses or apartments belonging to such prisons, and liberty of the yard within the same, in the day time, but not to pass without the limits of the prison." Now, it is upon the terms of this enactment, that the district attorney rests his case, and contends, upon the authority of decided cases, that it is an escape for a debtor, having the liberty of the yard, to be without the walls of the prison, although he be within the limits of the yard, in the night time. And, in this position, he is fully borne out by the authority of the state courts. The very point has undergone repeated adjudications in the most solemn and formal manner. Bartlett v. Willis, 3 Mass. 86; Baxter v. Taber, 4 Mass. 361; Clap v. Cofran, 7 Mass. 98, 10 Mass. 373; Freeman v. Davis, 7 Mass. 200; Burroughs v. Lowder, 8 Mass. 373; Walter v. Bacon, Id. 468; Patterson v. Philbrook, 9 Mass. 151; Trull v. Wilson, Id. 154.—are directly in point. With these decisions, so far as they profess to decide, that the debtor is not entitled to claim the liberty of the yard, except in the day time, as a matter of right, I entirely accord. But so far as they decide, that the sheriff has no authority, at his own discretion and peril, to allow the debtor the liberty of the yard in the night time, as a matter of favor and not of right, if the question were new, I should be compelled to differ from the learned court. In the case of Steere v. Field [Case No. 13,350], I had occasion, in the state of Rhode Island, fully to express my opinion on this point; and to the opinion then given I deliberately adhere. But I consider the decisions of the state courts, upon the construction of their own statutes, to be conclusive upon the judgment of the courts of the United States; and, therefore, I adopt and follow these decisions, as containing the true interpretation of the Massachusetts statute of 1784, c. 41. And as the act of 1800, c. 4, allows the liberty of the gaol yard "under the like regulations and restrictions" as govern in the state courts, there has been an escape, constituting a breach of the present bond, if the act of 1800 alone gives the rule to this court.

And this leads me to the consideration of another point, which is, whether the act of congress of 1828, c. 68, does not embrace and regulate the right of imprisoned debtors to the gaol liberties. If it does, then it carries down the national legislation, so as to embrace all the state laws in force on the same subject at the time of passing that act. The first section of that act, provides, "that the forms of mesne process, except the style, and the forms and modes of proceeding, in suits in the courts of the United States, held in those states admitted into the Union since the 29th of September, in the year 1789, in those of common law, shall be the same in

each of the said states respectively, as are now used in the highest court of original and general jurisdiction of the same," &c. &c.; subject, however, to such alterations and additions, as the said courts of the United States respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rules, to prescribe to any circuit or district court concerning the same. Now, it is to be recollected, that the acts of Massachusetts and Maine, give the privilege of the gaol liberties to debtors imprisoned on mesne process, as well as on execution; and the question might naturally arise, under such circumstances, whether the "forms and modes of proceeding," in suits at common law, referred to in this section, did not include the right of such debtors in Maine to the privilege of gaol liberties. I confess, that I should have great difficulties in holding a different doctrine. But the third section of the act is more directly applicable. It provides, "that writs of execution, and other final process issued on judgments and decrees, rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same, except their style, in each state respectively, as are now used in the courts of such state, &c. &c.; provided, however, that it shall be in the power of the courts, if they see fit in their discretion, so far to alter final process in said courts as to conform the same to any change, which may be adopted by the legislatures of the respective states for the state courts." Now, here we find it expressly provided, that "the proceedings," upon writs of execution and other final process, shall be the same as were at that time used in the state courts. The question, then, arises, whether the allowance of the gaol liberties were not a part of the "proceedings" upon such writs of execution and other final process within the true intent and meaning of the act.

Upon the best consideration I have been able to give the subject, I think it was. It seems to me that all proceedings consequent upon, and incident to such writs of execution and other final process, until the complete satisfaction and discharge thereof, are properly, in the sense of the act, proceedings on the execution or other final process; and that, therefore, the proceedings to obtain the gaol liberties by a debtor imprisoned on such execution, or other final process, are "proceedings thereupon," within the scope and purview of the act. This, it seems to me, is the natural import of the terms used, and a rational exposition of their intention and object. One consideration, which would weigh greatly with me in supporting this construction, is, that, in any other view, no debtor imprisoned on execution in any of the new states, admitted into the Union since the passing of the act of 1800, c. 4, and then constituting a part of the territories of the United States, would have any right to such gaol liberties, however liberally the privilege may have been granted on mesne or final process by the laws of such new states. I do not know, but I presume, that the general, if not the universal, practice in these states has been, to allow the privilege of the gaol liberties to all imprisoned debtors under the state process; and that the same practice has prevailed in the courts of the United States in those states. And if the fact be, as I presume it to be, the practice in the courts of the United States had a natural foundation and origin in the provisions of the act of 1792, c. 36, which adopted the "modes of proceeding in suits at common law," then existing in the state courts under the state laws; and authorized the courts of the United States, in their discretion, to make alterations and additions thereto; thus opening the means of adopting by express rule or by silent usage the regulations, which might, from time to time, be authorized by the progressive legislation of the states on the same subject. It constitutes no objection to this construction of the act of 1792, c. 36, that there was at that time in existence, a temporary act of congress (act of 1792, c. 29), on the very subject of the gaol liberties; or that there were other acts of the like purport, up to the act of 1800, c. 4. These may be accounted for upon two considerations; first, that they were designed to give a positive right to imprisoned debtors to gaol liberties; and, secondly, as a prevention against any doubt, touching so interesting and humane an object.

But what entirely satisfies my mind on this point, is, that the supreme court of the United States, in the case of Wayman v. Southard, 10 Wheat. [23 U. S.] 35–37, manifestly adopted this very construction of the words "modes of proceeding" in suits at common law, in the act of 1792, c. 36. Mr. Chief Justice Marshall, addressing himself to the question then before the court, whether "proceedings on execution" were within the purview of the words "modes of proceeding in suits at common law," in delivering the opinion of the courts said: The act, passed in 1800, "for the relief of persons imprisoned for debt," takes up a subject, on which every state in the Union had acted, previous to September, 1789. It authorizes the marshal to allow the benefit of prison rules to those, who are in custody under process issued from the courts of the United States, in the same manner, as it is allowed to those, who are imprisoned under process issued from the courts of the respective states. Congress took up this subject in 1792, and provided for it by a temporary law, which was continued from time to time, until the permanent law of 1800. It is the only act, to which the attention of the court has been drawn, that can countenance the opinion, that the legislature did not consider the process act, as regulating the conduct of an officer in the service of executions. It may be supposed, that, in adopting the state laws as furnishing the rule for proceed-

ing in suits at common law, that rule was applicable to writs of capias ad satisfaciendum, as of fieri facias; and that the marshal would be as much bound to allow a prisoner the benefit of the rules under the act of congress, as to sell upon the notice and on the credit prescribed by the state laws. The suggestion is certainly entitled to consideration. But were it true, that the process act would, on a correct construction, adopt the state laws which give to a debtor the benefit of the rules, this single act of superfluous legislation, which might be a precaution, suggested by the delicacy of the subject, by an anxiety to insure such mitigation of the hardships of imprisonment, as the citizens of the respective states were accustomed to see, and to protect the officer from the hazard of liberating the person of an imprisoned debtor, could not countervail the arguments to be drawn from every other law passed in relation to proceedings on executions, and from the omission to pass laws, which would certainly be requisite to direct the conduct of the officer, if a rule was not furnished by the process act. But there is a distinction between the cases sufficient to justify this particular provision. The gaols, in which the prisoners are to be confined, did not belong to the government of the Union, and the privilege of using them was ceded by the several states, under a compact with the United States. The gaolers were state officers, and received prisoners committed under process of the United States, in obedience to the laws of their respective states. Some doubt might reasonably be entertained, how far the process act might be understood to apply to them. The resolutions of congress, under which the use of the state gaols was obtained, "recommended it to the legislatures of the several states, to pass laws, making it expressly the duty of the keepers of their gaols, to receive and safe keep therein all prisoners committed under the authority of the United States, until they shall be discharged by due course of laws thereof." The laws of the states, so far as they have been examined, conform to this resolution. Doubts might well be entertained, of permitting the prisoner, under this resolution, and these laws, to have the benefit of the rules. The removal of such doubts, seems to have been a prudent precaution."

Now, it is observable from the whole current of reasoning in this opinion, that the principal doubt, whether "proceedings" on executions were within the reach of the words, "modes of proceeding" in the act of 1792, c. 36, arose from these very acts on the subject of gaol liberties. And yet the court treated them as merely affirmative, and as prudent precautions. But the doubt in Wayman v. Southard is completely done away by the express words of the act of 1828, "the proceedings thereupon," that is, upon writs of execution, and other final process. And the whole reasoning of the supreme court shows, that such words would include proceedings by debtors to obtain the gaol liberties. The case of Beers v. Haughton, 9 Pet. [34 U. S.] 329, 359-362, recognises and enforces the same interpretation of the act of 1792. In this last case the court said, "This act (the act of 1828, c. 68), was made after the decisions in Wayman v. Southard, 10 Wheat. [23 U. S.] 1, and Bank of U. S. v. Halstead, Id. 51, and was manifestly intended to confirm the construction given in those cases to the acts of 1789 and 1792; and to continue the like powers in the courts to alter and add to the processes, whether mesne or final, and to regulate the modes of proceeding in writs and upon processes, as had been held to exist under those acts. The language employed seems to have been designed to put at rest all future doubts upon the subject. But the material consideration, now to be taken notice of, is, that the act of 1828 expressly adopts the mesne processes and modes of proceeding in suits at common law then existing in the highest state courts under the state laws, which included all the regulations of the state laws, as to bail and exemptions of the party from arrest and imprisonment. In regard also to writs of execution and other final process, and the proceedings thereupon, it adopts an equally comprehensive language, and declares that they shall be the same as were then used in the courts of the state. Now the words 'the proceedings on the writs of execution and other final process' must from their very import be construed to include all the laws which regulate the rights, duties, and conduct of officers in the service of such process, according to its exigencies, upon the person or property of the execution debtor, and also all exemptions from arrest and imprisonment under such process created by those laws." Now, although some part of this language is addressed to the consideration of the immediate question then before the court, the discharge of bail, upon the ground that the debtor was by the state laws discharged from imprisonment, which laws had been adopted by a rule of the circuit court; yet the general scope of the reasoning is very full to the purposes of the present case. If the words, "the proceedings" on executions, would include exemptions from arrest and imprisonment, they must, a fortiori, include the minor right of mitigating imprisonment by an allowance of the gaol liberties.

If I am right in this interpretation of the act of 1828, then it has, by implication, adopted the act of Maine of the 9th of February, 1822, c. 209, on the subject of gaol liberties. The second section of that act provides, "that the boundaries of the gaol yards, in the several counties in this state, as fixed and determined prior to the 21st day of March, 1821, be and are hereby established, and shall continue until the same or any of them shall be changed by the court of sessions." The fourth section provides, "that whenever any

person, who is or may be imprisoned for debt on mesne process or execution shall give bond to the creditor, with one or more sureties approved, &c., conditioned, that from the time of executing such bond, he will not depart without the exterior bounds of the gaol yard, until lawfully discharged, and if imprisoned on execution, further conditioned, that he will surrender himself to the gaol keeper, and go into close confinement, as is required by law, without requiring any other condition of the bond." The eighth section provides, "that nothing shall be considered a breach of any bond, which has been or may be given to obtain the liberty of the gaol yard, except the passing over and beyond the exterior limits and bounds thereof, as by law established, or neglecting to surrender himself to the gaol keeper as required by the twenty-first section of this act." The twenty-first section provides, "that if any, who may be hereafter imprisoned for debt on execution, shall not within nine months after being first admitted to the liberty of the gaol yard, by giving bond as aforesaid, be discharged according to law, such person shall no longer be entitled to the liberty of the gaol yard; but it shall be the duty of the gaol keeper, from and after the expiration of nine months, to hold such person in close confinement, until lawfully discharged therefrom; and if such person shall not, within three days after the expiration of said nine months, surrender himself to the gaol keeper and go into close confinement, it shall be deemed a breach of the condition of his bond for the liberty of the gaol yard."

These are all the provisions of the statute, which it seems necessary to cite upon the present occasion. In the first place, it is plain from them, that the condition of the present bond does not, either in form or substance, conform to that prescribed by the statute. What may be the legal effect of this departure from the terms prescribed by the statute, I do not pretend to state, except that I may say, that not being a statute bond, the judgment, if any, which may be rendered upon it, must stand upon the common law, and not upon the regulations of the statute.

In the next place, it is as plain, that the statute makes no difference between the day time and the night time, as to the right of the debtor to the full use of the privileges of the gaol yard. On the contrary, it expressly declares, that nothing shall be considered as a breach of the bond, except passing over and beyond the exterior limits and bounds of the gaol yard, or a nonsurrender according to the provisions of the twenty-first section of the statute. In this respect it differs essentially from the Massachusetts act of 1784, c. 41, already cited.

It will make no difference in the present case, that the Maine act of 1822, c. 209, has been changed, or added to, or repealed by any state legislation subsequent to the act of 1828, c. 68. This latter statute having adopted the antecedent state laws, no subsequent change or repeal of those laws has any effect upon the proceedings upon executions, and other final process issuing from the courts of the United States. The proceedings on executions, and other final proceedings, are to be, and remain, exactly, as if the state acts so adopted continued in full force without alteration or addition. This very point was expressly declared in Beers v. Haughton, 9 Pet. [34 U. S.] 329, 363.

The consequence of this view of the case, upon the statement of facts, is, in my judgment, that there has been no escape, by which the present bond has become so forfeited. As the district judge concurs therein, judgment will be rendered for the defendants accordingly.

[The case was taken on a writ of error to the supreme court, where the judgment of this court was affirmed. 14 Pet. (39 U. S.) 301.]

Case No. 15,540.

UNITED STATES v. KNOWLES.

[4 Sawy. 517.] [1]

District Court, N. D. California. July 11, 1864.

HOMICIDE—ALLOWING A SAILOR TO DROWN—DUTY OF SEA CAPTAIN—REASONABLE DOUBT—GOOD CHARACTER.

1. An indictment against a ship-captain for murder, charging him with having willfully omitted to stop the ship, or to lower either of its boats, or to make any attempt to rescue a sailor, who, while employed on the royal-yard arm, had accidentally fallen into the sea, by reason of which omission and negligence, the sailor was drowned, will not warrant a conviction of any greater offense than manslaughter.

2. Where the death of a human being is the direct and immediate result of the omission of a party to perform a plain duty, imposed upon him by law or contract, such party is guilty of a felonious homicide.

[Cited in Thomas v. People (Colo. App.) 31 Pac. 350.]

3. In case of a person falling overboard from a ship at sea, whether passenger or seaman, where he is not killed by the fall, the commander is bound both by law and by contract to do everything, consistent with the safety of the ship and of the passengers and crew, necessary to his rescue, no matter what delay in the voyage may be occasioned, or what expense to the owners may be incurred.

4. A doubt founded upon a consideration of all the circumstances and evidence, and not a doubt resting upon mere conjecture or speculation, is a reasonable doubt.

[Cited in State v. Gile (Wash.) 35 Pac. 421.]

5. On the trial of a sea-captain for manslaughter, in omitting any attempt to rescue one of his crew, who had fallen from the royal-yard-arm into the sea, and the defense was that the seaman had been killed by the fall: *Held*, that the burden was upon defendant of showing that the fall was fatal, or of showing such attending circumstances as to create a reasonable doubt whether such was not the fact.

6. If there be any doubt as to the conduct of a person charged with crime, his previous good

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

life and character is entitled to consideration with the jury.

The defendant [Josiah N. Knowles] was indicted and tried at the June term of 1864, for murder on the high seas. The facts of the case sufficiently appear in the charge of the court.

William H. Sharp, U. S. Atty.
Hall McAllister, for defendant.

FIELD, Circuit Justice (charging jury). The defendant is charged in the indictment with the crime of murder upon the high seas. The district attorney does not, however, seek from you a conviction of the defendant for this offense. He asks only a conviction for manslaughter, and the trial has been conducted as if the indictment charged only this lesser offense. Indeed, the facts it alleges as a foundation for the charge would not warrant a conviction of any greater offense. It alleges that the defendant was, on the first day of April, 1864, captain of the American ship Charger, belonging to citizens of the United States; that the ship had on board ten mariners, and among them one John P. Swainson; that the ship was provided with three boats, for the protection and safety of the lives of the persons on board, in case of accident; and that it was the duty of the defendant to manage and control the ship and boats, so as to insure such protection and safety; that on the first of April, 1864, the said Swainson was employed as seaman upon the royal-yard-arm of the mainmast of the ship in furling the royal-sail; that whilst thus employed he accidentally fell into the sea; and that the defendant willfully omitted to stop the ship, or to lower either of the boats, or to make any attempt to rescue and save Swainson, as was his duty to do; that Swainson would have been rescued and saved had the defendant stopped his ship and lowered either of his boats, and from his negligence and omission in this respect, Swainson was drowned.

As you will thus perceive, gentlemen, the charge is that the death of Swainson was occasioned by the willful omission of the defendant to stop the ship, lower the boats, and rescue him, or to make any attempt for his rescue. In the majority of cases where manslaughter is charged, the death alleged has resulted from direct violence on the part of the accused. Here the death is charged to have been occasioned by the willful omission of the defendant to perform a plain duty.

There may be in the omission to do a particular act under some circumstances, as well as in the commission of an act, such a degree of criminality as to render the offender liable to indictment for manslaughter. The law on the subject is this: that where death is the direct and immediate result of the omission of a party to perform a plain duty imposed upon him by law or contract, he is guilty of a felonious homicide. There are several particulars in this statement of the law, to which your attention is directed.

In the first place, the duty omitted must be a plain duty, by which I mean that it must be one that does not admit of any discussion as to its obligatory force; one upon which different minds must agree, or will generally agree. Where doubt exists as to what conduct should be pursued in a particular case, and intelligent men differ as to the proper action to be had, the law does not impute guilt to any one, if, from omission to adopt one course instead of another, fatal consequences follow to others. The law does not enter into any consideration of the reasons governing the conduct of men in such cases, to determine whether they are culpable or not.

In the second place, the duty omitted must be one which the party is bound to perform by law or contract, and not one the performance of which depends simply upon his humanity, or his sense of justice or propriety. In the absence of such obligations, it is undoubtedly the moral duty of every person to extend to others assistance when in danger; to throw, for instance a plank or rope to a drowning man, or make other efforts for his rescue, and if such efforts should be omitted by any one when they could be made without imperiling his own life, he would, by his conduct, draw upon himself the just censure and reproach of good men; but this is the only punishment to which he would be subjected by society.

In the third place, the death which follows the duty omitted must be the immediate and direct consequence of the omission. There are many cases in the reports in which this doctrine of liability for negligence resulting in death is asserted. In one case a defendant had been employed to give signals to railway trains of obstructions on the road. Having on one occasion neglected to give the proper signal of an obstruction, a collision followed, causing the death of a passenger. The negligence was held to be criminal, and the defendant was convicted of manslaughter. Reg. v. Pargeter, 3 Cox, Cr. Cas. 191. In another case, the defendant was employed as the ground bailiff of a mine, and as such it was his duty to cause the mine to be ventilated, by directing air-headings to be placed where necessary. By his omission to do this in a particular place, the damp in the mine exploded, and several persons were killed. The defendant was indicted for manslaughter, and the court instructed the jury that if they were satisfied that it was the ordinary and plain duty of the prisoner to cause the air-heading to be made in the mine, and that a person using reasonable diligence would have had it done, and that by the omission the death of the deceased occurred, they should find the prisoner guilty. Reg. v. Haines, 2 Car. & K.

368. In these cases, you will perceive that the omission which resulted fatally was of a plain personal duty, and that the accident was the immediate and direct consequence of the omission.

Now, in the case of a person falling overboard from a ship at sea, whether passenger or seaman, when he is not killed by the fall, there is no question as to the duty of the commander. He is bound, both by law and by contract, to do everything consistent with the safety of the ship and of the passengers and crew, necessary to rescue the person overboard, and for that purpose to stop the vessel, lower the boats, and throw to him such buoys or other articles which can be readily obtained, that may serve to support him in the water until he is reached by the boats and saved. No matter what delay in the voyage may be occasioned, or what expense to the owners may be incurred, nothing will excuse the commander for any omission to take these steps to save the person overboard, provided they can be taken with a due regard to the safety of the ship and others remaining on board. Subject to this condition, every person at sea, whether passenger or seaman, has a right to all reasonable efforts of the commander of the vessel for his rescue, in case he should by accident fall or be thrown overboard. Any neglect to make such efforts would be criminal, and if followed by the loss of the person overboard, when by them he might have been saved, the commander would be guilty of manslaughter, and might be indicted and punished for that offense.

In the present case it is not pretended that any efforts were made by the defendant to save Swainson, nor is the law as to the duty of the commander, and his liability for omitting to perform it under the conditions stated, controverted by counsel. The positions taken in the defense of the accused are: (1) That Swainson was killed by his fall from the yard; (2) that if not killed, it would have been impossible to save him in the existing condition of the sea and weather; (3) that to have attempted to save him would have endangered the safety of the ship and the lives of the crew. If in your judgment either of these positions is sustained by the evidence, the defendant is entitled to an acquittal.

The killing of Swainson from his fall is alleged from the distance he must have fallen, and the absence of any appearance of subsequent motion on his part in the water. The distance was one hundred and ten feet, as stated by one of the witnesses from actual measurement. Another witness says that Swainson struck the water on his back or front; a third witness states that the feet of Swainson struck the water first, but that the position of the body was somewhat inclined. From the noise made in falling, the mate was of the opinion that Swainson struck the channels on the side of the vessel in his fall. You can judge of the probabilities of the man being alive after a fall of this kind. If you believe from the evidence that he was killed by the fall, that is an end of this case, and you need not pursue your inquiries further. But more, if you have any reasonable doubt, by which I mean a doubt founded upon a consideration of all the circumstances and evidence, and not a doubt resting upon mere conjecture or speculation, whether he was killed by the fall, you need not go further. The prosecution proceeds upon the ground that he was not thus killed, the district attorney relying upon the general presumption of the law that a man known to be alive at a particular time continues alive until his death is proved, or some event is shown to have happened to him which usually, in the experience of men, proves fatal. The fall of a person into the sea from a height of one hundred and ten feet is not an event which is necessarily fatal. Nor can it be said that in the experience of men it is usually so. Its effect depends very much, if not entirely, upon the manner in which the party falling strikes the water, and the existence of obstacles breaking the force of the fall. The fact, therefore, that the fall of Swainson appears in the evidence presented by the prosecution, does not change the presumption of the law, which I have mentioned. The burden still remains upon the defendant of showing that the fall was fatal, or of showing such attending circumstances as to create a reasonable doubt whether such was not the fact. You will not take the fall itself as conclusive on this point, but will consider it in connection with the evidence of the manner in which the party fell, and particularly of the manner in which he struck the water in falling.

If you are satisfied that the fall was not immediately fatal, the next inquiry will be whether Swainson could have been saved by any reasonable efforts of the captain, in the then condition of the sea and weather. That the wind was high there can be no doubt. The vessel was going, at the time, at the rate of twelve knots an hour; it had averaged, for several hours, ten knots an hour. A wind capable of propelling a vessel at that speed would, in a few hours, create a strong sea. To stop the ship, change its course, go back to the position where the seaman fell overboard, and lower the boats, would have required a good deal of time, according to the testimony of several witnesses. In the meanwhile, the man overboard must have drifted a good way from the spot where he fell. To these considerations, you will add the probable shock and consequent exhaustion which Swainson must have experienced from the fall, even supposing that he was not immediately killed.

It is not sufficient for you to believe that possibly he might have been saved. To find the defendant guilty, you must come to the

conclusion that he would, beyond a reasonable doubt, have been saved if proper efforts to save him had been seasonably made, and that his death was the consequence of the defendant's negligence in this respect. Besides the condition of the weather and sea, you must also take into consideration the character of the boats attached to the ship. According to the testimony of the mate, they were small and unfit for a rough sea.

During the trial, much evidence was offered as to the character of the defendant as a skillful and able officer and as a humane man. The act charged is one of gross inhumanity; it is that of allowing a sailor falling overboard, whilst at work upon the ship, to perish, without an effort to save him, when by proper efforts, promptly made, he could have been saved. If there be any doubt as to the conduct of the defendant, his past life and character should have some consideration with you.

With these views, I leave the case with you. It is one of much interest, but I do not think that, under the instructions given, you will have any difficulty in arriving at a just conclusion.

The jury returned a verdict of acquittal.

Case No. 15,541.

UNITED STATES v. KOCHERSPERGER.

[9 Am. Law Reg. 145.]

Circuit Court, E. D. Pennsylvania. 1860.

POST ROADS AND ROUTES—PRIVATE LETTER CARRIERS.

1. The acts of congress of March 2, 1827, § 3 [4 Stat. 238], forbidding all persons other than the postmaster general, or his agents, from setting up any foot or horse post for the conveyance of letters, &c., upon any post-road then or thereafter established, and of March 3, 1845, § 9 [5 Stat. 735], forbidding the establishment of any private express for the conveyance of letters, &c., from a city, town or place, to another city, town, or place, between which the mail is regularly transported, prohibit the business of private letter carriers on mail-routes, but not that of private letter carriers within the limits of a post-town.

[Cited in Byrne v. Rising Sun Ins. Co., 20 Ind. 105.]

2. In the act of March 3, 1851, § 10 [9 Stat. 591], authorizing the postmaster general "to establish post-routes within the cities or towns" whose postmasters are appointed by the president, the word post-routes is not synonymous with post-roads in the act of 1827.

[Cited in Blackham v. Gresham, 16 Fed. 611.]

3. The postmaster general having, conformably to the provisions of the act of 1851, and other statutes, established within the postal district of a city whose postmaster was appointed by the president, a local post for the collection and delivery of letters, &c., not carried by mail, issued an order declaring that, under the authority conferred by the act of 1851, the streets of the city were established as post-roads. This order did not make them post-roads within the meaning of the act of 1827, or make the business of private letter carriers within the postal district of the city, unlawful.

The cause was heard upon a demurrer to the bill, which prayed an injunction to prohibit the defendants from continuing the business of letter carriers, in which they were engaged in the city of Philadelphia.

CADWALADER, District Judge. Judge GRIER authorizes me to state that he has perused the following opinion carefully, and that he fully concurs in it.

A post, etymologically defined, is a mode of conveying written or unwritten intelligence, to and from appointed stations, at regular intervals, or whenever the performance of such service may properly be required. The modes by which intelligence is transmitted through a post, otherwise than at regular intervals, are usually called expresses. Regular posts no longer transmit unwritten intelligence. A post-road is a public highway, whose use by the post is prescribed or authorized by law. A mail is a portable receptacle in which letters, or packets of written or printed sheets, are conveyed by post to an appointed station. A post-office, according to the primary meaning of the word, is an apartment, or building, at an appointed station, for the local transaction of the business of the mail. No postal station is now maintained without such an office.

No government has ever organized a system of posts without securing to itself, to some extent, a monopoly of the carriage of letters and mailable packets. The policy of such an exclusive system is a subject of legislative, not of judicial, inquiry. But the monopoly of the government is an optional, not an essential, part of its postal system. The mere existence of a postal department of the government is not an establishment of the monopoly. When it is legislatively established, it may include one, or more, without embracing all of the subjects of the government's postal arrangements. The business of private carriers of letters and mailable packets, even on principal mail-routes, is lawful, unless legislatively prohibited. A private monopolist, secured by prohibitory legislation, cannot require the suppression of a rival business of competitors who do not infringe the prohibition, merely because the continuance of their business would lessen or destroy the profits of his monopoly. A like rule applies in determining the effect of a government's legislative prohibitions to secure its own postal monopoly. The monopoly cannot be extended beyond the legislative prohibitions merely because the continuance of a specific business which has not been prohibited would reduce the postal earnings of the government, or even frustrate the purposes of its exclusive policy. The remedy, if required, is, in such a case, legislative. These remarks are applicable to the laws which congress has thought necessary and proper for carrying the constitutional power to establish post-offices and post-roads into execution.

How far, if either post-offices alone, or post-

roads alone, had been mentioned in the constitution, the carriage of mailable matter by private persons could have been prohibited by congress, might perhaps, under certain heads, have been a question attended with difficulties which do not exist under the constitution as framed. If the necessity or expediency of a postal monopoly is assumed, the wisdom of expressly mentioning both post-offices and post-roads in the constitution must be conceded. Neither subject of the two-fold constitutional power is altogether distinct or independent of the other. But, as the words of the constitution should be interpreted, each subject of the power is to be regarded as additional to the other. In the present case, the question is, not how far the constitutional power under either head extends, but how far it has been legislatively carried into execution.

The policy of the postal statutes has been to establish, as post-roads, those highways in every prescribed or authorized mail route, which are within the general public domain of the respective states. This has been done by declaring the respective mail routes, post-roads, authorizing the postmaster general to enter into temporary contracts to extend the line of posts, and making prospectively the roads designated in such contracts post-roads. The statutes also make all navigable waters on which steamboats regularly pass, from port to port, post-roads, and all completed railroads post-routes; and authorize the postmaster general to contract for carrying the mail on plank roads and navigable canals, declaring them respectively, for such times and such distances as the mails may be carried on them, post-roads. To obstruct or to retard the passage of the mail, or to refuse to it the privilege of a public ferry, is made penal. On such general public highways, natural or artificial, the citizens of each state are, under the constitution, entitled to all the privileges and immunities of citizens of the several states. The states, in surrendering the powers which they have united in delegating to the general government, had no prudential reasons inducing them to restrict its postal authority over such highways.

But the constitutional power to establish state roads as post-roads, can be executed only by the designation of actual public highways, present or future, for use by carriers of the mail. The existence and continuance of such highways are independent of congressional control. Congress cannot regulate their use, or secure their permanence. When they cease to be common public highways of the respective states, they are no longer post-roads. While they are post-roads, carriers of the mail use them under the same conditions as the respective states have imposed on their own citizens. In a case in the Western district of this circuit, the court was of opinion that the act of congress making all railroads post-routes, applied only to railroads laid out and constructed conformably to the legislation of the respective states. A subsequent act of congress had enacted that certain roads, including a designated railroad, should "be established as post-roads," and declared this railroad a post-route. The road was in a route unauthorized by the legislative charter of the company which constructed it. The court was of opinion that these acts of congress had not made it a lawful highway Cleveland, P. & A. R. Co. v. Franklin Canal Co. [Case No. 2,890]. See 10 Stat. 250; 9 Harris [21 Pa. St.] 123. An act of congress declaring the Wheeling bridge, as it had been constructed at a particular elevation, an established post-road, required steamers navigating the river to adapt the height of their chimneys to this elevation of the bridge. This provision as to steamers, though considered by the supreme court a constitutional exercise of the power to regulate commerce between the states, was not sustained as an execution of the power to establish post-roads. [Pennsylvania v. Wheeling & B. Bridge Co.] 18 How. [59 U. S.] 431. The post office law authorizes the postmaster general to "direct the route or road, where there are more than one, between places designated by law for a post-road," and enacts that the road thus designated "shall be considered the post-road." But though there is only one road in a prescribed mail-route, he cannot, when the road is, from physical obstructions or want of repair, impassable, adopt measures to render it serviceable. The same law requires him in any such case "to report" the fact "to congress, with such information as can be obtained to enable congress to establish some other road instead of it, in the same main direction."

But, the highways of a state, so long as open to the common public use of her own citizens, may be used unobstructedly by carriers of the mail, and cannot be used by private carriers of mailable matter in any mode which has been prohibited by congress. In quoting prohibitory statutes which have created or secured the postal monopoly, their penal provisions, their exemptions of letters carried by special messengers, or of letters carried in a vessel relating to her cargo, and other such particular exceptions, will not be mentioned.

The post-office law of 1825, § 19, enacts that no stage or other vehicle, which regularly performs trips on a post-road, or on a road parallel to it, and no packet boat or other vessel which regularly plies on a water declared a post-road, shall convey letters. This enactment had, in the post-office acts of 1794 [1 Stat. 354], 1799 [Id. 733], and 1810 [2 Stat. 592], been combined with a prohibition of private foot or horse posts on post roads. But the act of 1825 repealed all prior postal statutes, without re-enacting this prohibition. The right of establishing such private posts existed, therefore, from its date until an amendatory act of March 2, 1827, revived the prohibition. This law of 1827, § 3, enacts that no person other than the postmaster general, or his authorized agents, shall set up any foot or horse post for the conveyance of letters and

packets upon any post-road, which is or may be established as such by law.

Increased facilities, afforded by steamers and rail cars, afterwards enabled a private letter carrier, traveling in them as a passenger, to transport packages, containing letters and other mailable matter, as his baggage or as freight. The conveyances which he thus used passed regularly over post-roads, and often carried the mails for the post-office department. But they had not been set up, and were not specially maintained as posts. The means by which he carried on the business were ordinarily designated as expresses. The postmaster general's annual report of December 2, 1843, stated that numerous private posts, under the name of expresses, had sprung within a few years into existence, extending themselves over the mail-routes between the principal cities and towns, and transporting letters and other mailable matter, for pay, to a great extent. This report had been preceded by opinions of two successive attorneys general, upon the effect of the laws which have been quoted. One of these opinions was particularly upon the question of the liability of carriers of such expresses, under the existing laws. 4 Op. Attys. Gen. 159, 276. In the years 1843 and 1844, suits upon these laws, for penalties, were prosecuted by the United States in the district courts for both districts of New York, the Massachusetts district, the Eastern district of Pennsylvania, the Maryland, and perhaps other districts. The defendants were in some cases the principal carriers, whose conveyances were used. In other cases the suits were against the carriers of the expresses themselves. Except in Pennsylvania, and in Maryland, the prosecutions were unsuccessful. The questions, and the points decided in other districts, were very clearly stated in a written opinion of Judge Randall, which was published in the Philadelphia Ledger of October 9, 1844. It appears, from the postmaster general's annual report of November 25, 1844, that the government had been uanble to suppress the private expresses, which were still continued "upon the leading post routes." In this, and in the former annual report, he recommended legislation by congress for their suppression.

Sections 9 to 12 inclusive of an act of March 3, 1845, were intended for this purpose. The ninth section enacts that it shall not be lawful to establish any private express, or expresses, for the conveyance, or in any manner to cause to be conveyed, or provide for the conveyance or transportation by regular trips, or at stated periods or intervals, from one city, town, or other place, to any other city, town, or place in the United States, between and from and to which cities, towns, or other places, the United States mail is regularly transported under the authority of the post-office department, of any letters, packets, or packages of letters or other matter properly transmittable in the United States mail, except newspapers, pamphlets, magazines, and periodicals. The 10th section enacts that it shall not be lawful for any stage coach, railroad car, steamboat, packet boat, or other vehicle or vessel, or any of the owners, managers, servants, or crews of either, which regularly performs trips, at stated periods, on a post-route, or between two or more cities, towns, or other places, from one to the other of which the United States mail is regularly conveyed under the authority of the post-office department, to transport or convey any letter or letters, packet or packages of letters, or other mailable matter, otherwise than in the mail. The eleventh section makes it penal for the owner of a stage coach, railroad car, steamboat, or other vehicle or vessel, to convey or transport any person acting or employed as a private express for the prohibited conveyance of mailable matter; and the twelfth section imposes a penalty for the transmission of any such matter by any prohibited means, or for the depositing of it for the purpose of being transported by any such means. The purpose of these prohibitory statutes was thus to secure to the United States a monopoly of the carriage of letters and mailable packets on mail routes.

Public streets, intersecting a municipal town, are, as highways, distinguishable, specifically, from the general public highways of a state beyond the town limits. The streets are, indeed, as thoroughfares, general public highways of the state. But, independently of this character of thoroughfares, the streets are specially local highways of the town. Internal affairs of municipal towns, affecting their local interests alone, are always regulated more or less by their local governments. These governments are administered in subordination to the paramount authority of the government of the state in which the towns are situated. But, in the legislation of the paramount government affecting local interests of such municipalities, the burdens, necessities, and future welfare of their inhabitants are always to be considered. In the United States the power of uncontrolled legislation on such subjects is exercisable by the several states. They are subjects over which the states have delegated no power of direct legislation to the government of the United States. The streets within the limits of such towns are made and repaired at the charge of the respective towns, or of their inhabitants. The transaction of local business in such streets may, to a greater or less extent, be regulated by local ordinances. Internal regulations of police require especial adaptation to and observance and enforcement in, the streets. A street in a town is within the sovereign dominion of the state, but not as a part of its general public domain. It is a part of the special public domain, as to which no just government can legislate with a disregard of local rights and interests of inhabitants of the town. The public streets of a municipal

town over which the mail may be carried in any of the routes established by congress as post-roads, are, doubtless, post-roads for the passage of the mail. Whether streets of such a town can be established by congress as post-roads for any other purpose is questionable. The question may not be one of constitutional power, but may concern only the constitutional head under which the power is exercisable. So far as the prohibition of private letter carrying within the limits of such a town may be concerned, the legislative power which is wanting under the head of post-roads, may, perhaps, be incidental to the execution of the power to establish post-offices. If this be so, the point may be of little ultimate practical importance. But its present importance, from the particular language of the prohibitory and other enactments of the postal statutes in force, is not insignificant.

In some enactments of the postal statutes, the word "post-office" designates—according to its primary meaning—a building, or apartment, in which the postal business of a mail station is transacted. Thus, the act of July 2, 1836, § 36, requires every postmaster to reside in the city, or town, in which his office is situated, or in the district of country which it usually supplies. The word has also this meaning in the seventeenth and sixth sections of the post-office act of 1825. These two sections contain the only prohibitory enactments by congress, expressly securing the postal monopoly of the government, which have not already been cited. The seventeenth section, repeating enactments of prior laws of the United States, which had been adopted from British statutes, provides that no vessel arriving at any port where a post-office is established, shall be permitted to report, enter, or break bulk, until all letters directed to any person or persons in the United States, or their territories, brought in her, under the care or control of her master or commander, shall have been delivered to the postmaster. The sixth section requires every master, or manager of any steamboat, passing from one port or place to another port or place where a post-office is established, to deliver all letters and packets addressed to, or destined for, such port, or place, to the post-master there; and requires every person employed in any steamboat, to deliver every letter and packet of letters entrusted to him, to her master or commander, before she shall touch at any port or place.

But, in postal statutes, the word "post-office" frequently has another meaning. The postmasters are not, in any respect, carriers of the mail. [Dunlop v. Munroe] 7 Cranch [11 U. S.] 267; 8 Watts, 453; Cowp. 764. The business of their offices includes many local arrangements in, and near, their stations, or districts, which congress, in executing the power to establish them, has, necessarily, regulated. The word "post-office," as used in the statutes, therefore, frequently designates a mail station, or the postal district of such a station. The station may be a single detached house in which the post-office is kept. A post-office may be in a village, or in a municipal town, small or great. In the United States, a mere village is not, for postal purposes, usually distinguishable from such parts of the rural district in which it is situated as contain only detached houses. But, where the site of a post-office is a municipal town, the whole space within its limits, beyond the walls of its post-office, is usually included within the station; and is, for many postal purposes, distinguishable from exterior spaces. Adjacent built spaces may be included in the postal district of the town. If the corporate limits of the town embrace unbuilt spaces, they may be excluded from its postal district. But either the whole town, or its whole postal district, may be, and usually is, a single postal station. Some postal statutes, hereafter quoted, apply only to such sites of post-offices as are incorporated under the name of cities. Other statutes apply to cities and other principal post-towns. The principal post-towns are distinguishable from those of secondary importance by a difference in the methods of appointing the postmasters. Under the act of July 2, 1836 [5 St. 87], the president appoints them at places where the annual commissions have amounted to $1,000. At other places they are appointed, under the act of March 3, 1825, by the postmaster general. Thus, New York, Philadelphia, and the other great cities, and all other municipal towns, whether cities or not, at which the respective postmasters are appointed by the president, may be classed as principal post-towns. But, the primary general division here, and in England, is into post-towns and rural districts. The supreme court of the United States has used the word "post-town" as including, in a general sense, all spaces other than those designated as rural. [Bank of Columbia v. Lawrence] 1 Pet. [27 U. S.] 583; 2 Pet. 651. The legal definition of a town accords with such a general use of the word "post-town." Co. Litt. 115, 116. Lord Mansfield, referring to the words, "any town or place," in an English postal statute, said that they were used because, at some stages, there was only a single house, but that the whole of a town was considered as one spot, and referred to a prior case, in which the court had "considered the city of Gloucester as the post-town or place in opposition to limits out of the town." Cowp. 188.

The constitutional power of congress may, perhaps, as to some subjects which have been mentioned, be executed under the head of either post-offices, or post-roads, or partly under the one head, and partly under the other. But, of other subjects of the power, this cannot be said. Under the head of post-roads, the power seems to have been properly executed in designating highways for use in mail routes, and in protecting and reg-

ulating such use. Under the head of post-offices, the power is properly executed by establishing mail stations, and regulating their postal business and its incidents. According to this classification, a post for the carriage of letters on a mail-route is distinguishable from a local post for their collection and carriage within the limits of a mail station. The former has been called a general post. Cowp. 188. Such a post has already been sufficiently described. The local posts, of which, as yet, nothing has been said, are special arrangements of comparatively modern origin. Their establishment has been preceded, perhaps, everywhere, by the employment of letter carriers for the local delivery of the contents of mails. The business of such official carriers as thus deliver letters received by mail may be combined with deliveries of drop letters. These, in the language of the act of March 3, 1845, § 1, are "letters placed in any post-office not for transmission by mail, but for delivery only." This two-fold official business of the carriers employed for the delivery of letters received at post-offices differs from that of official carriers employed in the special collection and delivery of letters for a local post. The difference exists alike whether the respective duties of the two employments are performed by different persons, or, in whole or in part, by the same carriers. The business of letter carriers who deliver letters received at post-offices, including drop letters, will be first considered. The special business of the official carriers of the public local posts will, afterwards, be considered separately.

The business of a general post, consisting in the carriage of the letters and packets by mail, is completed by their delivery. In England, a retention of them at the post-office of destination until they should be called for, was not, in general, considered a delivery. 3 Wils. 453; Cowp. 182. In general, therefore, no compensation for delivering them elsewhere could be charged as an addition to the statutory mail postage. Way letters were, to some extent, collected and delivered by mail carriers on post-roads at points inconveniently distant from any post town. This was probably done only in sparsely peopled rural districts, in order to obviate the necessity for increasing the number of unproductive post-offices. See St. 9 Anne, c. 10, § 33. The persons to whom way letters were thus delivered paid no more than the statutory mail postage. 3 Wils. 450, 451. When the post-office of a station was a single detached house in the country, the deliveries were made at it, the letters remaining there until called for. Cowp. 182, 189. This, probably, was the rule, or practice, at most, if not all, the rural stations. But, in the post-towns, including London, the letters were deliverable, within the town limits, at the houses of residence, or sojourn, or business, of the respective persons to whom they were directed. They were thus deliverable in the town without any charge in addition to the mail postage. But, the letters directed to persons beyond the town limits were considered as deliverable at the post-office. These letters might remain at the respective post-offices, therefore, until called for. The postmasters, or letter carriers of the post-offices, who extended their deliveries beyond the respective town limits, were thus at liberty to derive an emolument from this extension of the business. Persons beyond the town limits, who did not prefer calling at the post-office, paid a compensation for the carriage of their letters in addition to the mail postage. English legislation of two centuries ago indicates that this extension of the letter carrying business was then a source of actual or expected profit. The same legislation shows that a prohibition of private letter carrying within the limits of a post-town was not then implied from an enactment forbidding the carriage of letters by a foot or horse post, but, that when the private carriage of letters within such a town was to be prevented, it was forbidden by a distinct prohibition.

The post-office department in England, was first permanently organized in 1656, by an ordinance for which the act of 1660 (12 Car. II. c. 35), passed at the Restoration, was a substitute. Of the prior arrangements of the government with successive patentees and farmers of the posts, the last had been a contract made by the council of state in 1653, confirmed by an ordinance of 1654, farming, for two years, the office of postmaster, foreign and inland, and prescribing regulations of the office. It ordained that the farmer should have the exclusive care and charge of the postage and carriage of all letters and packets foreign and inland from all persons, and in all places, of England, Scotland, and Ireland, and to and from all other places within the dominions of the commonwealth, that no person other than himself and his deputies should set up any post, or keep horses, or any packet boat or boats, for the carrying or sending of letters inland or foreign, and prohibited all posts, and carriers post, to or from any town or place within the commonwealth or its dominions not licensed by him or his deputies. This ordinance did not prohibit private letter carrying otherwise than by post, but prohibited private posting as fully as the acts of congress of 1825 and 1827. The ordinance of 1656 secured the monopoly to the postmaster general and his deputies by prohibitions which, though somewhat amplified in expression, did not, in effect, extend beyond those of the ordinance of 1654. But, the act of 1660 contained a twofold prohibition, forbidding private letter carrying as well as private posting. It enacted that no person other than the postmaster general, and his deputies, should carry, recarry, and deliver letters for hire, or set up or employ any

foot-post, horse-post, coach-post or packet-boat whatever, for the conveying or carrying of any letters or packets by sea or land, within the dominions of the crown. It was provided that nothing in the act should be understood to prohibit the carrying or re-carrying of any letters to or from any town or place to or from the next respective post-road, or stage appointed for that purpose, but that every person should have free liberty to send and employ such persons for the purpose as he should think fit. Thus, all private letter carrying, not included in this and other particular exceptions, was prohibited. The contrast of the former ordinances, and this act of 1660, shows that though, by the latter, private letter carrying elsewhere than on mail routes was forbidden, it was not included in the phrase private posting, or understood to be forbidden by a prohibition of such posting. This was not less indicated in the post-office act of 1710, which supplied that of 1660. The modifications in the act of 1710 were especially consequent upon the establishment of local posts which had been introduced in the meantime.

The motive of extending the prohibition of private letter carrying by the act of 1660, must have been to secure to the official letter carriers of the post-towns an emolument from their deliveries beyond the town limits. But, as the villages became towns, and the population of the towns increased, the spaces within which the postmasters were compellable to deliver letters, without any charge, were extended. Their emoluments from the carriage of letters were thus diminished as their burdensome duties were increased. In the smaller post-towns, which were about four-fifths of the whole number in the kingdom, the postmasters declined making deliveries, except at the respective post-offices, without an additional allowance. Cowp. 189, 186. In 1768 it was decided that no postmaster could lawfully demand an additional payment for delivering letters at private houses in a post-town. 4 Burrows, 2149; 5 Burrows, 2711, 2709. But, the postmasters still insisted that the post-offices were the only places at which they were bound by law to deliver letters, and that persons unwilling to make the extra-payment could not require the deliveries to be made at the respective places of their abode. In this position, the postmasters appear to have been at one time sustained by the postmaster general. Id. 2710. But the point was afterwards judicially decided in the common pleas in 1773, and king's bench in 1774, against this opinion. 3 Wils. 443, Cowp. 182. The decisions were that, in all post-towns, the deliveries must be made, for the mail postage only, at the respective private residences of all persons whose residences were known or could be found. But the rule of decision was not applicable to letters for persons residing beyond the town limits. After these decisions, the course of business was to suffer letters for such persons to remain in the post-offices until called for. 2 J. P. Smith [Eng.] 404, 405.

The general provisions of the English post-office acts of 1660 and 1710 were, in express terms, applicable to the colonies. While the act of 1660 (12 Car. II. c. 35) was in force the office of postmaster general for the colonies was created, and its administration aided by colonial legislation. The act of 1710 (9 Anne, c. 10) expressly authorized the establishment, with the approval of the English postmaster general, of a chief post-office in each colony. This act was in force until the War of Independence. It was afterwards consulted by those who drew the earlier postal statutes of the United States, and was the source from which some provisions of acts now in force were derived. But local reasons rendered many of its regulations inapplicable in the colonies. Insuperable difficulties would have prevented any general organization of a system of deliveries of letters in them except at post-offices.

The congress of the United Colonies, in July, 1775, appointed a postmaster general, under whose direction a line of posts was to be established with cross-posts. The articles of confederation of 1778 gave to congress the sole and exclusive right and power of establishing and regulating post-offices from one state to another throughout all the United States, and exacting such postage on the papers passing through the same as might be requisite to defray the expenses. The preamble and enactments of an ordinance of October 18, 1782, regulating "the post-office of the United States," indicate that the congress of the Confederation defined its own legislative power for postal purposes "throughout all the United States," as if the article conferring it had not contained the words "from one state to another," or as if these words had not been of restrictive import. As mail-routes within a state were essential to a postal communication between the states, the words could not have excluded the power of establishing such mail-routes. This ordinance enacted that a continued communication of posts should be established under prescribed regulations, and that the postmaster general and his deputies, and no other person, should have the receiving, dispatching, sending post, carrying, and delivering of any letters, packets, or other despatches, from any place within the United States, for hire or profit, but that private cross-posts might, with the consent of the postmaster general or his deputy, be employed on any cross-road until a public rider could be established on it. The first congress under the present constitution enacted, in 1789, a law for "the temporary establishment of the post-office," authorizing the appointment of a postmaster general, whose powers, and the regulation of the post-office, were to be the same as they last had been under the resolutions and ordinances of the congress under the former government.

This law was annually renewed until 1792, when it was temporarily supplied by "an act to establish the post-office and post-roads within the United States," which was to remain in force for two years. The latter act was altered and supplied on May 8, 1794, by the first permanent post-office law of the United States. As the act of 1794 was also the first law of the United States which mentioned letter carriers at the sites of post-offices, or drop-letters, its prohibitory enactments which defined and secured the postal monopoly should be compared and contrasted with those of the previous temporary act of 1792. The law of 1792 (section 14) made it penal for any person other than the postmaster general or his deputies, or persons by them employed, to take up, receive, order, dispatch, convey, carry, or deliver any letter or letters, packet or packets, other than newspapers, for hire or reward, or to be concerned in setting up any foot or horse-post, wagon or other carriage, by or in which any letter or packet should be carried for hire or any established post-road, or any packet or other vessel or boat, or any conveyance whatever, whereby the revenue of the general post-office might be injured. The law of 1794 substituted for these prohibitions an enactment (section 14) which only prohibited any person other than the postmaster general or his deputies, or persons by them employed, from being concerned in setting up or maintaining any foot or horse-post, stage, wagon, or other stage-carriage, on any established post-road, or any packet, boat, or other vessel, to ply regularly from one place to another, between which a regular communication by water should be established by the United States, and from receiving any letter or packet other than newspapers, magazines, or pamphlets, and carrying the same by such foot or horse-post, stage, wagon, or other stage-carriage, packet, boat, or vessel. The exception as to newspapers, &c., is no longer in force. In other respects, the prohibitions of this act of 1794 were the same as those in the acts of 1825 and 1827, now in force, which have been quoted.

The act of 1794 (section 28) authorized the employment at such post-offices, as the postmaster general should direct, of carriers for the delivery of letters at the places respectively where such post-offices were established, except letters to persons who might, in writing, request them to be detained in the post-office. The act allowed a certain compensation to the carriers for the delivery of every letter received by post, and ascertained the postmaster's compensation for every drop-letter. These enactments were repeated in the laws of 1799 and 1810, and, with a slight verbal alteration, in the act of March 3, 1825, the provisions of which section, except that the letter carriers' compensation has been reduced, are now in force. Thus, the business of the carriers who deliver letters received at the post-office of a mail station, is not regulated, in the United States, as it was in England at the date of their independence. But, notwithstanding the differences of the regulations in the two countries, the towns which include the respective districts of such letter carriers are, in the United States, for postal purposes, not less than in England, single places. We have seen that, in England, the business of such letter carriers in a post-town was not that of a distinct independent post. The differences of regulation in the United States do not bring this business, as a separate one, within the statutory definition of a carriage by post. If this had not already been shown, it would be proved by the description of a drop letter in the acts of 1794, 1799, 1810, and 1825. Such a letter is described in them as one "lodged at any post-office not to be carried by post, but to be delivered at the place where it is so lodged." That carriage by post here meant carriage by mail, appears from the language in which this definition of a drop letter was repeated in the passage already cited from the act of 1845.

No act of congress, hitherto quoted, indicates, on the part of the government of the United States, a purpose to monopolize the local business of letter carrying in a post-town. On the contrary, the omission in the act of 1794, and in the subsequent legislation, of every word used in any prior statute on either side of the Atlantic which could possibly have been thought applicable to such letter carrying, as distinguished from private letter carrying on mail-routes, proves that congress intended to prohibit the latter business only. The letter carriers of the post-offices in towns would have had no motive to desire any prohibitory statute for their protection, if drop letters had not been included in their deliveries. Their superior facilities of access, in the post-offices, to the contents of the mails, would have secured the priority of their deliveries over those of private carriers calling there for letters. Through this priority, the official carriers would have had a practical monopoly, so long as the service of a competent number of them was properly performed at reasonable rates of charge.

Local posts will next be considered. These, as has already been observed, are special arrangements for the carriage of letters and packets to and from subordinate stations within the limits of a mail station. Such special posts, private or public, become necessary when the buildings of a populous mail station cover an extensive space. The business of such posts, when transacted by a government, is altogether independent of the reception or delivery of the contents of the mails. A government which monopolizes the business of letter carrying in a populous post-town, must establish such a system of postal stations within the town limits. A government which does not monopolize the business within the town, may, also, for the accommodation of its inhabitants, establish such a system of internal posts. This may be done by an extension of the drop letter system, through ar-

rangements for a subsidiary collection, by postal officials, of letters, and packets, at convenient points of reception or deposit within the town, beyond the walls of its post-office. When other offices are established for this purpose at any of the subordinate stations, they are called sub, or branch, post-offices. Though the primary receptacles of the letters are not offices, but mere appointed places of deposit, the local collection and carriage of the letters is a species of post. The word "post-office," when used without any qualification, designates not a branch post-office, but a post-office at which mails arrive. So, the word "post" used without qualification, express or implied, signifies a general post, and not a mere local post within the limits of a mail station. But the relation, or context, of the word post, may so qualify it as to show that a special or local post is intended where no qualification is otherwise expressed.

In England, the type of such a post is the penny post of London. This post was first established while the above quoted prohibitory enactments of the English post-office law of 1660 were in force. It originated in a private post established within the city, and the built suburbs, by letter carriers, whose business was conducted without the sanction of the post-office department. The prohibitory provisions of the act of 1660 enabled the department to suppress the business as a private enterprise. It was taken out of the hands of its projector into the management of the government; but he received a compensation from the government. A subsequent private undertaking of the same kind, called the half-penny post, was also suppressed by the government while the act of 1660 was in force. This act contained nothing which expressly sanctioned the charge by the government of a penny upon every letter and packet carried by this post. But, as no such service was prescribed by the act, the charge, when the service was performed, was, perhaps, not unlawful. The post-office law of 1710 contained enactments which indicate, however, that some doubt may have existed as to the lawfulness of this charge, and also some doubt of even the sufficiency of the prohibitions in the act of 1660, to prevent private letter carrying within the limits of a post-town. The act of 1710, among the prescribed rates of postage, included one penny upon every letter and packet passing or repassing by the carriage called the penny post, established and settled within the cities of London and Westminster, and borough of Southwark, and parts adjacent, and to be received and delivered within ten miles from the general post-office in London. This act prohibited all persons other than the postmaster general, or his deputies, from receiving, dispatching, conveying, carrying, recarrying, or delivering, any letters or packets, or making any collection of letters, or setting up, or employing any foot-post, horse-post, or packet boat, or other vessel or boat, or other person or persons, or conveyance, for the receiving, dispatching, conveying, carrying, recarrying, or delivering, any letters or packets, by sea or by land, or on any river, within the dominions of the crown, or by means whereof the same should be done. But nothing in the act was to be understood to prohibit the carrying or recarrying of any letters or packets to or from any town, or place, to or from the next respective post-road, or appointed stage, above six miles from the general post-office in London, or the chief offices of Edinburgh and Dublin; and every person was to have liberty to send and employ such persons for the purpose as he should think fit; provided that nothing therein contained should authorize any collection of letters to be made in or near London, or the suburbs, under pretence of conveying the same to any parts or places in the city, or suburbs, or to the general post-office of London, without the license of the postmaster general. The limits of the business of the penny post were enlarged in 1732 by the statute of 4 Geo. II. c. 33. This act authorized the charge of an additional penny for deliveries beyond the former limits. These former limits were afterwards understood to include all such suburbs as had been covered with rows of contiguous buildings in 1710. Cowp. 624. The opinion which seems to have been afterwards entertained was, that the postmaster general could not, without further legislative authority, establish such a post in any other town, on such a footing as to be secure against competition with private letter carriers. This appears from a statute of 1765 (5 Geo. III., c. 25, §§ 11 and 12), which authorized him to establish an office, to be called the "Penny Post-Office," in any city or town, and the suburbs thereof, and places adjacent, in Great Britain and Ireland, and the British dominions in America, and to demand and receive the same rates for the postage of letters and packets conveyed by such penny post as were, or might be, taken for the carriage of letters and packets by the penny post established in the cities of London and Westminster, and borough of Southwark, and parts adjacent, according to the extent and meaning of the acts of 1710 and 1732, and of this act; and that, when such penny post-office, or offices, should be established, no person should, without the postmaster general's license, make any collection of letters or packets, in or near such city, town, suburbs, or places where the same should be established. If any measures, under this authority, were adopted by the British government before the Declaration of Independence, for the establishment of a penny post any where within the present limits of the United States, no such measure was carried permanently into execution. The review of the English statutes on the subject has been thought necessary, because they are legislative precedents indicating that a mere authority to establish a penny post of the government in a town

does not imply that, when it is established, private letter carrying in the town is prohibited. They indicate also that something more than a general enactment forbidding private posting is required in order to prohibit private letter carrying within the limits of a local post.

The first in date of the acts of congress of the United States which expressly sanctioned the establishment of local public posts within the limits of mail stations was the act of July 2, 1836. This act (section 41) authorizes the postmaster general, whenever proper for the accommodation of the public in any city, to employ letter carriers for the delivery of letters received at the post-office in the said city, except letters for persons who may, in writing, have requested them to be retained in the post-office, "and for the receipt of letters at such places in the said city as the postmaster general may direct, and for the deposit of the same in the post-office." The provisions of this enactment concerning the employment of carriers of letters received at the post-office, were, in effect, a repetition of the provisions of the act of 1825 on that subject. They must have been introduced in order to preclude any implication of an intention to change the prior system of delivery of such letters. The only part of the act of 1836 which concerns the subject of present consideration was the authority to employ carriers for the primary receipt of letters at places other than the post-office of the respective cities. Before arrangements of this kind were thus expressly authorized by this act, they had been, to some extent, made by the postmasters at one or more cities. The second section of an act of May 18, 1842, required the "postmasters at New York, Boston, Philadelphia, Baltimore, and New Orleans, and the other several cities of the Union" to account thereafter for all emoluments or sums received for boxes, or pigeon holes, or other receptacles for letters or papers, or for the delivery of letters or papers at or from any place in either of the said cities other than the actual post-office of such city, and for all emoluments, receipts, and profits, from keeping branch post-offices in either of the said cities. An act of March 3, 1847, authorizes and directs the postmaster general to establish, when, in his judgment, the public interest or convenience requires it, one or more branch post-offices, to facilitate the operations of the post-office in any city or place which, in his opinion, may require such additional accommodation for the convenience of the inhabitants; and makes it his duty to prescribe regulations for such branch post-offices, and provides that no additional postage shall be charged for the receipt or delivery of any letter or packet at any branch post-office. A law of March 3, 1851 (section 10), enacts "that it shall be in the power of the postmaster general at all post-offices where the postmasters are appointed by the president of the United States, to establish post-routes within the cities or towns, to provide for conveying letters to the post-office by establishing suitable and convenient places of deposit, and by employing carriers to receive and deposit them in the post-office; and at all such offices it shall be in his power to cause letters to be delivered by suitable carriers to be appointed by him for that purpose." And an act of June 15, 1860, has authorized the postmaster general to establish boxes for the delivery of letters at the outside stations in the suburbs of cities if it can be done without loss to the department or injury to the service.

Under the respective authorities conferred by the laws which have been mentioned, branch post-offices have been established in the city of Philadelphia, and also boxes for the reception of letters and packets at other places in the streets of the city. As the postal business within the station has been regulated, the letters and packets received in these branch offices, and in the boxes throughout the city, are collected and carried to the Philadelphia post-office. In the five enactments which have been quoted as authorizing or sanctioning the establishment of posts within the limits of mail stations, we find no prohibition of the business of private letter carriers within such limits. Congress has, on the contrary, omitted to insert the prohibitions of which legislative precedents would have suggested the adoption, if it had been intended to forbid such business. Of the five enactments, none except those of 1847 and 1851, apply to any mail station whose municipal character is not that of a city. The act of 1847 applies to places not of this character so far as the words "any city or place" can thus determine its application. But this act authorizes no specific arrangement of a local post except through subsidiary post-offices. We have seen that such offices are not the only primary receptacles of letters at the internal stations of such a post. The act of 1851, which applies to every principal post town, whether a city or not, authorizes the establishment of a more extended and more complete system of local posts; and specifies the intended subjects of its arrangements in detail. We have seen that a monopoly by the government of letter carrying, at the sites of the local posts, is not an essential part of such a system. The "post-routes," which this tenth section of the act of 1851 authorizes the postmaster general to establish in the respective towns or cities are thus local posts to and from interior subordinate stations of the cities or towns. The definition of them is thus distinctly given in the act itself, which designates them as "post-routes within the cities or towns." If any other meaning of the word post-routes was intended by the draftsman of the act, the latent intention is

expressed so that effect can be given to it. The special post-routes defined in the act are thus different from such mail-routes, used by general posts, as are called, in a more general sense, post-routes. Unless the word "post-route" is isolated, and its context and relation disregarded, this general meaning is not attributable to it, as it is used in the act.

But, at the post-office department, the general meaning has been attributed to it, and it has been considered synonymous with post-roads. The postmaster general issued, on July 17, 1860, an order, to take effect on August 1, 1860, declaring that, under the authority conferred by the act of 1851, the streets and other public avenues in certain designated parts of the city of Philadelphia "are established as post-roads." "Post-route" and "post-road" are not properly synonymous even when applicable to the carriage of a mail to and from appointed postal stations. A post-route, in this general sense of the word, is the appointed course, or prescribed line of transportation of the mail. Post-roads are, as we have seen, the highways, or public passages, on which it is transported in such a route. In the postal statutes the words post-route and post-road have, therefore, sometimes, distinguishable meanings. Their meanings may be practically different. See 9 Harris [21 Pa. St.] 127. Nevertheless, the distinction has not always been observed. The words "post-route" and "post-road" have, sometimes, in the postal statutes, the same signification. Of the instances in which this occurs, one, in particular, will be mentioned. The act of July 7, 1838, § 2, contains the words: "Each and every railroad within the limits of the United States which now is or hereafter may be made and completed, shall be a post-route; and the postmaster general shall cause the mail to be transported thereon, provided he can have it done upon reasonable terms," &c. And the act of July 25, 1839, provides that he shall not, under this authority, allow more than a certain rate of compensation to railroad companies for the conveyance of the mails "upon their roads." Here the railroads were to be used in the routes of general posts, to and from appointed mail stations. If such mail-routes had likewise been the subject of the tenth section of the act of 1851, the word post-routes, as used in it, might have been understood as having likewise the meaning of post-roads. But the interior local posts of a town, and not such general posts, are the subject of this enactment. We think, therefore, that the word post-routes is used in it in a special sense in which it is not synonymous with post-roads, and that the latter word is, consequently, misapplied in the postmaster general's order.

The bill, after setting out this order, complains that the defendants, without the authority of the United States, have set up, and now continue a foot-post and a horse-post for the conveyance of letters and packets over the streets and other avenues in the parts of the city designated in the order, and are engaged in carrying and delivering such letters and packets for hire or compensation within these limits. The defendants having demurred to the bill, admit the truth of these allegations. The argument for the United States is that the word post-routes is, in the act of 1851, synonymous with post-roads, that the postmaster general's order has, therefore, under the authority conferred by this act, made the streets in question post-roads, and that, consequently, the act of 1827 prohibits the business of the defendants as that of carriers of letters and packets, by post, on such roads. For the reasons which have been stated, we do not think that this interpretation of the act of 1851 can be sustained, or that the defendants are letter carriers by any such post as the act of 1827 prohibits. We think that the act of 1827 applies only to private posts on mail-routes, and that the act of 1851 does not apply to such routes.

The bill further complains, and the demurrer admits, that the defendants, without the authority of the United States, have established and now continue in use a private express, for the conveyance or transportation, for hire or compensation, of letters and packets, other than newspapers, pamphlets, magazines, and periodicals, by regular trips, and at stated periods or intervals, from various places within the city of Philadelphia to various other places in the city within and between the postal districts of the city, over the streets, avenues, and other highways of the city. These allegations are copied from the ninth section of the act of 1845, which has already been fully set forth "Cities, towns, or other places" are mentioned in it. Upon these words the argument for the United States is, that private expresses between "places" within the postal district of a city or other town are prohibited. We have seen, that the purpose which induced this legislation of 1845 was to prohibit private expresses on mail-routes. A legislative enactment may, however, extend beyond, as it may fall short of, the purpose of its draftsman. In its interpretation the question to be decided is, not what he may have intended, but what its words mean. The enactment now in question preceded the acts of 1847 and 1851—the latter of which was the first authority for the establishment of an extended system of local posts in towns. But the prior act of 1842 had recognized the existence of branch post-offices in cities, and the act of 1836 had authorized the reception of letters, in cities, for the respective post-offices at designated places beyond their walls. Therefore, it is not impossible that congress might have intended, in 1845, to

prohibit private letter-carrying within the limits of cities in which such internal posts are established. The question consequently may be considered as if the acts of 1847 and 1851 had preceded the act of 1845. This gives the utmost effect possible to the argument for the United States. But the argument, with all this aid, cannot be sustained. Where "cities, towns, or other places" are mentioned in the act, the word places designates mail-stations which are neither cities nor towns. But no "places" other than mail-stations are designated. Points within the limits of a mail-station or postal district are not within the meaning of the word "places," as used in the act. In the statute already mentioned as having been quoted by Lord Mansfield, the word "place" in a similar context thus had the meaning of postal-station. Cowp. 188. It has had a like meaning in other English and American acts of legislation, which have been mentioned. The word has had this precise meaning also in a judicial statement of the methods of giving notice of the dishonor of negotiable paper, personally or by post, "when the parties reside in the same city or place," and when the party to be served "resides in a different place or city." 11 Johns. 232. In the act of congress now in question, the whole import of the context and the particular import and application of certain words which might be quoted and commented upon, thus define the word "places." Thus, the business in which the defendants, as letter-carriers, are engaged, is neither a private post within the meaning of the act of 1827, nor a private express within the act of 1845. The continuance of their business has a tendency to reduce the postal profits of the government or of its officials, by diminishing the number of letters received officially for local delivery. But this does not render the business unlawful, unless it is prohibited by the statutes which create or secure the postal monopoly of the government. The question is, not whether the business could constitutionally have been prevented or suppressed, but whether it has been legislatively prohibited. Though a local post, with subordinate stations, has been established in a post-town, the statutes in force do not, in our opinion, prohibit the business of private letter-carriers within the limits of the town.

Hitherto, the case has been considered as if the business of the defendants was confined to the carriage of such letters and packets as officials of the government could carry only on routes of the local post established within the limits of the Philadelphia mail station. If the business of the defendants, as described in the bill, were confined to the carriage of such letters, the demurrer, in its present form, would be sustained, and the bill dismissed. But, the bill contains other allegations. The legislature of Pennsylvania, by an act of February 2, 1854, incorporated newly the city of Philadelphia, with an enlargement of its boundaries, which now embrace the whole of the former county of Philadelphia, including extensive rural spaces beyond the limits of the former city and of the adjacent built districts. Within this enlarged municipality are many mail-stations, every one of them having its post-office, which is neither a sub nor a branch office. The built and rural districts of the city are intersected by streets which, so far as used between these offices by the general posts, are, of course, mail-routes. The parts of the city designated in the postmaster general's order include several of the mail stations and certain rural spaces. The bill, referring to the act of the state legislature incorporating the new city, names the several mail stations within its limits, and contains allegations importing that the defendants carry, not only such letters as have been specifically mentioned, but also letters which general posts of the government might carry on the streets in question, as established post-roads between such mail stations. The defendants, if engaged in carrying letters or packets which might otherwise be thus carried by mail, violate the prohibition in the act of 1827. This prohibition is thus, however, independent altogether of the postmaster general's order of July, 1860, and of any act of congress passed since 1827. So far as the bill may have this import, the demurrer cannot be sustained. A demurrer to so much of the bill as is not of this import would, however, have been sustainable. A demurrer thus framed would, perhaps, as may be inferred from the course of the argument, cover the whole intended subject of controversy. An application to amend the demurrer, or to take it off the file and demur again, may, therefore, be entertained. See 2 Schoales & L. 207; 4 Madd. 192, 207, 208. The case will stand over that the defendants may have an opportunity to make such an application.

Case No. 15,542.

UNITED STATES v. KOHNSTAMM.

[5 Blatchf. 222.] [1]

Circuit Court, S. D. New York. May 30, 1864.

CLAIMS AGAINST UNITED STATES — PRESENTING FALSE PAPER—CRIMINAL PROSECUTION.

1. Under the first section of the act of March 3, 1823 (3 Stat. 771), making it an offence to knowingly present a false paper in support of a claim against the United States, with intent to defraud the United States, it is not necessary that the claim should be one in favor of the person who presents the false claim in its support.

2. The repealing clause of the act of March 2, 1863 (12 Stat. 699), saves prosecutions for criminal offences committed under the said act of

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

March 3, 1823, previous to the passage of the act of 1863.

This was a motion in arrest of judgment. The defendant [Solomon Kohnstamm] was indicted and convicted, under the first section of the act of March 3, 1823 (3 Stat. 771), of the offence of presenting false papers to a disbursing officer of the government, in relation to an account or claim, with intent to defraud the government, knowing at the time, that the papers were false. The first count of the indictment charged, that the defendant, on the 1st of August, 1862, did transmit to and present at, and cause to be transmitted to and presented at, an office of the government of the United States, in the city of New York, called the "United States Mustering and Disbursing Office," a certain false writing, in relation to a claim then and there made by the defendant against the United States, namely, that the defendant was entitled to receive and collect from the United States the sum of thirteen hundred and sixty-six dollars, setting out in the indictment a copy of papers which purported to be a claim of one Louis Pfeffer against the government, for the subsistence and lodging of soldiers belonging to Company F, of Captain Steinel; and that the defendant knew, at the time, that the papers or writings were false. The second count was substantially like the first, except that it averred that the claim was for rations and lodgings furnished by Louis Pfeffer for recruits in the service of the United States. The third count was substantially like the second, except that the false writing charged was the certificate of Captain Steinel, certifying to the correctness of the account of Pfeffer for the subsistence and lodging of the soldiers.

Edwards Pierrepont, for the United States.

William M. Evarts and James T. Brady, for defendant.

NELSON, Circuit Justice. The act under which the defendant is indicted, so far as it is material to this motion, provides, that if any person or persons shall transmit or present to, or cause or procure to be transmitted or presented to, any officer or office of the government of the United States, any deed, &c., or other writing, in support of or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, &c., every such person, on conviction, shall be punished by imprisonment at hard labor, for not less than one year nor more than ten years.

It is insisted, on the part of the defendant, that the indictment is defective in this—that, in order to constitute the offence under the act of congress, it must appear that the defendant had a claim against the government, and that he presented the false writing or paper in support of or in relation to his own claim; whereas, the false writings set out in the several counts purport to be in support of, and in relation to, a claim not of the defendant, but of one Louis Pfeffer. It is also insisted, that the evidence conforms to this view of the claim. The precise averment in the several counts in the indictment is, that these false papers were presented in support of, and in relation to, a certain claim made by the defendant against the government, namely, that he was entitled to receive and collect from the United States the sum of $1,366. We are of opinion that this averment is sufficient. It will be seen, on reference to the act of congress, that the claim or account against the government need not be in favor of the party presenting the false writing in support of it. Indeed, in most of the cases which have come before me, and in which convictions have taken place, the accused were but the guilty agents of the parties in whose favor the claim or account was presented. The offence consists in presenting the false writing, in the language of the act "in support of, or in relation to, any account or claim, with intent to defraud the United States."

Another ground urged in arrest of judgment is, that the act of 1823, under which the indictment is found, has been repealed by the act of March 2, 1863 (12 Stat. 699). We agree, that this act provides for the same offence that is provided for in the act of 1823, and that, unless the offences committed under the earlier act, previous to the passage of the subsequent one, are saved by the terms of the repealing clause, they are discharged. Although that clause in the act of 1863 is not drawn with professional skill, or with knowledge of the legal distinctions between civil and criminal proceedings, and is open to the criticism of the learned counsel, yet we are of opinion that the meaning and intent of congress cannot well be mistaken. The clause saves not only suits and prosecutions pending, but "all rights of suit or prosecution, under any prior act of congress, on account of the doing or committing of any act hereby prohibited." This, we think, embraces offences that may have occurred under the act of 1823. Although that act is not referred to in terms, it is embraced in the description. The phraseology, "suit or prosecution," as used in the clause, was intended, as is apparent, to refer to and embrace both civil and criminal cases. The term "prosecution" is more usually applied, in legal language, to criminal than to civil proceedings. With better knowledge the clause could have been made more explicit and certain, but we cannot doubt as to the intent of it.

Motion denied.

Case No. 15,543.

UNITED STATES v. KORN.

[Gilp. 49.] [1]

District Court, E. D. Pennsylvania. Feb. 27, 1829.

SURVIVAL OF ACTIONS—TORTS—PENALTIES.

The legal principle, that actions arising ex delicto die with the person, is not changed or affected by the act of congress which gives special bail in suits brought by the United States, for pecuniary penalties.

This was an action brought for the recovery of a penalty, alleged to have been incurred by the intestate in his life time, for a violation of the revenue law. The defendant [Henry Korn] admitted that the penalty was incurred by the intestate, but denied that it was recoverable from his administrator.

Mr. Ingersoll, U. S. Dist. Atty., cited the act of March 2, 1779, §§ 50, 65 (1 Story's Laws, 617, 630 [1 Stat. 665, 676]).

Mr. Keemle for defendant. The act of congress makes only those persons liable for the penalty who have been guilty of the offence. There is nothing in it to extend it to the representative. The cause of action arises ex delicto and not ex contractu. The enactment, that the offender shall be held to bail to answer to the United States, is on a different principle from the surviving of the action to his representatives, and does not alter the nature or legal character of the action. 3 Bl. Comm. 302; 3 Bac. Abr. 97; 1 Com. Dig. 461, tit. "Administration," B, 15; Wheatley v. Lane, 1 Saund. 216; Hambly v. Trott, Cowp. 375.

HOPKINSON, District Judge. This action is brought for the recovery of a penalty, alleged to have been incurred by James Hepworth in his lifetime, charging that he was knowingly concerned and aided in removing and securing certain goods, brought in a vessel from a foreign port, without having obtained a permit from the collector and naval officer, for such unlading and delivery. It is admitted that James Hepworth was guilty of this offence and was liable personally for the penalty. The only question is, whether an action for the recovery of it may be maintained against his administrator. The English cases are uniform, confirmed by several in our own country, particularly in New York, that actions founded in tort or misfeasance, and arising ex delicto, die with the person. I do not think that the law, in this respect, is changed or affected by the circumstance, that the act of congress gives special bail in actions brought by the United States for pecuniary penalties, which is the only ground taken by the district attorney to maintain his suit.

Let judgment be entered for the defendant.

[1] [Reported by Henry Gilpin, Esq.]

Case No. 15,544.

UNITED STATES v. KROUSE.

[2 Cranch, C. C. 252.] [1]

Circuit Court, District of Columbia. Oct. Term, 1821.

CRIMINAL LAW—PEREMPTORY CHALLENGES.

A prisoner indicted for horse-stealing, in Washington county, is not entitled to the right of peremptory challenge.

Indictment [against Everhard Krouse] for horse-stealing.

Mr. Key, for the prisoner, claimed the right of peremptory challenge, and referred to U. S. v. Black [Case No. 14,601], at December term, 1819, where it was allowed.

But THE COURT refused to allow it, because in that case the court had to decide whether they could not sentence the prisoner to death under the law of Maryland.

Case No. 15,545.

UNITED STATES v. KUHN.

[4 Cranch, C. C. 401.] [1]

Circuit Court, District of Columbia. Nov. Term, 1833.

ACCOUNT — EVIDENCE — PRESUMPTIONS FROM SILENCE—REBUTTAL OF PRIMA FACIE EVIDENCE — ACCOUNTS OF PAYMASTER OF MARINE CORPS — PAY AND EMOLUMENTS — AUTHORITY OF SECRETARY OF NAVY.

1. An account, although duly authenticated according to law, is not, per se, evidence of a balance due on a former account, nor of items transferred from the account of any other person, nor of items recharged, which had before been credited.

2. From the fact that the defendant objected to certain items of debit in the account, and was silent as to the other items, the jury may, and ought to infer, that he acquiesced in the items not objected to, unless they should be satisfied that he did not so intend, the burden of proof of which is on the defendant.

3. The jury may infer that the defendant claimed no credits but what are stated in the "reconcilement," and ought so to infer, unless the defendant can show that there were other credits claimed by him, or to which he is entitled.

4. If the United States produce in evidence the defendant's account current, showing a balance in his favor, he is entitled to a verdict in his favor, unless the plaintiff shall prove errors, or omissions in that account, which shall turn the balance the other way.

5. To rebut such prima facie evidence, it is not sufficient to show, that certain claims of the defendant were suspended by the proper accounting officers, on the coming in of the accounts current containing them, and were subsequently disallowed, and that no such claim had been previously allowed by the secretary of the navy.

6. The defendant claimed a credit of $4,480.13, for commissions at 5 per cent. on money disbursed by him for the quartermaster's department.

7. The amount of the disbursement was proved by the accounting officer of the treasury, and

[1] [Reported by Hon. William Cranch, Chief Judge.]

upon the back of the document produced by the United States, and containing the defendant's claim for that credit, was an indorsement by the fourth auditor, dated March 2, 1829, that he had been verbally directed by the then secretary of the navy, to allow the claim, it being for extra official service.

8. The court *held*, that, to rebut this evidence, it was not sufficient to show that a subsequent fourth auditor referred the claim to a subsequent secretary of the navy, who rejected it; and that there was no evidence that such commissions had been allowed in any like case, and that no precedent could be found for it in the proceedings of the department.

9. And the court also *held*, that, in order to rebut the prima facie evidence arising from the production and giving in evidence by the United States of the defendant's account containing the charge, it is incumbent on the United States to satisfy the jury that the charge was such as the secretary of the navy ought not to have allowed.

10. The court instructed the jury, in effect, that if the secretary of the navy did not order the fourth auditor to allow the specific sum claimed, but only to make such allowance as, on examination, he should find to have been made in similar cases, they should, from a consideration of all the evidence, make such allowance as they should find had been usually made in similar cases, and if it should appear that no such allowance had been made in any similar case, then to make such as they should deem reasonable.

11. And the court further instructed the jury, in effect, that the secretary had a right to order the fourth auditor to make such allowance; and if made by him, under such order, it amounted, in law, to an actual allowance by the secretary himself.

12. And, further, that if the secretary of the navy did authorize the allowance of the claim, and the accounting officers omitted to pass the same, without any default of the defendant, then the defendant is entitled to such allowance, unless it was made by fraud, imposition, or misapprehension of the facts of the case.

13. The paymaster of the marine corps was not, by law, entitled to the pay of a major in the general staff, nor of a major in the cavalry from November, 1821, to October, 1830.

14. Up to the year 1828, he had received the pay and emoluments of a major in the infantry, and this was continued to him until 1831, by the resolution of May, 1830.

15. The books of account of a paymaster are to be considered so far public books, as to authorize the United States to use them in evidence.

16. After a credit has been given by the United States, and the account settled, it is not competent for the United States to open the account and revoke such credit, unless it were originally given by fraud, imposition, or mistake.

[Cited in U. S. v. Collier, Case No. 14,833.]

This was an action brought by the United States for the balance ($21,966) against the defendant [Joseph L. Kuhn] as paymaster of the marine corps.

Mr. Key, for the United States, offered an account stated in the treasury department, authenticated according to law, and commencing with a balance of a former account.

Mr. Coxe, for defendant, objected that it was not evidence to charge the defendant with that balance. This point was decided in the case of U. S. v. Jones, 8 Pet. [33 U. S.] 375, by the supreme court of the United States at their (then) present term. See, also, the case of U. S. v. Buford, 3 Pet. [28 U. S.] 12.

Mr. Key, in reply. "The reconcilements" are evidence, because they are settlements by the proper accounting officers; and are admissions by the defendant that he claims so much, and that so much has been rejected, and so much allowed.

THE COURT (nem. con.) decided that the account was not admissible evidence, per se, to charge the defendant in this action. It consisted only of balances per report No. 2,436, &c., and two items, to wit:

To Charles Grymes, Lt. Marines, for..	$13 65
To A. A. Nicholson, " " "..	90 00
	$103 65

These two items were understood as having been charged first to Grymes and Nicholson, and transferred to the debit of Kuhn.

Mr. Key then offered the various accounts settled at the treasury, from 1821, when Captain Kuhn was appointed paymaster, to 1830 (14 in number). No objection being made, they were read to the jury, constituting a continuing account.

Mr. Coxe objected to the following item in the account No. 10, which had been passed to the credit of Kuhn by the officers of the treasury in 1823: Amount of stoppages for allowances made by his predecessor, Mr. Desha, $60,667.92. And to the following item in the account No. 11: To Desha, payrolls recharged, which had been credited in 1823, $9,925.89. And prayed the court to instruct the jury, that the said accounts Nos. 10 and 11 are incompetent and insufficient of themselves to establish any of the items of charge therein contained against the defendant of $7,564.13; and $3,455.44 in the first page of the account No. 10; and $3,657.94 in the account marked N. S. 1325, and other similar items, which are not charged against the defendant as money paid to and received by him from the treasury.

Which instruction THE COURT gave (nem. con.) upon the authority of the case of U. S. v. Orr's Adm'r [8 Pet. (33 U. S.) 375], at the (then) present term of the supreme court of the United States. To this opinion no exception was taken.

Mr. George Gillis, an accounting officer of the treasury department, having been examined on the part of the United States to show that the "general reconcilement" exhibited the whole of the matters in controversy, and that the defendant acquiesced in all the charges against him except certain disputed items,

Mr. Butler, Atty. Gen., prayed the court to instruct the jury: (1) That from the evidence aforesaid, the jury may infer and presume that the defendant admitted all the charges to the 8th of October, 1830, except those specially excepted to as stated in the reconcilement annexed to the account No. 11; and that unless the defendant shall sat-

isfy the jury that he did not intend to make such admission, it will be their duty so to infer and presume. (2) That from the evidence aforesaid the jury are at liberty to infer and presume that the defendant claimed no credits other than those allowed to him in the said accounts or stated in the reconciling statement annexed to the said account No. 11; and unless the defendant shall satisfy the jury that he did intend to insist on other claims before exhibited and rejected and not included in the last reconciling statement, it will be their duty so to infer.

This opinion was given with the understanding that the defendant's account current of the 8th of October, 1830, was in the proper office in the treasury department; but it appearing that it could not be found, the court required the United States to prove the debit side of the account by the original vouchers filed in the department.

Mr. Coxe then contended that as the United States had produced the defendant's accounts current, in evidence, which contained the charge of the disputed items, they have so far admitted their correctness as to take upon themselves the burden of disproving them; and prayed the court so to instruct the jury; and cited Goodenow v. Travis, 3 Johns. 427; Hotchkiss v. LeRoy, 9 Johns. 141; Hopkins v. Smith, 11 Johns. 161, Whitwell v. Wyer, 11 Mass. 10; Morris v. Hurst [Case No. 9,832]; Bell v. Davidson [Id. 1,-248]; Randall v. Blackburn, 5 Taunt. 245; Id. 1 Serg. & L. 92.

The attorney general admitted the principle as to matters of fact; but not as to matter of law; nor as to government cases. This court, and the supreme court have so decided in the cases against Orr's administrators, so far as regards the defendant. They permitted him to rely on the account of the United States for the credits therein given to him, without obliging him to admit the debits against him in the same account. But the government does not rely on the defendant's account alone; they have also the testimony of Mr. Gillis. The government have not admitted this item (the charge of five per cent. for commissions).

One argument adduced by Mr. Jones in those cases was that the defendant there had surrendered his vouchers, which differed it from the common case. Here the United States objected to the claim when first presented, and ultimately rejected it.

Mr. Coxe's prayer, and the objection of the plaintiffs, was as follows: The defendant prayed the court to instruct the jury that, as the United States had given in evidence the accounts current of the defendant, by the last of which it appeared that there was a balance of $9,107.51 in favor of the defendant, he is entitled to the verdict of the jury upon such evidence, unless the plaintiff shall further prove errors or omissions in said accounts which shall destroy such balance in his favor, and show, after such rectification, a balance against him in favor of the plaintiffs. To which the plaintiffs objected, because the accounts settled by the proper accounting officers, and before produced in evidence by the plaintiffs, show, as they contend, that certain of the credits claimed in the defendant's accounts current, amounting in the whole to a greater sum than the said balance, were suspended by the proper accounting officers, on the coming in of the said accounts current containing them, and were subsequently disallowed; thereby rebutting any presumption that such credits were ever assented to by any officer authorized to act for the plaintiffs; and showing affirmatively that no such assent was given.

THE COURT (THRUSTON, Circuit Judge, doubting) gave the instruction thus prayed by the defendant.

Mr. Key, for the United States, then took up the first disputed item; being a charge, by the defendant, of $4,480.13 for commission at five per cent. on money disbursed by the defendant for the quartermaster's department, and produced the two vouchers which had been presented to the accounting officers of the treasury, namely, a statement of the amount disbursed, and a claim of the commission, and an indorsement thereon in the handwriting of T. Watkins, then fourth auditor of the treasury, signed T. W., and dated March 2, 1829, saying that he had been verbally directed, by the then secretary of the navy, to allow the claim, it being for extra official service. The amount of the disbursement was proved by Mr. Gillis, one of the accounting officers. Mr. Kendall, who succeeded Mr. Watkins as fourth auditor, testified that he referred the claim to Mr. Branch, the secretary of the navy, about the 21st of March, 1829, who rejected it; and that he did not know that any commission of five per cent. had been allowed in a like case, and could find no precedent for it in the proceedings of the department.

The United States rested their case here.

Mr. Coxe, for the defendant, prayed the court to instruct the jury.

And THE COURT (nem. con.) after argument, did instruct them, that the evidence so adduced by the plaintiffs is not sufficient to rebut the prima facie evidence that the defendant is entitled to his credit for the item of $4,480.13.

THRUSTON, Circuit Judge, was understood to be of opinion that the indorsement of T. Watkins, then fourth auditor, upon the defendant's vouchers, produced in evidence by the United States, was evidence of the allowance by Mr. Southard, then secretary of the navy, and that it was the final action of the proper officer upon the subject, and that it could not be revoked by Mr. Branch, his successor.

CRANCH, Chief Judge, was of opinion

that the indorsement so produced by the United States was evidence that the claim had been allowed by Mr. Southard, then secretary of the navy; but he was also of opinion that the allowance was liable to be revoked by his successor before the item had been actually carried to the defendant's credit in account by the proper accounting officer; and that it had been so revoked; but that the mere rejection of the claim by the government is not sufficient to rebut the prima facie evidence of the defendant's own account produced in evidence by the United States. Nor was that rejection, together with the other evidence given by the United States, sufficient for that purpose.

The attorney general, having, without objection, read Mr. Southard's deposition, made the following prayer to the court: "The deposition of Samuel L. Southard having been read in evidence, the counsel of the plaintiffs insisted that the same conduced to prove that the said S. L. Southard, as secretary of the navy, had never, in point of fact, instructed the fourth auditor, T. Watkins, to allow the defendant the additional compensation charged in the aforesaid vouchers, Nos. 219 and 220, as stated in the memorandums indorsed on the said vouchers, but had only authorized him to make such allowance as he, the said fourth auditor, should find, on examination, to have been allowed in similar cases; and that, if the jury should believe the deposition of the said S. L. Southard, to give the correct version of his direction to the said fourth auditor, it would be their duty to consider the charges for commissions contained in said vouchers, as open to inquiry, and, upon all the evidence applicable thereto, to make such allowance only as they should find had been made in similar cases; and prayed the court so to instruct the jury."

Mr. Coxe, for defendant, then prayed the court to instruct the jury, "that it is incumbent upon the plaintiffs, in order to rebut the said prima facie evidence, in addition to the fact that the item of claim, in question, never had been allowed by a secretary of the navy, to show, to the satisfaction of the jury, that the said claim was one which he ought not to allow; and was not authorized, under the usage which has been proved before the jury, to allow."

The counsel of the United States, after the examination of Mr. Southard, here in court, varied their prayer thus: "The deposition of S. L. Southard having been read, and his testimony, as above stated, having been given to the jury, the United States prayed the court to instruct the jury, that, if they should believe, from the evidence, that the said S. L. Southard, as secretary of the navy, had never, in point of fact, instructed the fourth auditor, T. Watkins, to allow the defendant the specific compensation of 5 per cent. charged in the aforesaid vouchers, Nos. 219, 220, but had only directed him to make such allowance as he, the said fourth auditor, should, on examination, find to have been allowed in similar cases, it would then be their duty to consider the charges for commissions, contained in said vouchers, as open to inquiry; and, upon all the evidence applicable thereto, to make such allowance only as they should find had been usually made in similar cases; or, if it should appear that no such allowance had ever been made in any similar case, then such as they should deem reasonable and just, under all the circumstances of the case."

THE COURT (nem. con.), but MORSELL, Circuit Judge, doubting, gave this last instruction, as prayed; and also gave the above instruction prayed by Mr. Coxe, excepting the last clause in these words, "and was not authorized, under the usage which has been proved before the jury, to allow."

Mr. Coxe then prayed the court to append to the instruction last given, at the prayer of the United States, the following instruction, namely: "But, if the jury shall believe, from the said evidence, that Mr. Southard, as secretary of the navy, did direct the fourth auditor to allow the said claim, specifically, to the extent of 5 per cent. on the amount of said disbursements, as claimed in said vouchers; or, having decided that the said defendant was entitled to an allowance for said services, and that the commission of 5 per cent. was a proper and adequate compensation for such services; and referred to the auditor to examine whether said allowance was in conformity with precedents in other cases, for like extra official disbursements by officers belonging to, or attached to, the navy, by the direction or sanction of the secretary; and if the jury shall further find, from the said evidence, that, for similar disbursements of an official character, settled in the said auditor's office, sanctioned and allowed by the secretary, the commission of 5 per cent. had been allowed, that then the said auditor was authorized to make such allowance, and to make such indorsements as appear on the said vouchers; and that such indorsement amounted, in law, to an actual allowance by the secretary himself."

Which instruction THE COURT gave (THRUSTON, Circuit Judge, dissenting).

Mr. Coxe then prayed the court to instruct the jury, that, if they should believe, from the aforesaid evidence, that the said S. L. Southard did authorize and direct the allowance of the claim stated in said vouchers, Nos. 219 and 220, and that the accounting officers omitted to pass such items, upon such allowance, without any default of the defendant, then the said defendant is entitled to the allowance, unless, in making such allowance, the plaintiffs shall satisfy the jury that the said secretary was induced to make it, by fraud, imposition, or misapprehension of the facts of the case.

Which instruction THE COURT gave

(CRANCH, Chief Judge, dissenting). because he thought the act of Mr. Southard was revocable by his successor; and was revoked by his successor before the credit had been given in any statement of the account by the accounting officers of the department, and before the credit was given upon the books of the department; and that the United States, therefore, were not bound by the act of Mr. Southard, which was thus revocable by himself or by his successor, and was so revoked.

Mr. Key, for the United States, then prayed the court to instruct the jury, that, if they believed, from the evidence, that Mr. Southard, the secretary of the navy, by his instructions to the fourth auditor, did not designate any specific commission to be allowed to the defendant for the disbursement stated in said vouchers, but left it to the fourth auditor to examine the cases of such allowances, and to allow to the defendant such commission as had been allowed to other officers for such disbursements, then such authority could be lawfully given to the said fourth auditor, and his indorsement on said vouchers is not binding on the United States.

Which instruction THE COURT refused to give (THRUSTON, Circuit Judge, dissenting).

The next class of charges, in the defendant's account, consisted of claims for compensation, as paymaster of the marine corps.

Mr. Key, for the United States, contended that the only law under which the defendant could claim compensation was the act of congress of the 16th of April, 1814. 3 Stat. 124.

Mr. Coxe, for defendant, contended that the defendant was entitled to the pay and emoluments of a major of cavalry, or a major of the general staff, under the acts of the 16th of May, 1812, (2 Stat. 735), and the 24th of April, 1816; the same having been allowed to Mr. Satterlee Clark, a district paymaster in the army of the United States, by the verdict of a jury, and the judgment of the circuit court of the United States for the Eastern district of New York, in the year 1827. Upon the authority of that case Mr. Southard allowed the same compensation to the defendant, as appears by the voucher No. 215, with Mr. Watkins's indorsement thereupon. The officers of the marine corps, not being satisfied with the compensation allowed by the act of April 16, 1814, congress, by a joint resolution, on the 29th of May, 1830, continued the old rates of compensation till the 28th of February, 1831, and made a special appropriation for the extra emoluments. See, also, the act of 2d March, 1831, c. 57 (4 Stat. 460), and the resolution of 25th May, 1832 (Id. 605); Cong. Doc. No. 107, 28th May, 1829; the auditor's report, printed by order of the house of representatives, 1830, pp. 6 and 7; Navy Rules 1832, p. 40, c. 45; Doc. 121, p. 7; the fourth auditor's report.

The attorney general referred to Doc. 121, p. 1; letter from the secretary of the navy of 29th May, 1830; report of the fourth auditor; and statement D, and the remarks in p. 7. Mr. Kendall testified that the defendant had never received more than the pay and emoluments of a major in the infantry, and never claimed more until the decision in the case of Satterlee Clark.

Mr. Coxe, for defendant, then prayed the court to instruct the jury "that if they should believe the evidence aforesaid, the defendant is entitled to the several credits claimed in the vouchers Nos. 332 and 333," namely, the pay and emoluments of a major in the cavalry.

Which instruction THE COURT (MORSELL, Circuit Judge, doubting) refused to give.

CRANCH, Chief Judge. The defendant, as paymaster of the marine corps, claims, in his account with the United States, a credit for the pay, subsistence, emoluments, and allowances of a major in the general staff of the army, from the 20th of November, 1821, to the 8th of October, 1830, when he ceased to be paymaster. Up to the 1st of January, 1828, he received credit in his accounts for the pay and emoluments of a major in the infantry. In the year 1827, Mr. Satterlee Clark, who had been a district paymaster in the army of the United States, in a suit brought by the United States against him in the Eastern district of New York, obtained, by the verdict of the jury and judgment of the court, credit for the pay and emoluments of a major in the general staff. The present defendant then exhibited a like claim against the United States; and on the 2d of March, 1829, Mr. Southard, then secretary of the navy, verbally instructed the then fourth auditor, Mr. Watkins, to allow it, on the ground that the paymaster of marines was entitled to the pay of a district paymaster, which, in Clark's case, was decided to be that of a major of the general staff, as appears by the indorsement of Mr. Watkins upon the voucher No. 215. Nothing further appears to have been done until a change had taken place in the offices of the secretary of the navy and fourth auditor, when the claim was rejected, the new secretary and auditor being of opinion that the defendant was only entitled to the pay and emoluments specially provided for in the act of congress of the 16th of April, 1814 (3 Stat. 124), by which the adjutant, paymaster, and quarter-master of the marine corps, were to "receive thirty dollars per month in addition to their pay in the line, in full of all emoluments." This decision of the new secretary and auditor having been made a subject of complaint to congress by the officers of the marine corps, a joint resolution was passed on the 29th of May, 1830, "that the pay, subsistence, emoluments, and allowances, received by the officers of the marine corps previous to the 1st of April, 1829, be, and the

same is hereby directed to be continued to them from that date up to the twenty-eighth day of February, one housand eight hundred and thirty-one." 4 Stat. 430. This resolution confirms and continues the allowances that had been received by the officers of the marine corps previous to the 1st of April, 1829; and comprehends the whole period of the defendant's accounts. It seems, therefore, unnecessary to inquire whether the decision of the new secretary and auditor was or was not correct; and the only question which can arise, is a question of fact, to wit, what were the pay, subsistence, emoluments, and allowances received by the officers of the marine corps, previous to the 1st of April, 1829, so far as regards the paymaster. Up to the year 1828, he had received the pay, &c. of a major in the infantry; and no paymaster of the marines had, on the 1st of April, 1829, received more. On that day the defendant had never received the pay, subsistence, emoluments, or allowances of a major of the general staff; nor does it appear that any paymaster of the army had ever received such pay, &c., except Mr. Clark, whose case had been judicially decided. The practice of the department had not been changed by the decision of that case. The words in the resolution, "allowances received," must mean, sums of money allowed and paid to the officers, or passed to their credit in account. The order of Mr. Southard, then secretary of the navy, to the then fourth auditor, to allow the defendant's claim, was not, as it seems to me, an allowance received by the defendant, within the meaning of the resolution; nor does it appear that that order was known to congress when the resolution was passed. That resolution received the signature of the president on the 29th of March, 1830. It does not appear what documents were before congress in relation to the pay, &c. of the officers of the marine corps previous to the 1st of April, 1829. The letter of the fourth auditor to the secretary of the navy of the 28th of May, 1829 (Document No. 107), was not ordered to be printed by the house of representatives till the 25th of May, 1830; and the letter of the fourth auditor of the 28th of May, 1830 (Document No. 121), was not read and laid on the table till the 29th of May, 1830, the very day on which the joint resolution was approved by the president; so that it is not probable that either of those documents was the foundation of the resolution, and, therefore, cannot be considered as having any bearing upon the construction which ought to be given to that resolution. They may. however, in connection with the testimony of Mr. Kendall, be considered as evidence to show what was the pay, &c., received by the officers of the marine corps previous to the 1st of April, 1829. If no paymaster of the marine corps had, previous to that day, received the pay, subsistence, emoluments, and allowances of a major of the general staff of the army, it seems to me very clear that the defendant is not entitled to claim them under that resolution; and even if the court should be of opinion that he would have had a right to claim them if that resolution had not been passed, although he had not received them before that day, I doubt whether he could, after that resolution, claim more than the pay, &c. which he had received previous to that day. The joint resolution does not profess to affirm that the allowances, previously received, were at the time, authorized by law; but to sanction what had been done, and to continue the same pay, &c. for a limited time. If, therefore, the jury should be satisfied by the evidence, that the pay, subsistence, emoluments, and allowances, received by the defendant as paymaster of the marine corps, previous to the first of April, 1829, were those of a major in the infantry, I should instruct the jury that the defendant is only entitled to claim the same pay, &c.; and is not entitled to claim the pay, &c. of a major of the general staff. It has been suggested that the estimates upon which the appropriations for the marine corps for the years 1831, 1832 and 1833, were based, state the pay of the paymaster at $60 a month, and four rations; and that that statement sanctions the defendant's claim. I doubt, however, whether, when a salary is fixed by a law such as that of the 16th of April, 1814, a simple appropriation, based upon an estimate in which a higher salary is stated, can be considered as repealing the law which fixed the salary. Suppose an officer's pay to be fixed, by the law which creates the office, at $1,000, and an appropriation for the civil list should be made, founded upon an estimate in which the salary should be stated at $2,000, would the officer be entitled to receive the $2,000? Or, suppose the estimate should state it to be only $500, would he not be still entitled to the other $500? But, however that may be, the estimates referred to, are all subsequent to the time for which the defendant claims, and, therefore, cannot affect the case. It may be observed, also, that those estimates are made by the paymaster himself, who would, of course, make them conformable to the law as he understood it; and as there was a claim for $60 a month, it was, perhaps, proper to state enough to cover it. I cannot, therefore, agree to give the instruction prayed by the defendant's counsel.

THRUSTON, Circuit Judge. By the admission of the counsel of the United States, and of the defendant, the only question, now left for the court to decide, is, what were the pay and emoluments of the paymaster of the marine corps, previous and up to the 1st of April, 1829; or rather, was he then entitled to those of a major of cavalry, or of a major in the infantry? It seems to be admitted by the counsel for the United States, that, by the resolution of congress

of the 29th of May, 1830, which reversed the construction of the fourth auditor, who restricted the pay and emoluments of the paymaster to the limits of the act of the 16th of April, 1814 (3 Stat. 124), inasmuch as the pay and emoluments of the paymaster had, previous to such decision of the fourth auditor, been allowed in the navy department as those of a major of infantry, and credit given on the books of the department therefor, that such allowance cannot now be questioned; but they deny that, in addition to the pay and emoluments of a major in the infantry, the defendant is entitled to those of a major of cavalry, which addition constitutes the difference between the parties now to be adjusted by this court and jury. It becomes the duty of the court carefully to examine the acts of congress, to see how far the claim of additional compensation can be sustained. Although, by the decision of the supreme court, and the admission of the counsel of the United States, the allowance of the pay and emolument as a major of infantry as settled and credited on the books of the navy department, is no longer open to examination by this court, not because such allowance was sanctioned by the laws, but because it had been actually made and credited to the defendant on the books of the navy department, yet we have the power, and it is our duty to determine how far the accounting officers of the navy department were warranted, previous to the resolution of congress of the 29th of May, 1830, by the then existing enactments of congress on this subject, to have made such allowance; and should this court be of opinion that they ought not to have exceeded the rate prescribed by the act of the 16th of April, 1814 (3 Stat. 124), then the matter now in dispute is settled, and the claim of the defendant for further compensation than what has been allowed, must be overruled. The statute of the 16th of April, 1814, is certainly too clear to admit of any doubt in its construction; it applies specially to the marine corps; admits of no latitude of construction, and fixes the pay of paymasters of the marine corps.

The question then arises, has this statute been directly or impliedly repealed by any subsequent statute? It has been attempted, on the part of the defendant, to show that the compensation, provided by the act of the 24th of April, 1816 (3 Stat. 297), of paymasters of the army was applicable to, and ought to be extended to paymasters of the marine corps; and that this compensation was equivalent to the pay and emoluments of a major of cavalry. We will first examine the prior branch of this proposition, namely, that the paymasters of the marine corps are, by reasonable construction of this statute, embraced in the enactment which fixes the compensation of paymasters of the army; if so, the statute of the 16th of April, 1814, must be virtually repealed, not expressly, but by necessary inference or implication; and in support of this construction it was contended, that the marine corps is part of the army in fact; that when required to do service on land, they are so to all intents and purposes; that they are subject to the rules and articles of war, and that various statutes recognize this identity in regard to general provisions, where there is no special declaration or indication of any intention to discriminate between them; that the defendant was compelled to give bond as paymaster of the marine corps, pursuant to the requisition of the sixth section of the said act of the 24th of April, 1816 (3 Stat. 297); that the law had always received this construction by the accounting officers of the navy department, since the defendant received the appointment of paymaster, &c., and other arguments of equal weight and importance. With a view to estimate the value of these arguments, I have examined the several acts on this subject, as far as time would permit, and will state the result of my investigations.

In the first place the act of the 1st of July, 1797, "providing a naval armament" (1 Stat. 523), assigns to each ship, besides mariners, &c., a certain number of marines. The duty of the marines is exclusively maritime; for sea service only. By this act they have no connection with the army, in character or duty to be performed. Here they are not amphibious. The next act on the subject of the marine corps is that "for establishing and organizing a marine corps," of the 11th of July, 1798. 1 Stat. 594. From the first enacting clause an argument has been drawn from the words "in addition to the present military establishment, there shall be raised a corps of marines," &c., that marines became, in fact, a part of the military establishment; or, at any rate they established such a harmony, and blending of the two corps, that certain general provisions relating to one, (that is, the army,) embraced the other, and that this consentaneousness or harmony was materially strengthened and confirmed by the last section, authorizing the president to employ the marines on shore, &c. (see section 4). But it is a most violent interpretation, it seems to me, to consider the words, "in addition to the present military establishment," as having any force in identifying the two corps in character or circumstances. The marines were a body known to the law by the act of July 1, 1797, as a purely maritime or naval force; and the enlargement of that force, or assigning to them duties on shore, does not necessarily identify them with the army, and those words could not have the effect of constituting a force, governed by different rules and regulations, and destined to a service unknown to, and incompatible with, the character and duties and services of the army, a part of that army. The marines are certainly a military force, as well as the

army, and are in addition to the then existing military establishment. It is to be remarked, also, that although the marines may be compelled to do duty on shore, it is no part of their ordinary duty, but at the discretion of the president, as in case of the invasion of the territories of an enemy's coast, by a naval force the seamen may be compelled to do the duty of soldiers or marines, at the discretion of the commander of the ship or squadron. But, whatever inferences might be drawn from these expressions, the act of the 16th of April, 1814, annihilates them, because it legislates on the very matter in question, and makes a special provision for paymasters of the marine corps which admits of no sort of doubt. It professes to embrace the marine corps only. Here all former doubts, all inferences and constructions are done away. The compensation of the paymaster of the marine corps is fixed so clearly, that, but for the joint resolution of congress of the 29th of May, 1830, it must be now in full force, unless it has been repealed by some subsequent statute directly or expressly, or by some strong and necessary implication; for I take it for a certain and established rule of construction, that a statute distinctly and clearly expressing the intention and meaning of the legislature on any particular point, cannot be repealed unless by a subsequent statute equally clear and distinct, or by necessary implication or inference with which the previous statute cannot be reconciled; but a subsequent statute legislating upon a different subject, and where there is such an incongruity between the objects of legislation, as that of the army and marine corps, where, if there be any harmony or identity it is in certain points only, one of which is that they are both military establishments; and another, much relied on, is, that the marines may (not by the direction of law, but by the will of the president, at his discretion, and which, therefore might have never been invested with this feature of congruity or identity,) be compelled to serve on shore; for from this provision, that the president may order them to do duty on shore, is the strongest argument drawn that they became identified with the army. But unless the president does order them to do duty on shore, the analogy, or identity is done away; then it depends on the exercise of the president's will whether the ground of identity is to vest or not. If he does not order the marines to serve on shore, then they are no longer of doubtful character; no amphibious men, but purely of a maritime character, distinct from the army essentially in numerous particulars, set out more at large by the fourth auditor in his report of ——, and on which, as they are known to the counsel on both sides I make no remarks, except that I thought they had much weight. I do not see much more reason to consider the character of marines transformed into that of soldiers by their liability occasionally to serve on shore, than that seamen compelled sometimes to serve on land with marines should be transformed into that of marines. We find distinct statutes concerning the army and marine corps. The pay of the officers of the marine corps is fixed by statutes confined to the marine corps only; of the army, by statutes relating to the army only. In fact, I have seen no act professing any thing like general legislation in the same act over both branches of our national defence, except in some special provision, where it is clear that congress meant to extend them to both bodies. There are numerous statutes relating to the army, particularly during the last war, and comparatively few relating to the marine corps; and to consider such general expressions as the words, "in addition to the military establishment," or the provisions of the "liability of the marines to serve on shore at the will of the president," as so identifying the two corps, as that the provision for the compensation of the paymaster of the army should extend to the paymaster of the marine corps also, and thereby repealing the previous statute of April 16, 1814, especially fixing the compensation of the paymaster of the marine corps, is extending the license of construction further than I have known; for such, if I understood, is the argument; for, having in the manner I have stated, fixed, as the defendant's counsel supposed, the analogy, congruity, or harmony, and, indeed, identity, or whatever it is, between the army and marine corps, he then comes to the act of the 24th of April, 1816, "for organizing the general staff, and making further provision for the army of the United States." Army, observe; not "the military establishment;" army proper, as appears evident from its general enactments; and it is the third section of this act which fixes the pay of the paymaster of the army under which the defendant has thought himself justified in claiming his pay as paymaster of the marine corps, as growing out of and sanctioned by this third section; that the said section included the paymaster of the marine corps.

Now it does seem to me, that, as well from the title which exposes the object of the statute, as all the enactments throughout, there is no ground for extending any of its general provisions to the marine corps. It would be too tedious to enumerate the multiplied evidences of this; but we will take up the most material section, the third, which legislates on the very matter in hand, to wit, the compensation of paymasters. They are to receive the pay and emoluments of major, and therefore the defendant is entitled to the pay and emoluments of major; and this section repeals the special statute of 1814. Now is it not evident, to say nothing of other objections, that this section cannot be construed to have embraced paymasters of the marine corps, because it is

provided in the fourth section that regimental and battalion paymasters shall make correct reports to the paymaster-general once in two months, on pain of being dismissed? Now the paymaster of the marine corps does not make his reports to the paymaster-general, nor is he under his jurisdiction; but his reports, if he ever makes any, and his accounts are settled to and with the navy department. The compensation here, then, was intended exclusively for such paymasters as were accountable to the paymaster-general; that is, paymasters of the army proper; and such a construction seems warranted by the whole context throughout. But it seems the defendant gave the bond required by the sixth section. How far the secretary was right in demanding it, is not material. The generality of the expression, "all officers of the pay department," &c., might seem to justify such an exaction from the defendant; but if it did, it may grow out of the universality of the import of the word "all;" but in my conception, the provision is coextensive only with the provisions of the act, and relates to paymasters only of the army proper. But it is immaterial whether the secretary acted right or wrong in requiring an official bond from the defendant as paymaster of the marine corps; his construction of the act does not bind us, more than it binds the defendant, who is now asking this court to reverse the judgment of the secretary on the construction of the very act, when he is at the same time invoking that same judgment in aid of the construction he urges before this court.

Again, the case in New York, U. S. v. Clark [unreported], has been cited, where, by the verdict of a jury, the pay of a major of cavalry was allowed to the defendant, who was a district paymaster of the army. We have not the record before us, and therefore cannot be certain that the judge settled any point of law in the case. If he had so settled the amount of pay, I confess, without having his reasons before me, I am utterly at a loss to imagine on what grounds he so decided. Why he should, if he did so, take the pay of a major of cavalry as the measure of compensation for a paymaster, when the law expressly fixes it by the pay of a major of infantry, I am unable to discern. This decision of the New York judge (if he gave such an opinion,) is said to be balanced or neutralized by the opinion of Judge Peck, in Missouri; and, as the case is now before the supreme court, the matter is likely soon to be settled, and will, I suppose, be the rule by which the accounting officers of the navy department will adjust the claim of the defendant, should it also be settled that the paymaster of the marine corps is entitled to the same compensation as an army paymaster; which, however, for the reasons I have already given, does not appear to me to be the case.

It was contended, also, by the defendant's counsel, that the joint resolution of congress, of the 28th (29th) of May, 1830, which impliedly sanctioned the allowance which had been made, of the pay of major of infantry, to the defendant, by directing such pay and emoluments as had been, before that time, received by the officers of the marine corps, to be allowed to them thereafter (for a limited period, but by a subsequent resolution extended indefinitely), ought not to be restricted to such compensation as had been actually received, but should be extended to such compensation as ought to have been received, and that such compensation ought to be that of a major of cavalry. But the wording of the resolution will not admit of such construction. Congress knew, from the reports of the secretary and fourth auditor, what had been received, and what was claimed, and they limit the amount to what had been received, and did not extend it to the amount claimed, so that there is nothing in these resolutions showing any design in congress to extend the compensation further than the plain sense of the words of the resolutions import. But if those words could afford any inference that congress meant to give their approbation to such compensation as ought, by law, to have been allowed, and not to such "as had been received," still the question is open for this court to say what ought to have been allowed. No aid, therefore, in support of the claim, can be derived from these resolutions, but the reverse; and as far as those resolutions can be considered as any declaration of the legislature as to the meaning of the several statutory provisions, in regard to the defendant's compensation, they go to sanction what was already done, and to repel the additional compensation now claimed. They have granted a boon, not a right founded on preceding laws; though their grant may be based on equitable principles. It was a case where there was no reason to make a distinction between officers of the same rank, and with equal and similar duties, but which the legislature had not provided for, and which defect we could not supply; and were the accounts of the defendant not closed at the navy department, and those resolutions of congress, out of the way, and I was reduced to the necessity of now saying what compensation the law allowed to the paymaster of the marine corps, I should be compelled to say that I have seen no subsequent act of congress, which, without a most strained and unreasonable construction, repealed that of the 16th of April, 1814, and that, consequently, that act afforded the true and only rule by which such compensation should be settled.

I have thus, as far as my memory served me, noticed all such material points as appear to me to have been urged by the defendant's counsel, and written, very hastily, to be sure, from the shortness of time, such remarks as the very imperfect consideration

of the statutes on the subject suggested to me. I must conclude, as the result of my consideration of the case, that I cannot give the instruction prayed for by the defendant's counsel. But, as this is a case different from that decided in the court of Missouri, by Judge Peck, which involved the pay and emoluments of a paymaster of the army proper, in which, I understand, there is an appeal to the supreme court; and, as the decision of the supreme court, in that case, may not settle the disputed points in this; and, as the claim of the defendant involves a sum of consequence, in which an appeal will lie, I should be gratified if the matter could be so arranged as to make the United States appellants, as they possess faculties and facilities for prosecuting an appeal, for want of which the defendant might be unable to prosecute his appeal, and so lose the benefit of a revision of our judgment, by that tribunal.

Mr. Coxe, for defendant, then prayed the court to instruct the jury, that the act of the 16th of April, 1814 (3 Stat. 124), does not preclude the defendant from the allowance claimed.

Which instruction THE COURT (MORSELL, Circuit Judge, doubting) refused to give, being of opinion that the second section of that act has not been repealed or altered, so far as regards this case, except so far as it is repealed or altered by the resolution of the 29th of May, 1830; and that there is no evidence, before the jury, to show that the pay, substance, emoluments, and allowances claimed by the defendant, in the said items, No. —— had been received by any paymaster of marines previous to the 1st of April, 1829.

The United States, having given notice to the defendant to produce his books of accounts kept by him, as paymaster, THE COURT (nem. con.) said that these were to be considered public books, so far as to authorize the United States to use them in evidence.

Mr. Coxe, for defendant, then prayed the court to instruct the jury, that it was not competent for the fourth auditor, in 1829, to direct a recharge against the defendant, of the item of $7,564.13, which had been passed to his credit, in the treasury account, settled in 1823. Or, if the court should refuse that instruction, that they would instruct the jury, that, before the defendant shall be precluded from the benefit of such credit, in the said account of 1823, the jury must be satisfied, beyond any reasonable doubt, that such original credit was allowed by the proper accounting officers who settled the same, by fraud, imposition, or mistake.

THE COURT (nem. con.) refused the first part of the instruction, and granted the second; and CRANCH, Chief Judge, delivered the following opinion:

In the settlement of the defendant's account, No. 3,961, with the United States, in April, 1823, he was credited "by R. M. Desha," his predecessor, the late paymaster, "for amount paid Captain Samuel Miller, $7,564.13." The voucher for this item consists of a receipt, in these words: "Received vouchers from Major Miller, amounting to seven thousand one hundred and eleven dollars and thirteen cents, which vouchers were acquired during my visit to the western country, and which were paid by him. Washington, 31st January, 1820. R. M. Desha, P. M. M. C." "Admitted, C. F." Upon which was the following indorsement: "The amount of the within receipt has not been placed to the credit of Major Miller, on the books of R. M. Desha." "Joseph L. Kuhn, P. M. M. C." And of two receipts given by Major Miller, to Mr. Desha, for amount of his services as acting quartermaster of marines, in behalf of Colonel Grayson, amounting to $453; upon which receipts were similar indorsements that the amount thereof had not been placed to the credit of Major Miller, on the books of Mr. Desha. The defendant was the successor of Mr. Desha, as paymaster of marines; and sundry balances due by officers of marines, on Mr. Desha's books, for advances made by him to them, were transferred from his books to those of the defendant, for collection, or stoppage out of their future pay and emoluments; a list of which balances the defendant had sent to the fourth auditor, on the 19th of November, 1822. Mr. Desha, when he went out of office, was largely indebted to the United States; and there seems to be evidence tending to show an understanding, at least, between Mr. Desha, the accounting officers of the United States, and the defendant, that, when the defendant should receive those balances, they should be passed to his debit, and to the credit of Mr. Desha, upon the books of the United States.

Among the balances, thus transferred, was one of $12,481.74, against Major Miller, to whose credit the $7,564.13 ought to have been entered upon the books of Mr. Desha, and, if they had been so entered, the balance of Major Miller's account, transferred from Mr. Desha to the defendant, would have been so much less, namely, $4,917.61, instead of $12,481.74. The sum of $7,564.13, if the proper vouchers had been produced, should have been placed by the proper accounting officers of the United States to the credit of Mr. Desha, to whose debit the money was placed, out of which it was paid; and the accounting officers of the United States could not be justified in passing that sum of $7,564.13 to the credit of the defendant, unless they should, at the same time, charge him with the balance, $12,481.74, appearing against Major Miller on Mr. Desha's books, and transferred from them to the books of the defendant. And, it seems, from a memorandum made in the dissecting book, by Mr. McDaniel, late accounting clerk in the fourth auditor's office, that he supposed it was to be passed to the debit of the defendant and to the credit

of Mr. Desha, "as so much of the balances on Desha's books, transferred to the defendant." The memorandum is in these words: "Kuhn, ch. to Desha for these sums," ($7,111 and $453,) "as so much of the balances on Desha's books, transferred to Kuhn." In the same settlement of the account No. 3,961, the defendant is debited $22,218.53, "to R. M. Desha for stoppages on account of balances transferred on paymaster's books." The voucher for this charge was a letter from the defendant to the fourth auditor, directing him to charge him and credit Desha for that amount.

It is evident, however, that this item did not include the sum of $7,564.13, which was not a stoppage, with which the defendant would charge himself, as he had received nothing for it. When, therefore, it was entered to the credit of the defendant in the account No. 3,961, it stood alone without any corresponding debit, and was a palpable error; and if it was not corrected in any intermediate settlement, the debit in the settlement (new series, No. 1,133) of the 9th of June, 1830, is correct, in these words: "for this sum improperly debited to Desha, and credited to J. L. Kuhn, in the settlement of his account No. 3,961, reported May 1, 1823, $7,564.13." The subsequent statement, charging the defendant with $60,667.92 for balances transferred, and deducting therefrom the several items there stated, does not alter the case as to the item of $7,564.13; for that statement is only a transcript of the defendant's own account as stated with Mr. Desha, excepting the following items, which constitute the balance of $3,455.44:

Overcharge to Captain Gamble.....	$ 350 00
" to Thomas A. Linton	220 00
Commission, at 5 per cent. on $33,835.34	1,691 76
Balance due Desha by Col. Wainwright	1,093 68
And an error in adding up the balances	100 00
	$3,455 44

In that statement the sum of $7,564.13 is very properly deducted from the list of balances.

The court, therefore, refuses to give the instruction prayed by Mr. Coxe, for the defendant, "that it was not competent for the fourth auditor, in 1829, to direct a recharge against the defendant of the item of $7,564.13, which had been passed to his credit in the treasury account settled in 1823."

MORSELL, Circuit Judge, concurred.

THRUSTON, Circuit Judge, gave no opinion.

Mr. Key, for the United States, having concluded his opening argument to the jury upon the evidence, prayed the court to instruct the jury, "that the papers offered in evidence by the plaintiffs and defendant, in reference to the item of $7,564.13 do show, in the opinion of the court, that the credit given to the defendant at the office of the fourth auditor, for that sum in the settlement of 1823, was erroneously given."

But THE COURT (THRUSTON, Circuit Judge, absent) refused to give the instruction; because the written evidence was connected with a great deal of parol evidence, and the question, whether the credit was "erroneously" given, was a question of fact to be decided by the jury from the whole evidence, written as well as parol.

THE COURT (MORSELL, Circuit Judge, absent), at the prayer of Mr. Key, for the United States, instructed the jury that the act of 1814 gives the paymaster of the marine corps, a certain sum, in lieu of all emoluments; that that law was in force from 1821 to 1829; and that the defendant ought not to be allowed the pay, &c. of a major of cavalry under the said act; and that the defendant, upon the evidence aforesaid (meaning the whole evidence,) is not entitled to claim any allowance, in this suit, for the pay, &c. of a major of cavalry.

Verdict for the United States, $10,373.03.

The defendant died soon after the verdict, and no writ of error was prosecuted.

Case No. 15,546.

UNITED STATES v. KURTZ.

[4 Cranch, C. C. 674.] [1]

Circuit Court, District of Columbia. March Term, 1836.

LARCENY—VAGUE INDICTMENT.

An indictment for stealing "sundry pieces of silver coin of the value of twenty-five dollars," is too vague.

Indictment [against William Kurtz] for stealing "sundry pieces of silver coin of the value of twenty-five dollars, of the goods and chattels of one Nicholas Callan."

W. L. Brent, for the defendant, moved to quash the indictment, because the description of the property was too uncertain; and contended that the number and kind of coins should have been stated, and cited Starkie, Cr. Pl. 218, 440; 2 Russ. Crimes, 168. "The general rule is, that the goods stolen should be described with such certainty as will enable the jury to decide whether the chattel, proved to have been stolen, is the very same with that upon which the indictment is founded, and show judicially to the court, that it could have been the subject-matter of the offence charged, and enable the defendant to plead his acquittal or conviction to a subsequent indictment relating to the same chattel." On page 169, he says: "An indictment for stealing '£10 in moneys numbered,' is not sufficient; some of the pieces of which that money consisted should be shown." Rex v. Fry, Russ. & R. 482.

Mr. Key, contra, cited 1 Chit. Cr. Law, 235, and 3 Chit. Cr. Law, 946, 947, that certainty,

[1] [Reported by Hon. William Cranch, Chief Judge.]

to a common intent, is sufficient. But in 3 Chit. Cr. Law, 946, it is said: "The quantity and number of the things stolen, should appear with certainty, as essential to the legal description of the offence; and also because the prosecutor cannot claim restitution of any other goods than those stated on the record. 2 Hale, P. C. 182. An indictment for stealing twenty sheep and ewes, is bad, because the number of each sort is not stated. So it is bad to say that the defendant feloniously stole divers sheep, or doves, without expressing their number." And on page 947, it is said: "An indictment for stealing money should specify the pieces of which that money consisted; saying '£10 in moneys numbered,' is not sufficient." See, also, Peel's Case, Russ. & R. 407; Rex v. Edwards, Id. 497; Rex v. Chalkley, Id. 258, and Rex v. Johnson, 3 Maule & S. 547.

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion that the description of the things stolen was too vague, and quashed the indictment. A new indictment was found by the grand jury. [Case No. 15,547.]

Case No. 15,547.

UNITED STATES v. KURTZ et al.

[4 Cranch, C. C. 682.] [1]

Circuit Court, District of Columbia. March Term, 1836.

LARCENY—EVIDENCE—CONFESSIONS.

If a person, arrested for larceny, makes a confession, to the officer, as to that larceny, under a promise, by the officer, to do what he could for him if he would tell where the stolen goods were; and afterwards, before the magistrate, without any new promise, or threat or question, makes a confession of a different larceny, such latter confession is admissible evidence against the party upon his trial for such latter larceny.

Indictment [against Kurtz, Tarlton, and Spaulding] for stealing "fifteen pieces of silver coin of the value of fifty cents each, and twenty pieces of silver coin of the value of twenty-five cents each, of the moneys, goods, and chattels of one Nicholas Callan." A former indictment for the same theft had been quashed because the description of the property stolen was too vague. [Case No. 15,546.]

The defendant Spaulding having been arrested by two of the constables, Robinson and Jeffers, upon a charge of stealing the goods of one Singstack, was told by them that they could not discharge him; and must take him before a magistrate, but that if he would tell them where the goods could be found, they would do what they could for him. The defendants were suspected also of having stolen Callan's money on a former day, but nothing was said by the constables to Spaulding about that theft of Callan's money, when they told him they would do what they could for him. Spaulding told Robinson where to find Singstack's goods, and they were found accordingly. Spaulding made other confessions to Robinson about Singstack's goods; and afterwards, without any new promise, made confession before the justice, as to Callan's money.

In the trial of Spaulding for stealing Singstack's goods THE COURT rejected his confession made under the promise of favor; but in the trial of Spaulding and others, for stealing Callan's money, THE COURT admitted his confession as to that theft; there having been no promise as to that charge, nor any request that he would confess. The confession was not made to Robinson, but to the justice.

Verdict guilty. Sentenced to the penitentiary. Pardoned.

[1] [Reported by Hon. William Cranch, Chief Judge.]

UNITED STATES v. The LAC LA BELLE. See Case No. 7,968.

Case No. 15,548.

UNITED STATES v. LA COSTE.

[2 Mason, 129.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1820.

SLAVE TRADE—INDICTMENT—SURPLUSAGE—WORDS OF STATUTE.

1. The offence of sailing from a port with an intent to engage in the slave trade, under the act of 20th of April, 1818, c. 86, §§ 2, 3 [3 Story's Laws, 1698; 3 Stat. 450, c. 91], is not committed unless the vessel sails out of the port.

[Cited in U. S. v. Smith, Case No. 16,338.]

2. If under the act an offence of causing a vessel to sail from a port of the United States, be alleged in the indictment to be on a day now last past, and on divers days and times before and since that day, the allegation is sufficient; for the words, "now last past," mean last past before the caption of the indictment, and the words, "on divers days and times," may be rejected as surplusage, if the offence be but a single offence.

[Cited in Cook v. State, 11 Ga. 53; Cowley v. People, 83 N. Y. 472; Gallagher v. State, 26 Wis. 425; State v. Briggs, 68 Iowa, 419, 27 N. W. 359. Cited in brief in State v. Hayes, 24 Mo. 358. Cited in State v. Nichols, 58 N. H. 42; Wells v. Com., 12 Gray, 328.]

3. It is not necessary in an indictment for such an offence, to allege that the negroes, &c. were to be transported to the United States, or their territories, or that they were free and not bound to service, or that the defendant was a citizen or resident within the United States, or that the offence was committed on board an American vessel. It is sufficient if the indictment follow in these respects, the language of the statute, and is as certain.

[Cited in U. S. v. O'Sullivan, Case No. 15,974; U. S. v. Quinn, Id. 16,110.]

4. One of the phrases used in the statute, being "persons of colour," it is sufficient in the indictment to use the same words, without more definite specification of the meaning of the words.

5. It is sufficient in the indictment for such offence, to allege that the defendant, "as master,

[1] [Reported by William P. Mason, Esq.]

for some other person, the name whereof being to the jurors yet unknown," did cause the vessel to sail, &c.

Indictment [against Adolphe La Coste] on the second and third sections of the act of 20th of April, 1818, c. 86 [3 Story's Laws 1698; 3 Stat. 450, c. 91], against the slave trade. There were various counts in the indictment, but that which was principally relied on, was for causing a certain vessel, called the Science, to sail from the port of New York, for the purpose of procuring negroes, &c. from Africa, to be transported and held, sold and disposed of as slaves. At the trial the cause turned principally on questions of fact.

Mr. Hooper and J. T. Austin for defendant, contended that the crime, if at all, was committed within the port of New York, and was exclusively cognizable in the circuit court of the United States for the judicial district comprehending that port. They argued, that unless the crime was committed after the vessel passed the dividing line between the port of New York and the high seas, so as to be committed on the high seas, it was not cognizable under the laws of the United States, in the circuit court of the United States, for Massachusetts district. They contended that sailing "from the port" is inclusive of the port, and supposes the act to commence within the port; and that this was the true and consistent meaning of the statute. That no vessel could be said to sail from a port, unless she were within the port. They cited The Ann [Case No. 397]; Evans v. Bollam [Id. 4,554]; U. S. v. Burr [Id. 14,693].

Mr. Blake, U. S. Dist. Atty., e contra, argued that the words of the statute, "sail from any port," necessarily excluded the port. This was the ordinary meaning of the word "from." If the vessel had sailed within the port, with the intent stated in the statute, and had never gone beyond it, no crime would have been committed. As soon as the vessel sailed from the dividing line of the port of New York, she was on the high seas, and there the crime was committed. So that as the defendant was first apprehended and brought into Massachusetts district, this court, and this court alone, by the statutes of the United States, has jurisdiction.

STORY, Circuit Justice. On the point of law, the court does not entertain any kind of doubt. It is admitted that this court has jurisdiction, if the crime was committed on the high seas. It is admitted, also, that the port of New York lies contiguous to the sea, and that the moment a vessel sails without the exterior limit of that port, she is on the high seas. The words of the statute are, that no citizen, &c. or any other person, &c. shall "cause any such ship or vessel to sail from any port or place whatsoever," within the jurisdiction of the United States, &c. It is clear to us, that the word "from," is here exclusive of the port; and if the vessel had never sailed out of the port, no crime would have been committed within the purview of the statute. The terminus a quo is the boundary line of the port, and when the vessel passes from that, she sails from the port, and is on the high seas. Many analogous cases have been decided in this court.

A verdict of guilty was brought in against the prisoner. After which, a motion was made by the prisoner's counsel, for a new trial, on the following grounds: Because the judge, who presided at the trial, and directed the jury, mis-directed them in certain matters of law, and also neglected and omitted to direct them in certain other matters of law, that is to say, the said judge directed the jury that the offence charged against the prisoner in said indictment, was not committed in construction of law, until the vessel had passed the limits of the port of Baltimore, and the said judge omitted to direct the jury, that the offence, if any, of the defendant, originated and was complete, immediately when the sails were raised, and the vessel was under way on the voyage; and that, if she sailed from a place within the port, the offence in point of law, was committed in the state of Maryland; and the judge omitted to direct the jury, that the government were bound to shew that the offence was committed out of the jurisdiction of any particular state, and that, if they had no evidence conclusive of the fact, they must acquit the defendant.

Mr. Hooper, in support of the motion. It is a principle of the common law, that every offence shall be tried by a jury of the vicinage. The place where the act is alleged to be done, is the place where it should be tried. This is the rule, not only of the English law, but of our own state and national laws. The reason of it is plain, and it applies with great force to the present case. Could the prisoner have been tried in Baltimore, or could he now be tried there, he would not have been destitute of the necessary papers and witnesses which he has been unable to procure here. The court will, therefore, be solicitous to afford him the privilege of a new trial, if any legal grounds can be shown in support of his claim to it. The construction of the act by the court, in support of the jurisdiction, conforms, we think, neither to the popular or common sense meaning of the language, nor a technical exposition of the words. As the word from, may have various meanings according to its connection with other words and phrases, it becomes important to inquire, what, from the whole tenor of the statute, appears to have been the meaning of the legislature. They have made the fitting, preparing, &c. of a vessel in a port, for the purpose of procuring slaves, criminal. And why should they not attach the same importance to the sailing, or causing the vessel to sail, on the voyage within the port, as without the

bounds of the port? Can it be imagined, that congress intended to make it criminal to sail from the exterior line of a port, and to say, that a vessel sailing on the voyage for the unlawful purposes mentioned, should not be considered as transgressing the law, until she had passed the bounds of the port? What reason can be given for such a supposition? Is not the sailing in the harbor on the voyage, as much a commission of the offence intended to be punished? Most certainly it is. It is as great an offence as the fitting out of the vessel in the harbor. The word place makes the meaning of the legislature clear. Sailing from a place, &c. is made criminal. What is the wharf or dock in the harbor where the ship lies, but a place? And what is sailing from thence, but sailing from a place? It is plain then, that the meaning of the legislature was, that the moment the sails were raised, and the vessel got under way on the voyage, then in the eye of the law the offence was committed of sailing from a place; and if it happened in a port, from a port. But putting the intention of the legislature and other parts of the act out of the question, what could be the technical construction of the phrase, sailing from a port? When is the vessel properly said to sail from a port? Certainly when she is traversing the boundary line. The moment her bows are beyond the line, she is sailing. Where? Not in the port, nor to it, but out of it, and therefore from it. The offence is committed the moment the vessel is traversing the line. It cannot be committed but once. But further, to suppose that the construction which the government contend for is correct, would be to consider congress as having undertaken to legislate upon cases not within the scope of their authority. A foreign vessel, which had never entered our ports, might be condemned for approaching to the exterior boundary line of them, and then sailing from them. If the sailing from a place in the harbor be a crime, can the court bring the case within their cognizance and jurisdiction, by alleging it to have been committed at any point in the voyage they please? Surely not. The offence is single. It cannot be committed but once. It either is committed by sailing from a place, in the harbor, or it is not. If it is, then the government cannot allege it to have been committed in another place. It is not in the power of the court, to make the sailing legal, until the vessel arrives at a certain point in the voyage, and then illegal beyond that point. They must take the case as they find it, and no technical fiction can be allowed to deprive the defendant of his right to a trial, where the offence arose. It is unnecessary, before this court, to cite cases illustrative of the principle, that every man is to be tried where his offence is committed. It is one of the most familiar in the law, as well of England as our own country. Among the frequent recognitions of it in our own reports, [Lesher v. Gehr] 1 Dall. [1 U. S.] 333, U. S. v. Burr [Case No. 14,693], and The Ann [Id. 397], may be mentioned. There is one case, however, in the English books, so much resembling the present, that it is proper now particularly to notice it. By St. 3 Jac. it is provided, "that every subject of this realm, that shall goe or passe out of this realm to serve any foraign prince, state, or potentate, or shall passe over the seas, and there shall voluntarily serve any such foraign prince, &c. shall be a falon." Coke (3 Inst. 80), in commenting upon this statute, recognizes the rule, that in criminal causes concerning life or member, "ubi deliquit ibi puniatur," the offence is local, and cannot be tried but where it is committed, nor cannot be alleged to be in any other place than where in truth it was done. This felony must be tried in the county where he went or passed over, and consequently in that town where part of the act was done. The words passe out of this realm, or passe over the seas, might surely as well be held to exclude the place from which he passed over, as the words, sail from a port, be taken to be exclusive of the port. Upon the whole it is contended with confidence, that whether the interests of public justice; the intention of the legislature, the popular or strict construction of the words be considered, the prisoner should be tried in the district from which he sailed, and is entitled, therefore, to have the verdict set aside, and a new trial granted.

A motion was also made in arrest of judgment, on the following among other grounds: (1) Because the statement in each of the counts, of the time when the said supposed offence was committed, is uncertain, repugnant, and entirely insufficient. (2) Because it is not stated, that the negroes and persons of color mentioned in the said indictment, were to be transported to any place in the United States, or the territories thereof, nor that they were free, and not bound to service or labor. (3) Because the words, persons of color, in the counts in said indictment, are material parts of the same, and are indefinite and unintelligible. (4) Because the names of the owner or owners of the said vessel, are alleged to be to the jurors unknown, when they were known or could be ascertained.

Other exceptions were also taken to the indictment, and commented on by the counsel for the prisoner; but were rejected without observation by the court, as not applying to the third count of the indictment, which was the only one relied on by the government.

Mr. Hooper, for the prisoner, contended on the first exception, that the statement in each of the counts, of the time when the said supposed offence was committed, was uncertain, repugnant, and entirely insufficient, and that this was a fatal objection. If there is any thing well settled, it is that the time, the year, and the day, of committing the alleged offence, must be precisely stated in every indictment. 2 Co. Inst. 318;

Chit. 218; 2 Hawk. P. C. c. 23, § 88; Id. c. 25, § 77; Com. Dig. "Indictment," G, 2. No indictment can be good, without precisely showing the year and day of all the material facts alleged in it; or if any indictment lay the offence on an impossible day, or on a day that makes the indictment repugnant to itself; or if it lay one and the same offence at different days, it is bad. Vin. Abr. 14, 378. An indictment is the king's count, and ought to be certain for the year, day, place, and fact. Id. 387. In an indictment against two for scolding, the time was precisely laid, but it was objected, that the scolding of the one, could not be the scolding of the other; but Holt said, "they may scold jointly, and therefore it is well, the time being sufficiently certain." There is, in fact, no precedent it is believed, of alleging an offence on divers days and times, except in the case of nuisances, where the offence is continuing, and even there, a particular day is stated, and divers days and times, after and before, &c. In an information, indeed, the same strictness has not been required, but this is not an information, but an indictment. The offence here was necessarily single. It commenced and was complete, when the vessel began to sail from a certain place or point, assume that point to be where you please; and it could have but one commencement and completion.

As to the second exception. It is not stated that the negroes and persons of color mentioned in said indictment, were to be transported to any place in the United States, or the territories thereof, nor that they were free, and not bound to service or labor. The law is clear, that it is not always sufficient to follow in indictments the words of the statute. 2 Hawk. P. C. c. 25, §§ 3, 71; Bac. Abr. "Indictment," G. They must be stated with the addition of such things as are to be inferred from the act. Did the government intend to punish the transporting of negroes from Africa to a foreign port? Is there any thing in the statute expressly forbidding such traffic? Is it not unusual to legislate on matters not done by our citizens, nor within our jurisdiction? If there be no express statute law, is not the inference a fair one, that the law was intended to apply to the bringing of them into the territories of the United States? Is not the drift of all other similar statutes against this latter traffic only? If such traffic as the indictment is framed to reach, be not against any express law, the inference is, that the law did intend only to forbid traffic carried on between Africa and the United States, and bringing into our territories, people of the above description. But if this be so, then it is necessary (even if there be no express words in the statute declaring this) to allege it in the indictment, and to bring the defendants not only within the letter, but the spirit, scope, and real intent of the law. Again. It is not stated that they were free. Who can know from the indictment that it was proved? Is it not necessary to show that they were not slaves legally bound to service before? Is it against our laws, to fit out a ship to bring from St. Domingo, or any other foreign port or place, slaves that have escaped from the Southern plantations in the United States?

As to the third exception. The words, persons of colour, in the said indictment, are material, and are indefinite and unintelligible. The words in the act are too vague; and where the statute is uncertain, no indictment can be founded on its words. U. S. v. Cantril, 4 Cranch [8 U. S.] 167. The exception is to the indefiniteness of material words. If the transporting, &c. of persons of colour, is an offence, (and certainly the statute has endeavoured to make it so) then it was sufficient to shew on the trial, that such persons were transported. And it must now be presumed, that this was in proof as far as it could be, and that on such proof, the defendant was convicted. It does not help the indictment, to allege the transportation of negroes also, for proof of either would support the indictment. It is of no consequence, that the legislature have used the phrase; for if they describe an offence in so imperfect and vague a manner, that it cannot be understood, no indictment founded on such description can be sustained.

In support of the fourth exception, 2 Hawk. P. C. c. 25, § 91, Chit. 275, and 3 Camp. 264, were cited.

STORY, Circuit Justice. A motion has been made for a new trial in this case, upon the ground of mis-direction by the court in the opinion given at the trial, that the offence charged in the indictment could not be committed, unless the vessel sailed without the port of New York; and that "from the port," in the statute, was exclusive of the port. We have heard nothing that has induced us to change our opinion; and it is conformable to the construction which similar words, in other penal statutes of the United States, have received from this, as well as from the supreme court. The only new case cited at the bar is that from 3 Co. Inst. 30, where Lord Coke is commenting on the statute of 3 Jac. c. 4, which declares it a felony in every subject, "that shall go or pass out of this realm, to serve any foreign prince, &c. or shall pass over the seas and there shall voluntarily serve any such foreign prince," not having taken the oath of obedience, &c. He says, it had been objected, that the offences here stated could not be tried within the realm, because done out of the realm. But he answers that by a subsequent clause in the act, "all and every offence to be committed or done against the act," is to be inquired, &c. at the assizes, or at the quarter sessions, "to be holden within the shire, &c. where such offence shall happen." So, he adds, by the meaning of the

makers of this act, the felony must be tried in the county where the party went or passed over, and consequently in that town, where part of the act was done; and that the words, "wherein such offence shall be committed," must be construed in this case, where part of the offence is committed. Not to say one word of this forced and unnatural construction, that "passing over the seas and there voluntarily serving a foreign prince," is an offence committed in part before going on the seas, (which, for aught that appears, is Lord Coke's own private opinion, and was never judicially decided) it is sufficient to say, that the opinion of Lord Coke proceeds altogether upon the ground, that this latter clause expounds and restrains the sense, in which the preceding language was used by the legislature. And it tacitly admits, that but for such clause the offence would be deemed to be wholly committed without the realm. We do not, however, consider this case as bearing much on the case before us. The words are not the same as the words of our statute, and there is no such qualifying clause here as there. And if there were, we should incline to follow the rational construction of our own courts in analogous cases, rather than strain so hard to wrest words out of their natural and ordinary import. Another reason for a new trial is the omission of the court to give certain directions to the jury, though no such directions were asked for. If the evidence did not warrant the conviction, in point of law, this would be a sufficient reason at all events for a new trial: but a mere omission to do, what no one at the moment suggested to be material, and was taken for granted to be understood by all, would not justify us in such a course. The reason, why the court did not direct the jury that the onus was on the United States to establish jurisdiction in the case, was because there was no doubt of the rule suggested by any one; and supposing the court were right in the construction of the statute, there was no doubt in point of fact, from the proofs in the case, that the jurisdiction was established. If the crime was not committed within the port of New York, but only by sailing out of the port, which was contiguous to the high seas, there was nothing which could prejudice the defendant in the omission. The motion for a new trial is therefore overruled.

A motion has also been made in arrest of judgment, upon the ground of alleged defects in the indictment. The list of supposed errors is indeed truly formidable. But whatever may be their validity and force in general, as to which we decide nothing, it will be sufficient for us to confine our attention to the third count in the indictment, on which alone much stress was laid at the trial. If that count be good, it will be sufficient to warrant a judgment, even though all the others shall be totally defective. The first exception is, that the offence (viz. causing the vessel to sail from the port of New York) is alleged to have been committed "on the third day of January, now last past, and on divers days and times before and since the last mentioned day, and after the said 20th day of April, 1818;" whereas, it is but a single offence, and could be committed but on a single day, and should have been alleged to have been committed on a day and year certain, and not on divers days, or on a day now last past. In respect to the averment, it is certainly wanting in technical accuracy and precision, and departs from the settled forms of pleading. But if it have certainty to a proper intent, and can be sustained by the rules of law, we are bound to sustain it, though we cannot but lament, that it should have been so inartificially drawn. In our opinion, the words, "on the third day of January, now last past," refer to the third day of January, last past, before the caption of the indictment, that is to say, to the third day of January, A. D. 1820, and therefore are sufficiently certain. This conforms to the doctrine laid down in the better authorities. Hawk. P. C. bk. 2, c. 25, § 78; 1 Starkie, Cr. Pl. 51; 3 Bac. Abr. "Indictment," G, 4; Com. Dig. "Indictment," G, 2; 2 Hale, P. C. 177. As to the other objection, that the offence is stated to have been committed on divers days and times, it is sufficient to say, that as the offence is alleged to have been committed also on a day certain, if it be but a single offence, the words, "on divers days and times" may be rejected as insensible and surplusage. 1 Starkie, Cr. Pl. 235; Rex v. Redman, 2 Leach, 536; Rex v. Morris, 1 Leach, 109. If the offence might have been committed on divers days and times, the allegation in this respect is too uncertain to warrant a judgment for such times; but this does not prevent a judgment for one offence, which is stated to be committed on a day certain. Either way, then, the objection is not fatal. Hawkins puts an analogous case; if an indictment charge a man with having done a nuisance, such a day and year, &c. and on divers other days, it is void only as to the facts on those days, which are uncertainly alleged, and effectual for the nuisance on the day specified. 2 Hawk. P. C. bk. 2, c. 25, § 82. So in Rex v. Dixon, 10 Mod. 335, 1 Starkie, Cr. Pl. 52, the indictment charged, that they on such a day, and on divers other days and times, &c. as well before as after, &c. kept a common gaming table. On demurrer, the court held, that the time was uncertain as to all but one day, and that judgment could only be given for a single penalty. The rule is, that if an indictment be uncertain as to some particulars only, and certain as to the rest, it is void only as to those, which are uncertainly expressed, and good for the residue. 2 Hawk. P. C. bk. 2, c. 25, § 74. In the Case of Lord Wintown, too, it seemed admitted by the counsel on both sides, that even in an indictment for high treason, if a day certain were stated, as well as diversis diebus, it would be good.

Lord Wintown's Case, 6 St. Tr. 17, 53, 56, 57.

There are some other exceptions to the third count, which apply in common to the other counts; such as that the indictment does not charge, that the negroes and persons of colour were to be transported to the United States, or the territories thereof; or that they were free and not bound to service; or that the defendant was a citizen or resident within the United States; or that the offence was committed on board an American vessel. It is a sufficient answer to all these objections, that the indictment in these respects follows the language of the statute, and no more certainty is in general required in cases of this sort. Exceptions there may be; but this case falls not within them. Hawk. P. C. c. 25, § 3. The offence may be committed, although the negroes are not to be transported to the United States, or their territories; and the causing of any vessel to sail from any port within our jurisdiction, for the purpose of being engaged in the slave trade, may be an offence against the statute, although such vessel be a foreign vessel, and the defendant be not a citizen or resident. But if it be otherwise, this as well as the other points stated in the exception are matters of defence, and are not necessary to be averred or negatived in the indictment. Another exception is, that the phrase, "persons of colour," is too indefinite and is unintelligible. It has, however, acquired quite as definite a meaning as negro, mulatto, &c.; and at all events is the chosen phrase of the statute, which we cannot reject, and the indictment is not bound to avoid or to define it. Another exception is, that in the third count the name of the owner of the vessel is alleged to be unknown, when he was known, or might have been ascertained. The indictment charges, that the defendant did, "as master, for some other person, the name whereof being to the jurors yet unknown, cause a certain vessel, called the Science, to sail from a port within the jurisdiction of the United States, &c." Now there is no pretence to say, that if the averment were material, the indictment might not so allege it, if such were the fact. 2 East, P. C. 651, 781; 1 Starkie, Cr. Pl. 173. All the authorities show that it would be good under such circumstances. And if the case of Rex v. Walker cited from 3 Camp. 264, be supposed to assert, (what was certainly not the case before the court) that if the indictment conformed to the fact upon the evidence before the grand jury, and the certainty of ownership was made out only by the evidence subsequently given at the trial, it would be a fatal objection, we are not prepared to admit the doctrine to this extent; and we should choose to reserve our opinion until the case came in judgment before us. See 1 Starkie, Cr. Pl. 175, 176. But in no shape can this be a good objection in arrest of judgment, for the indictment is good, if the fact warrant it; and we may add, that there was no evidence at the trial, that the grand jury had not found the indictment according to the evidence before them. And it is at least questionable, whether the name of the person, known or unknown, for whom the act is done, is material to be stated in any indictment on the statute.

Allusion has been made to the subsequent averment in the third count, that the vessel had been previously fitted out, &c. by the owners for the slave trade. This whole averment may be, nay, must be rejected as surplusage, for it constitutes no part of the offence charged in the preceding part of the third count, which is complete without it.

Upon the whole, the motions for a new trial and in arrest of judgment are overruled, and judgment will be pronounced against the defendant, the third count being in substance, though not technically accurate.

Case No. 15,549.

UNITED STATES ex rel. CROOKE v. LAFAYETTE COUNTY COURT.

[5 Dill. 288, note.] [1]

Circuit Court, W. D. Missouri. 1879.

MANDAMUS TO LEVY TAX—DUTY OF COUNTY COURT IN RESPECT TO COLLECTION—RETURN.

Before DILLON, Circuit Judge, and KREKEL, District Judge.

DILLON, Circuit Judge. In the case of United States ex rel. Crooke v. Lafayette County Court, the circuit judge substantially said: The relator, having recovered judgment, obtained, in the spring of 1877, a writ of mandamus, requiring the levy and collection of a tax on Lexington township. Several returns have been made by the respondents, but no money has been paid. These returns are summed up in the last, which states that the county court had levied a tax of one-tenth of one per cent. on all the assessed property, but the tax had not been paid. Thereto is appended a report of the collector, who says that he made sundry levies on personal property for the payment of other similar writs, but that the property had been taken from him by writs of replevin issued from the state courts, and that at tax sales no bidders appeared, and that tax-bills duly presented had been left unpaid, and that hence his efforts had been fruitless, and nothing had been paid; in short, it appears that in response to the writ issued a year and a half ago, a levy was made, tax-bills were issued to the collector, and he has done nothing whatever with them because his efforts had failed in other cases; because suits of replevin and a failure of bidders occurred as to other cases, he concluded it would be the same in this case. That does not satisfy the command of this court. The writ has been out a year

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

and a half, and nothing has been done therewith. This debt of the county, being reduced to a judgment, is just as binding and valid as a debt for a court-house, and should be so treated; and if public officials were to abandon efforts to collect such debts, the community would not approve of their action. It is the duty of the county court to contest such replevin suits. Without assuming to state what should be done, it is at least clear in this case that nothing has been done herein towards collecting the tax. If the replevin suits had been appealed, and everything done that could have been done, a case would be presented different from that now before us. When judgments are given in this court, we will not doubt that they will be duly respected.

In the present case, we will grant the request of the respondents to make a further and more detailed return. And herein, or in some other case, one of us will take opportunity to write out our views at length as to the respective duties of the county justices and the collector in relation to the collection of taxes levied in obedience to a mandamus of this court.

Case No. 15,550.

UNITED STATES v. LAFONTAINE.

[4 Cranch, C. C. 173.] [1]

Circuit Court, District of Columbia. May Term, 1831.

CRIMES BY SERVANTS OF FOREIGN MINISTERS.

An indictment against the domestic servant of a foreign minister quashed for want of jurisdiction.

Joseph Lafontaine was indicted for an assault and battery upon Edward Cowen.

Mr. Dandridge, for the defendant, moved the court for a rule on the attorney of the United States to show cause why the indictment should not be quashed, on the ground that the defendant was the domestic servant of the Baron Stackelberg, chargé d'affaires of his majesty the king of Sweden and Norway, and that the supreme court of the United States alone has jurisdiction of proceedings against foreign ministers and their domestics. This motion was supported by an affidavit of Mr. Dandridge that he had often seen the defendant in the employ of the Baron Stackelberg as a domestic servant, and that he had received from the baron a letter, which is annexed to his affidavit, in which the baron informs him that his cook, Joseph Lafontaine, has been indicted in the circuit court of this District and county for an assault and battery; and requesting Mr. Dandridge will see that the defendant is proceeded against according to the laws of the United States and the laws of nations.

Mr. Dandridge also produced a certificate from the department of state that the baron is, and has been ever since his residence here, chargé d'affaires of his majesty the king of Sweden and Norway, near this government, and that he is fully acknowledged and accredited as such by the president of the United States.

Mr. Dandridge also cited the judiciary act of 1789, § 13 (1 Stat. 73), and Archb. Cr. Pl. 45, 46.

All which appearing upon the return of the rule, and no cause to the contrary being shown, the following order was made and entered on the minutes of the court:

THE COURT being satisfied by the affidavit of John Dandridge, filed in this cause, that the defendant was at the time of the supposed offence, charged in the indictment, a domestic servant of the Baron Stackelberg, chargé d'affaires of the king of Sweden and Norway, received and accredited as such by the president of the United States, and that, therefore, this court has not jurisdiction of the cause, it is therefore ordered that the indictment be quashed.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,551.

UNITED STATES v. The LA JEUNE EUGENIE.

[2 Mason, 409.] [1]

Circuit Court, D. Massachusetts. May Term, 1822.

SLAVE TRADE—FORFEITURE OF VESSEL—INTERNATIONAL AND MUNICIPAL LAW—ADMIRALTY JURISDICTION AND PRACTICE—RIGHT OF SEIZURE AND SEARCH.

1. If a foreign claimant of a vessel seized for being engaged in the slave trade, sets up a title derived from American owners, he must give affirmative evidence, that the case has no admixture of American property.

2. Whenever property is brought into a court of admiralty for adjudication, upon a seizure for a forfeiture, or other cause cognizable there, the property is, in contemplation of law, in the custody of the court, and cannot be withdrawn from its possession but by some person, who shall establish a title to receive it.

[Cited in Hooper v. Fifty-One Casks of Brandy, Case No. 6,674; Church v. Seventeen Hundred Dollars, Id. 2,713; Averill v. Smith, 17 Wall. (84 U. S.) 93.]

3. A right of seizure may exist on the high seas independently of any right of search.

[Cited in The Springbok, Case No. 13,262.]

4. The lawfulness or unlawfulness of the mode by which evidence is obtained, does not affect its admissibility in a court of law.

[Cited in U. S. v. Hughes, Case No. 15,419.]

5. The African slave trade, abstractly considered, is inconsistent with the law of nations; and a claim founded upon it, may be repelled in any court, where it is asserted, unless the trade be legalized by the nation to which the claimant belongs.

[Cited in Tufts v. Tufts, Case No. 14,232.]

[6. Any trade contrary to the general law of nations, although not tending to, or accompanied with, any infraction of the belligerent rights of

[1] [Reported by William P. Mason, Esq.]

that country whose tribunals are called to consider it, may subject the vessel employed in that trade to confiscation; and it matters not in what stage of the employment, whether in the inception or the prosecution or the consummation of it, the vessel is arrested.]

[Cited in Wheaton v. Peters, 8 Pet. (33 U. S.) 691; The Malaga, Case No. 8,985.]

[7. A vessel engaged in the slave trade, and sailing under French colors and with French papers, was seized by an American cruiser on suspicion of being of American ownership. It appeared, however, that she was in fact a French vessel. *Held*, that she was subject to condemnation both by the law of nations and the municipal law of France, and she therefore should not be delivered to the claimants, who had used her in the illegal traffic; that, as she was not an American vessel, the officers and crew of the seizing cruiser had no interest in her; and that the court would order her to be delivered to the French consular agent, to be by him turned over to his government.]

[Distinguished in Gedney v. L'Amistad, Case No. 5,294a. Cited in Albury v. The Byron, Id. 2,275.]

This was a libel against the schooner La Jeune Eugenie [Raibaud and Labatut, claimants] for being engaged in the slave trade. By an act passed by the congress of the United States on the 2d of March, 1807, the importation of slaves into any port of the United States was prohibited after the 1st of June, 1808; the time limited by the constitution of the United States, beyond which slaves could not be imported. By this act the president was also authorized to employ armed vessels to cruise on any part of the coast, where he might judge attempts would be made to violate the act, and to instruct the commanders of armed vessels to seize, and to bring in, vessels found on the high seas contravening the provisions of the law. Previous acts had been passed to prevent the citizens of the United States, or any resident within the United States, from being engaged in the transportation of slaves from Africa, or elsewhere, to any foreign port. By an act passed on the 20th of April, 1818 [3 Stat. 450], in addition to the above, it is provided among other things, that in all prosecutions under this act the defendant shall be holden to prove that the negro, &c. which he shall be charged with having brought into the United States, or with purchasing, holding, selling, &c. was brought into the United States at least five years previous to the prosecution, or was not brought in, holden, purchased, or otherwise disposed of, contrary to the provisions of this act. By an act passed on the 3d of March, 1819 [3 Stat. 532], the power of employing the armed ships of the United States to seize and bring into port any vessel, engaged in the slave trade by citizens or residents of the United States, was continued in the president. And by this act such vessels, together with the goods and effects on board, are to be forfeited and sold, and the proceeds to be distributed in like manner, as is provided by law for the distribution of prizes taken from an enemy, and the officers and crew to undergo the punishment inflicted by previous acts. On the 15th of May, 1820 [3 Stat. 600], it was further enacted, that if any citizen of the United States, being of the crew or ship's company of any foreign ship or vessel, engaged in the slave trade, or any person whatever, being of the crew or ship's company of any ship or vessel owned in the whole, or in part, or navigated for, or in behalf of, any citizen or citizens of the United States, shall land from any such ship or vessel, and on any foreign shore, seize any negro or mulatto, not held to service or labor by the laws of either of the states or territories of the United States, with intent to make such negro or mulatto a slave, or shall decoy or forcibly bring, or carry, or shall receive, such negro or mulatto on board any such ship or vessel with intent as aforesaid, such citizen or person shall be adjudged a pirate, and on conviction shall suffer death.

Under the authority of these acts, and for the purpose of more effectually enforcing the provisions of them, the public armed schooner Alligator, commanded by Robert F. Stockton, Esq. was sent among other vessels to cruise on the coast of Africa early in the year 1821. On the 17th of May last, Captain Stockton fell in with the schooner La Jeune Eugenie at Galenas near Cape Mount, on the western coast of Africa, and captured her on the suspicion of her being engaged in the slave trade; she at that time bearing the French flag, and having French papers. She was brought, under the charge of a prize master, into the port of Boston, and libelled at the September term of the district court next following, as an American vessel engaged in the slave trade. All the regular ship's papers, and other documents relating to the cargo were found on board of her. And it appeared from her register that she was owned by Messrs. Raibaud and Labatut, residents at Basseterre in Guadaloupe, but was built in the United States. It also appeared in evidence that she was fitted out at Basseterre in the month of February next preceding her capture; sailed from thence, sometime in the same month to St. Thomas, and from thence to the coast of Africa, with the ostensible purpose of procuring palm oil and other products of Africa. Wm. W. M'Kean, a midshipman on board of the Alligator, and the prize master, who brought the Eugenie into the port of Boston, deposed that the Eugenie had a moveable deck, that her main hatchway was very large, and grated with three iron bars, that the water on board was sufficient to supply two hundred men for a month; and her provisions, including rice, enough for her crew for a twelvemonth. Joseph Dickson, a seaman belonging to the Alligator, deposed, that the Eugenie had a crew of nineteen persons including boys; some of them Spaniards and some Italians, that she had a large supply of provisions, sufficient for her crew for

five months, and a number of handcuffs and fetters. It was also in evidence that there was a surgeon attached to the vessel, and a supply of medicines on board. Henry Henderson, a seaman belonging to another vessel on the coast, which was also captured by the Alligator, deposed, that he was on shore at a place called the "Factory" four and a half days, in company with the captain of the Eugenie. And that he understood that the Eugenie was then after a cargo of slaves. That the captain had then procured twenty or more, and said that he should have all the slaves ready in twenty days; and Henderson further deposed, that he was told by the owner of the Factory, that the captain of the Eugenie was to have 250 or 300 slaves; and that he also heard the king's son say the same thing. All the seamen belonging to the crew of the Eugenie, who were examined, deposed, that they had no reasons whatever to suppose that the vessel was engaged in the slave trade. A claim was entered by the Chevalier de Valnais, the French consul, on behalf of the owners of the Eugenie, and also a protest against the seizure and judicial proceedings, on behalf of the French government. A claim for restoration of the vessel and damages for her seizure and detention was also made by M. Alleye de Billon, the attorney and agent of the owners, Messrs. Raibaud and Labatut. A pro forma decree in favor of the claimants was rendered in the district court, and the case brought up by appeal to the circuit court at the last October term.

The libel contains two counts. The first alleged, that the Eugenie was, at the time of the seizure, a vessel of the United States, seized for a contravention of the acts of the United States prohibiting the slave trade. The second alleged, that the Eugenie was captured as prize, and at the time of the seizure was concerned and employed in the slave trade, without alleging to what nation she belonged.

Messrs. Blake and Webster, on behalf of the United States and of the captors, contended: (1) That the Eugenie was a vessel of the United States. It appeared from the register, that she was built in the United States, and no evidence being offered to shew, that she had been transferred to French citizens before the passage of the law of the 20th of April, 1818, it was not to be presumed, that she was so transferred until after that time. That the assumption of the French flag, and of French papers, for the purpose of evading the laws of the United States had now become so common, that the courts of the United States would not rest satisfied with such evidence, alone, of French ownership. That the act of the 20th of April, 1818, which threw the burden of proof on the defendant to shew, that he had not broken the laws of the United States, applied as well to this case, as to that of the importation of slaves into the United States. And it therefore became necessary for the claimants to show a bona fide transfer of the Eugenie to French subjects, which could only be done by producing the bill of sale. (2) That it fully appeared from the evidence in the case, that this vessel was actually engaged in the slave trade. (3) That if the court should be of opinion, that the vessel was bona fide French property, still, as it necessarily appeared to the court from the investigation of the case, that she was engaged in the slave trade, the court would take notice of the French ordinances against that traffic, and the ship being rightfully in the possession of the court, it would refuse to deliver it up to the claimants, who were precluded from asserting property therein, as well by the law of their own country, as by that of this country. (4) It was contended, that the slave trade was contrary to the law of nations, as at present understood and received; and that this court might rightfully condemn the Eugenie for an infraction of that law. It was urged, that the slave trade was contrary to the law of nations, because it was a violation of the law of nature, which constituted a component part of the law of nations. It was not denied, that slavery might under some circumstances have a legal existence: and therefore a trade in slaves might be under these circumstances legal. But that this traffic preyed upon the innocent and the free to make them slaves for no crime or offence. That it was merely a barbarous, unauthorized, private, piratical warfare, carried on against Africans to make them slaves. That it was contrary to the law of nature, because it instigated and encouraged the most atrocious crimes and barbarities, and presented an insurmountable barrier to the advancement of civilization and virtue in that country, which was its theatre. It was further contended, that most or all the civilized nations of the globe, had declared their sense of the illegality of this trade, by enacting laws to suppress it, and by various other public acts, treaties, and declarations. And that it might now therefore be considered as contrary to the conventional law of nations. And to support this ground the various laws and ordinances of different governments on this subject were adverted to, and commented on, as also the various treaties between nations, and their public declarations and diplomatic correspondence. It was finally contended, that this point had been already judicially decided; and the case of The Fortuna, 1 Dod. 81; The Amedie, Id. 84, note; The Donna Marianna, Id. 91; The Diana, Id. 95; and the case of The Plattsburg, decided by Judge Van Ness in the district of New York [unreported], were here cited.

The counsel confined their argument solely to the claim of Messrs. Raibaud and Labatut; and admitted, that a different question might arise in the case, if any claim should be presented in the name, or on behalf of the French government.

Wm. Sullivan, for claimants (having made several objections to the form of the libel, and among others, that it was a process on the instance side of the court, but in the nature of prize, and at a time, when no belligerent rights could come in question; that the evidence of the persons found on board had been taken according to the form of prize proceedings, and without notice to any adverse claimants; that the evidence, thus irregularly introduced, did not, and that no other evidence in the case did prove La Jeune Eugenie to have been employed in the slave trade; that the construction of the vessel was consistent with the mercantile employment alleged by the claimants; that the casks on board were intended for the reception of palm oil, which was the principal object of the voyage; that the number of men was not more than is usual in the French mercantile service; that there were no irons, no boilers, no preparations usually found, and said to be necessary, in vessels intended for transportation of slaves; that the alleged employment of the vessel was absolutely negatived by the persons, who had been found in her; and that the employment asserted by the claimants had been established by every one of those witnesses; that the proper form of process would have been to set forth an offence against some law of the United States; and that it should contain all such facts, and allegations, as would show a case to have arisen, of which this court can take cognizance; and that the evidence should have been presented according to the forms in use, where a crime is alleged to have been committed, or a forfeiture to have been incurred), contended that this vessel not being American, was not subject to the jurisdiction of this court, unless the libellants were right in assuming, that the African slave trade was prohibited by the law of nations; and to show, that no such prohibition existed, the claimants' counsel assumed: (1) That there is no other principle, to which to refer national law in a court having jurisdiction of the law of nations, than the assent of nations; and that such assent can be known only by custom or usage. (2) That as to slavery generally, or the African slave trade in particular, nations have expressed no opinion, no assent, which can be noticed in a national court.

The counsel for the claimants, after illustrating these points by a course of argument derived from historical events, proceeded: There are no principles applicable to this case, which are not sanctioned by all jurists, and by practice and custom universally admitted. Those, on which the case must be decided, are no where better expressed, nor so well, as by Sir W. Scott: "One fundamental principle of public law is the perfect and entire equality of nations; and it mainly concerns the peace of mankind, in their private and politic capacities, to preserve this principle inviolate."

The second is, "that all nations have an equal right to the uninterrupted use of the ocean. In places where no local authority exists, where the subjects of all states meet upon the footing of entire equality, and independence, no one state, or any of its subjects, has a right to assume, or to exercise, authority over the subjects of another." The present chief justice of the United States, while a member of congress, had occasion to consider some principles applicable to this case. "The jurisdiction of a nation extends to the whole of its territory, and to its own citizens in every part of the world." He quotes Rutherford: "The jurisdiction, which a civil society has over the persons of its members, affects them immediately, whether they are within its territories or not." 2 Ruth. Inst. p. 180. "On the sea itself no nation has any jurisdiction; all may equally exercise their rights." "No nation has any jurisdiction at sea, but over its own citizens, or vessels, or offences against itself." He cites to this point 2 Ruth. Inst. 488–491. "The right of any nation to punish is limited, in its nature, to offences against the nation inflicting the punishment; this principle is believed to be universally true." Piracy "under the law of nations, which alone is punishable by all nations, can only consist in an act, which is an offence against all. No particular nation can increase, or diminish, the list of offences, thus punishable." Principles no less fundamental, and asserted by all writers, and sanctioned by universal assent, are the sovereignty of each state within its own territories. And that each nation may regulate every interior interest without giving offence, and without accountability to any other nation. The form of government, and mode of administration; religion and mode of worship; what shall be deemed to be property, and what shall not be; the mode of acquisition, possession, and alienation; what acts shall be deemed crimes, and what forfeitures shall ensue, are all subjects which each nation reserves to itself.

The argument on the part of the libellants proceeds on some, or all of these grounds. (1) The law of nations is founded on the principles of justice and humanity. This law must forbid slavery, because slavery is inhuman and unjust. (2) The law of nations, if it does not forbid slavery, universally, forbids the African slave trade; because, that trade is unjust, inhuman, and barbarous. (3) The municipal prohibitory laws of our own nation and of the nations of Europe, the recent negotiations in Europe, and the treaties, which have followed them, are evidence that the slave trade is illegal by the law of nations. It is insisted, that the slave trade has been wrong for six hundred years; that it ought now to be broken up, and by judicial sentence. If slavery is illegal by the law of nations, that fact will appear by the usage and customs

of nations. If it does not appear from custom and usage, to be so, nothing but international treaties will show it to be so. At this day there is no one point concerning slaves, which is international, unless it has been made so by treaty. As to the possession of slaves, as a mere matter of property, within the territorial limits of different nations, such possession, and use of human beings, was never connected with any question of national law until this discussion occurred. When moralists and jurists, whose works are held to be authorities on natural or national law, have spoken of slavery, the strongest expression that any of them have used, is the mere assertion, that no man is by nature a slave. If this be so, and there were custom to the contrary, it is an assertion, which applies to men individually, and to the states of which they are members; it is not a principle, addressed to communities, or states, collectively. If it be one of those just and moral precepts and injunctions, which are discoverable by the light of reason, that no man may make his fellow-being his slave, it is one of those precepts, or injunctions, which every man, and every community, have interpreted and applied for themselves. Whatever the precept may be, by whomsoever, and wheresoever pronounced, it has always encountered the fact, that mankind have always been divided into masters and slaves. Whatever changes the world and society have undergone in other respects, thus far it has undergone none in this; excepting in some few communities, where slavery has ceased. This lamented Africa, to which we are now called upon to make retribution on claims, which have been accumulating for ages, if she was the first, in time, in arts, in science, and refinement (which may well be doubted), was also the first to show the division of mankind into master and slave. The monuments of northern Africa, which have survived all history and tradition, prove nothing so distinctly as their own antiquity, and that they were raised by the toil of slaves. The same distinction is found among Jews and Gentiles; among Greeks, and barbarians; among Romans, and strangers.

Slavery ceased in Europe towards the middle of the thirteenth century; but from what operative causes, it is not necessary to examine; most probably partly from the influences of Christianity, and partly from political necessity. But unquestionably not from any new discovery, that slavery was forbidden by any law, human or divine. If there had been any such positive prohibition by any law, by whatever name it may be distinguished, this law would have appeared, and would have been found in practice, at some time before the beginning of the fourteenth century. Modern slavery began on Portuguese capital, protected, and encouraged by royal authority. In England, now so distinguished in the abolition, no question of the legality of holding slaves appears to have been raised; but every possible proof is found, that it was considered as on the same footing as any other commerce. Between the years 1618 and 1672, there were no less than four chartered companies to deal in slaves; the last of which was dignified with the name of the Royal African Company, and had among its subscribers the king of England, his royal brother, and many persons of high rank and quality, and was founded on a capital of £110,000, a prodigious capital for that time. From 1688, till the period of abolition, the trade has been free and open to all British subjects. As lately as 1750 an act was passed by the English parliament, for extending, and improving the trade to Africa. In Spain, the slave trade began as early as the year 1500. In 1517, the Emperor Charles V. granted a patent to supply 4,000 negroes annually; and the carrying of negroes soon became a branch of regular and established commerce. The concurrence of the emperor was obtained by that distinguished prelate Las Casas. His motive is stated to have been that the Indians, born free, and who were reduced to servitude by conquest, were incapable of the toils which were exacted of them; while the negroes, who were imported, were inured to servitude and drudgery, and would experience no unfavorable alteration of circumstances by a change of masters. Don Onis, the Spanish ambassador, says, in his letter to Mr. Adams, secretary of state (14 May, 1818): "The introduction of negro slaves into America was one of the earliest measures adopted for the improvement and prosperity of those vast dominions. This is not to be considered as having originated slavery, but as materially alleviating the evils of that, which already existed, in consequence of the barbarous practice of the Africans upon saving the lives of a considerable portion of the captives in war, whom they formerly put to death. By the introduction of this system, the negroes, far from suffering additional evils, or being subjected while in a state of slavery to a more painful life than when possessed of freedom in their own country, obtained the inestimable advantage of a knowledge of the true God, and of all the benefits attendant on civilization." In France, the peopling of their colonies with Africans appears to have attracted notice soon after the traffic was discovered. The views taken by the French government of this branch of commerce indicate no intention to break any law in pursuing it; nor any intimation, that any man, however philosophical, moral, or wise, had at that time, nor at any time since, discovered that national law stood in the way of the African traffic, nor any principle of any law, in opposition to the right of property in slaves.

Valin, in his Commentaries (volume 1, p. 411), says: "Par rapport, a ces negres esclaves, dont la multiplication est la source feconde

des richesses des nos colonies, le gouvernement a toujours été également attentif à soutenir et protéger le commerce de Guinée, où se fait le traite de ces negres, à régler leur état, et leur discipline aux colonies, et a ne permettre leur introduction dans le Royaume, qu'avec précautions capables d'empêcher, que les colonies ne fussent privées de leur secours." In the 12th article of the ordonnance of 1738, it is enjoined on slave owners to take care, that slaves should be brought up, and instructed, in the principles, and in the exercise of the Roman Catholic and apostolic religion. In the United States, the introduction of slaves into the colonies of North America was a natural consequence of the traffic. They were introduced and held as property without any moral shock; and time and circumstances have, at this day, circumscribed their existence to the latitudes in our territory, within which, it is said, the white man cannot labour. There is nothing to remark on slavery in the United States, but the fact, that in all, and every instance, in which the blacks have been considered, spoken of, or referred to, it has been as property, subject to all the general and particular provisions, which the respective states saw fit to make concerning it. When the national compact was formed, slaves were no otherwise noticed, than to confer on the holders of them certain political privileges and immunities;—and to limit the power of prohibiting importation to a definite time. It is obvious, that the power over slaves was referred to the authority which congress had, to regulate commerce. How much of the apprehension, that this commerce would be prohibited, was referable to political jealousy, and how much to humanity, it is now unimportant to inquire, since all are willing to ascribe the prohibition to the best of motives. The last view, which this nation has taken on the subject of the right to hold black men as slaves, is found in that memorable and long continued effort of reason and eloquence, which terminated in opening a market for slaves throughout that immense territory, which is bounded east by the Mississippi, and north by the 36th degree of latitude, and west by what the United States may choose for a boundary. Perhaps the land march of a native black man of the United States, over hundreds of miles, securely bound to his fellow travellers, and they to him, and repeating his painful steps under the excitement of a driver's whip, does not present so shocking a spectacle, as is found in the hold of an African slave ship.

I have endeavored to show that slavery is unknown to the laws of nations in any manner, since slavery was a consequence of captivity in war; that no moralist, or jurist, who has given any opinion on slavery, has connected this subject with national law; that all nations have uniformly considered slaves as property, and consequently governed by municipal, or civil laws;—and especially are they so considered in each of the United States respectively, in which slavery is tolerated, and so admitted to be by the government of the United States. It is perfectly consistent with reason, common sense, the principles, on which national law rests, and with the practice of all nations, that neither the acquisition, the manner of holding, using, abusing, transferring, or transporting slaves, is either forbidden, commanded, permitted, or recognized by the law of nations. Why should the law of nations be applied to this subject of property, any more than to any other? How does it affect the safety, welfare, industry, rights, or happiness, of any individual of one nation, that the members of another nation, buy or sell on the coast of Africa, or elsewhere, black men to be held in slavery? How does it affect the military, or naval power; the resources, the commerce, the rights, the honour, dignity or glory of one sovereignty, that the subjects of another should commit immoralities and crimes, however shocking, within their own territories, or where no one nation has an exclusive jurisdiction, and every nation a jurisdiction, over its own subjects, only? It is clear, that slavery itself, according to the universal practice of all nations, is forbidden by no law. The place, in which they are first acquired, and the manner of transporting them, are merely circumstances connected with the possession of property, which men have agreed to hold as such. By the law of interior Africa, slavery is lawful. It is so, and ever was so, as far as practice and usage prove what the law is. Frenchmen, Englishmen, Dutchmen, Spaniards, Swedes, Danes, and Americans, may own slaves in their own territories. What is it, that the law of nations is supposed to step in, and forbid? It is the transportation over the Atlantic;—that is, a circumstance connected with the ownership of a particular species of property. All cruelty, inhumanity, barbarity and oppression, are forbidden by the law of nature, everywhere. But how are the abominable acts of the slave traffic distinguishable by the law of nations, from the cruelties, which a planter on a West-India island, or a planter in a southern state, or a negro driver employed to stock the new territories, may commit? Whatever the law of nature, and of conscience, may say, the law of nations is silent.

There are certain things, which are essential to every law: (1) A law must be possible. (2) It must be of some utility. (3) It must be just;—that is, conformable to the order and nature of things, and the constitution of man. (4) It must be sufficiently known. (5) It must be attended with proper sanctions. A law against the slave trade must be possible, useful, and just. If nations have made such a law, or have adopted the provision of the law of nature to this effect, how is it known as a law? When and

where have nations promulgated this law? By their precepts, or by their practice? If they have promulgated such law, under what sanction, or penalty have they done this? Have they agreed to a forfeiture of property, or to any punishment, which each and every nation may impose and inflict? When and where have they done this? If they have made a law, but have annexed no sanction, or penalty, to the breach, is it any thing more than mere recommendation, prudent counsel, which may be taken, or rejected without offence? Thus the matter of slavery stood, and continues to stand, so far only excepted, as has been affected by the positive laws of respected sovereignties, and the diplomatic intercourse at Vienna and Aix-la-Chapelle, within the last six years, and by the consequences of this intercourse.

(The counsel for the claimants here went on to remark upon the measures taken in England to effect the abolition of slavery, and on the negotiations by the sovereigns of Europe.)

It is now urged upon the court, that because the sovereigns of Europe happened to meet, and to converse, upon a great moral evil, and came to the conclusion, that it ought, in some way, and at some time, and as soon as the habits and prejudices of their respective subjects, would permit, to be done away; and that to this end, when they went home, they would restrain their respective subjects accordingly, the law of nations is changed. A new chapter has been struck off, and is the law to this court, and to this nation, who had no part in the conference. Suppose that the ministers at Vienna and Aix-la-Chapelle had taken into consideration the frequency, and enormity of the plunderings and murders, practised upon travellers, who were lawfully employed in traversing Europe, and the facility, which felons found, of escaping by crossing territorial lines; and the conference had produced new laws, and higher penalties in each state;—would robbery have, therefore, been made a crime punishable by the law of nations? Suppose that the conferees had considered, whether it would be expedient to agree by convention, and positive contract, that a robbery, committed in one sovereignty, might be punished in another, if the felon were found there; and they had, una voce, declared, that they never would, or could, surrender the right of administering their own laws in relation to their own subjects; would robbery, nevertheless, be made a crime by the law of nations? Lord Castlereagh is of opinion, and has attempted to convince the proper functionaries of all the states in Christendom, that mutual search and seizure are yet wanting in the remedial process. Of that opinion has been no nation, but his own. The Netherlands, Portugal, and England are trying an experiment, limited exclusively to cases, where slaves are found on board:—no other nations have agreed to this. Our own, and France, have positively refused all accordance in such measure. And both France and the United States have again and again most emphatically refused to permit their vessels to be visited and searched for slaves, or for any other purpose, in time of peace. (See the report of the committee of the house of representatives in congress on the slave trade, Feb. 9, 1821.)

If the law of nations is silent on the subject of slavery, as found in jurists, and as found in practice and custom among sovereigns; if no treaty, which this court can notice, has prescribed any rule on this subject; if the vessel in question was French, and even if she has offended only against the law of France, yet the learned advocates insist, that this court has jurisdiction, and may refuse restoration to the claimants, may refuse to condemn, and may withhold the property, until some better title appears; that the claimant is an actor, or plaintiff, and must prove his case, and show himself innocent of all offence, against any law, but certainly against the law of his own country. These are new and extraordinary doctrines. Admitting, for the present argument, that this court has the most unqualified power, that can be exercised by any court of the law of nations, by any court of admiralty and maritime jurisdiction; still it has no jurisdiction over this vessel, let her have done what she may. The only possible reason, on which the decision in the cases of the Amedie and the Fortuna could have rested, was, that the courts, in which those cases occurred, had a lawful jurisdiction as prize courts; and having it, the lords of appeals saw fit to notice, as a court administering the law of nations, their own municipal law, and that of this country. If the Jeune Eugenie had been brought in here by a belligerent cruizer, and this court were trying questions on the law of prize of war, these cases would require more consideration. But the case of the Eugenie is the same, in all respects, as though she had been lying in a port of France, and had been cut out thence by the Alligator, on suspicion that she was American, and liable to seizure for some offence committed against the United States.

The case of Le Louis [2 Dod. 210], before Sir W. Scott, was here commented on, as decisively settling, that the slave trade is not prohibited by the law of nations. In Madrazo v. Willes, 3 Barn. & Ald. 353 (in 1820), Mr. Justice Bailey says—"Although the language used by the legislature in the statute referred to is very strong, yet it can only apply to British subjects, and can only render the slave trade unlawful, if carried on by them. It cannot apply in any way to a foreigner. It is true, that if this were a trade contrary to the law of nations, a foreigner could not maintain this action; but it is not; and as a Spaniard cannot be considered as bound by the acts of the legislature prohibiting this trade, it would be un-

just to deprive him of a remedy for the wrong which he has sustained." Mr. Justice Best says—"It is impossible to say, that the slave trade is contrary to what may be called the common law of nations."

In presenting the claimant's view of this case, a justification of slavery, or the slave trade, is not intended. I concur entirely in the views of the libellant's counsel on these subjects; and readily acknowledge, that at no time, nor on any occasion, have the noble and honorable sentiments, which spring up in cultivated minds, been more eloquently and ably impressed, than in this case. As to slavery, generally, it is a subject to be touched with some tenderness in this country. In our Northern clime, we do not want, and cannot use slaves. Slavery would have ceased among us without the aid of positive law. The character of our industry, and our sentiments on civil rights, apart from all moral and religious objection, would, long since, have rendered such servitude among us odious and intolerable. It is far otherwise in the South. Among the best informed and most virtuous men, perceptions of moral truths often take their character from wants and necessities. A white person, born and educated in a community, where the distinction between master and slave has endured through successive generations for centuries, would hardly discover by the light of reason, that slavery, by which he gets his wealth, comforts, and daily bread, is forbidden by the law of God, while he finds so many human laws to the contrary. He would be startled to hear, that the holding of negroes in servitude is a foul stain on the moral character of his country. Philosophical reasoning is a feeble arm against those, who defend rights of property, which have been long continued, and frequently, and solemnly admitted. However we may deplore such a state of society, who has been able even to suggest a remedy? Let any man, the most enlightened and humane, apply himself to the study of slavery, and the means of ending it, and he will find, that rights and duties and conflicting necessities have cast him on an ocean, where he can take no observation by day, and where no beacon will cheer him, when the day is gone. The voluntary extension of slavery, through vast, and unpeopled regions, is a far different subject. And widely different from either is the African traffic.

Without stopping to inquire what nature has given, or denied to the black man; or whether nature intended him for the white man's equal or the white man's slave (see "Notes on Virginia"), it is the highest honor of the age, that all Christian states have severally admitted the slave trade, to be a sin of deepest dye. It includes, and is the collective name for all the crimes, which moralists and lawgivers have declared to be, severally, punishable with death. In this dreadful sin, the Christian rulers of the earth may not hold themselves guiltless, since all who can prevent, and who do not, are justly said to command, the offence. It were far better for the honor of humanity, and for the condition of Africa, that abolition should not have been attempted, than to leave it, where it is. To what immediate cause are we to refer the increased, and increasing horrors of the traffic? Why is it that "human beings are concealed in casks—and sometimes thrown into the sea?" Why is it that the narrow space of a small swift-sailing vessel is filled with living men, women and children; shut up, where it is agony to breath;—where the living, the dying, and the dead, are found in the same fetters; and where the past, the present, and the future must alternately distract attention? It is the inefficient attempt at abolition, which is chargeable with these enormities. No half-way measure can be justified. Nations, having begun, are bound in honour and conscience to go on. It is their solemn duty to declare the slave trade an offence against all, and punishable by all; and to agree among themselves, that slave dealers on the ocean are hostes humani generis. But even this is not enough;—the means should be found of detecting, and punishing those, who stay at home, but who furnish the capital for the traffic, and who are far more guilty, than the brutal agents, whom they employ. Such laws, such conventions, and the aid of fleets, are alone competent to effect the abolition. Surely it cannot be the way to suppress this traffic, to ask from a judicial tribunal an act of legislation; and to presume the assent and concurrence of all other nations, against the express and positive dissent of every one of them. It may do for zealous and humane advocates, in the fervour of their feelings, to found their arguments on the maxim, aut viam inveniam, aut faciam, but they cannot expect of any court of the law of nations to found its judgment thereon.

In deciding on new and unprecedented cases, some consideration is due to expediency and convenience. At least such has been the practice in the British court of admiralty. By the judgment which the libellants desire to have given, in the present state of the world, the progress of assent to effect abolition may be seriously retarded. The apprehensions of those cabinets, which have resisted Lord Castlereagh's importunities, may be greatly strengthened. Visitation and search will be legitimated; these will be followed by resistance, conflict and blood; by inflamed and exaggerated accounts of both parties; and then, something of an old grudge, or an appetite for a new one, or nothing more than the feverish inquietude of peace, may bring the lamented wars of interior Africa to the Atlantic, and to the shores of all civilized nations. There are some high men in Europe, who do not like our political example; nor the economy and simplicity of our government; nor our interior industry and ingenuity; nor our external enterprise and com-

merce; nor the gradual extension of our limits; nor the sound of our cannon. There are many, who think it would do the old world no evil, to clip effectually the pinions of the new; and all of them know, that a wrong done by a public officer is a wrong done by a nation, until disavowed. But in this court, neither of the counsel can believe, that judgment ever was, or ever will be, rendered according to hopes and wishes; nor according to apprehensions of remote, or possible consequences. The law must rule here, whatever may be private opinion. If in replying, any thing has been offered for the claimants, which does not deserve the notice of the court, it will, of course be disregarded. But, on the other hand, I cannot but consider no small portion of what has been urged for the libellants, as mere embellishment of reasoning;—rhetorical fragrance, which ascends to the bench of justice, to refresh and delight, but which, in obedience to the law of its nature, will escape and pass away; while that only, which is solid and tangible, will remain, among the materials of that judgment, which our own nation, and perhaps the community of nations, will regard with no common interest.

STORY, Circuit Justice. This is a libel brought against the schooner La Jeune Eugenie, which was seized by Lieut. Stockton, on the coast of Africa, for being employed in the slave trade. The allegation asserts the offence in two forms: first, as against the slave trade acts of the United States; and, secondly, as against the general law of nations. A claim has been given in by the French consul, in behalf of the claimants, who are subjects of France, resident in Basseterre, in the island of Guadaloupe, as owners of the schooner; and there is also a protest filed by the French consul against the jurisdiction of the court, upon the ground, that this is a French vessel, owned by French subjects, and, as such, exclusively liable to the jurisdiction of the French tribunals, if she shall turn out, upon the evidence, to have been engaged in this dishonourable traffic.

I am fully aware of the importance and difficulty of this case, considered under some of the aspects, in which it has been presented to the court. The case has already, as we are informed, and truly, become the subject of diplomatic intercourse between our government and that of France; and it is not, perhaps, too much magnifying its grave character to declare, that rarely can a case come before a court of justice more deeply interesting to the cause of general justice and humanity, or more likely to excite the jealousies of a foreign government, zealous to assert its own rights, and, it is to be hoped, not, in the slightest degree, reluctant to fulfil its own plighted faith for the abolition of the African slave trade. Whatever may be my own distress in being called upon to attend to such weighty considerations, and whatever my solicitude rightly to discharge my duty to my own country, to France, and to the world, on the present occasion, it cannot escape the attention of any persons, who hear me, that a court of justice in this country has its path clearly marked out and defined. However delicate or painful may be its predicament, it cannot seek shelter under the wings of executive authority, or bind up its judgment under considerations of mere convenience or comity, or a blind obedience to the wishes of any sovereign, or a desire to extinguish, what it must justly deem, a trade abhorrent to the great principles of Christian morality, mercy, and humanity. It is bound to administer the law, as it finds it, fearlessly and faithfully, according to the dictates of its own judgment, in the hope at least, that errors of law may be corrected by a higher tribunal, and national difficulties may be removed by those, who hold the legislative and executive authorities of the nation

It appears from the evidence in the case, that this vessel is duly documented as a French vessel, and that she sailed on a voyage from Basseterre for the coast of Africa, and was found upon that coast by Lieut. Stockton, under circumstances, which left no doubt on his mind that she was engaged in the slave trade. The master and some of the principal officers were on shore engaged, as it should seem, in collecting slaves at one of the factories established for this purpose. The vessel was equipped in the manner, that is usual for the slave trade. She had two guns, a false or movable deck, and a large quantity of water and provisions, and water casks, quite unusual in ordinary voyages, and indispensable in this particular class of voyages. If there are any persons, who entertain doubts as to the real destination and employment of this vessel, I profess myself not willing to be included in that number. Upon the evidence in the case it is irresistibly established to my mind, that the sole purpose of the voyage was a traffic in slaves; and that the intention was to carry them from Africa to some one of the French colonies, and, in all probability, to the port, in which the enterprise originated. In respect to the ownership, it has been already stated, that the vessel was sailing under the customary documents of France, as a French vessel; and certainly in ordinary cases these would furnish prima facie a sufficient proof that the vessel was really owned by the persons, whose names appear upon the papers. In ordinary times, and under ordinary circumstances, when disguises are not necessary or important to cloak an illegal enterprise, or conceal a real ownership, the ship's papers are admitted to import, if not an absolute verity, at least such proof, as throws it upon persons, asserting a right in con-

tradiction to them, to make out a clear title establishing their falsity. But if the trade is such, that disguises and frauds are common; if it can be carried on only under certain flags with safety or success; it is certainly true, that the mere fact of regular ship's papers cannot be deemed entirely satisfactory to any court accustomed to know, how easily they are procured by fraud and imposition upon public officers, and how eagerly they are sought by those, whose cupidity for wealth is stimulated and schooled by temptations of profit, to all manner of shifts and contrivances. Now upon the face of these very papers it appears, that this schooner is American built, and was American owned, and that within about two years she was naturalized in the French marine in the port of her departure, and her American title either really or nominally divested. At this period France and Portugal alone, of all the nations of Europe, possessed the painful and odious prerogative of covering under their flags a traffic, that all the great states of Europe had concurred in condemning to infamy. And by our own laws, which had been long sedulously directed against it, it was almost impracticable for any citizen to pursue the traffic under the flag of our own country, not only from the penalty of confiscation denounced against it, but from the offence being visited with capital punishment, as a most detestable piracy. Under such circumstances, if American citizens were engaged in the traffic, it is manifest, that they would conceal their interests under a foreign flag and passports, and wear any disguises, which might facilitate their designs, and favour their escape from punishment. And that such disguises might be cheaply bought, and promptly obtained through the instrumentality of private agents in foreign countries, who would be ready to assume a nominal ownership, no one, that has been much acquainted with the real business of this commerce, would be inclined to doubt or deny.

Sitting as I do in a court of the law of nations, accustomed to witness, in many shapes, the artifices of fraud, practised by those, whose interest lies in evading the salutary restraints of the laws, I think, that I should manifest a false delicacy and unjustifiable tenderness for abstract maxims, if I did not borrow somewhat of the experience of the world, to enable me to disentangle the network, which covers up unlawful enterprises. It is too much to ask a court of justice to shut its eyes against what is passing in the world, and to affect an ignorance, of what every man knows; to deal with the surface of causes, and pronounce them to be innocent, because no stain is permitted to appear there, or because guilt is not ostentatiously displayed to the first glance. It cannot be concealed, however humiliating the fact may be, that American citizens are, and have been, long engaged in the African slave trade, and that much of its present malignity is owing to the new stimulus administered at their hands. I speak what the records of this court show; what the records of the government show; what is loudly and vehemently complained of by that foreign government, which is so zealously enlisted in the cause of its abolition. Under such circumstances it cannot but be supposed, that an American court will have its suspicions alive; and that when it sees. that a vessel, recently American, is found in the traffic under foreign papers, something more will be necessary than the mere formalities of those papers, to establish the fact of a bona fide transfer to the ostensible foreign owners. It is doing no injustice to a foreign owner to require in a traffic of this nature, so little reconcilable with good faith or sound morals, and prohibited by our laws, that he should give affirmative evidence, that the case has no admixture of American interests, when he sets up a title derived from American owners. It appears to me, that I should impose no hardship therefore in requiring the claimants in this case to show the bill of sale, by which they acquired their title, to give the names of the American owners; and to establish to a reasonable extent, that the transfer was for a valuable consideration. It is well known, that a bill of sale is the universal instrument, to which courts of admiralty look to establish the legal interests in ships; and this is equally a part of our own law and the law of France. And I take great pleasure in citing from an enlightened authority a confirmation of this doctrine. "It cannot," says Sir W. Scott, "be considered as any hardship upon the subjects of those countries, which still carry on the slave trade, that it (the court) should possess such a power (of inquiring into the real title of the ship.) It can be no unconstitutional breach of the law of nations to require, that when a claim is offered on the ground, that the property belongs to the subjects of a country, which still permits this trade, the burthen of giving proof of the property should lie upon those, who set it up, &c. It would be a monstrous thing, where a ship, admitted to have been, at one time, British property, is found engaging in this traffic, to say, that however imperfect the documentary evidence of the asserted transfer may be, and however startling the other circumstances of the case, no inquiry shall be made into the real ownership." The Donna Marianna, 1 Dod. 91, 92. Standing, then, as this cause does, I am not satisfied, that the property is owned as claimed; and before it would be restored, even if all other difficulties were overcome, I should feel myself bound to require farther proof of proprietary interest. If there were nothing more in the cause, I should pass such an order without hesitation.

But supposing the vessel to be established to be French, sailing under French papers, and employed in the African slave trade, the more important question is, whether this court is at liberty to entertain jurisdiction of the cause, or is bound to restore the property without any farther inquiry, remitting the party to the domestic forum.

It is contended, on behalf of the plaintiffs, that this court has a right to entertain jurisdiction, and is bound to reject the claim of the defendants: First, because the African slave trade is repugnant to the law of nations; secondly, because it is prohibited by the municipal laws of France. On the other side it is contended, that the trade is not repugnant to the law of nations; and if prohibited by the laws of France, it is a municipal regulation, which the tribunals of France are alone competent to inquire into and punish.

Before I proceed to the consideration of these points, it may be well to dispose of one or two preliminary considerations, which have been thrown out in the argument at the bar, and may assist us in coming to a correct determination as to the duty of the court. Whenever property is brought into a court of admiralty for adjudication upon a seizure for a forfeiture, or other cause cognizable there, the property is, in contemplation of law, in the custody of the court and cannot be withdrawn from its possession, but by some person, who shall establish a title to receive it. This is familiarly known as a rule of the prize court; but the principle is not less applicable to the instance court. In a suit in rem both parties are actors. If the libellant does not make out a title by forfeiture or otherwise, it does not follow, that the property is removed from the custody of the court, or that the claimant is to receive it. It may be true, that the libellant has failed to establish a title of forfeiture; and if the claimant has failed also in his title, the court would surrender its duty, if the property was delivered up to the latter. In point of fact it may turn out, that neither party can establish a title to the property; and if so, it will remain in the custody of the court, until a lawful owner appears and demonstates his title. If, for instance, upon a seizure for a forfeiture, no ground for condemnation should appear, and yet the claimant should found himself upon a title grossly illegal, or fraudulent, or piratical, there cannot be a doubt, that his claim must be rejected. "The general injustice of a claim," says that very learned person, who yet presides in the high court of admiralty, "may be the subject of cognizance in a municipal court. A claim founded on piracy, or any other act, which in the general estimation of mankind, is held to be illegal or immoral, might, I presume, be rejected in any court upon that ground alone." The Diana, 1 Dod. 95, 100. In the ordinary course of proceedings, it is certainly true, that a decree of acquittal is followed by a decree of restitution, but this arises from the fact, that the title of the claimant rarely becomes a matter of controversy. And this doctrine is founded on a general sense of justice, and for the convenience of mankind. A court of admiralty is solicitous to preserve the property, which falls into its hands, for the rightful owner; and if no such person appears before it, it will keep it in its custody, until such an owner shall appear. It would be most mischievous to the whole community to deliver over property to a claimant, simply because he asserts a claim, without proving a title. The case of salvage strongly illustrates this course of proceeding. If salvage be decreed in a suit in rem, it is paid out of the proceeds. If it be denied, either on general grounds, or as forfeited by misconduct, the property is retained for the real owner; and it may happen, that all the parties before the court have collusively instituted proceedings in the cause for the express purpose of defrauding the real owner. Under such circumstances, the court would be bound to retain the property, and dismiss all the parties before it for gross and fraudulent conduct, visiting them, as far as it could, with a proper penalty in the shape of costs. If, therefore, it should turn out in this investigation, that Lieut. Stockton was mistaken in his right of seizure, and the schooner cannot be condemned for a breach of our municipal laws, not having an American ownership, there will still remain a duty for the court to ascertain, whether the vessel can be restored to the claimants. If I am right in this view of the nature and authority of a court of admiralty acting in rem, the question, as to the jurisdiction of this court to make a farther and final inquiry into this cause, vanishes; and however unwelcome and perplexing the task, the court is bound to sift to the very bottom the merits of the present claim.

Another objection of a more general cast, and involving more general principles, is, that if this is a French vessel, the seizure was tortious, and no right, and consequently no jurisdiction, over this case can be founded on a wrong. It is said, that Lieut. Stockton could only claim to visit this vessel upon the high seas upon the ground of a right of search, which right never exists in a time of peace, and therefore his seizure was founded on an abuse of power, which cannot authorize an American court to use any evidence acquired in virtue of such abuse. I am free to admit, as a general proposition, that the right of visitation and search of foreign ships on the high seas can be exercised only in time of war, in virtue of a belligerent claim; and that there is no admitted principle or practice, which justifies its exercise in times of peace. It is unnecessary to scan opinions or authorities on the subject, since the point was not controverted at the argument, and it is no part of my duty to re-ascend to the source of its origin. But if from a denial of

a right of visitation and search on the high seas, it is meant to be concluded, that there exists no right of seizure of any vessel on the high seas, bearing a foreign flag, under any circumstances, I am not ready to admit the correctness of such a conclusion. The right of visitation and search is, in its nature, distinct from a right of seizure. A belligerent cruiser has a right to search all vessels found on the high seas, for the purpose of ascertaining their real, as well as assumed character, and capturing the property of its enemies. The exercise of such a right, being strictly lawful, involves the cruizer in no trespass or wrong, entitling the party searched to damages, if it shall turn out upon examination, that there was no ground for the search, and that the property is in all respects neutral. If, indeed, upon such search, the captor proceeds to capture the vessel as prize, and sends her in for adjudication, and there is no probable cause of capture, he is liable to responsibility in costs and damages. But this is not for the search, but for the subsequent capture; which, being without sufficient reason, is treated as a tortious act, and a usurpation of possession. It does not, therefore, by any means follow, that a right of search justifies a capture, so that the latter may not be deemed a gross violation of the rights of a foreign neutral ship. It is, indeed, difficult to perceive, how a tortious capture, jure belli, can clothe a party with any more rights, in any respect, either as to evidence, or grounds of condemnation, than a tortious seizure in time of peace. And the right of search, as such, neither protects nor aids a capture, if considered per se the latter is incapable of justification. But a right of seizure may exist on the high seas independently of any right of search, or the protection from damages, which that right guarantees. For instance, no one can doubt, that vessels and property in the possession of pirates may be lawfully seized on the high seas by any person, and brought in for adjudication. But such a seizure is at the peril of the party. If the property upon examination turns out not to be piratical, or piratically employed, the seizor is a trespasser ab initio, and liable, as such, to damages; and it will be no justification upon the principles of general law, that there was probable cause of seizure. And yet no one will be hardy enough to contend, that the mere right to seize property in the possession of pirates on the high seas, which right exists as well in peace, as in war, draws after it a right of visitation and search of every vessel found on the high seas, to ascertain, whether she be piratical or not, or whether her flag be assumed or genuine. If this example should not be thought unexceptionable, I may be permitted, under the sanction of that high tribunal, whose decisions I am bound to obey, to put one, that has passed in rem judicatem. It is now the settled doctrine of the supreme court, that if a foreign vessel has committed any offence within the territorial jurisdiction of another nation, by which a forfeiture is incurred, she may be seized any where upon the high seas by the ships of the nation, against which she has offended. And it is manifest that, in most cases, it cannot be ascertained, whether a ship descried on the high seas be the offending ship or not, without actual search and visitation. Yet it has never been supposed, that a general right of search grew out of this admitted right of seizure. On the contrary, it is the general understanding, that the seizor visits, in such cases, at his peril, and is excused and justified, not by probable cause, but by the fact, that the seizure is followed by a just condemnation.

It appears to me, also, that every nation has a right to seize the property of its own offending subjects on the high seas, whenever it has become subject to forfeiture; and it cannot, for a moment, be admitted, that the fact, that the property is disguised under a foreign flag, or foreign papers, interposes a just bar to the exercise of that right. What, then, is to be done? If it be said, that foreigners are not to be molested on the high seas, while engaged in their own innocent and lawful trade, it is no less true, that foreigners engaged in the fraudulent cover of the property of your own subjects, and, in concert with them, evading your own laws, are not to be protected in such illegal enterprises. In such a case you do not acquire a right of search which justifies your encroachment upon the private concerns of a foreign ship; but nevertheless, having a right to seize for breach of your own laws, you may seize at your peril; and if the case turns out to be innocent, you are responsible for damages; if guilty, you are justified by the event. Unless such a community of right be conceded to exist for purposes like those alluded to, the ocean would become a sanctuary for all sorts of offences; and evils, at least as alarming as those, with which we are threatened in this case, would afflict the whole commercial world. It is not lightly to be supposed, that any nation would be inclined to abuse any right, which it holds in common only with all other nations; and if it should choose, in the wantonness of power, to abuse it to the serious injury of other nations, the same remedy would exist, and none other, as for like oppressions practised within the range of its ordinary authority.

As to the other position, that if there exists no right of visitation and search, there cannot exist any right to use any evidence, which may be discovered by such search, I must be permitted to doubt, if that doctrine, in the full extent of its meaning, can be supported. In the ordinary administration of municipal law the right of using evidence does not depend, nor, as far as I have any recollection, has ever been supposed to depend upon the lawfulness or unlawfulness of the mode, by which it is obtained. If it is

competent or pertinent evidence, and not in its own nature objectionable, as having been created by constraint, or oppression, such as confessions extorted by threats or fraud, the evidence is admissible on charges for the highest crimes, even though it may have been obtained by a trespass upon the person, or by any other forcible and illegal means. The law deliberates not on the mode, by which it has come to the possession of the party, but on its value in establishing itself as satisfactory proof. In many instances, and especially on trials for crimes, evidence is often obtained from the possession of the offender by force or by contrivances, which one could not easily reconcile to a delicate sense of propriety, or support upon the foundations of municipal law. Yet I am not aware, that such evidence has upon that account ever been dismissed for incompetency.

If I am not much misled in my general recollection, cases of prize, which are emphatically under the administration of the law of nations, are not exempt from the introduction of evidence obtained by similar means. Force is there sometimes applied, and deception also, to meet the contrivances of fraud, and draw papers from the possession of parties, which may disclose the real truth of the transactions. It is matter of extreme doubt with me, whether any court of prize would feel itself at liberty to reject such evidence, even though it should be proved, that it was obtained by a personal trespass, or even by an aggravated constraint. If, independently of any supposed right of search, a seizure be made upon the high seas in a time of peace, and the evidence, on which condemnation is sought, either for a breach of municipal or national law, is obtained exclusively from the papers found on board after the seizure; yet if sufficient for the purpose of condemnation, it completely justifies the seizure. And it does not occur to my mind, what is the objection, that can legally be taken to the admission of such evidence. If these papers strip off the ostensible character of the property, and discover its real ownership, and the case be such, that a nation is justified in pronouncing condemnation, it seems not too much to assert, that a court of law is not bound to tax its ingenuity, to aid the offenders in escaping from justice. The question, whether the seizure be wrongful, depends upon the real facts, and not upon the colorable character of the transaction; and if the party may be lawfully dispossessed when the evidence is obtained aliunde, it is not very easy to perceive, why it loses its force by being detected travelling with the very corpus delicti. If it be said, that you cannot avail yourself of discoveries unlawfully produced, nor take advantage of the consequences of your own wrong, it may with equal propriety be answered, that it is the very question in controversy, whether you are in the wrong, and that the evidence, if admitted, establishes the reverse. And, at all events, the maxim applies with equal force to the other party, who, if guilty of a public offence, ought not to be permitted to take advantage of his own wrong as a ground for an escape from the consequent forfeiture. Whatever may be the merits or demerits of the particular parties before the court, it seems to me, that being once in the lawful custody of the thing and of the evidence, the court is bound to dispose of it as the law, by which it is to regulate its judgment, requires. Nor do I consider these principles at all novel in the history or practice of jurisprudence. I need not go farther than to advert to some of the cases, which have been cited at the argument (The Fortuna, 1 Dod. 81; The Donna Marianna, Id. 91; The Diana, Id. 95; The Amedie, 1 Act. 240, 1 Dod. 84, note), and which I shall presently have occasion to mention more particularly, to shew, that courts of justice do not restrain themselves in the exercise of their powers to the mere case of right made out by the libellants. In those cases, which I am contented, at present, to consider merely as cases of capture, the courts by their solemn judgment established, that the captors had no right of condemnation, jure belli; and the cases were, so far as one might venture to conjecture from the state of the facts presented in the reports, so bare of any probable cause of capture, that the argument does not attempt to fix any suspicion upon them of a meditated violation of belligerent rights. It proceeds upon the sole ground, that there was an illegality in the voyage, which justified a rejection of the claims, independently of any rights of war. And the courts pronounced for the rejection of the claims accordingly; though but for this special ground, which was derived altogether from the papers and persons on board, the cases would seem to have called for damages and costs against the captors. It might have been as justly argued in those cases, as in this, that the capture was tortious, and that the captors could not by the right of search claim to obtain, or use, any evidence, except such as applied to the rights of war; and that evidence obtained by such a capture, applying to mere municipal forfeiture, was taking advantage of a wrong. But it is sufficient for my purpose, that the learned judges, who decided those causes, did not limit their doctrine to cases, where the capture was justifiable or excusable; but, on the contrary, from their language it is no rasnness to conclude, that if the capture had been tortious, it would not, upon the principles held by them, have varied their judgment.

It may be, that I am in an error in entertaining these notions upon the objections now under consideration; but I should have great reconsideration; but I should have great reluctance in abandoning them, unless taught another doctrine by a tribunal, which I am bound implicitly to obey.

Another objection has been made to the nature of the present proceeding, as of an anomalous character; and it is asked, wheth-

er it be a cause belonging to the instance or prize side of the court. I have no inclination to look minutely into these proceedings, to see if in all respects they are perfectly regular according to the course of the admiralty; but I scruple not to declare, that, in my judgment this is a mere civil proceeding on the instance side of the court to enforce a supposed forfeiture; and that it has nothing whatsoever to do with the proceedings of prize. Unless, therefore, the court can sustain the suit in its former character, it will dismiss it from its consideration without any regret, that it cannot entertain it for farther inquiry. As to that supposed novelty in the proceeding, so far as the information proceeds for a municipal forfeiture under the American laws, it is in the ordinary form; and so far as it seeks condemnation upon the asserted infraction of the law of nations, the novelty lies not in the form of proceeding, but in the question, whether the facts constitute an infraction of the law of nations. In the cause of The Diana, 1 Dod. 95–100, Sir Wm. Scott, in commenting on an analogous proceeding for the condemnation of a slave ship, did not deny the competency of a court of civil jurisdiction to adjudicate upon a question of this sort, upon proper allegations to direct its inquiries. If there be any right to be asserted by the libellants, I am not aware, that the mode, which is here adopted, is in substance, however it may be in form, exceptionable.

Having adverted to these preliminary considerations, I may now be permitted to proceed to the great points in controversy. And the first question naturally arising out of the asserted facts is, whether the African slave trade be prohibited by the law of nations; for, if it be so, it will not, I presume, be denied, that confiscation of the property ought to follow; for that is the proper penalty denounced by that law for any violation of its precepts; and the same reasons, which enforce that penalty ordinarily, apply with equal force to employment in this trade. The Fortuna, 1 Dod. 81; Madrazo v. Willes, 3 Barn. & Ald. 353.

I shall take up no time in the examination of the history of slavery, or of the question, how far it is consistent with the natural rights of mankind. That it may have a lawful existence, at least by way of punishment for crimes, will not be doubted by any persons, who admit the general right of society to enforce the observance of its laws by adequate penalties. That it has existed in all ages of the world, and has been tolerated by some, encouraged by others, and sanctioned by most, of the enlightened and civilized nations of the earth in former ages, admits of no reasonable question. That it has interwoven itself into the municipal institutions of some countries, and forms the foundation of large masses of property in a portion of our own country, is known to all of us. Sitting, therefore, in an American court of judicature, I am not permitted to deny, that under some circumstances it may have a lawful existence; and that the practice may be justified by the condition, or wants, of society, or may form a part of the domestic policy of a nation. It would be unbecoming in me here to assert, that the state of slavery cannot have a legitimate existence, or that it stands condemned by the unequivocal testimony of the law of nations. But this concession carries us but a very short distance towards the decision of this cause. It is not, as the learned counsel for the government have justly stated, on account of the simple fact, that the traffic necessarily involves the enslavement of human beings, that it stands reprehended by the present sense of nations; but that it necessarily carries with it a breach of all the moral duties, of all the maxims of justice, mercy and humanity, and of the admitted rights, which independent Christian nations now hold sacred in their intercourse with each other. What is the fact as to the ordinary, nay, necessary course, of this trade? It begins in corruption, and plunder, and kidnapping. It creates and stimulates unholy wars for the purpose of making captives. It desolates whole villages and provinces for the purpose of seizing the young, the feeble, the defenceless, and the innocent. It breaks down all the ties of parent, and children, and family, and country. It shuts up all sympathy for human suffering and sorrows. It manacles the inoffensive females and the starving infants. It forces the brave to untimely death in defence of their humble homes and firesides, or drives them to despair and self-immolation. It stirs up the worst passions of the human soul, darkening the spirit of revenge, sharpening the greediness of avarice, brutalizing the selfish, envenoming the cruel, famishing the weak, and crushing to death the broken-hearted. This is but the beginning of the evils. Before the unhappy captives arrive at the destined market, where the traffic ends, one quarter part at least in the ordinary course of events perish in cold blood under the inhuman, or thoughtless treatment of their oppressors. Strong as these expressions may seem, and dark as is the colouring of this statement, it is short of the real calamities inflicted by this traffic. All the wars, that have desolated Africa for the last three centuries, have had their origin in the slave trade. The blood of thousands of her miserable children has stained her shores, or quenched the dying embers of her desolated towns, to glut the appetite of slave dealers. The ocean has received in its deep and silent bosom thousands more, who have perished from disease and want during their passage from their native homes to the foreign colonies. I speak not from vague rumours, or idle tales, but from authentic documents, and the known historical

details of the traffic,—a traffic, that carries away at least 50,000 persons annually from their homes and their families, and breaks the hearts, and buries the hopes, and extinguishes the happiness of more than double that number. See state papers of congress for 1821; report on the slave trade, February 9, 1821, page 59. "There is," as one of the greatest of modern statesmen has declared, "something of horror in it, that surpasses all the bounds of imagination." Mr. Pitt's speech on the slave trade, in 1792. It is of this traffic, thus carried on, and necessarily carried on, beginning in lawless wars, and rapine, and kidnapping, and ending in disease, and death, and slavery,—it is of this traffic in the aggregate of its accumulated wrongs, that I would ask, if it be consistent with the law of nations? It is not by breaking up the elements of the case into fragments, and detaching them one from another, that we are to be asked of each separately, if the law of nations prohibits it. We are not to be told, that war is lawful, and slavery lawful, and plunder lawful, and the taking away of life is lawful, and the selling of human beings is lawful. Assuming that they are so under circumstances, it establishes nothing. It does not advance one jot to the support of the proposition, that a traffic, that involves them all, that is unnecessary, unjust, and inhuman, is countenanced by the eternal law of nature, on which rests the law of nations.

Now the law of nations may be deduced, first, from the general principles of right and justice, applied to the concerns of individuals, and thence to the relations and duties of nations; or, secondly, in things indifferent or questionable, from the customary observances and recognitions of civilized nations; or, lastly, from the conventional or positive law, that regulates the intercourse between states. What, therefore, the law of nations is, does not rest upon mere theory, but may be considered as modified by practice, or ascertained by the treaties of nations at different periods. It does not follow, therefore, that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations. Nor is it to be admitted, that no principle belongs to the law of nations, which is not universally recognised, as such, by all civilized communities, or even by those constituting, what may be called, the Christian states of Europe. Some doctrines, which we, as well as Great Britain, admit to belong to the law of nations, are of but recent origin and application, and have not, as yet, received any public or general sanction in other nations; and yet they are founded in such a just view of the duties and rights of nations, belligerent and neutral, that we have not hesitated to enforce them by the penalty of confiscation. There are other doctrines, again, which have met the decided hostility of some of the European states, enlightened as well as powerful, such as the right of search, and the rule, that free ships do not make free goods, which, nevertheless, both Great Britain and the United States maintain, and in my judgment with unanswerable arguments, as settled rules in the law of prize, and scruple not to apply them to the ships of all other nations. And yet, if the general custom of nations in modern times, or even in the present age, recognized an opposite doctrine, it could not, perhaps, be affirmed, that that practice did not constitute a part, or, at least, a modification, of the law of nations. But I think it may be unequivocally affirmed, that every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations; and unless it be relaxed or waived by the consent of nations, which may be evidenced by their general practice and customs, it may be enforced by a court of justice, whenever it arises in judgment. And I may go farther and say, that no practice whatsoever can obliterate the fundamental distinction between right and wrong, and that every nation is at liberty to apply to another the correct principle, whenever both nations by their public acts recede from such practice, and admits the injustice or cruelty of it.

Now in respect to the African slave trade, such as it has been described to be, and in fact is, in its origin, progress, and consummation, it cannot admit of serious question, that it is founded in a violation of some of the first principles, which ought to govern nations. It is repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice. When any trade can be truly said to have these ingredients, it is impossible, that it can be consistent with any system of law, that purports to rest on the authority of reason or revelation. And it is sufficient to stamp any trade as interdicted by public law, when it can be justly affirmed, that it is repugnant to the general principles of justice and humanity. Now there is scarcely a single maritime nation of Europe, that has not in the most significant terms, in the most deliberate and solemn conferences, acts, or treaties, acknowledged the injustice and inhumanity of this trade; and pledged itself to promote its abolition. I need scarcely advert to the conferences at Vienna, at Aix-la-Chapelle, and at London, on this interesting subject, as they have been cited at the argument of this cause, and authenticated by our own government, to show what may be emphatically called the sense of Europe upon this point. France, in particular, at the conferences at Vienna, in 1815, engaged to use "all the means at

her disposal, and to act in the employment of these means with all the zeal and perseverance due to so great and noble a cause" (the abolition of the slave trade). And accordingly, in the treaty of peace between her and Great Britain, France, expressing her concurrence without reserve in the sentiments of his Britannic majesty with respect to this traffic, admits it to be "repugnant to the principles of natural justice, and of the enlightened age, in which we live;" and, at a short period afterwards, the government of France informed the British government, that it had "issued directions in order, that on the part of France the traffic in slaves may cease from the present time everywhere and forever." The conduct and opinions of Great Britain, honorably and zealously, and I may add, honestly, as she has been engaged in promoting the universal abolition of the trade, are too notorious, to require a pointed enumeration. She has through her parliament expressed her abhorrence of the trade in the most marked terms, as repugnant to justice and humanity; she has punished it as a felony, when carried on by her subjects; and she has recognized through her judicial tribunals the doctrine, that it is repugnant to the law of nations. Our own country, too, has firmly and earnestly pressed forward in the same career. The trade has been reprobated and punished, as far as our authority extended, from a very early period of the government; and by a very recent statute, to mark at once its infamy and repugnance to the law of nations, it has been raised in the catalogue of public crimes to the bad eminence of piracy. I think, therefore, that I am justified in saying, that at the present moment the traffic is vindicated by no nation, and is admitted by almost all commercial nations as incurably unjust and inhuman. It appears to me, therefore, that in an American court of judicature, I am bound to consider the trade an offence against the universal law of society and in all cases, where it is not protected by a foreign government, to deal with it as an offence carrying with it the penalty of confiscation. And I cannot but think, notwithstanding the assertion at the bar to the contrary, that this doctrine is neither novel nor alarming. That it stands on principles of sound sense and general policy, and, above all, of moral justice. And I confess, that I should be somewhat startled, if any nation, sincerely anxious for the abolition, and earnest in its duty, should interpose its influence to arrest its universal adoption.

There is an objection urged against the doctrine, which is here asserted, that ought not to be passed over in silence; and that is, if the African slave trade is repugnant to the law of nations, no nation can rightfully permit its subjects to carry it on, or exempt them from obedience to that law; for it is said, that no nation can privilege itself to commit a crime against the law of nations by a mere municipal regulation of its own. In a sense the proposition is true, but not universally so. No nation has a right to infringe the law of nations, so as thereby to produce an injury to any other nation. But if it does, this is understood to be an injury, not against all nations, which all are bound or permitted to redress; but which concerns alone the nation injured. The independence of nations guarantees to each the right of guarding its own honor, and the morals and interests of its own subjects. No one has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns. If a nation were to violate as to its own subjects in its domestic regulation the clearest principles of public law, I do not know, that that law has ever held them amenable to the tribunals of other nations for such conduct. It would be inconsistent with the equality and sovereignty of nations, which admit no common superior. No nation has ever yet pretended to be the custos morum of the whole world; and though abstractedly a particular regulation may violate the law of nations, it may sometimes, in the case of nations, be a wrong without a remedy. Then how stands judicial authority on the subject? It appears to me, speaking with all possible deference for those, who may entertain a different opinion, that the case of The Amedie (1 Act. 240, 1 Dod. 84, note) is directly in point; and, unless the principles there stated can be shaken, they must govern the case now in judgment. Sir Wm. Grant, in delivering the judgment of the court of appeals in The Amedie, after adverting to the former state of the British law on the subject of the African slave trade, uses the following language, which I quote the more readily, as I know not, how in so concise and luminous a manner to convey the sentiments, which on this subject I deliberately entertain. "But," says that eminent judge, "by the alteration, which has since taken place in our law, the question now stands upon very different grounds. We do now, and did at the time of this capture, take an interest in preventing that traffic, in which this ship was engaged. The slave trade has since been totally abolished in this country, and our legislature has declared, that the African slave trade is contrary to the principles of justice and humanity. Whatever opinion, as private individuals, we before might have entertained upon the nature of this trade, no court of justice could with propriety have assumed such a position, as the basis of any of its decisions, whilst it was permitted by our own laws. But we do now lay down as a principle, that this is a trade, which cannot, abstractedly speaking, be said to have a legitimate existence. I say, abstractedly speaking, because we cannot legislate for

other countries; nor has this country, a right to control any foreign legislature, that may think proper to dissent from this doctrine, and give permission to its subjects to prosecute this trade. We cannot certainly compel the subjects of other nations to observe any other, than the first and generally received principles of universal law. But thus far we are now entitled to act according to our law, and to hold that, prima facie, the trade is altogether illegal, and thus to throw on a claimant the burthen of proof, in order to shew, that by the particular law of his own country he is entitled to carry on this traffic. As the case now stands, we think, that no claimant can be heard in an application to a court of prize for the restoration of the human beings he carried unjustly to another country for the purpose of disposing of them as slaves. The consequence of making such a proof it is not now necessary to determine; but where it cannot be made, the party must be considered to have failed in establishing his asserted right. We are of opinion, upon the whole, that persons engaged in such a trade cannot, upon principles of universal law, have a right to be heard upon a claim of this nature in any court."

Such is the doctrine sanctioned by the highest prize court known to British jurisprudence. I consider it, as the high court of admiralty has considered it, as establishing the principle, that any trade contrary to the general law of nations, although not tending to, or accompanied with, any infraction of the belligerent rights of that country, whose tribunals are called to consider it, may subject the vessel employed in that trade to confiscation; and it matters not in what stage of the employment, whether in the inception or the prosecution, or the consummation of it, the vessel is arrested. The Fortuna, 1 Dod. 81, 85, 86. It has been said, that this doctrine first arose in a case of capture, jure belli, and was applied by a court of prize. Be it so; but the doctrine is not limited in its terms or purport to cases of this sort. The capture, as a belligerent capture, was tortious and without any reasonable cause; and the court admitted, that there had been no violation of belligerent rights. But it applied the doctrine upon principles of universal law, and asserted, that it might be applied to a claim of such a nature in any court. The Fortuna, Id., and The Donna Marianna, Id. 91, in which the doctrine was followed, were also cases of capture; but although it is pretty clear, that there were some lurking doubts as to the propriety of the doctrine in the mind of the court, there was not the slightest attempt to place it upon any ground, that limited it to the prize jurisdiction. In the case of The Diana, Id. 95, which, at the interval of nearly a year afterwards, called again for the application of the general doctrine, no such distinction was even alluded to, although that was clearly, in the judgment of the court itself, a case on the instance side of the court, where condemnation was directly sought on an information for a forfeiture for an asserted employment in the slave trade. It turned out upon the investigation of the facts, that the vessel was Swedish; and, as such, upon the supposition, that Sweden permitted the traffic to her subjects, restitution was decreed. But the court unequivocally admitted the propriety of applying the doctrine to the case, if the Swedish law were proved to be deficient. I think, then, I stand firm upon the position, that up to the period of these adjudications, no distinction, like that now contended for, was in the contemplation of the court; and certainly no such distinction can in reason be applied to the doctrine in The Amedie. Whatever, indeed, may be the extent of the belligerent right of search and visitation, it does not authorize a subsequent capture, unless for just cause of suspicion; and if the search be in this respect unproductive, it cannot be, that the capture is less tortious on account of the exercise of this right, than it would be, if no such right existed. The capture is just as wrongful, as a seizure in time of peace would be, and no more. It violates the right of the foreign ship just as much, and no more, than such a seizure; and if, notwithstanding such a tortious capture, the party may avail himself of a ground of condemnation for the breach of universal law, independent of belligerent rights, he may, for the same reason, avail himself of it in case of such a tortious seizure. In truth, however, the law looks not to niceties of this sort. If for any cause, precedent or subsequent, known at the beginning or known at the end, the property is condemned, the party is justified and retroactively for all purposes the capture, or seizure, or forcible possession, call it what you may, is deemed rightful and bona fide.

The case of Le Louis, 2 Dod. 210, which followed after a period of almost four years, has been pressed upon the attention of the court, and certainly is entitled to the most respectful and cautious examination. I will not yield to any person in reverence for the profound learning and talents of the accomplished judge, by whom that decision was pronounced. His judgments have been justly the admiration of Europe and America; and will be read for instruction, for beauty of illustration, for felicity of style, and for unambitious, but lofty principles, long after their illustrious author is gathered to the fathers, who have enlightened and improved mankind; as long indeed, in my humble belief, as the common language of his and our country shall indicate to mankind our common lineage. Still, however, it is my duty, painful and responsible as it may be, and with whatever hesitation and humility, when I am led to differ from other minds, with which I have not the least title to be brought in comparison; I say, it is my duty

to follow the dictates of my own judgment in all cases, where my judicial conscience is not already bound by the decisions of the highest appellate court of the government, under which I sit. The case of Le Louis may be distinguished from that before the court in several circumstances. The seizure was made at a time, when no public ordinance of France prohibited the slave trade, and before the recent discussions at Aix-la-Chapelle. Upon the very face of the information the vessel was admitted to be French, and seized as such, and condemnation was sought upon two grounds—First, the resistance of the right of search of a British cruiser in a time of peace; and secondly, because the trade was contrary to the laws of France and the law of nations. The whole ground, therefore, excepting that of forfeiture under the law of nations, was removed from the cause, for no such right of search in point of law existed, and no such law of France in point of fact existed. And it is perfectly clear upon the doctrine of the other cases already cited, that it was necessary, that a prohibitory law of France should concur with the public law of nations, before a foreign tribunal could apply the penalty of confiscation. The cause was therefore on its merits correctly decided in perfect harmony with the former cases. But the learned judge, in a most elaborate and masterly manner, discusses the general question, and comes to the conclusion, that the African slave trade is not a crime against the law of nations; and that the seizure of a foreign ship, engaged in that trade, although it is prohibited by the nation, to which she belongs, cannot be rightfully made by a British cruiser, and that a suit for condemnation of such a ship cannot be rightfully maintained in a British court.

The first observation that I am called upon to make respecting this case is, that I do not find, that the court any where attempts to distinguish between this and the preceding cases, by limiting the doctrine of rejecting claims for illegality of traffic to cases of capture during war, or suits in the prize jurisdiction. Nor does it occur to me, meaning to speak with the greatest diffidence of my own judgment, that a distinction of that nature would be quite consistent with what fell from the court in the case of The Diana, 1 Dod. 95. In the next place, I find myself utterly at a loss to comprehend, how the fundamental doctrine of the case of The Amedie, and the other cases already cited, that the slave trade, abstractedly speaking, cannot have a legal existence, and that it is repugnant to the principles of universal law, and the law of nations, can consist with the unequivocal denial of the same doctrine in the case of Le Louis. I find myself driven, therefore, to the conclusion, that the last case is meant silently to abandon and repudiate the whole doctrine, on which the former cases rest. In this conflict of authority and learning, of matured and deeply weighed decisions, it is no rashness to follow those, which on the whole seem built on the most solid grounds of justice, public policy, and principle. In the struggle, which my own mind has undergone upon this occasion, I cannot escape from the conclusion, that the reasoning of Sir William Grant has not been overturned, even if it should be thought in any measure shaken; and that if I were to adjudge otherwise, it would be following another authority against the dictates of my deliberate judgment. And I think I may call in aid the opinion of a court of common law, though perhaps not, in general, the best qualified court to entertain the discussion of questions of national law, to show, that the doctrine of the former cases meets the entire approbation of such tribunals. I allude to the case of Madrazo v. Willes, 3 Barn. & Ald. 353, and particularly the opinion of Mr. Justice Best, where, though single expressions may appear to militate with my own views on this subject, the fair result of the opinions stands in perfect consistency with the doctrine of The Amedie.

But supposing, that the opinions already expressed by the court are as erroneous, as the counsel for the claimant contends them to be, and that the law of nations is to be exclusively derived from the practice of nations, and the practice is in favor of the African slave trade; still there remains another obstacle to the recovery of the property by the claimants, which must be displaced before his title is unimpeachable. And that is, that the African slave trade stands prohibited by the positive municipal regulations of France. This has not been denied at the argument, at least to the extent of reaching a case, where the trade is attempted to be carried on to a French colony, which is exactly the case before the court, if any slave voyage was intended by the owners. The French ordinance of the 8th of January, 1817, comes up to this point, and purports to be made in execution of the obligations by treaty to abolish the slave trade, however inadequate it may be justly deemed for this purpose. But I think, independently of this document, (which is admitted to exist) by the general principles already asserted, the onus probandi rests on the claimants to establish the legitimate existence of the trade in France; and more especially since her recent declarations in the face of all Europe, that she had caused it to be everywhere abolished. They have not pretended to offer any proof on this point; and the argument of their counsel proceeds upon the supposition of an actual prohibition.

It is said, that the cognizance of penalties and forfeitures for breaches of municipal regulations exclusively belongs to the tribunals of the nation, by whom they are enacted. And this, in a general sense, with reference to the right to originate proceedings for the sole purpose of enforcing such penalties and forfeitures, may be true. But that any court may take notice of the laws of a foreign country, whether civil or penal,

which come incidentally before it in the exercise of its general jurisdiction over persons or property, can admit of as little dispute. We know, that the lex loci is often applied in courts of justice to enforce rights and redress wrongs; and that contracts and titles, which cannot have a legal existence in the country, where they have their origin, are held void every where. In respect to mere municipal regulations, the general rule certainly is, that courts do not take notice of them with a view to their direct enforcement. It is often said, that no country takes notice of the revenue laws of a foreign country, or holds itself bound to repudiate commercial transactions, which violate them. But this is a rule adopted from a motive of policy or comity; and is not an essential ingredient in any system of the law of nations. If any nation were disposed to discountenance any smuggling in violation of the laws of a foreign country, and in cases coming regularly before its own courts were to refuse to recognize any rights of property founded on such violation, I am not able to perceive, what just ground of complaint the offended nation could have against such conduct. It seems to me, that it might with more justice complain of the refusal to enforce such laws, and to discountenance such violations. But where a title to property originates in what a nation deems in its own subjects a public crime, more especially if it be an aggravated crime founded on fraud and rapine; and it finds, that another nation deems it a crime of a like nature, and prohibits it as such, and confiscates the property of its subjects engaged in the commission of it, I do not perceive, why such property, so polluted by crimes, should, if it falls into the custody of a court of the former nation, be so sacred from judicial touch, that it must be restored to the wrongdoer. And I would ask, where is the authority, that requires such a court to act in this manner, when the public policy of its own, as well as of the foreign, government is avowedly engaged in endeavoring to suppress that crime? If in a case before this court, acting in rem, a title to property, founded on theft or other municipal crime, or on a fraud committed in a foreign country, were set up, until my judicial conscience is better instructed, I should have extreme difficulty in recognising such a title, if the property was once legally in the custody of the court.

In the case now before me, on the face of the libel, the court certainly has jurisdiction; for if the allegation, as to the property being engaged in the slave trade against our laws, be well founded, it justifies condemnation. But jurisdiction does not depend upon the event of the suit, but upon the right to entertain the suit, and proceed by inquiry to settle its merits. In this respect the case before me stands differently from that of Le Louis. It is, therefore, in the investigation of the merits of this case, that I am met by the title of French subjects to the property; and that title, if the vessel be engaged in the slave trade, is a title connected with a crime against France, and which, by French law, becomes forfeited. In this posture of the cause, it does not occur to me, that any principle of general justice, or of national comity, or of universal law, requires this court to surrender up the property to the claimants, however well it might be disposed to surrender it to the sovereign of France. If, therefore, this ground alone were before the court, as at present advised, I should incline to reject the claim for the breach of this municipal law of France, which our country recognises as a breach, not of mere positive law, but of the immutable principles of justice.

If I am asked, what would be the predicament of this cause under the views, which have been suggested, I answer, that if the vessel be not American, engaged in a traffic contravening our laws, Lieut. Stockton and his associates can have no title to seek condemnation for any interest of their own, for a share in the forfeiture accrues to them only, when the case is reached by our laws; and the libel, so far as it is founded on these allegations, must be dismissed. Then as to the claimants, their claim being rejected, there would be no person judicially before the court to claim restitution. The property, then, must either be condemned to the United States generally, as unclaimed property, or forfeited property, upon principles analogous to those adopted in The Etrusco, 4 C. Rob. Adm. 262, note 1, or it must remain in the custody of the court, to be delivered up to the sovereign of France, if he should choose to interpose a claim, or assert a right to proceed against it in his own courts for the supposed forfeiture. It appears to me, that the latter is the true course. It enables the foreign sovereign to exercise complete jurisdiction over the case, if he shall prefer to have it remitted to his own courts for adjudication. It enforces the policy, common to both nations, of repressing an odious traffic, which is denounced by both. It makes our own country, not a principal, but an auxiliary, in enforcing the interdict of France, and subserves the great interests of universal justice. I am not aware of any obstacle in the constitution of a court of admiralty, proceeding in rem, to the adoption of such a practice; and I am greatly mistaken, if it does not carry in its bosom the seeds of peace and conciliation, instead of animosity and recrimination.

Thus far I have proceeded in the cause without reference to any other claims, but those asserted in the original libel and answer. But at a late period in this cause, by direction of the president, a suggestion has been filed by the district attorney, expressing a willingness to yield up the vessel to the French government, or its consular

agent, for the purpose of remitting the cause for ultimate adjudication to the domestic forum of the sovereign of the owners. To a suggestion of this nature this court is bound to listen with the most respectful attention. It is understood to be, not a direction to the court, for that is beyond the reach of executive authority, but an intimation of the wishes of the government, so far as its own rights are concerned, to spare the court any farther investigation. If it had seemed fit to all the parties, whose interests are before the court, to agree to the course held out by this suggestion, it would have relieved my mind from a weight of responsibility, which has most heavily pressed upon it. But the French claimants resist this course, and require, that the property should be delivered over to their personal possession, and not to the possession of their sovereign. Under such circumstances this court must follow the duty prescribed to it by law, independently of any wishes of our own government or of France. I have been compelled, therefore, reluctantly to travel over the whole merits of the cause, and to decide it with reference to the French owners upon the great principles, on which it has been argued.

After listening to the very able, eloquent, and learned arguments delivered at the bar on this occasion—after weighing the authorities, which bear on the case, with mature deliberation,—after reflecting anxiously and carefully upon the general principles, which may be drawn from the law of nations to illustrate or confirm them, I have come to the conclusion, that the slave trade is a trade prohibited by universal law, and by the law of France, and that, therefore, the claim of the asserted French owners must be rejected. That claim being rejected, I feel myself at perfect liberty, with the express consent of our own government, to decree, that the property be delivered over to the consular agent of the king of France, to be dealt with according to his own sense of duty and right. No one can be more sensible than myself of the real magnitude and intricacy of the questions involved in this cause. It becomes me, therefore, to speak with great distrust and diffidence of my own judgment respecting its merits. But I think, I have a right to say, that the American courts of judicature are not hungry after jurisdiction in foreign causes, or desirous to plunge into the endless perplexities of foreign jurisprudence. If I could have had my choice of causes, this class is not that, which would have been selected from peculiar favour. But it is to be remembered, that while the court is not rashly to engage in asserting jurisdiction over foreign causes from the odium, which is justly attached to a traffic conceived in atrocious and unfeeling cruelty, and stained and sealed with blood; it has also a public duty to perform, from which it dare not shrink, to pronounce its own judgment of the law, and to leave it to more wise and learned minds to correct any errors, into which it may inadvertently have fallen.

Case No. 15,552.

UNITED STATES v. LAKEMAN.

[2 Mason, 229.] [1]

Circuit Court, D. Massachusetts. May Term, 1820.

INDICTMENT—VARIANCE—FISHING BOUNTY—FALSE DECLARATION.

In an indictment on the seventh and ninth sections of the act granting a bounty to vessels employed in the cod fisheries, (Act July 29, 1813, c. 35 [3 Stat. 49]), for making a false declaration, the indictment having stated the purport of the written paper to be that the vessel was of the burthen of 14 tons and 45-95ths of a ton, whereas the paper produced stated it to be 14 tons and 50-95ths of a ton, the variance was held fatal.

Indictment [against Humphrey Lakeman] for making a false declaration as to the employment of a vessel in the cod fisheries, contrary to the act of congress of July 29, 1813, c. 34, §§ 7, 9. The indictment in describing the agreement and certificate required to be sworn to, by the seventh section of the act, and in respect to which, the false declaration was averred to be made, stated that the defendant produced to the collector, "a certain paper, purporting to be a written account of the length, breadth and depth of the said boat or vessel, in substance and effect as follows, that is to say, that the boat Fame, of Ipswich, was of the burthen of fourteen tons and 45-95ths of a ton, that she was employed in the bank and other cod fisheries, &c. &c." At the trial, upon the plea of not guilty, the paper produced as that described in the indictment, stated the boat to be of the burthen of fourteen tons and 50-95ths of a ton.

Webster & Saltonstall, for defendant.
G. Blake, U. S. Dist. Atty.

THE COURT held the variance, viz. 45-95ths instead of 50-95ths of a ton, to be fatal; and a verdict was given for the defendant.

Case No. 15,553.

UNITED STATES v. LAMBELL.

[1 Cranch, C. C. 312.] [2]

Circuit Court, District of Columbia. June Term, 1806.

PAROL EVIDENCE—LOST WARRANT.

Parol evidence may be given of the contents of a lost warrant.

[Cited in U. S. v. Long, Case No. 15,625.]

Indictment [against William Lambell] for opposing Clement Venable, in the execution of his duty as a constable.

[1] [Reported by William P. Mason, Esq.]

[2] [Reported by Hon. William Cranch, Chief Judge.]

Mr. F. S. Key, objected to parol testimony of the warrant being given, because it is matter of record. Peake, Ev. 19.

THE COURT permitted the contents of the warrant to be proved by parol, after the magistrate had sworn that he had searched every part of his house where it was probable to find it and could not; and that he believed it was lost or destroyed; that he had not seen it since the officer returned it to him.

Verdict, guilty; fined thirty dollars.

Case No. 15,554.

UNITED STATES v. LAMBERT.

[2 Cranch, C. C. 137.] [1]

Circuit Court, District of Columbia. April Term, 1817.

BIGAMY—EVIDENCE—BOND TO OBTAIN LICENSE—OFFICIATING CLERGYMAN—BENEFIT OF CLERGY—PEREMPTORY CHALLENGE.

1. Upon a trial for bigamy in Alexandria, D. C., the bond given by the defendant to the clerk of the court at Richmond to obtain a marriage license, cannot be given in evidence on the part of the United States.

2. The fact that the person who performed the ceremony of marriage was a clergyman authorized to celebrate the rites of matrimony according to the laws of Virginia, may be proved by parol, as any other matter of fact in pais; and the record of the testimonial required by the act of Virginia, of December 22, 1792, c. 104, § 3, need not be produced; nor a copy thereof.

3. A person convicted of bigamy in Alexandria is entitled to the benefit of clergy, and may be burnt in the hand, and required to recognize for his good behavior.

4. Upon a trial for bigamy in Alexandria, the prisoner is entitled to a peremptory challenge.

This was an indictment for bigamy. The prisoner [Joshua alias Joseph Lambert] was allowed a peremptory challenge.

E. J. Lee, for the United States, offered a certified copy of the bond given by Lambert to the clerk of the court of hustings in Richmond to obtain a marriage license.

But THE COURT (THRUSTON, Circuit Judge, absent) rejected it.

Mr. Lee offered the clergyman, the Rev. Mr. Courtney, as a witness to prove the first marriage, and parol evidence that he had been in the practice of celebrating the rites of matrimony nearly fifty years.

Mr. Mason and Mr. N. Herbert, for the defendant, objected that his testimonial to celebrate the rites of matrimony required by the act of Virginia, of December 22, 1792, c. 104, § 3, ought to be produced, as the best evidence of his authority; or a copy of it from the record.

But THE COURT decided that the fact of his being a clergyman authorized to celebrate the rites of matrimony might be proved by parol as any other matter in pais. Thus the authority of a justice of the peace may be proved by reputation, and by the fact of his publicly acting as such, &c.

Verdict, guilty—recommended to mercy by the jury.

THE COURT decided that he was entitled to the benefit of clergy, and sentenced him to be burnt in the hand, and to recognize in 500 dollars for his good behavior for one year, and to stand committed till the costs should be paid.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,555.

UNITED STATES v. LANCASTER.

[7 Biss. 440; [1] 9 Chi. Leg. News, 307.]

Circuit Court, N. D. Illinois. May, 1877.

INSANITY—BURDEN OF PROOF—PRACTICE.

1. Upon an inquisition of insanity upon a motion for a new trial after verdict of guilty of perjury, the question is the same as if raised when the prisoner was called to plead.

[Cited in U. S. v. De Quilfeldt, 5 Fed. 279.]

2. Upon such an inquisition the question to be decided is, whether the defendant was incapable of comprehending the dangerous position in which he was placed, and of taking intelligent measures to meet it.

3. The burden of proof of insanity is upon the defendant, yet he should have the benefit of any reasonable doubt.

4. In an inquisition of insanity the counsel for the prisoner should open and close the case to the jury.

Mark Bangs, U. S. Atty.

Leonard Swett, for defendant.

BLODGETT, District Judge (charging jury). On the 14th of February last, Alvin N. Lancaster was put upon his trial in this court, on an indictment for the crime of perjury. The trial resulted in a verdict of guilty, and a motion was made for a new trial. One of the grounds of this motion was based upon the suggestion that at the time of his trial the defendant was of unsound mind, and therefore unable to properly plead to the charge or conduct his defense. This suggestion was sustained by such affidavits and other proofs as, in my estimation, made it necessary to the ends of justice that the fact should be investigated by a jury. And you have been impaneled to inquire into and pass upon the question.

There is no controverted question of law in the case, and the inquiry involves only a question of fact, of which you are the proper and sole judges. The question is, was the prisoner, at the time of his trial, so far of unsound mind as to be incapable of comprehending the nature of the charge against him, and of properly presenting his defense? The testimony is material to be considered only so far as it tends to throw light on this question, and naturally divides itself into two classes:

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

1. The testimony of witnesses who have known the prisoner for a longer or shorter time, and have detailed facts in regard to his history, his business enterprises, and his domestic and financial troubles.

2. The testimony of professional men who have given special attention to the investigation of mental and nervous diseases, and who, by reason of their skill and attainments are deemed in law qualified to give an opinion as experts, or persons of skill upon the question before you.

You have heard from the various witnesses who have known the defendant, some of them for many years, many facts in regard to his previous life; his business, his temperament, and various vicissitudes and incidents in his career; his successes and failures, and the alleged changes which, it is claimed, have taken place in him, and from which you are asked to infer that he has become insane.

There are no special contradictions or discrepancies in this testimony. The witnesses who have been called on both sides agree in many of the substantial matters of fact. It may be considered as conceded that defendant now is about 50 years of age; that for many years previous to 1873 he had been an extensive and successful operator in real estate, and had accumulated a large amount of property, his property being estimated as worth, in 1873, over and above incumbrances, from $150,000 to $250,000; that he possessed unusual capacity as a business man —was prompt and rapid in his conduct of negotiations and business affairs, and always exhibited a quick and irascible temper and a somewhat imperious, jealous and exacting disposition; that in 1869 he lost his wife, and in 1870 his children died, and he showed immediately after this bereavement great grief, and had a very demonstrative way of displaying it.

Sometime in the summer of 1873, a Miss Warren, of New York City, brought some suits against him, for the collection of about $12,000, which she claimed he owed her. He resisted this claim, and insisted that it was prosecuted for purposes of blackmail, and charged all persons who took part in its prosecution as conspiring against him. And it seems to have become an almost fixed habit to indulge in violent denunciations of, and threats toward, all who had any part in the prosecution of these suits. His property has melted away, and he is now impoverished, and instead of being wealthy, is really a poor man. These facts are admitted, or at least not disputed.

Other facts which may be said to be proved but are not admitted: That his mind is engrossed in trifles; he has become indifferent to business; has acted in a strange and unusual manner; become eccentric in his conduct; and although indicted for a grave crime, did not appear to realize his danger, and made no preparation for his defense, although often urged to do so by his friends. Eminent medical men, from examinations and from knowledge of the man, give an opinion, as a matter of skill, that he is insane.

From all this group of facts, you are asked to deduce the conclusion, that the prisoner was, at the time of trial, insane, the theory being, that the proof shows that since the death of his children, his mind has been giving way, until he is now and was at the time of his trial, actually insane, or so far in the incipient stages of insanity as to render him incapable of properly appreciating and meeting the peril in which he was placed.

On the part of the government it is contended, and supported by the evidence of eminent medical men, that while they do not deny many of the facts testified to, they deny that they necessarily or fairly establish the allegation of insanity, but insist that all the incidents and facts stated in the testimony, only show him to be a man of violent passions, who has given way in latter years to a sort of ungovernable rage toward those who were endeavoring to enforce the collection of a valid debt from him; that he was always quick tempered and jealous, and has only exhibited to an aggravated degree his natural character toward those whom he disliked, and is simulating or putting on the appearance of insanity to avoid sentence.

The real question, as I have before said, is, whether the evidence satisfies you that this man's mind had so far broken down and lost its texture that he was at the time of his trial incapable of comprehending the dangerous predicament in which he was placed, and taking intelligent measures to meet it? Did he realize the gravity of the offense with which he was charged, as he would if in the possession of his ordinary mental faculties? Not that he should have been so much affected by it as some other men would [but did he treat this case as he would] [2] if he had been in possession of his ordinary mental vigor and coherence of ideas?

All the evidence tends to show that he was at one time, and not many years ago, a man of clear mental perceptions, understood the ordinary obligations which one man owes to another and to society, and while he may have been shrewd and sharp at a bargain, and perhaps exacting in enforcing what he deemed a legal or business advantage over those with whom he was dealing, yet there is no proof but that he recognized the ordinary moral and legal obligations of business, and was as truthful and upright as ordinary men in their dealings. And I think it may be considered as proven, that in the last two or three years, since the loss of his children, to some ex-

[2] [From 9 Chi. Leg. News, 307.]

tent, and since the commencement of his troubles with Miss Warren in a more palpable degree, his most intimate friends have noticed a marked change in his manner, conduct and habits of thought.

Does the proof satisfy you that the change in the man shows that he has become insane, or so far insane as to be incapable of properly caring for himself? And a single act of eccentricity or of irrational conduct is not evidence of insanity, but a group or series of unnatural acts may properly be considered as tending to prove insanity. Or were these acts the result of his giving way to a naturally violent temper and jealous disposition? Were these exhibitions the result of insanity, or mere neglect to properly rule his own spirit? Has he simulated insanity, or was he in fact insane at the time of his trial?

The name of the disease is not important if the man is really crazy. It makes no difference whether it is called paralysis of the brain, or paresis—or by some other name—if the fact of insanity exists. Doctors may disagree as to a diagnosis of disease, but we have nothing to do with mere names.

While the burden of proof may be said to be on the defendant, to satisfy you that he is in fact insane, yet, if the proof, when all considered together, leaves a reasonable doubt upon your mind of this man's sanity, he should have the benefit of the doubt. That is to say, no man should be considered as a proper subject for criminal prosecution, of whose sanity there is ground for a reasonable doubt.

The question is not as stated by counsel for the prisoner, whether the defendant has had a fair trial, but whether he was in such a mental condition as to be capable of appreciating the exigency and properly preparing for it. If he was sane, he ought to have made proper preparations for his trial. If he was so insane as not to comprehend the peril he was in, or the crime he was charged to have committed, then he ought not to have been tried, and if he is still so insane, he ought not to be sentenced for the crime of which he has been found guilty by the jury.

This case should be considered in the same light by you as if it had not been tried. Suppose his trial was now impending, and his counsel should come into court and suggest that his client was so far insane as that he ought not to be tried, and the court as a preliminary step, had ordered a jury to be impaneled to try the question of his sanity or insanity, the duty of that jury would be precisely what yours is now—that is, to inquire into and find whether the defendant was so far insane as to be incapable of realizing the peril in which he was placed, and taking such steps as a prudent man, under the circumstances, would have taken to prepare for his trial, and whether that insane condition still continues. If found insane by your verdict, the verdict now standing against him will be set aside.

The jury found the prisoner to have been insane at the time of his trial on the indictment.

NOTE. On calling the matter for trial, the question arose as to which side should open the case. The court ruled that counsel for the prisoner should open and close the case to the jury. The question has been decided both ways in England, and seems to have been left in doubt. See 1 Russ. Crimes (9th Ed.) p. 29.

Case No. 15,556.

UNITED STATES v. LANCASTER.

[2 McLean, 431.] [1]

Circuit Court, D. Illinois. June Term, 1841.

FEDERAL CRIMINAL JURISDICTION — OFFENCES UNDER POSTAL LAWS — EMBEZZLEMENT — EVIDENCE—INDICTMENT—STATUTORY WORDS.

1. The federal government has no criminal jurisdiction except what is given by statute.

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867; U. S. v. Coppersmith, 4 Fed. 205; U. S. v. Gibson, 47 Fed. 834; U. S. v. Mitchell, 58 Fed. 997.]

2. An offence described in the words of the statute is, generally, sufficient.

[Cited in U. S. v. O'Sullivan, Case No. 15,974; U. S. v. Patterson, Id. 16,011; U. S. v. Sander, Id. 16,219; U. S. v. Ballard, Id. 14,506; U. S. v. Atkinson, 34 Fed. 317.]

[Cited in Buck v. State, 1 Ohio St. 64; State v. Abbott, 31 N. H. 439. Cited in brief in State v. Smith, 63 Vt. 205, 22 Atl. 604.]

3. Offences under the postoffice law are not felonies. They are misdemeanors; and, in such cases, less nicety in the form is required, than in indictments for felonies in England.

[Cited in U. S. v. Baugh, 1 Fed. 787.]

4. It is not necessary to give a particular description of a letter charged to have been secreted and embezzled by a postmaster, nor to describe the bank notes, particularly, inclosed in the letter.

[Cited in U. S. v. Falkenhainer, 21 Fed. 627.]

5. But if either the letter or the notes be described in the indictment, they must be proved as laid.

[Cited in U. S. v. Fuller (N. M.) 20 Pac. 177.]

6. It is enough to show that the letter came into the hands of the postmaster, in the words of the statute, without showing where it was mailed, and on what route it was conveyed.

[Cited in U. S. v. Fuller (N. M.) 20 Pac. 179.]

7. The evidence of an accomplice is competent, but it should always be received with caution.

Mr. Butterfield, U. S. Dist. Atty.

Baker, Lamburn & Dunbar, for defendant.

OPINION OF THE COURT. This is an indictment against the defendant for stealing letters containing money from the mail, while he acted as postmaster, at Carrolton, in this state. The indictment contained six counts. And a motion was made, and argued at length, to quash the second, fourth, fifth and

[1] [Reported by Hon. John McLean, Circuit Justice.]

sixth counts. The second count charged that, within the district aforesaid, the said Charles Lancaster did then and there secrete and embezzle one letter which came to his possession, and was intended to be conveyed by post, containing divers bank notes for the payment of money, he, the said Charles Lancaster, being, at the time of such secreting and embezzling as aforesaid, then and there employed in one of the departments of the postoffice establishment, to wit: A postmaster at Carrolton, in the county of Greene, in the state and district aforesaid. This count is framed under the twenty-first section of the act of March 3, 1825, to punish offences against the postoffice regulations, which provides that if any person, employed in any of the departments of the postoffice establishment, shall secrete, embezzle, or destroy, any letter, packet, bag, or mail of letters, with which he or they shall be intrusted, or which shall have come to his or her possession, and are intended to be conveyed by post, containing any bank note, or bank post bill, &c., such person shall, on conviction for any such offence, be imprisoned not less than ten years, nor exceeding twenty one years.

It is objected to this count: First, that the charge of embezzling the letter is not specific; second, that the bank notes are not described; third, no crime charged; fourth, no averment that defendant did the act at Carrolton; fifth, a conviction on this count could not be pleaded in bar to a charge of embezzling a specific letter, &c.

The federal government has no jurisdiction of offences at common law. Even in civil cases the federal government follows the rule of the common law as adopted by the states, respectively. It can exercise no criminal jurisdiction which is not given by statute, nor punish any act, criminally, except as the statute provides. The offences defined in the postoffice law are misdemeanors and not felonies. The statute does not declare them to be felonies, and, by the federal government, they are only punishable under the statute. In describing an offence under the statute no technical words are necessary as in many common law offences. In the case of U. S. v. Mills, 7 Pet. [32 U. S.] 142, the court say: "The general rule is, that in indictments for misdemeanors created by statute, it is sufficient to charge the offence in the words of the statute. There is not that technical nicety required as to form which seems to have been adopted and sanctioned by long practice in cases of felony." In an indictment for murder no word can be substituted for murdravit; in burglary, for burglariously, &c.

The second count charges the offence in the words of the statute. And the defendant is shown to have been employed, at the time the act was done, in the postoffice department. Is it essential that the letter, charged to have been embezzled, should be described by stating to whom it was directed, and by whom it was written. This description is generally given where it is practicable. But it is seldom in the power of the prosecuting attorney to state these facts, much less to prove them. A postmaster, or carrier, after having stolen a letter from the mail, will not be likely to preserve it as the evidence of his guilt. Where the act is done deliberately, as may be presumed to be the case, generally, when done by a postmaster, there is not one instance in a thousand, perhaps, where the letter is not destroyed. And if a particular description of it be essential to the validity of the indictment, a conviction under this, or any other similar provision of the act, would be hopeless. Where a letter is thrown into the mail to decoy a postmaster, by an agent of the department, who opens and examines the mail immediately after it leaves the office, the letter may be described with the certainty required by the counsel; but such certainty could not be obtained in any other case where the violated letter was not recovered: The security of individuals does not seem to demand this particular description of the letter; and to require it would, in most instances, defeat the great purposes of justice.

The case of U. S. v. Mills, above cited, was brought before the supreme court by a division of opinion of the judges of the circuit court, on a motion in arrest of judgment. There were two counts in the indictment. The first count charged that the defendant at, &c., did procure, advise, and assist ——— to secrete, embezzle, and destroy a mail of letters with which the said ——— was intrusted, and which had come to his possession, and was intended to be conveyed, by post, from Pittsburg, in the district aforesaid, to Fayetteville; also, in said district, containing bank notes, &c. The second count was framed in the same words as above, excepting the writer of the letter, and the person, to whom it was directed, were stated, adding after the words, "bank notes, amounting, in the whole, to sixty dollars, of a description, to the jurors aforesaid, unknown, and of the issue of a bank to the said jurors, also, unknown," &c. The court say: "The second count in the indictment sets out the particular letter secreted, embezzled, and destroyed, containing bank notes amounting to sixty dollars." And they remark, the offence here set out against ———, the mail carrier, is substantially in the words of the statute, repeating the words above cited. The court do not pronounce either count defective, but say the charge is set out with sufficient certainty to authorize a judgment. The main point was, whether the guilt of the principal was sufficiently averred to convict the defendant, for having advised and procured him to do the act.

By the English postoffice act the stealing of a letter from the mail, by a person employed by the postoffice, is made a high misdemeanor, and is punished by fine or im-

prisonment. And an indictment there for that offence describes the letter as "a post letter." The person to whom it was directed, or by whom it was written, is not stated; nor the place where mailed, or to which it was destined, nor the route on which it was to be conveyed. It is stated to be the property, and, also, its contents, of the postmaster general, but this is in virtue of an act of parliament of 7 Wm. IV. and 1 Vict. c. 36, § 40. It is insisted that this count does not show that the letter was, in fact, in the mail. It is enough that the letter is charged "to have come to the possession of the defendant, and was intended to be conveyed by post," in the words of the statute.

Is it necessary, particularly, to describe the bank notes. This in some cases may be practicable, but in most cases it is not. In the first count of the indictment against Mills the notes were not described. Nor were they described in the second count, except as amounting to sixty dollars. They were represented to have been issued by a bank unknown to the jurors, and of a description unknown. In an indictment for larceny, it is essential to the validity of the charge, that the name of the owner of the property should be stated. And if the fact of ownership be mistaken, it is ground for the acquittal of the defendant. As before remarked, by statute in England, the property of the bank notes, or other articles contained in a letter stolen from the mail, is laid in the postmaster general. But this, it is presumed, could not have been done before the statute. Why is it necessary that the property in these notes should be laid in any person in the indictment? It is difficult to perceive any good reason for this form. Under our statute it is believed not to have been done generally, if at all. The taking of these notes does not constitute the principal offence. It adds greatly to the enormity of the act, and increases the punishment. But the main offence is the violation of the sanctity of the mail, by an individual who had sworn to protect it.

In 1 Chit. 698, it is laid down, that where the offence can not be stated with complete certainty, it is sufficient to state it with such certainty as it is capable of. As in the case of a conspiracy to defraud a person of goods, it is not necessary to describe the goods as in an indictment for stealing them; stating them as "divers goods," has been holden sufficient. Pursuing the words in the statute is sufficient, in describing an offence, unless there are generic terms, in which case it is necessary to state the species, according to the truth of the case. Archb. Cr. Pl. (Ed. 1840) 47. Under the English form it is not necessary to describe the bank note, or bill of exchange, contained in the letter stolen. Id. 211. A bill of exchange, for the payment of ten pounds, is stated in the precedent, and no other decription is given. The value of the article inclosed need not be alleged in the indictment, or proved on the trial. This, however, is under the act of 7 Wm. IV. and 1 Vict. c. 36, § 40, which provides, "it shall not be necessary, in the indictment, to alledge, or to prove upon the trial, or otherwise, that the post letter bag, or any such post letter, or valuable security, was of any value."

It was held by the circuit court of Ohio (U. S. v. Nott [Case No. 15,900]) that some evidence of the value of the article inclosed in the letter must be given. That "it was clearly not necessary to prove the hand writing of the presidents and cashiers, whose signatures appear on the face of the notes, by one who has seen them write." But this was a case where the notes were described in the indictment; of course proof of them would be required. But from this, it by no means follows that it is necessary to set out the notes particularly in the indictment. The court, in the above case, further remarked, that a counterfeit note being of no value, or a note on a bank which never existed, or is wholly insolvent, would not constitute the offence under the statute. That the rights of the accused are in no sense abridged or jeoparded by a general description of the notes—"as bank notes, for the payment of money," as contained in the present indictment, strongly appears from the British precedent. For the principles of the common law are less departed from in that country, in the administration of justice, and, especially, of criminal justice, than in any other. And although the present form of an indictment like this has been framed under the sanction of an act of parliament, it is considered of no less weight of authority on that account. If the form of the indictment had been adopted by the rules or decisions of their courts, it would have been regarded as no slight evidence of the law. And the principle having received the sanction of the legislature, as well as of the courts, the authority is stronger. It is certainly stronger as regards the safety and propriety of the form. That the count does not state the value of the notes, or that they were of any value, was not objected in the agreement on the motion to quash, nor was it considered by the court. This is, perhaps, the strongest objection to the count. The notes are described, generally, as bank notes for the payment of money, but if, as suggested in the above case against Nott that the notes must be proved to be of some value, it is doubtful whether some value should not be averred. If the notes must be of some value, the notes of an insolvent bank, which are wholly worthless, are not within the statute. If this position be correct, the notes of insolvent banks form an exception, and the rule is, where an act prosecuted criminally may be within an exception, which makes it an innocent act, the defendant should be shown not to be within it. And if the notes in this case, being on

insolvent banks, could add nothing to the criminality of stealing the letter, it would seem that the indictment should show that they were not bank notes of this description, by an averment that they were of some value. But, as before remarked, at the trial, this point was not raised in the argument nor decided by the court.

As to the third objection that no crime is technically charged in this count, it is sufficient to say the count charges, in the very words of the statute, that the defendant did secrete and embezzle one letter, &c. The word embezzle is a significant word; it is used in the statute and means to steal by breach of trust, which is a most appropriate term, and more descriptive of the offence than any other.

It is objected, in the fourth place, that there is no averment that the act was done by the defendant, while acting as postmaster at Carrolton; and that if the act had been committed at any other place, he is not punishable under this count. There is no foundation for this exception. The count charges that the defendant did secrete and embezzle one letter containing divers bank notes for the payment of money; the said Charles Lancaster, being at the time of such secreting and embezzling as aforesaid, then and there employed in one of the departments of the postoffice establishment, to wit—a postmaster at Carrolton, &c.

In the fifth and last place it is objected that an acquittal or conviction on this count could not be pleaded in bar to a future indictment, for the same offence, more technically described. This objection cannot be sustained. The true test whether an acquittal could be pleaded is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. Rex v. Clark, 1 Brod. & B. 473; Rex v. Sheen, 2 Car. & P. 634; Rex v. Emden, 9 East, 437. An acquittal upon an indictment for burglary and larceny, may be pleaded to an indictment for a larceny of the same goods; because on the former indictment the defendant might have been convicted of the larceny. 2 Hale, P. C. 245; Rex v. Vandercomb, 2 Leach, 716. Where the offence is alleged in the two indictments to have been committed at different times or places, they may be identified by a general averment, that they are one and the same offence. But if one of the indictments appear to be for the murder of a person unknown, or for the larceny of the goods of a person unknown; and the other for the murder of J. N., or for larceny of the goods of J. N., a plea may aver that the person so described as a person unknown, and J. N. are one and the same person and not different persons. And so in every other case, however different on the face of the two indictments the facts may be charged, yet, if they relate to the same offence, a formal acquittal or conviction may be pleaded. 2 Hawk. P. C. (6th Ed.) c. 35, § 3; Rex v. Wildey, 1 Maule & S. 183. On these principles there can be no doubt that an acquittal or conviction on this count, could be pleaded in bar to an indictment for the same offence.

The fourth count, to which objection is made, charges that the defendant, &c., "did then and there feloniously steal two bank notes for the payment of money, to wit—a bank note issued by the Bank of Louisville, in the state of Kentucky, for the payment of two dollars, and of the value of two dollars; and one other bank note issued by the Franklin Bank of Cincinnati, in the state of Ohio, for the payment of one dollar, and of the value of one dollar, out of a certain letter, which came to the possession of the said Charles Lancaster, at the time the said letter came to his possession, as aforesaid, and at the time of stealing of the said bank notes out of the said letter, as aforesaid, being then and there employed," &c. This charge is framed under the twenty-first section of the postoffice act above referred to, which provides, "if any person employed as aforesaid shall steal or take any of the same, that is, bank note or other article of value, named in the section, out of any letter, packet, bag, or mail of letters, that shall come to his or her possession, such person shall, on conviction," &c. The objections to this count are that the letter is not sufficiently described, and that it does not appear to have come into the possession of the defendant to be conveyed by post. It will be observed that this count does show that the letter came into the possession of the defendant as postmaster of Carrolton. It is not necessary that it should have come to his possession to be conveyed by post. The objection as to the statement of the letter is sufficiently answered in considering the same exception made to the second count.

An objection is made to the fifth count which, in no respect, varies from the fourth, except the defendant is charged in the fifth with having unlawfully taken two bank notes, &c. The words of the statute are, shall steal or take, &c. This count, it is insisted, charges no crime. It charges the taking to have been unlawful. Now the word unlawful is not in the statute, but the punishment provided can only have been intended by the statute where the taking was unlawful, that is, in violation of law. It could not mean a lawful taking. This offence, though one of high magnitude, is only a misdemeanor. It is not necessary to charge that there was a felonious taking. We think the count is sufficient.

The sixth and last count objected to, charges that the defendant did "steal out of a mail of letters," that then and there came to his possession, &c. This count, with the above exception, is the same as the preceding count. The words of the statute are, "any person employed as aforesaid, shall steal, or take, any of the same out of any

letter, packet, bag, or mail of letters, &c." This count charges the defendant with stealing out of a mail of letters, &c., one bank note, &c.; and we think it contains the requisite precision and certainty. Indeed the counts are all drawn with a commendable brevity and precision.

The motion to quash the indictment being overruled a jury was called and sworn. Mr. Brown, a traveling agent of the postoffice department, being sworn, stated that, being desirous of testing the honesty of the postmaster at Carrolton, repeated losses of letters containing money having occurred on that route, on the 25th May, 1840, a letter was written by the postmaster, at Pittsfield, signed D. A. Clarkson, and directed to James S. Bellsinger, at Carrolton, Greene county, Illinois, which on its back purported to be postmarked, at Salem, Iowa Territory. Seventy three dollars in bank notes—seventy of which were counterfeit—two dollars on the Bank of Louisville, Kentucky, and one dollar on the Franklin Bank of Cincinnati, both of which notes, he believes to have been genuine, were inclosed in the letter. It was accompanied by a postbill, with the postage marked seventy five cents—paid. The letter was put into the mail at Greggsville, and was received at the Carrolton office the 26th May. On the 28th May he went into the office, looked over the letters, and saw the above letter in the pigeon hole, under the letter B. The witness returned to Springfield where he resided, and in about eight or ten days, when Mr. Abell, postmaster at Chicago, then at Springfield, wrote to the postmaster at Carrolton, inquiring for the above letter, and requested him to forward it to Springfield if in his office. No answer was received nor was any letter forwarded as requested. The witness, in company with Mr. Abell, went to Carrolton; arrived there in the evening, and Mr. Abell, as he testified, called at the office for the above letter. He first inquired for a letter for himself; finding none, the postmaster answered the other inquiry by saying that there was no such letter in the office nor had there been in it any such. The postmaster then inquired whether he had not written to him from Springfield about the letter, and being answered in the affirmative, he observed that he intended to write him but neglected to do so. The next morning Mr. Brown went into the office, and on looking over the account of mails received, he found that an entry had been scratched out made the 26th May, and another entry of mails received from Jacksonville, in the same place, written over it. This entry had been first made in a line below the entry which had been scratched out, and afterwards erased. On a close examination of the entry scratched out, Mr. Brown could perceive pretty distinctly the letters S—l and m, and the letters I. T., from which it appeared, to him, the word Salem had been first inserted, and the letters I. T., designating Iowa Territory. On the account of mails received the postbill is copied, which states the place where the letter was mailed, the date, and the amount of postage paid or unpaid. In the above entry the date and the amount of the postage had, also, been scratched out, and other figures inserted. Mr. Brown thought he could perceive some parts of the figures, 75 not having been entirely scratched out or covered by the new entry. He says, since this time, the traces of the word Salem, and the others, have been eradicated by scratching. Mr. Brown inquired of the defendant who made the alteration, and he admitted that he had made it, but gave no satisfactory explanation respecting it. Mr. Brown then observed that if he had seen that entry before Lowndes was arrested, he should have had him examined. Mr. Chester, a witness, confirmed the statement of Mr. Brown as to the alteration of the entry or transcript of mails received. The letters I. T., and some of the letters in the word Salem, were perceivable when he first saw the entry. The entry was then different from what it now appears; the scratching out has been completed. He saw the lost letter in the office, but cannot, with certainty, state the last time he saw it there. Mr. Lowndes, a young man, who was an assistant in the office, states that the defendant took the letter, opened it, gave the witness thirty eight dollars of the money inclosed, and retained the balance himself. This was done on the afternoon of Sunday, succeeding the receipt of the letter.

In his defence, the defendant proved, by several witnesses, that he had maintained a good character in the county. That he had risen by his own merits, from a humble employment in life to be postmaster, and recorder of the county, having been elected to the latter office by the people, and that his character for honesty, before the present accusation, was as good as that of any other man. Mr. Carlin stated that he thinks the defendant was in the country, with his friends, on the Sunday on which Lowndes swore he took the letter. But the witness has no other ground for this impression, than that, during the day, he did not see the defendant in town. He did not see him leave the town or return to it, but, he thinks, as his residence is near the postoffice, he should have seen him sometime during the day had he not been absent. Mr. Terry stated that Lowndes, when about being arrested, on the charge of the defendant, for taking this letter, wanted him to swear that he loaned Lowndes twenty dollars, which had been seen in his possession, and how he obtained it he could not prove. Mr. Avery saw Lowndes' pocket book which contained ninety eight dollars. Among these was a twenty dollar note on the Valley Bank of Virginia, and a one dollar note on a bank in Cincinnati. Notes of these descriptions, the former being a counterfeit, were inclosed in the stolen let-

ter. Mr. Adams heard Lowndes say that if they made him tell how he came by his money, he would make Lancaster, the defendant, tell how he came by his. Mr. Bowyer stated that he was in the office when a man (Mr. Abell) inquired for the letter to Bellsinger, when the defendant asked Lowndes whether there had been such a letter in the office, and that Lowndes replied there had been such a letter, but he had given it to Bellsinger. There was other evidence of the statements of Lowndes with a view to discredit him.

THE COURT, in their charge to the jury, adverted to the prominent points in the evidence, and, particularly, to those facts about which there seemed to be no controversy. These were that the letter charged to have been stolen was in the postoffice at Carrolton, the denial of the defendant that such a letter had been in the office, and the alteration of the record of mails received, which he admitted had been done by him; and, also, the traces of the original entry, that had been scratched out, as sworn to by Mr. Brown and Mr. Chester. That to these facts the defendant had only offered his former good character, and that the letter might have been taken by his assistant, Lowndes. That the statements of Lowndes, under the circumstances, should be received with great caution, and, where uncorroborated, should have little weight. The law made him a competent witness, though by his own statement he was an accomplice. If the jury believed his statement, there could be no doubt of the defendant's guilt. But it was for them to weigh the testimony and give credit only where it was due. That they might consider the case independently of the statements of this witness, and then, in connection with his evidence, if they entertained reasonable doubts of the defendant's guilt, it must lead to his acquittal. But if, on the other hand, these doubts do not exist they were bound to convict. That they had a right to find the defendant guilty or not guilty of any one or more counts in the indictment. And upon the whole, that looking into the evidence with great care, and under a due sense of the high importance of the case, they would return such a verdict as the law and evidence required.

The jury returned a verdict of guilty against the defendant on three counts in the indictment, which charged the defendant with secreting and embezzling the letter.

A motion was made for a new trial on grounds assigned, which, after due consideration by the court, was overruled. In giving their opinion, on this motion, THE COURT said the evidence on which the jury had rendered their verdict was entirely satisfactory. That, independently of the testimony of Lowndes, the evidence proved the guilt of the defendant, in their opinion, beyond all reasonable doubt.

At a subsequent day of the term THE COURT sentenced the defendant to ten years confinement in the penitentiary.

Case No. 15,557.

UNITED STATES v. LANCASTER.

[4 Wash. C. C. 64.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1821.

PENALTIES — REMISSION — INTEREST OF THIRD PARTIES — EMBARGO.

1. The secretary of the treasury may remit not only the interest of the United States, but of individuals, in penalties and forfeitures in certain cases, after suit brought, and before judgment.

2. Quere, if the president of the United States can pardon in such a case, so as to affect the interest of third persons?

3. A pardon of the president of the United States after condemnation, as to all the interest of the United States in the penalty incurred by a violation of the embargo laws, and directing all further proceedings on behalf of the United States to be discontinued, does not remit the interest of the custom house officers in a moiety.

[Cited in Holliday v. People, 5 Gilan, 217; Lapham v. Almy, 13 Allen, 307; In re ——— (an attorney), 86 N. Y. 570; Anglea v. Com., 10 Grat. 699.]

[Appeal from the district court of the United States for the district of Pennsylvania.]

This is an action of debt upon a bond dated the 2d of February, 1809, in the penalty of $4,002. The case agreed states that in 1808 the brig Eliza was seized by the collector of the Delaware district, and libelled for violations of the embargo laws passed in that year. Upon the claim of the defendant in error, the vessel was restored at the appraised value of $2,001, on bond and security given, with condition to respond for the said value in the event of condemnation. The district court acquitted the vessel, which decree was affirmed upon appeal to the circuit court. [Unreported.] But this decree was reversed by the supreme court in 1813 [unreported], and in June, 1816, sentence of condemnation passed in the circuit court. On the 5th of July, 1816, the defendant petitioned the secretary of the treasury for a remission of the forfeiture; and on the 16th of August, in the same year that officer remitted to the defendant all the right, claim, and demand of the United States, and of all others whatsoever, to the forfeiture by him incurred, so far as respects the bond in the petition mentioned, on payment of costs. On the 24th of September, 1816, suit was brought on this bond, and, on the further petition of the defendant, the president remitted to the defendant all the right and interest of the United States in and to said bond, and required all proceedings on the part of the United States to be forthwith discontinued. The remission is dated the 25th of April, 1817. The counsel agree that the above matters shall be considered as brought out by a plea and a replication, stating the vested rights of the collector

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

and other officers of the customs to a moiety of the forfeiture, and praying judgment to the amount of their interest or moiety; and the defendant to be considered as having demurred to said replication, so as to submit to the court the question whether, notwithstanding the remissions, judgment and execution in this suit may be had for the moiety of the forfeiture aforesaid.

For the United States were cited the following cases: Taber v. Perrot [Case No. 13,721]; [Jones v. Shore's Ex'r] 1 Wheat. [14 U. S.] 470; The Mars [Case No. 9,106]; [Van Ness v. Buel] 4 Wheat. [17 U. S.] 74; [The Caledonian] Id. 100; [The Josefa Segunda] 5 Wheat. [18 U. S.] 338, 2 Bay, 565.

For defendant: Ex parte Marquand [Case No. 9,100]; United States v. Mann [Id. 15,718].

C. J. Ingersoll, for the United States.
Mr. Rawle, for defendant.

WASHINGTON, Circuit Justice. This is a writ of error from a pro forma judgment of the district court. The remission of the secretary of the treasury bears date the 23d of August, 1816. It recites the petition of the defendant, touching a certain forfeiture incurred under the first embargo law and the act supplementary thereto, and then proceeds to remit to the petitioner all the claim and demand of the United States as stated in the case. The petition on which the above demand is founded states that, upon the sailing of the vessel, the petitioner, together with two other persons, Turly and Maginnis, in conformity to law for that purpose, entered into a bond to the United States in the sum of $75,000; that the landing of the cargo at Havana being considered as a forfeiture of said bond, a suit was brought thereon against the three obligors, and a judgment for the whole amount thereof was obtained in May, 1811. The pardon of the president of the United States, bearing date the 25th of April, 1817, recites that on a preceding day in that month he had remitted to the defendant all the claim of the United States in and to the penalty of a certain bond, incurred by him and others for an infraction of the embargo law; and further, that it being made known to him that proceedings are still pending against said Lancaster on a bond given for the appraised value of the Eliza, which was forfeited in consequence of the said violation, proceeds to remit all the interest of the United States in, and claim to, the penalty or forfeiture of said bond, for the appraised value of said brig, so far forth as the said Lancaster is concerned therein, willing and requiring all further proceedings in the case, on behalf of the United States, to be forthwith discontinued and discharged. The declaration is on the bond for the appraised value of the vessel, and, after setting out the condition, it appears that, upon the appeal to the circuit court, that court decreed condemnation of the said vessel; yet that the defendant had not paid, &c.

I put out of the case the remission of the secretary of the treasury, which was confined exclusively to the embargo bond in the penalty of $75,000; that being the only bond mentioned in the petition. I also exclude from the case the president's pardon, recited in that of the 25th of April, 1817, because that too is confined to the embargo bond. The question then is, whether the pardon of the president, remitting the interest of the United States in and to the penalty or forfeiture of the bond, on which this action is founded, can effect the moiety of the penalty claimed by the officers of the customs? According to the doctrine of the common law of England, the king cannot, in the exercise of his prerogative of pardon, defeat a legal interest or benefit vested in a subject; as, for example, an interest or right of action given by statute to the party grieved, or even a popular action, after suit commenced. 5 Bac. Abr. 286, 287; Chit. Cr. Law, 742, 764; 3 Inst. 240, 241; 12 Coke, 29, 30. How far this doctrine is applicable to the constitutional power of the president of the United States, has not, I think, been decided, either in the supreme court of the United States, or in any of the circuit courts. In the case of Jones v. Shore's Ex'rs, 1 Wheat. [14 U. S.] 670, and Van Ness v. Buel, 4 Wheat. [19 U. S.] 74, it is stated by the judge who delivered the unanimous opinion of the court that, by the common law, a party entitled to a share of the thing forfeited acquires, by the seizure, an inchoate right, which is consummated by condemnation; and that, when so consummated, it relates back to the seizure; that the same rule applies to personal penalties only; that the right of an individual to a part of the forfeiture in rem attaches on seizure, and to personal penalties on suit brought; which right, in both cases, is rendered indefeasible by the judgment or sentence. But this case does not decide the question whether the president can, by his pardon, defeat the inchoate right of a private person, in a case where the remedy for the recovery of the penalty or forfeiture can be prosecuted only by and in the name of the United States. In such a case may not the president direct the law officer of the government to discontinue the suit? And if the remedy be within the control of that branch of the government which possesses also the pardoning power, would not the inchoate right of an individual be necessarily so? That the power of remission vested in the secretary of the treasury extends to such a case, and that, where so exercised, the interest of an individual in the penalty, not consummated by judgment, may be defeated, is unquestionable. The act of the 3d of March, 1797 (2 Bior. & D. Laws, 361, 585 [1 Stat. 506]), authorizes that officer to mitigate or remit all fines, penalties, or forfeitures arising under the embargo laws, and in

many other cases; and further, to direct the prosecution, if any have been instituted, for the recovery thereof, to cease and be discontinued, on such terms as he may deem reasonable; and the third section provides that nothing in the said act shall be so construed as to affect the right of any person to that part of any penalty or forfeiture, which he may be entitled to, by virtue of the said laws, in cases where the prosecution has been commenced, or information given before the passing of that act, or any other act, relative to the mitigation or remission of such penalties and forfeitures. From this it is apparent that congress considered this proviso necessary to save the inchoate right of individuals, which had previously accrued, from the effect which a treasury remission would otherwise have had upon them.

It certainly does not follow from this that the pardoning power of the president extends to the barring of private inchoate interests; because he derives his prerogative to pardon under the constitution, and its extent must be tested by that instrument. Those of the secretary of the treasury arise out of legislative provisions; and in respect to the rights of collectors and others to a part of the penalties, cujus est dare, ejus est disponere. Without, then, giving any opinion as to the power of the president to remit, and thus to defeat the inchoate rights of individuals to penalties and forfeitures, and admitting, for the present, that he possesses such a power, I proceed to inquire whether he has in fact exercised it in the present instance. The instrument which grants the pardon, after reciting that proceedings are still pending against Lancaster, on the bond given for the appraised value of the vessel, proceeds to remit all the interest of the United States in, and claim to, the penalty or forfeiture, so far forth as it concerns the said Lancaster. Now what was the interest and claim of the United States in and to this penalty? Clearly, to no more than a moiety. The eighty-ninth and ninety-first sections of the duty law (2 Bior. & D. Laws, c. 128 [1 Stat. 695]), to which the embargo law refers, directs the collector to receive from the court or officer the sum recovered, and to pay one moiety of what may remain, after charges deducted, into the treasury, for the benefit of the United States, and to distribute the balance amongst certain officers of the customs, where there is no other informer. It is true that the rights of those officers to the other moiety are inchoate until judgment; but still the United States never had, for a moment, an interest in, or claim to that moiety; and consequently a remission of it cannot by fair construction be included under expressions applicable only to the interest and claim of the United States. If the president, willing to release the claim of the United States, was, nevertheless, indisposed to extend his mercy to the injury of private interest, I am at a loss to conceive in what more appropriate language he could have expressed such his will. It is true that he directs all further proceedings to be discontinued. But here again he proceeds with studied caution, requiring, not that the action should be discontinued, but the proceedings in the case on behalf of the United States; which may fairly be construed, in connexion with the clause of remission, which is confined to the claim of the United States, to mean so far forth as the United States are concerned; thus observing a proper correspondence between the right and the remedy. This construction is warranted by the rules of the common law, which lay it down that no pardon shall be carried beyond the express purport of it. 5 Bac. Abr. 291; 6 Coke, 13. Thus, a pardon of three persons of all felonies by them committed, without adding "or either of them," is void, as it supposes them guilty jointly, whereas all felonies are several. 5 Bac. Abr. 293. But this rule must apply, a fortiori, to a case when an interpretation carried beyond the plain expressions of the pardon would interfere with and defeat the rights of third persons, though not then actually consummated.

I am therefore of opinion that the interest of the custom house officers in a moiety of this penalty is not remitted or affected by the pardon of the 25th of April, 1817. And proceeding upon the agreement of the counsel to waive all formal objections, I shall give judgment for the penalty of the bond, to be discharged, by the payment of a moiety of the sum mentioned in the condition to be paid to the collector of the Delaware district, for the benefit of the officers of the customs entitled to the same.

UNITED STATES (LANDER v.). See Case No. 8,039.

Case No. 15,558.

UNITED STATES v. LANDRUM.

[See Case No. 3,393.]

Case No. 15,559.

UNITED STATES v. LANE.

[3 McLean, 365.] [1]

Circuit Court, D. Indiana. May Term, 1844.

UNITED STATES—CONTRACTS—PROPERTY RECEIVED IN DISCHARGE OF DEBT—AUTHORITY TO PURCHASE LANDS.

1. The government of the United States has power to make a contract, as incident to its sovereignty. It may compromise a suit, and receive real and other property in discharge of the debt in trust, and sell the same.

[Cited in Dikes v. Miller, 25 Tex. Supp. 281.]

2. The solicitor of the treasury is charged with this duty.

3. Such a procedure does not come under any authority to purchase lands.

[1] [Reported by Hon. John McLean, Circuit Justice.]

4. This cannot be exercised except under authority of law.

At law.

Mr. Cushing, U. S. Dist. Atty.
Lane & Wright, for defendant.

OPINION OF THE COURT. Several years ago, I. T. Canby, being indebted to the government in a large amount of money as receiver of public moneys, agreed, in discharge of his indebtedness, to convey to the United States certain lands. The district attorney, T. A. Howard, for Indiana, was directed to sell those lands, by the solicitor of the treasury; they were accordingly sold for cash, payable in instalments. The obligation for nine hundred and ninety-eight dollars, on which the present action is brought, was given on the purchase of a part of these lands. And the defendants [the administrators of Lane] set up in defence, that the obligation is without consideration, and void in law. That the United States had no power to purchase lands, except under an act of congress, and that they cannot sell without the authority of law.

The third section of the fourth article of the constitution declares, "the congress shall have power to dispose of, and make all needful rules and regulations respecting the territory, or other property belonging to the United States." By the seventh section of the act of May 1, 1820 [3 Stat. 568], it is provided, "that no land shall be purchased on account of the United States, except under a law authorising such purchase." The sixth section of the same act declares, "that no contract shall be made by the secretary of state, or of the treasury, or of the department of war, or of the navy, except under a law authorising the same, or under an appropriation adequate to its fulfilment," &c. The first section of the act for the appointment of a solicitor of the treasury, passed May 29, 1830 [4 Stat. 414], provides, "that the solicitor shall have charge of all lands and other property which have been, or shall be, assigned, set off, or conveyed to the United States, in payment of debts; and of all trusts created for the use of the United States, in payment of debts due them; and to sell and dispose of lands assigned, or set off to the United States in payment of debts, or being vested in them by mortgage, or other security for the payment of debts; and in cases where real estate hath already become the property of the United States by conveyance," &c. the solicitor is to release, &c.

This provision, it is contended, refers to lands previously obtained under laws of the United States, and not to those which might, afterwards, be acquired. That the act gives no new power to the government, through the solicitor, to acquire lands. And it is urged, that unless under an express law of congress, through any of the agencies of the government, lands cannot be purchased. That the lands now referred to, were not taken, under the laws of the state, in payment of a debt, or where the party was insolvent. There can be no doubt that the act regulating the duties of solicitor, had a reference to existing laws in some of the states, which authorise the debtor to set off his real estate, on execution; and in other cases where he surrenders all his property to the United States, on which he is released; but all the provisions are not limited to these cases. Some of them are general, and apply to cases of "trusts created for the benefit of the United States, in payment of debts due them." But, independently of this provision, we think there was power in the government to receive the lands in question.

In the case of U. S. v. Tingey, 5 Pet. [30 U. S.] 1828, the court, in considering the powers of the government to make contracts, say, "upon full consideration of the subject, we are of opinion that the United States have such a capacity to enter into contracts. It is, in our opinion, an incident to the general right of sovereignty; and the United States, being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts, not prohibited by law, and appropriate to the just exercise of those powers." As a party to a suit, no one doubts the power of the government, through its properly authorised agent, to direct the course of the suit as shall best advance the public interest. And if a compromise be necessary for that interest, it may be made. And that is what was done in the present case. The lands were taken, not as a purchase, but to secure the debt of the late receiver. And these lands were sold on a credit, in order that the sum due by the receiver might be paid. It was a case of trust, recommended by the public interest, and opposed to no law or public policy. The action is sustained. Judgment.

Case No. 15,560.

UNITED STATES v. LANGTON et al.

[5 Mason, 280.] [1]

Circuit Court, D. Massachusetts. May Term, 1829.

TRUSTEE PROCESS — DECLARATIONS IN ANSWER — INSOLVENCY—PRIORITY OF UNITED STATES IN PAYMENT—ASSIGNMENT—INTENT.

1. Under the trustee process of Massachusetts by statute of 1794, c. 65, if the trustee swears he has no goods, effects, or credits of the debtor in his hands, he is entitled to be discharged, unless, from other parts of his disclosure, that averment is overthrown.

[Cited in Gordon v. Coolidge, Case No. 5,606.]

[Cited in Crossman v. Crossman, 21 Pick. 24.]

2. Where an assignment does not, on its face, purport to be of all the debtor's property, it is

[1] [Reported by William P. Mason, Esq.]

incumbent on the United States, if they insist on a priority of payment under the act of congress of 1799, c. 128, § 65 [1 Story's Laws, 630; 1 Stat. 676, c. 22], to establish that it does, in fact, contain all the debtor's property.

[Cited in Farwell v. Cohen, 28 N. E. 39.]

3. A small portion left out by mistake or fraud, will not defeat the priority of the United States.

[Cited in Farwell v. Cohen, 28 N. E. 39.]

4. An assignment of all the debtor's property in a schedule referred to, which enumerates only specific property, and does not purport to be all, affords no presumption that it is all the debtor's property, or a general assignment.

[Cited in Bock v. Perkins, 139 U. S. 638, 11 Sup. Ct. 680.]

5. One of the trusts of an assignment was to pay "8,400 dollars on custom-house bonds, on which M. is surety," M. being one of the assignees; he was surety on bonds to a less amount; but the debtor in fact owed bonds to the custom-house, to the amount of 8,257 dollars; it was *held*, that no bonds were included in the trust but those on which M. was surety.

6. The trustee process lies against assignees in favour of the United States, where a debtor makes an assignment of his property in trust to pay custom-house bonds, or other debts due to the United States, to attach the funds to the amount of such trust, in the hands of the assignees, notwithstanding at law, the assignment passed the property clothed with the trust, to the assignees.

7. Quære, whether parol evidence is admissible to explain the intent of the parties in the above assignment, so as to show whether all bonds were intended to be included, or those only, on which M. was surety.

[Cited in Gordon v. Coolidge, Case No. 5,060.]

Suit upon the trustee process of Massachusetts by statute of 1794, c. 65 [1 Story's Laws, 630; 1 Stat. 676, c. 22]. The only questions in the cause arose upon the answers of the trustees.

Mr. Dunlap, U. S. Dist. Atty.

Fletcher & Rand, for trustees.

STORY, Circuit Justice. This case comes before the court under the trustee process of Massachusetts (Act 1794, c. 65), the main object being to charge the trustees as garnishees of the principal debtor [Samuel Langton], by attaching his funds in their hands. The case turns wholly upon the answers of the trustees. They have come into court and have declared, that they had not in their hands or possession at the time the writ was served on them, any goods, effects, or credits of the principal, and they have submitted themselves to an examination on oath touching the premises. They are therefore entitled by the very terms of the statute to a discharge with costs, "if, upon such an examination, the said declaration shall appear to the court to be true." I cannot agree to the suggestion at the bar in the broad and unqualified manner in which it is made, that persons, sued as trustees, are in all cases to be charged by the court, unless they clearly discharge themselves. Where they expressly swear that they have no goods, effects, or credits in their hands or possession of the debtor, that declaration must be taken for true, unless the court can clearly see, from the subsequent examination, that it is untrue. Where they neither expressly admit nor deny their liability, but put all the facts before the court, and leave the latter to decide the matter of law arising thereon, there must be sufficient upon the face of those facts to justify the court itself in pronouncing a judgment, which shall charge them as trustees. If those facts, fully and sincerely disclosed, leave the matter in doubt, for myself I cannot perceive how a judgment, charging them, can be pronounced, upon any acknowledged principles of law. I agree, that doubtful expressions may be construed most strongly against the trustees, if they admit of two interpretations; but they are not to be tortured into an adverse meaning or admission. The answers are not to be more rigidly, or differently construed, from what they would be in a bill in chancery. If the answers are not full, the plaintiff is at liberty to propound closer interrogatories; but he is not to charge parties upon a mere slip or mistake of certainty, or because they do not positively answer, what in conscience they do not positively know. The law would otherwise be a snare, which might entrap them to their ruin, and involve them in a double responsibility and payment. And such, I conceive, is the real doctrine in the state court, notwithstanding some general expressions, which have been quoted, and are applicable to special cases. Sebor v. Armstrong, 4 Mass. 206; Cleveland v. Clap, 5 Mass. 201; Whitman v. Hunt, 4 Mass. 272; Hatch v. Smith, 5 Mass. 42, 49; Gordon v. Webb, 13 Mass. 215.

By the answers of the trustees it appears, that Langton (the principal debtor) being in failing circumstances, on the 5th of January, 1828, executed an assignment, by indenture, tripartite, of certain property to the trustees, upon certain trusts stated in the deed of assignment. It begins by reciting, that Langton is indebted in large sums of money to the parties of the second part (the trustees), and third part (general creditors), and that W. Monroe (one of the trustees) is liable, as indorser and surety of Langton, to pay large sums of money, and also has lent and accommodated him with money, a schedule of which sums, debts, and liabilities, is annexed, marked A. It then farther recites, that Langton is possessed of certain goods, wares, merchandises, choses in action, credits, and demands, and other property, schedules whereof are annexed, marked C, D. It then recites the desire of Langton to secure to Monroe a full indemnity for all his liabilities as indorser and surety, and payment also of monies loaned, and an equal distribution of the property which shall remain among the other parties of the second and third parts, so far as it will extend, and they are ready to accept and release Langton, as far as the same will go. Afterward there follows an assignment

to the trustees of all the goods and other property, in the Schedules C and D, with a moiety of the brig Dido, a policy on her cargo, and the household furniture of Langton, at No. 1, Temple Street. The trusts are declared to be, to collect the debts, &c. and sell the property, &c. and to apply the proceeds as follows: "In the first place, to apply the said trust monies to the payment and discharge of $8,400, due for custom-house bonds and liabilities, as mentioned in said Schedule A; and also to the payment and discharge of the three sums of money mentioned in the said Schedule A as being lent and accommodated to said Langton, amounting in the whole to the sum of $9,784.69, monies so lent, &c. as stated in said Schedule A, and which said three sums of money, together with the said amount of custom-house bonds, amounts in all, as near as can be ascertained, to the full sum of $18,184.69, which amount is to be paid and satisfied in full." This is the material clause on which one of the questions made at the bar turns; the other clauses require no particular consideration. The Schedule A begins as follows: "Schedule of claims and demands due to Washington Monroe from Samuel Langton, custom-house bonds and notes by him indorsed for said Langton, as monies borrowed to be paid in full. Amount of custom-house bonds upon which Washington Monroe is surety, $8,400. Notes payable to Washington Monroe and by him indorsed for said Langton as follows." Then follows a special enumeration of them; and then a memorandum of monies borrowed, and other notes, &c. in the whole amounting with the custom-house bonds to $32,084.96. Schedule B contains the debts due to other creditors. The custom-house bonds owing by Langton amounted in fact to the sum of $8,257.43; and Monroe was surety upon all of them, excepting one for $1,752, which is now in suit. None of them were due at the time of the assignment; but all those upon which Langton is surety, amounting to $6,505.43, have since been paid. The whole amount of the property assigned to the trustees by the assignment, has produced less by $10,000, than the debts and liabilities of Monroe provided for in the assignment.

The trustees, upon their disclosures, are certainly entitled to be discharged from the suit, unless some one of the grounds contended for in argument, on behalf of the United States, can be maintained in point of fact and law. They explicitly deny, that they have any goods, effects, or credits of Langton in their hands or possession; and as no evidence aliunde is admissible by law, to control or contradict their answers, the onus probandi is on the United States, to extract an opposite conclusion from the facts stated in them.

Two grounds are contended for by the United States. In the first place, that the assignment is an assignment of all the property of Langton; and if so, the priority provided for by the act of 1799, c. 128, § 65 [1 Story's Laws, 630; 1 Stat. 676, c. 22], attaches in favour of the United States. I agree at once to the reasoning at the bar, that if the assignment be in fact of all the debtor's property, although it does not so appear upon the face of the instrument, the priority of the United States attaches. The same rule applies if a small part be left out for the purpose of fraudulent evasion of that priority. This doctrine is fully supported by the cases of U. S. v. Clarke [Case No. 14,807]; U. S. v. Hooe, 3 Cranch [7 U. S.] 73, 91; U. S. v. Howland, 4 Wheat. [17 U. S.] 108, 115; and Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 439. But the difficulty is, that the present assignment purports on its face to be an assignment, not of all the debtor's property, but of all the goods, &c. in the Schedules C and D; and these schedules do not purport to be all the property of the assignor, but of certain specific effects. In such a case (as was justly said by the court, in [U. S. v. Howland] 4 Wheat. [17 U. S.] 108, 116), the presumption must be, that there is property not contained in the deed, unless the contrary appears. The onus probandi is thrown on the United States. Now there is not only no proof in the case, that this assignment does contain all Langton's property; but both the trustees swear, that they believe it does not contain all his property; and there is not a shadow of evidence, that there was a suppression of any of his property, with a fraudulent design to evade the rights of the United States. On the contrary, it does appear that the parties at the time had no distinct knowledge of the actual sums owing on bonds at the custom-house. We may, therefore, upon the mere footing of authority dismiss this ground of argument as untenable.

But in the second place it is contended, that if this be not a general assignment, there is an express provision giving priority of payment out of the funds, to the custom-house bonds, of which the United States are entitled to avail themselves in the present form of suit. One answer urged on behalf of the defendants to this ground is, that the trustee process furnishes no means to enforce such a right, even if it exists. The argument is this. The trustee process can only reach goods, effects, or credits of the debtor himself. If the assignment is good and valid in point of law, it passes the goods &c. to the trustees, as their property, to be by them applied to the trusts stated in the assignment. The whole reasoning, on behalf of the United States, assumed, that the assignment is good and valid; and if so, the trust fund, to the amount of the custom-house bond provided for by it, is a trust fund belonging to the United States, and not to the debtor; and the United States cannot attach their own property by this process in the hands of the trustees. And reliance is

placed on the case of Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 386, 438, 439, where it was held by the supreme court, that even a general assignment passes the property to the assignees, and gives a priority of payment only out of the fund, and does not, pro tanto, defeat the assignment. To every thing stated in that opinion, I give my cordial assent, knowing that it was prepared upon very full deliberation of the court. I agree that the present assignment is good and valid, in point of law, to pass the property to the assignees. But the conclusion contended for by the defendants' counsel does not follow upon such an admission. If the United States had been called upon to assent, and had in fact assented, to the trusts created by the assignment so as to create a privity between themselves and the assignees, there might be great force in the argument. But until such assent, actual or constructive, the property was, by operation of law, a resulting trust for the assignor. If A. transfers his goods or money to B., to be delivered over or paid to C., unless C. assents, expressly or impliedly, to the bailment or trust, the trust is a resulting trust for A. If C. refuses to receive the goods or money, A. may recover them back for his own use. In such cases, the law implies a resulting use or trust for the benefit of the grantor, where the object of the trust has wholly failed. This is, as I think, the natural result of the general principles of law upon this subject. Our state decisions in relation to the trustee process, uniformly assume the doctrine to be sound, and make no distinction, whether the goods, credits, or effects in the hands of the trustee are equitable or legal; whether they are a naked debt or bailment, or a resulting trust, where the assignment, pro tanto, has become inoperative, being good and valid in its general structure. In every case where a general assignment is made for the benefit of creditors, and an attachment under this process intervenes, before all the creditors have become parties, the assignment is not held utterly void, but is held inoperative only as to the proceeds not covered by the debts of the antecedent creditors; and if any thing remains after such attachment, that may go, under the assignment, to any creditors who subsequently become parties. In short, the trust created by the assignment is defeated only pro tanto. And a creditor, who refuses to come in under the trust, may sue in the same manner as if he were not named or included in it. It appears to me, that wherever the property of a debtor is in the hands of an assignee under trusts, which are exhausted, or have failed, so that the assignee holds the property for his benefit by operation of law, the trustee process is a proper process to reach it. The statute of 1794, c. 65, seems to me to have had such cases peculiarly in its eye in creating the remedy. The words in the preamble clearly cover them. They are "goods, effects, and credits," of the debtor "so intrusted and deposited in the hands of others, that the same cannot be attached by the ordinary process of law."

Another answer suggested at the bar is, that the United States are not, upon the face of this assignment, cestuis que trust; but that the trust is created in favour of Monroe to discharge the custom-house bonds, and thus to exonerate him from his suretyship. But, assuming this construction of the instrument to be correct, (on which I give no opinion,) it would not aid the case of the defendants. If the debtor has confided his property to them to fulfil certain trusts, the assignees are bound to fulfil those trusts, and cannot apply it to other purposes. If they should refuse so to do, and the cestui que trust cannot enforce it, or the trustee has failed; they must be charged as trustees of the debtor, because it remains, in equity, his property, by way of resulting trust or indebtment. If they should not refuse, then the property is a fund in their hands applicable to the trust, and they are merely his agents to pass it over to the creditors. Now in this very process the United States, supposing all custom-house bonds are included in the trust, seek to have the acknowledged trust property of the debtor applied to the very purpose he intended; and I can perceive no solid objection upon reason or authority, or even technical grounds to refuse it. It is the debtor's property "intrusted" to them for this purpose, and not attachable by the ordinary process of law. In Jarvis v. Rogers, 15 Mass. 389, 414, Mr. Chief Justice Parker, in delivering the opinion of the court, said: "I have neither heard nor seen any judicial decision, tending to prove, that if a creditor accidentally gets possession of his debtor's goods, or if a debtor commits them to him on a particular trust or confidence, the creditor has a right to retain them as security for his debt. On the contrary, any other creditor may attach them, if they can be seized by an officer; or the creditor may be charged as trustee, if they cannot be come at to be attached."

The strongest objection to a recovery by the United States yet remains for consideration. It is, that the assignment did not mean to provide for the payment of all custom-house bonds owing by Langton; but only for those, on which Monroe was surety; and all these have been paid without scruple. It has been said, that Langton might well be presumed to intend to cover all bonds, because it would save him from imprisonment on execution at the suit of the United States, from which he would not be entitled to be discharged, as in cases of private debts upon taking the poor debtor's oath; but only by the special authority of the secretary of the treasury under the act of 1798, c. 66. I do not know that a court is at liberty to indulge any such presumption, unless the words of the instrument itself justify it upon a plain construction of their import. Let us attend then to the words of the present assignment. The direction is "to apply the trust monies to the

payment and discharge of $8,400 due for custom-house bonds and liabilities, as mentioned in said Schedule A." By turning to that schedule we find the description to be, "amount of custom-house bonds, upon which Washington Monroe is surety, $8,400." So that the schedule does not include all custom-house bonds; but those only, upon which Monroe is surety. If, therefore, we take the general clause as it is controlled and explained by the schedule, (as we are bound to do,) it is manifest that the custom-house bonds, alluded to, are those only, on which Monroe is surety. The preamble to the assignment fortifies this conclusion; for it recites as a main object the desire to secure Monroe for his liabilities as indorser and surety; and the whole structure of the assignment shows, that he was a favored creditor, not merely as surety, but as indorser. He is not yet indemnified to the amount of $10,000.

But it is argued, that the sum provided for, viz. $8,400, is more than the amount due on the bonds on which Monroe is surety, and that the actual amount of all the custom-house bonds approaches nearer the sum, viz. to $8,257; and therefore the presumption is, that all bonds were intended to be included. Now, in answer to this, there is force in the remark made at the bar, that the sum seems put down as a mere estimate, and not as the exact amount; for the terms of the assignment are, that "the three sums of money, together with the said amount of custom-house bonds, amount in all, as near as can be ascertained, to the full sum of," &c. Besides, in either view, there is a mistake as to the amount of the custom-house bonds. If the amount of all the bonds had been exactly $8,400, there might have been a stronger ground for argument. If, then, the sum be mistaken, and we resort to the other words of the instrument to qualify or explain the intention, we there find the bonds described to be those, on which Monroe is surety. The mistake is, therefore, corrected by the context. Where there is any repugnancy or mistake in a description, if sufficient certainty as to the thing intended on the whole appears, the repugnancy or mistake does not vitiate. Taking the whole description together, it will run thus: "$8,400 for custom-house bonds, upon which W. Monroe is surety;" and upon such an assignment, intended for his special protection, there cannot, I think, be a legal doubt, that the mistake of the amount must yield to the certainty of the other part of the description. The whole provision must otherwise be rejected for utter uncertainty, and Monroe be left without any security, since the misdescription as to the amount of all the bonds owing to the United States is equally clear; or we must resort to parol evidence to explain the latent ambiguity. See Colpoys v. Colpoys, 3 Jac. 451, 462.

My opinion is, that there is no necessity to resort to such evidence in this case. But if resort is to be had, the answers of the trustees, and particularly of Monroe, are entirely decisive. He explicitly swears, that no other bonds, than those on which he was surety, were in the contemplation of the parties, or intended to be provided for; and that at the time of the assignment, the exact amount of these was not known to them. This is not all. The onus probandi is on the United States in this case, to establish, that the bond now in controversy is covered by the assignment; for otherwise, Monroe has a right to retain for the deficiency due to him. There is an acknowledged mistake in the amount of the bonds in the description. The United States must show, either that there is sufficient certainty on the face of the instrument to establish their claim, (which has not been done,) or that parol evidence is admissible to explain the intent; and then that very evidence overthrows their claim.

Upon the whole, my opinion is, that the trustees are entitled to be discharged, and judgment must be entered accordingly. Trustees discharged.

Case No. 15,561.

UNITED STATES v. LARKIN.

[4 Cranch, C. C. 617.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

CRIMINAL EVIDENCE — CONVERSATIONS — INDICTMENT—SURPLUSAGE.

1. Conversations of the defendant may be given in evidence against him, although not amounting to a confession of guilt, and not corroborated by other testimony; but the court will not say whether the evidence is sufficient to convict the prisoner.

2. Unnecessary words, not altering the nature of the charge, inserted in an indictment, by the grand jury, may be rejected as surplusage, after verdict.

Indictment for highway robbery of George Milburn.

Mr. Milburn, the witness, testified, upon the trial, that, when the prisoner [Dennis Larkin] was arrested and brought into the magistrate's office, and before he was informed for what he was arrested, the prisoner asked on what night it was. Being informed that it was on the night of the 17th of October, he said he could prove by his bedfellow, that he was not there. Milburn then stated to the prisoner all the circumstances of the robbery, as he had learned them from others, as well as from his own knowledge, until he was made insensible by the blow which knocked him down. To which the prisoner replied that Milburn had no witnesses but colored persons, and they were not good witnesses against a white man. The prisoner also trembled, and appeared to be much agitated by the witness's statement of the circumstances.

Mr. Hoban, for the prisoner, prayed the

[1] [Reported by Hon. William Cranch, Chief Judge.]

court to instruct the jury, that such evidence, without corroborating circumstances, is not evidence against the prisoner. He cited Wheeler's Digest, which refers to a case decided in North Carolina.

But THE COURT (THRUSTON, Circuit Judge, absent) refused so to instruct the jury, and referred to the note to the same case in Wheeler, and to 4 Starkie, 48, 53.

The jury having found the prisoner guilty, his counsel moved, in arrest of judgment, because the indictment, which has only one count, charges two distinct offences, subject to different punishment, namely: highway robbery, and an assault and battery, with intent to kill; the first being punishable under the sixth section of the penitentiary act [4 Stat. 448], by imprisonment and labor in the penitentiary for a period of not less than three nor more than seven years; and the other under the second section, of not less than two nor more than eight years.

The indictment, as sent to the grand jury, by the district attorney, was a simple indictment, in common form, for highway robbery; the grand jury, however, interlined the words, "and battery, with intent, him, the said Milburn, to kill," and also the words. "did beat and wound," so as to make it read thus: "With force and arms, at the county aforesaid, in the common highway, there, in, and upon one George Milburn, in the peace of God and of the United States, then and there being, feloniously did make an assault and battery, with intent, him, the said Milburn, to kill, and him, the said George Milburn, did beat and wound, in bodily fear and danger of his life, in the highway aforesaid, then and there feloniously did put; and bank-notes of the value of three hundred dollars; and silver coins of the value of one dollar and fifty cents; and a gold watch and seal of the value of one hundred and seventy-five dollars; and one pencil-case of the value of one dollar; and one penknife of the value of seventy-five cents, the money and property of the said George Milburn, from the person and against the will of the said George Milburn, in the highway aforesaid, then and there feloniously and violently did steal, take and carry away, against the peace and government of the United States, and against the form of the statute, in such case made and provided."

The attorney for the United States cited 1 Chit. Cr. Law, 254, 255; Com. v. Gillespie, 7 Serg. & R. 469; Stoops v. Com., Id. 491; and Harman v. Com., 12 Serg. & R. 69.

THE COURT (nem. con.) overruled the motion, being of opinion that the assault and battery were included in and made a part of the offence of robbery, as much as the stealing, taking, and carrying away of the money, watch, &c., which are also charged; and therefore, although the words, "with intent to kill," are added, they are merely stated as words of aggravation, and may be rejected as surplusage; so that the count does not charge more than a single offence. See Young v. Rex, 3 Term R. 98, 103, 106, 107; 1 Chit. Cr. Law, 231 (b), 248, 249; and Rex v. Fuller, 1 Bos. & Pul. 180.

The prisoner was sentenced to the penitentiary for six years.

Case No. 15,562.

UNITED STATES v. LARKIN.

[Hoff. Dec. 23.]

District Court, N. D. California. Feb. 7, 1861.

MEXICAN LAND GRANTS—LOCATION—OBJECTIONS TO SURVEY—SUBSEQUENT GRANT OF SAME LAND.

[1. If a grant solicited by the diseño describes the first line as being a designated parallel of latitude, and the same is delineated on the diseño with great accuracy by reference to natural monuments, and the grant refers to the diseño for the description of the lands, the line as established by such natural monuments must be taken as the true boundary, although, owing to the lack of facilities or skill for determining parallels of latitude, the said natural line does not in fact coincide with the parallel line.]

[2. Where, after a valid grant had been made, a subsequent grant of a large tract, including most of the first grant, was made to another, on the supposition that the first grant had been abandoned, *held* that, the first grant having been made with reference to a base line ascertainable with positive accuracy, with a statement of quantity which would determine the other lines, the tract must be located according to the said description without reference to the fact of its inclusion in the subsequent grant, and without any attempt to extend it otherwise than as described for the purpose of avoiding such subsequent grant.]

[3. The location of a valid grant, confirmed by the departmental assembly, cannot in any way be affected by the circumstance that, without any notice to the grantee, his grant was treated as forfeited, and a part of the land embraced within the diseño of a tract granted to another.]

[Claim of T. O. Larkin to a ranch on Feather river, originally granted to one Flugge. On objections by the United States to the survey.]

HOFFMAN, District Judge. The rancho which has been surveyed was originally granted to one William Flugge, on the 21st of February, 1844. The tract solicited is described in the petition as situated "on the west side of Feather river, and extending along the said river from north latitude 39° 33′ 45″ to the parallel 39° 46′ 45″," forming, on this line, a square one league in breadth, and called "Boga," as appears by the accompanying diseño: On the 21st of February, 1844, the governor, by his decree of concession, declared Flugge the owner of five square leagues on the western side of the Feather river, and in the center of a tract called "Boga." Its first boundary to be from the parallel of latitude 39° 33′ 45″ N. The formal title issued on the same day, describes the land in a similar manner, and the fourth condition states it to be "of the extent of five square leagues, as the respec-

tive diseño explains." On the 13th of June, 1845, the grant was approved by the departmental assembly; and on the 26th of June of the same year a certificate of the approval was given to the grantee. The diseño which accompanies the petition was drawn by John Bidwell, and it represents the land solicited with unusual accuracy and certainty. A tract on the west bank of the Feather river is delineated five leagues in length and one in breadth, as shown by the scale. At its southern extremity, a straight line, marked "Latitud norte 39° 33′ 45″," is drawn; while on the north, on the margin of the paper, the words "Latitud 39° 48′ 45″" are written. It would seem, from this description, that the precise tract intended to be granted could be located with entire certainty. It is said, however, that the southern boundary of the land, as surveyed, is not the true parallel of latitude 39° 33′ 45″, which is much further to the north, and it is suggested that the land should be bounded on the south by that parallel, wherever the same, on accurate observations, be found to be.

It is not proved in this case where that line of latitude is in fact situated. I do not, however, understand it to be claimed that the land has been located with reference to it. With the imperfect instruments and inaccurate observations upon which the former inhabitants of the country were obliged to rely, it would be surprising if the latitude of any points had been determined with entire accuracy. But the diseño shows unmistakably what was the situation of the line considered and called the parallel of north latitude 39° 33′ 45″. It represents other ranchos lying below it on the river. Four Indian rancherias lying on the other side of the river are also designated, two near the upper and two near the lower lines of the tract. Near the center is represented an Indian village, called "Boga," from which the rancho derived its name, and what is still more unmistakable, the Honcut creek is laid down as flowing into the Feather river at a point somewhat to the south of the center of the tract. On comparing the course of the river, as represented on the diseño, with its delineation on the returned plot of survey, it will be found to be laid down on the former with great accuracy. Almost every bend can readily be recognized and identified, and the portion of it along which the rancho was intended to be located can be determined with entire certainty. As, then, the situation of the southern boundary is thus determined by natural objects, it must be located with reference to them, notwithstanding that the grantor, by reason of imperfect observations or inaccurate calculations, may have made an error in designating it as a particular parallel of latitude. If any authority be needed on a point so clear, it will be found in the case of U. S. v. Sutter [21 How. (62 U. S.) 170], when the supreme court disregarded a similarly erroneous designation of a parallel of latitude and located the line with reference to natural objects, and in accordance with the testimony showing where it was, in fact, run upon the ground.

It is further objected to the survey that the same land was afterwards granted to the brothers Fernandez. It appears that, after the grant to Flugge, the brothers Fernandez applied to Sutter for a certificate to the effect that certain lands on the Feather river, north of Sutter's line, and extending to the foot-hills of the Sierra Nevada, were vacant. Sutter, supposing that Flugge had abandoned his grant, directed Bidwell to make a map for the brothers Fernandez, embracing the best lands on the west bank of the Feather river. This Bidwell accordingly did, and the map was made so as to include a tract, extending from what was supposed to be Sutter's north line to the foot-hills, and including the place called "Boga," and all or the greater portion of Flugge's land, together with lands to the north of the latter extending to the foot-hills. The claim of Fernandez has been confirmed, surveyed, and patented. It is located five leagues to the north of the northern line of Sutter as now surveyed. The Larkin survey, now under consideration, embraces these five leagues, lying between the southern line of Fernandez and the northern line of Sutter.

It is urged, that inasmuch as the land designated on the diseño of Fernandez includes the whole or the greater part of the tract granted to Flugge, and inasmuch as the grant of the former has been located on the northern part of the tract embraced within his diseño, Flugge's grant should be so located as to cover the same lands; it being apparent that the government has made two grants of the same lands, the first grant having been treated as abandoned. This suggestion might possibly have been made with some force with regard to the location of the Fernandez grant. But the location of that grant has been finally made without the interposition of this court, the survey has been approved, and the patent issued. The only question now to be considered is, what lands were granted to Flugge. Nor can the location of his grant be affected by the circumstance, that without any denouncement, or notice to him, his grant, though confirmed by the departmental assembly, was treated as forfeited, and a portion of his land embraced within the diseño of a tract granted to another. The location of the Flugge rancho is fixed by the very terms of his grant and the delineation of the diseño, and nothing is necessary but to find the true situation of the line marked, on the diseño, "latitud norte 39° 33′ 45″," and measure thence to the northward five leagues in length by one in width along the Feather river.

It is further objected that Larkin, the

claimant, has sought to locate his land further up the river than the present survey; that he has represented such location to be that called for by the grant and claimed by him, and that various persons have made settlements on the southern portion of what is now embraced in the survey. If under the grant and within the limits of the diseño, any election could have been exercised by Larkin, as to the precise location of the quantity granted, he might possibly be found to make his election in accordance with previous representations, on the truth of which others have innocently relied. But whether or not such representations and claims would amount to an election, so as to estop him from subsequently making any other, it is unnecessary to inquire, for his grant permits no right of election whatever. It designates, in terms, the "first boundary." The Feather river is the second. The petition and diseño show the width of the tract, viz. one league, and quantity will determine the northern boundary. I am unable to perceive how, with so distinct a designation of the precise land, either Mr. Larkin or this court can exercise any discretion on the subject. The land granted, and none other, must be surveyed, no matter what may be the wishes of the present owners, or what might have been the erroneous notions or representations of Mr. Larkin as to its location.

But in locating this line, it appears to have been supposed that the northern line of Sutter's rancho was intended to be the southern line of the grant. It is true that Mr. Bidwell states that he meant the tract on the diseño to have for its southern boundary the land of Sutter. But neither the petition nor the grant make any mention whatever of Sutter's land. The position of the line which the grant declares to be the "first boundary," must either be determined by ascertaining where is the 39° 33′ 45″ north, or by finding by means of natural objects the position of the line so marked, and which the grantor erroneously supposed to be the parallel mentioned. That the latter course must be adopted is clear. But on comparing the line as drawn on the diseño with the southern boundary of the land surveyed, it is, I think, manifest, that the tract has been located too far to the southward. The Honcut creek, which is, perhaps, the most unmistakable object delineated on the diseño, is represented on the latter as falling into the Feather river,—the part below the junction being considerably less in extent than that above it. But in the tract surveyed, the junction of these streams is considerably above the center of the tract, leaving much the larger portion of the land below it. Again, the lands of the river, below the point of junction, are laid down on the diseño with much accuracy, and can be recognized and identified on the plot, though the latter is on a much larger scale. It can readily be seen, by comparing the two, at what point on the river the southern boundary of the diseño was run; and its position can further be ascertained by reference to the rancherias Honcut and Beebee, which are noted on the diseño as to the north of it, and the Rancheria Tomscha, which is referred to as lying to the south of it, and not within the tract solicited. It would seem that the most southern of these rancherias has been included in the survey. But the more reliable indication is the course of the river. By tracing its course from the junction of the streams, in both maps, it will be found that the southern line of the survey is not drawn at the head where the line of latitude is drawn on the diseño, but considerably above it. This I consider clearly erroneous.

It would seem that the surveyor has taken the southern line of the Fernandez rancho for his point of beginning, and surveyed south for the quantity, whereas the grant explicitly directs that the southern line be marked on the diseño; 39° 33′ 45″, shall be the "first boundary," but makes no mention whatever of a northern boundary. If, by commencing as the grant directs, the five leagues should embrace any portion of the land patented to Fernandez, it is a result naturally to be expected when a second grantee asks for and obtains land already granted to another. He may esteem himself fortunate (if Flugge's be the better title) that within the limits of his diseño was included a tract sufficiently large to allow his four leagues to be located in great part without interfering with Flugge, and that he has been allowed so to locate it as to cover the remainder of the tract. But it cannot be claimed, that, in order to give Fernandez his whole four leagues, the Flugge grant is to be pushed further down the river than the point so explicitly referred to in the grant, and plainly delineated on the diseño as the southern boundary.

It has already been said that neither the grant nor the petition in any way mention the land of Sutter, or his supposed northern line as forming the southern boundary of the tract. The parallel of latitude mentioned in Sutter's grant as his northern boundary is 39° 41′ 45″ N, while the parallel mentioned in this grant as its southern boundary is 39° 33′ 45″. This last cannot, therefore have been designated in this grant on the supposition that it formed the northern line of Sutter. But, even if the parallel on this diseño were the same as that designated in Sutter's grant as his northern boundary, it would merely show that the draftsman supposed that Sutter's line would be identical with the line drawn on this diseño as the southern boundary. Whether it be so or not cannot now be determined. The position of the line marked on this diseño with the figures 39° 33′ 45″ is absolutely fixed by unmistakable natural objects. Nor

can it be moved further south, so as to coincide with Sutter's northern line, as since surveyed, mainly because the two might have been supposed to be identical.

Case No. 15,563.

UNITED STATES v. LARKIN et al.

[Hoff. Land Cas. 41.] [1]

District Court, N. D. California. June Term, 1855.[2]

MEXICAN LAND GRANTS — APPROVAL OF DEPARTMENTAL ASSEMBLY.

Under the decision of the supreme court in U. S. v. Fremont [18 How. (59 U. S.) 30], this claim must be confirmed.

Claim for eleven leagues of land on the west bank of the Sacramento river, confirmed by the board, and appealed by the United States.

[This was a claim by Thomas O. Larkin and John S. Missroon for the Jimeno rancho in Colusi and Yuba counties, containing 48,854.26 acres.]

S. W. Inge, U. S. Atty.

A. C. Whitcomb, for appellees.

HOFFMAN, District Judge. In this case the claim of the appellees was confirmed by the board of commissioners. An appeal from that decision was taken to this court. But the case has been submitted by the district attorney without the statement of any objection to the validity of the claim on the part of the United States. The original grant by Governor Micheltorena to Manuel Jimeno is dated in November, 1844. The conveyance to the present claimants is dated August 30, 1847. The grant is fully proved. Nor is its genuineness called in question. The grant appears to have been submitted to the departmental assembly, and referred to a committee on vacant lands, June 3, 1846, but no further action on it is shown to have been had.

The expediente, however, was returned to and is found among the government archives. Had the action of the assembly been unfavorable, the governor should have transmitted it to the supreme government for its resolution. Regulations of 1828, § 6. The fact, therefore, that the expediente was not so transmitted, but was returned like other approved grants to the archives, renders it highly probable that the approval of the assembly was actually obtained. The absence, however, of that approval has been held by the supreme court to be no obstacle to the confirmation of the claim. It is unnecessary, therefore, to determine whether the evidence in this case is sufficient to raise the presumption that the assembly actually approved the grant. The land claimed by the appellees is described in the original grant as "the tract of land which is unoccupied between the rancho which has been granted to the children of Don Tomas O. Larkin, the river Sacramento and the uncultivated lands which are on the side of the south, entirely in conformity with the showing in the corresponding plan."

On reference to the plan or map found in the expediente, we find the boundaries of the tract granted laid down with considerable precision. The first or northern boundary is the rancho granted to the children of Don Tomas O. Larkin. The eastern boundary is the Sacramento river; the southern is a large estero, (marked on the map "lindero," or boundary) running into the Sacramento about two leagues above, as appears by the scale upon the diseño, the mouth of Feather river. Nothing appears on the map to indicate the locality of the western boundary. That boundary is evidently an imaginary line running parallel with the Sacramento, and as far distant therefrom in a westerly direction as to embrace within the tract the quantity of land granted. There is no difficulty, therefore, in ascertaining the locality of the land granted, nor has any objection of that kind been raised.

There is no evidence that the grantee took possession of his land. The grant, however, does not contain the usual condition of cultivation and habituation within a year. The omission of this condition may possibly have been owing to the fact that the grantee was already in possession of the land. It appears, however, from the evidence, that from the latter part of 1844 until the end of 1847, it was unsafe to go into the valley of the Sacramento unless in the vicinity of Capt. Sutter's fort. From 1844, the time of the grant, until its final occupation by the American forces, the country was distracted by the wars between Micheltorena and Pio Pico, and between the latter and Castro. It is well known that during this state of things the uncivilized Indians became more turbulent, and were dangerous to the frontier settlements, which were not strong enough to resist them. In 1847 the rancho was taken possession of and extensively stocked by the present claimants, and this seems to have been the earliest moment when the settlement could have been effected.

The circumstances in this case are almost identical with those in the case of U. S. v. Fremont [18 How. (59 U. S.) 30], and under the authority of that case the excuses for the nonfulfillment of the conditions must be deemed sufficient. There is nothing in the case from which an abandonment of the grant can be inferred. We think, therefore, that the decision of the board should be affirmed, and the claim of the appellees be decreed to be valid.

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

[2] [Affirmed in 18 How. (59 U. S.) 557.]

[Upon being taken on an appeal to the supreme court, the judgment of this court was affirmed, Mr. Justice Campbell dissenting. 18 How. (59 U. S.) 557.]

Case No. 15,564.

UNITED STATES v. LARKIN et al.

[Hoff. Land Cas. 75.] [1]

District Court, N. D. California. Dec. Term, 1855.

MEXICAN LAND GRANT — APPROVAL BY DEPARTMENTAL ASSEMBLY.

No objections made to the validity of this claim.

Claim for ten leagues of land in Colusi county, confirmed by the board, and appealed by the United States.

[This was a claim by Francis Larkin and others for the rancho de Larkin, granted December 15, 1844, by Manuel Micheltorena, claim filed March 24, 1852, confirmed by the commission April 25, 1854, containing 44,364.22 acres.]

S. W. Inge, U. S. Atty.

Stanly & King, for appellees.

HOFFMAN, District Judge. This case was unanimously confirmed by the board of commissioners. It has been submitted to us without argument or the statement of any objections to it on the part of the appellants. The points made by the law agent before the commissioners are all fully considered in their opinion contained in the transcript, and we deem it enough to say that we see no reason to dissent from the conclusion at which they arrive. Of the genuineness of the grant there can be no question. It was approved, as the board and this court consider, in an unqualified manner by the departmental assembly, and the conditions have been substantially complied with. The description in the grant and the delineation on the map, which is unusually accurate, indicate unmistakeably the locality and boundaries of the granted land; and the decree of the commissioners, which we are asked to affirm, particularly designates the boundaries of the tract, the title to which is confirmed to the claimants. A decree affirming their decision must be entered as prayed for by the claimants.

UNITED STATES (LARKIN v.). See Case No. 8,091.

Case No. 15,565.

UNITED STATES v. LARNED.

[4 Cranch, C. C. 312.] [2]

Circuit Court, District of Columbia. May Term, 1833.

HANDWRITING—COMPARISON.

Where the witness has acquired a knowledge of the handwriting of the prisoner, by having often seen him write, &c., it is competent for him to compare the paper in question with the genuine handwriting of the prisoner, and to state his belief resulting from both sources.

Indictment [against Joseph Larned] for forging a certificate of freedom. Upon the trial, a witness, Mr. Keller, stated that he was acquainted with the handwriting of the prisoner. That about three years ago he and the witness wrote in the same office. When he first saw the paper, if the prisoner's name had not been mentioned, he would not have said, at once, that it was his writing. If the prisoner's name had been mentioned, he would have thought it might be his, but he could not have sworn to it. He took it to the books of record, written by the prisoner, and from the comparison, and a similarity and peculiarity in the form of his capital letters, he did and does believe the paper in question to be in the handwriting of the prisoner.

Mr. Taylor, for the prisoner, objected that this was evidence by comparison of hands, which is not admissible.

THE COURT (nem. con.) said, as the witness' belief was founded, in part, on his general knowledge of the prisoner's handwriting, and in part on his having compared it with the writing of the prisoner, the evidence must go to the jury with an instruction, that so far as the witness' opinion was founded upon the comparison, it was not evidence.

But THE COURT (nem. con.), upon consideration of the authorities cited in 4 Starkie, 651, Add. (Pa.) 35, and 6 Bin. 349, said that they were satisfied that where the witness has acquired a knowledge of the handwriting of the prisoner by having often seen him write, &c., it is competent for him to compare the paper in question with the genuine handwriting of the prisoner, and to state his belief resulting from both sources.

The prisoner was convicted, and sentenced to the penitentiary. [See Case No. 15,566.]

Case No. 15,566.

UNITED STATES v. LARNED.

[4 Cranch, C. C. 335.] [1]

Circuit Court, District of Columbia. Oct. Term, 1833.

FORGERY—INDICTMENT—SURPLUSAGE—JUDGMENT.

Quære, whether, in an indictment under the penitentiary act [4 Stat. 448], for forging a "paper writing," it must not be averred to have been done "to the prejudice of the right" of some person; and whether upon an indictment for a felony, judgment may be rendered as for a misdemeanor; and whether, if the facts stated in the indictment do not amount to felony, the word "feloniously" may not be rejected as surplusage, and judgment given as for a misdemeanor?

The prisoner [Joseph Larned] who was convicted at the last term [Case No. 15,565] for

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

[2] [Reported by Hon. William Cranch, Chief Judge.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

feloniously forging, uttering, &c., a certain paper writing, &c. (being a certificate of freedom), was brought up and sentenced to the penitentiary, under the 11th section of the penitentiary act of March 2, 1831 (4 Stat. 448); CRANCH, Chief Judge, doubting, because the indictment does not charge it to have been done "to the prejudice of the right of any person, body politic," &c.; and because no statute in force here makes it felony; and because judgment as for a misdemeanor cannot be given on an indictment for felony. U. S. v. M'Carthy [Case No. 15,656]. But quære, whether, if the facts stated in the indictment do not amount to felony, the word "feloniously" may not be rejected as surplusage, and judgment given as for a misdemeanor? If the indictment does really charge a felony, I think the authorities are pretty clear that judgment cannot be given upon it, as for a misdemeanor. See 1 Chit. Cr. Pl. 195, 281, 286, 287, 289; Fost. Crown Law, 424; Cro. Jac. 607; 11 Coke, 58; 2 Hale, P. C. 170; 2 Leach, 1107; Hawk. P. C. bk. 2, c. 25, § 110; Bac. Abr. "Indictment" (H.) 2; Hardr. 21; 8 Term R. 536; 2 East, P. C. 985, c. 19, § 58; 2 Hale, P. C. 192; 1 Hale, P. C. 449; 3 Chit. Cr. Pl. 1022; 1 Chit. Cr. Pl. 367-369; Schofield's Case, 2 East, P. C. 1028; Westbeer's Case, 2 Strange, 1137; Joyner's Case, Kelyng, 29; 1 Chit. Cr. Pl. 456, 638, &c.; 2 Hale, P. C. 172; 2 Hen. VII., 10b.

Case No. 15,567.

UNITED STATES v. LATORRE.

[8 Blatchf. 134.] [1]

Circuit Court, S. D. New York. Jan. 5, 1871.

BANKRUPTCY—INDICTMENT FOR SECRETING PROPERTY—SUFFICIENCY OF—AVERMENTS.

An indictment, under section 44 of the bankruptcy act of March 2, 1867 (14 Stat. 539), purporting to charge the offence of secreting property by the debtor, with intent to prevent it from coming into the possession of his assignee in bankruptcy, will be quashed, where it merely avers the commencement of proceedings in involuntary bankruptcy pursuant to the act, without describing the proceedings except by the names of the petitioning creditors, and the words, "pursuant to the act," and without naming the court, or the time, or the place where the proceedings were instituted.

This case came before the court on a motion to quash an indictment [against Ramon S. Latorre]. The indictment was framed under section 44 of the bankruptcy act of March 2, 1867 (14 Stat. 539), which declares, "that, from and after the passage of this act, if any debtor or bankrupt shall, after the commencement of proceedings in bankruptcy, secrete or conceal any property belonging to his estate, * * * with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede or delay either of them in recovering or receiving the same, * * * he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, in any court of the United States, shall be punished by imprisonment, with or without hard labor, for a term not exceeding three years." The first count alleged, that, after the passage of an act, entitled "An act to establish a uniform system of bankruptcy," the accused, being then and there a debtor or a bankrupt, within the true intent and meaning of the said act of congress, and after the commencement of proceedings in bankruptcy, which had, then and there, under and pursuant to the act aforesaid, been commenced against him by certain of his creditors, to wit, Samuel H. Cornell and Charles J. Cane, secreted and concealed certain property (describing it with a degree of certainty), with intent to prevent the said money, bankbills and merchandize from coming into the possession of the assignee in bankruptcy in the said proceedings, with intent to hinder and delay the said assignee in bankruptcy of said Latorre, in recovering and receiving the same, and against the dignity of the United States and the force of the statute of the said United States in such case made and provided. There were several other counts in the indictment, which were similar in respect to the averment which was here called in question.

Ambrose H. Purdy, Asst. U. S. Dist. Atty.
Benjamin F. Sawyer, for defendant.

BENEDICT, District Judge. Many objections have been taken to the counts of this indictment, but I consider it necessary to pass upon only one of them here; and that is, that a mere averment of the commencement of proceedings in bankruptcy, pursuant to the act, without in any way describing the proceedings, except by the names of the creditors, and the words, "pursuant to the act," is insufficient. This objection, which is applicable to all the counts of the indictment, is fatal.

While it is conceded, that, in describing statutory offences, it is, in general, sufficient to follow the words of the statute, and it is equally true, that the strict rules held applicable to felonies are not applicable to those offences against the United States which are by law declared to be misdemeanors, it is none the less true, that an indictment for a misdemeanor must state an offence, and must convey to the accused the information necessary to enable him to make his defence. The present indictment does not do that. It does not state a time, nor a place nor a tribunal before which the alleged proceedings in bankruptcy were taken, subsequent to which, and with reference to which, the accused made the alleged conveyance of his property. It neither alleges any adjudication or proceedings in bankruptcy before a court of competent jurisdiction, nor does it set forth any facts from which the

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

court can see that any court had jurisdiction of the proceedings alluded to. The gist of the offence created by the 44th section of the bankrupt act, is a conveyance with intent to keep property from an assignee in bankruptcy, and the offence cannot be committed unless proceedings in bankruptcy have been commenced in a court of competent jurisdiction, in which an assignee can be appointed; but this indictment fails to aver such proceedings. It does not even aver proceedings in any court. There might have been proceedings in bankruptcy commenced by the creditors named, against the accused, on more than one occasion, and before more courts than one; but this indictment gives the accused no clue by which to determine with reference to which proceedings the charge of fraudulent conveyance is made. For this reason, therefore, I am of the opinion that the indictment is deficient and must be quashed.

Case No. 15,568.

UNITED STATES v. LAUB.

[4 Cranch, C. C. 703.] [1]

Circuit Court, District of Columbia. March Term, 1836.[2]

SET-OFF — TRANSCRIPT FROM TREASURY BOOKS — DISBURSING OFFICER—SECONDARY EVIDENCE —INSTRUCTIONS TO JURY.

1. If there is any evidence in support of a credit claimed by the defendant, the court will not instruct the jury that the defendant is not entitled to such credit.

2. A transcript from the books of the treasury of the United States, charging the balance of a former settlement, is not, per se, evidence upon which the jury can find a verdict for the United States for such balance.

3. If a public disbursing officer has lost his vouchers without fault on his part, and he has produced the best secondary and presumptive evidence in his power, it is for the jury to find whether he has faithfully disbursed the public money which came to his hands.

4. If a document be read by the defendant, by consent, containing a statement of the defendant's conversations, the court will not instruct the jury that such conversations are not evidence of the facts therein stated.

Assumpsit, to account for public money received by the defendant [Andrew M. Laub] for certain purposes. The United States claimed a balance of $11,855.86, unaccounted for. The defendant claimed credits for certain items to the same amount. By the burning of the treasury offices all his vouchers were destroyed; he being an officer in the treasury department, and having left his vouchers in his desk on the 31st March, 1833, the night of the fire. The defendant having offered some evidence in support of his claim for certain items of credit,

Mr. Key, for the United States, prayed the court to instruct the jury that the defendant was not entitled to credit for those items; which instruction THE COURT (THRUSTON, Circuit Judge, contra) refused to give.

THE COURT (THRUSTON, Circuit Judge, contra), instructed the jury, at the prayer of Mr. Coxe, the defendant's counsel, that the account from the treasury department upon which a balance appears against the defendant of $7,769.25, is not, per se, evidence upon which the jury can find a verdict against the defendant for the items in the same which appear to be balances on former settlements. And further (THRUSTON, Circuit Judge, contra) instructed the jury that if from the evidence, they should believe that the defendant had faithfully paid over, for public purposes and within the sphere of his official duty, all the public money which came to his hands, then the plaintiff is not entitled to recover.

The defendant's counsel, with the consent of the attorney of the United States, having read certain parts of a public document, No. 22, containing certain affidavits taken by order of the president, in relation to the burning of the treasury offices, and stating conversations between the defendant and Mr. Ashbury Dickens and Mr. McLane; and after other evidence had been given by the defendant; prayed the court to instruct the jury that the conversations of the defendant with Mr. Dickens and Mr. McLane, read from that executive document by the defendant's counsel, are not evidence to the jury of the facts stated by the said defendant in the said conversations.

Which instruction, THE COURT (THRUSTON, Circuit Judge, contra) refused to give.

Verdict for the defendant. Affirmed by the supreme court of the United States. 12 Pet. [37 U. S.] 1.

Case No. 15,569.

UNITED STATES v. The LAUREL.

[Newb. 269.] [1]

District Court, D. Missouri. March, 1852.

SHIPPING—PUBLIC REGULATIONS—PENALTIES—LIEN.

1. By the second section of the act of congress approved July 7, 1838 [5 Stat. 304], entitled "An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," no forfeiture of the boat is declared, and no express lien given on the boat for the penalty, in case of a violation.

2. The expression in the second section, "for which sum or sums the steamboat or vessel so engaged shall be liable," is simply used to give a remedy against the boat by libel, and was not intended to give a lien expressed or implied.

3. Where a steamboat violated the said second section, but subsequent to such violation, was seized and sold under the Missouri "boat and vessel act," by material men; *held*, that the United

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Affirmed in 12 Pet. (37 U. S.) 1.]

[1] [Reported by John S. Newberry, Esq.]

States had no lien or claim, that could overreach the claim of the material men, who had now acquired title to the vessel.

In admiralty.

The District Attorney, for the United States.

Thomas B. Hudson, for claimant.

WELLS, District Judge. This was a libel and seizure of a steamboat under the act of congress, approved 7th July, 1838, entitled "An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam." The particular violation of the act alleged in the libel was running the boat without a license under the second section, which is as follows: "Sec. 2. That it shall not be lawful for the owner, master or captain of any steamboat or vessel propelled in whole or in part by steam, to transport any goods, wares and merchandise or passengers, in or upon the bays, lakes, rivers or other navigable waters of the United States, from and after the first day of October, 1838, without having first obtained from the proper officer a license under the existing laws, and without having complied with the conditions imposed by this act; and for each and every violation of this section, the owner or owners of said vessel shall forfeit and pay to the United States the sum of $500, one-half for the use of the informer; and for which sum or sums the steamboat or vessel so engaged shall be liable, and may be seized and proceeded against summarily by way of libel in any district court of the United States having jurisdiction of the offence." The St. Louis Marine Railway and Dock Company intervened and filed a claim to the steamboat. The company had furnished materials for, and done work upon the boat, which, under the local law of Missouri, gave it a lien upon the boat. The statute of Missouri gave the lien, and directed the method of proceeding to enforce it. Under and in accordance with its provisions, the claim was filed in the court of common pleas for St. Louis county, and under process from that court the boat was seized by the sheriff before the libel was filed. Subsequently the boat was sold by virtue of the same proceeding, and the company became the purchaser. No exception was taken by the United States to the legality or regularity of these proceedings. No answer was filed or defence made by the owners of the boat, as those who owned the boat at the time she was run without the license. The boat had not been run since the claim of the company was filed in the court of common pleas, nor since the work was done and materials found.

It will be seen by reference to the section above quoted, that there is no forfeiture of the boat declared, nor is there any express lien given for the penalty. On the part of the United States it was insisted by the district attorney that the section expressly declared that the boat should be liable for the penalty, and he insisted further that this liability existed, no matter who might have been the owners at the time the penalty was incurred or to whom the boat might have been transferred afterward; that a lien acquired or sale made subsequent to the act done, although previous to the finding of the libel, could not prevent this proceeding for the penalty. The eleventh section of the act is as follows: "That the penalties imposed by this act may be sued for and recovered in the name of the United States in the district or circuit court of such district or circuit where the offence shall have been committed or forfeiture incurred, or in which the owner or master of such vessel may reside, one-half to the use of the informer, and the other to the use of the United States, or the said penalty may be prosecuted for by indictment in either of the said courts." Has the United States a lien upon the vessel for the penalty? The act gives no express lien. The acts of congress which give the United States a priority of payment in case of insolvency, or in the case of bankruptcy or death, where there is a general assignment of the property of the debtor, have nothing to do with this case. They give the United States a priority of payment out of the proceeds of the property, but give no lien or claim of any kind on the property itself. Nor do they avoid subsequent bona fide conveyances or liens. Act March 3, 1797, c. 20, § 5; [Brent v. Bank of Washington] 10 Pet. [35 U. S.] 596; [Beaston v. Farmers' Bank of Delaware] 12 Pet. [37 U. S.] 102; 1 Kent, Comm. 243–245. It will be seen by reference to section 2, above quoted, that the fine or penalty is against the owners and not against the boat: "The owner or owners shall forfeit and pay to the United States the sum of $500." It will also be seen by reference to that section and section 2, above quoted, that the United States have three methods of proceeding under the act for the enforcement of the penalty: by libel against the boat, and by suit and indictment against the owners. The expression in the second section, "for which sum or sums the steamboat or vessel so engaged shall be liable," is nothing but the phraseology used to give the remedy against the boat by libel, and was not intended to give any lien, either express or implied. "For which sum or sums the steamboat or vessel so engaged shall be liable, and may be seized and proceeded against summarily by way of libel, in any district court of the United States having jurisdiction of the offence." As the fine or penalty is against the owners and not against the boat, without such provision there could have been no proceeding by libel against the boat. The proceeding by libel was given, doubtless, because the owners might not be found or might reside in some other part of the Unit-

ed States, and therefore make a proceeding against them either impossible or very inconvenient and expensive, as witnesses would have to be taken into some other perhaps remote district. Nor would an informer be likely, for an offence committed in one district, to hunt up and prosecute the owner or owners in some other district, or in several districts. I know of no law, and none was cited, giving the United States a lien on any property for a fine or penalty. No case has been cited, and I know of none, wherein it has been held that the United States have such lien. If the case be likened to that of a foreign attachment, then the attachment first served holds the property, although the United States may be a party. In this case the property was first seized by the interveners. If it be likened to the case of an execution, the same principle prevails and governs. If it be like the case of several liens held by different persons, then in general, the oldest lien will have precedence. Here the claimant had a lien and the United States had no lien.

The case of a vessel declared by act of congress to be forfeited for certain violations of law—and there are many such—is somewhat analogous to the present case, but much stronger in favor of the United States; in the case at bar there is neither forfeiture nor lien There is in the other case, not only a penalty, and the vessel declared liable, but the vessel is declared forfeited to the United States. The act of congress of December 31, 1792 [1 Stat. 287], declares that if a false oath be taken in order to procure the registry of a vessel, the vessel or its value shall be forfeited. The United States filed a libel and seized the Anthony Mangin, as forfeited under this act. After the offence was committed, but before the seizure by the United States, the vessel was sold to an innocent purchaser. The purchaser interfered. The district court of the United States for the district of Maryland held his claim good—and that the forfeiture did not overreach the subsequent alienation. U. S. v. The Anthony Mangin [Case No. 14,461]. In this decision the United States acquiesced. The owner, who took the false oath, became bankrupt, and the United States brought suit against his assignee for the price or value of the vessel, it having been sold as aforesaid. The supreme court of the United States decided against this claim, and held that the United States had no claim to the vessel before seizure. The case is very like this case. There the vessel, or its value, was declared forfeited. The United States might proceed against the vessel or against the owner for the value. In this case the United States might proceed against the vessel or might proceed against the owners by suit or indictment. The supreme court held that until the United States elected to proceed against the vessel, they had no claim to it; and consequently, if the vessel were sold before they so elected, the sale would be valid. U. S. v. Grundy, 3 Cranch [7 U. S.] 337. The effect of a forfeiture on the subsequent claims of material men having a lien, came before the supreme court for consideration in the case of The St. Jago de Cuba, 9 Wheat. [22 U. S.] 416, and that court expressly decided that such claims, when fair, were not overreached by a previous forfeiture, and that the same principle applied to the claims of seamen for wages, to claims for salvage, and generally to maritime contracts. The district court of the United States for Wisconsin, in the case of The Celestine [Case No. 2,541], held that the lien of material men was preferred to the claim of a bona fide purchaser without notice of the lien.

I think I might rest this case on the foregoing observations and authorities; but I will remark that if congress had intended the United States should have a lien on the vessel for the penalty, it would have been easy to say so. They have not so provided, either in this, or, I believe, in any other case. And the reasons must be obvious. Who would purchase a vessel, assist in running her, or repair or give her an outfit, if the United States could deprive them of their just claims, because of some violation of law of which they were wholly ignorant? Even if they knew of acts committed in violation of law, they could not know that the United States would ever proceed for the penalty. Or if the United States were disposed to proceed for the penalty, who could tell whether they would proceed against the vessel rather than against the owners? Such lien would not only be unjust but would be highly injurious to commerce and navigation. I think, therefore, that the United States have no lien or claim that can overreach the claim of these material men, who have now acquired title to the vessel. The claim of the St. Louis Marine Railway and Dock Company is sustained, the libel dismissed and the bond given by the claimants, canceled.

Case No. 15,569a.

UNITED STATES v. LAVERTY et al.

[3 Mart. (O. S.) 733.]

District Court, D. Louisiana. 1812.

ALIEN INHABITANTS OF TERRITORY—ADMISSION AS STATE—CITIZENSHIP.

Inhabitants of the territory of Orleans became citizens of Louisiana and of the United States by the admission of Louisiana into the Union.

[See Boyd v. State of Nebraska, 143 U. S. 135, 12 Sup. Ct. 375.]

BY THE COURT. These persons have been arrested by a warrant, issued by me, on an affidavit made by the marshal, that he believes them to be alien enemies, who have neglected or refused to obey the notification of the government respecting them.

They deny that they are alien enemies, and insist that, as they were bona fide inhabitants of the territory of Orleans at the time of its admission into the Union, they became citizens of Louisiana, and consequently citizens of the United States. It is well known, that some of these persons have been discharged by one of the judges of the state; but as the marshal and many others are seriously impressed with a belief that they are not citizens, but aliens, it has been deemed proper to obtain the opinion of the judge of the United States.

It is contended by the attorney of the United States that congress alone have power to pass laws on the subject of the naturalization of foreigners, and that, by the constitution, it is declared that the rule for their admission must be uniform. On the other hand, it is said that congress have the power to admit new states into the Union; that this power is not inconsistent with nor repugnant to the other; that the first rule well applies where individual application is made for admission, but is not restrictive of the other power to admit at once great bodies of men, or new states, into the federal Union.

The power to admit new states, is expressly given by the third section of the fourth article of the constitution. It has been frequently exercised, and on the 30th of April, 1812, Louisiana was admitted into the Union, upon the same footing with the original states. In what manner has this power been exercised with respect to other states? On the 30th of April, 1802, the inhabitants of the eastern division of the territory northwest of the Ohio were authorised to form for themselves a constitution and state government. This was done, and they were afterwards admitted into the Union. Previous to their admission, the people of that country was governed by what is commonly termed the Ohio ordinance. That the population consisted partly of citizens of the United States and partly of foreigners, may be collected from the provisions of that instrument for their government. That a great body of aliens resided among them is known to many. It is declared, that possessing a freehold of fifty acres of land, having been a citizen of one of the states, and being resident in the district,—or the like freehold, and two years' residence,—shall be necessary to qualify a man as an elector. Here there are two descriptions of persons: (1) Citizens of the United States, with a freehold and actual residence; and (2) persons not citizens, with a freehold and two years' residence. Were they not all equally inhabitants? And, in the act of admission, is there any distinction made? The inhabitants, then, who were authorized to form a state government for themselves, must have been all the real inhabitants of the country; citizens or foreigners, and, after the admission of the state into the Union, must have equally participated in all its advantages, because, if a party only were entitled to its benefit, all the inhabitants had not formed a government for themselves. Can we, for an instant, believe that a wise, just, and liberal government, like that of the United States, would invite any portion of people, who were enjoying self-government in a considerable degree, to place themselves in a situation where they would be entirely deprived of it? I can have no doubt that all the inhabitants of the state of Ohio were admitted citizens of that state by their admission into the Union.

Let us, then, examine and discover (if possible) any difference between the case of that state and of this. Louisiana, it is said, was admitted under the treaty of Paris, by which it is stipulated, that the inhabitants shall be incorporated into the Union of the United States, and admitted, as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States. It is, then, contended by some, that the word "inhabitants," used in the act of February, 1811, applies solely to those who were inhabitants in 1803. On the 11th of February, 1811, congress passed an act "enabling the people of the territory of Orleans to form a state government." It commences by declaring, that the "inhabitants" of all that part of the country ceded under the name of Louisiana, shall be authorized to form for themselves a state government. It then goes on, and describes two classes of inhabitants,—First, citizens of the United States, and all persons having in other respect the legal qualifications to vote for representatives in the general assembly. Those qualifications are the same as those of Ohio,—two years' residence and a freehold, for those who are not citizens. We here find no distinction between the old inhabitant and the new; the man who has been here two years, and has fifty acres of land, let him be citizen or alien, is authorized to join in making a constitution for all the inhabitants of Louisiana. The law, then, evidently does not mean merely "the inhabitants at the date of the treaty"; and it will be found that the only question in this case is, whether congress had a right to include any others than citizens in their act of admission. I have already shown that they have exercised this right heretofore; that, in the case of the state of Ohio, it was not disputed; and it does not become us, at this time, to question it.

I shall now consider some of the arguments that have been urged by the district attorney and his colleague. Although an attempt was made to distinguish between the two classes of inhabitants (not originally citizens of the United States), yet, in truth, their arguments go as well to exclude the first as the last class. It is contended, that the only mode by which an alien can be naturalized is by

a compliance with the uniform rule; that this is the only constitutional mode; that the expression in the treaty, that "the inhabitants shall be admitted according to the principles of the constitution," means, according to the uniform rule required by the constitution. If so, the Creoles of Louisiana are not citizens yet, for not one of them has complied with that law. But one of the gentlemen has observed, "Here is a treaty, and treaties are paramount." I can never subscribe to the doctrine, that treaties can do away any part of the constitution. I will go as far as any one in supporting and observing them in anything not repugnant to it. If, then, the uniform system be the only constitutional one, any other must be unconstitutional, and though introduced by treaty, is void. If this were the only constitutional mode, I should tremble for the fate of the Louisianians; but, fortunately for them and for others, it is not the only one. The expression under the treaty is, that they shall be admitted according to the principles of the constitution; that is, with the consent of congress, which shall be obtained as soon as possible; and it has been since given. By this construction, every part is reconciled; and if congress, in their liberality, included others who have since settled in the country, they had a right to do so.

It is said, that the law respecting alien enemies declares, that they shall all be apprehended, unless actually naturalized; and it is contended, that the only actual naturalization is by the uniform rule. This does not follow. If it did, there is scarcely a Creole who, in case of a war with France or Spain, would not be subject to its penalties, for none of them have complied with it. The government has a right, by treaty, or by the admission of a new state, to naturalize, and such naturalization is equal to the other. Let us suppose, what is honestly believed by many, that, although the form of government changed, yet the political character of individuals remained the same; let us ask, who would compose the state? For (as the learned gentleman at the bar observed) the state does not consist of land, water and trees. It is composed of men, women and children. Some say, "The old Louisianians, and the few citizens of the United States, who have settled since the treaty." "No," say others, "the old Louisianians have not been admitted according to the uniform rule, and they have nothing to do with it, and as to the new comers, not citizens, they are out of the question." The uniform rule would unquestionably place the original citizens of the United States in a more important situation. It would give them all the power of the country. But the government of the United States intended otherwise. They called upon the actual inhabitants of the country to form a government for themselves. They promised them, if they should not disapprove of it, that all of them should enjoy its advantages, and be members of it. Who those inhabitants were, will be a subject of strict inquiry. It has been observed, that it will be almost impossible to fix any certain rule on this subject, but it appears to me there will be no difficulty. An inhabitant is one whose domicile is here, and settled here, with an intention to become a citizen of the country. I conclude in agreeing with the judges of the late superior and state courts that by the several acts of congress, and the admission of the state of Louisiana into the Union, all the bona fide inhabitants became citizens of this state. Desbois' Case, 2 Mart. (La.) 285.

Prisoners discharged.

NOTE. In pursuance of this decision, a considerable number of persons, born in the dominions of the king of the United Kingdom of Great Britain and Ireland, who had resided in Louisiana, under the territorial government, ceased to be considered by the marshal as British subjects, and as liable to the restrictions imposed on alien enemies.

UNITED STATES (LAW v.). See Case No. 8,131.

Case No. 15,570.

UNITED STATES v. LAWHEAD.

[10 Chi. Leg. News, 60; 2 Cin. Law Bul. 263, 268.]

District Court, N. D. Ohio. 1877.

RETARDING THE MAILS—EVIDENCE.

Indictment [against Harvey A. Lawhead] for obstructing the passage of the United States mail. Trial to a jury and verdict of guilty.

Judge WELKER, in charging the jury, made the following points:

First. To convict the defendant, it must appear that Lundy, the carrier, was, at the time stricken down by the defendant, in charge of the mail to deliver on the train, and was there with it to deliver and receive the mail to be carried to the postoffice.

Second. That the defendant knew that he was at the depot for that purpose, as such carrier.

Third. That the passage of the mail was obstructed or retarded by the act of the defendant, and that he willfully did the act that obstructed or retarded the mail.

Fourth. The intent may be shown by the result of the act itself, under the rule that a man intends the reasonable result of his acts.

Fifth. That where the act which creates and causes the obstruction is itself unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object.

Case No. 15,571.

UNITED STATES v. The LAWRENCE.

[Nowhere reported; opinion not now accessible.]

Case No. 15,572.

UNITED STATES v. LAWRENCE.

[13 Blatchf. 211.] [1]

Circuit Court, S. D. New York. Dec. 8, 1875.

FORGERY—CUSTOM HOUSE PAPERS—OWNER'S OATH—INDICTMENT.

1. Under section 1 of the act of April 5, 1866 (14 Stat. 12), now section 5418 of the Revised Statutes of the United States, which provides a penalty for the forging of "any bid, proposal, guarantee, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States," the words "other writing" includes an owner's oath required to be taken before making an entry of goods at the custom house, and an import entry, and an importer's bond.

[Cited in U. S. v. Huggett, 40 Fed. 642; U. S. v. Albert, 45 Fed. 557.]

[Quoted in Edgecomb v. His Creditors (Nev.) 7 Pac. 540.]

2. The fact that section 3 of the act of March 3, 1863 (12 Stat. 739), now section 5445 of the Revised Statutes of the United States, punishes as a misdemeanor all acts done in effecting an entry of goods, furnishes no reason why forgery of writings used in entering goods at the custom house should not be punished under section 1 of the act of April 5, 1866.

3. It is not necessary that an indictment founded on section 1 of the act of 1866, and alleging the forgery of writings used in entering goods at the custom house, should allege the existence of the goods mentioned in the writings.

[This was an indictment against Charles L. Lawrence.]

Benjamin B. Foster, Asst. U. S. Dist. Atty.

Benjamin F. Tracy, for defendant.

BENEDICT, District Judge. This case comes before the court upon a demurrer to the indictment. The indictment contains nine counts, in sets of three each. The first count of each set charges the forging of a certain writing for the purpose of defrauding the United States. The second count of each set charges the uttering of a similar writing, with like intent. The third count of each set charges, that the defendant did transmit to, and present at, an office of an officer of the United States, a writing similar to that set forth in the other counts. In each count the writing is set forth at length. The writing set forth in the first set of counts is what is known as an owner's oath, required by law to be taken before making an entry of goods at the custom house. The writing set forth in the second set of counts is an import entry. The writing in the third set of counts is an importer's bond. The indictment is framed under the act of April 5, 1866 (14 Stat. 12), now found reproduced in section 5418 of the United States Revised Statutes, which provision provides a penalty for the forging of "any bid, proposal, guarantee, official bond, public record, affidavit or other writing, for the purpose of defrauding the United States."

The first position taken in support of the demurrer is, that the rule of construction, according to which general words are restricted by particular words, should be applied to this statute, and the meaning of the words "other writings," in this provision, restricted so as to exclude from the operation of the statute such writings as are set forth in this indictment. The rule here invoked is not an arbitrary rule, but one of many resorted to for the ascertainment of the intent of the legislator, when such intent is not otherwise apparent. To apply it to all general words would often defeat the intention of the legislator, and such, in my opinion, would be its effect if applied to this statute. Nothing in the language used, nor in the mischiefs intended to be remedied, nor in the circumstances under which the statute was enacted, indicates that the words "other writings" were used in a restricted sense, but the contrary. Various writings are mentioned, but these writings have no common object, nor any characteristic features common to all, from which to infer an intention to restrict the effect of the provision to any particular class of writings. The language of the statute furnishes, therefore, no criterion by which to restrict its general words. This statute, at the time of its enactment, its title and its language show, was passed in consequence of the decision of the circuit court in the case of U. S. v. Barney [Case No. 14,524]. In that case, the defendant was charged under the act of March 3, 1823 (3 Stat. 771), with forging a bond similar in character to the one set out in this indictment. The court held that the bond was not covered by the act of 1823, because that act was limited to writings forged for the purpose of obtaining money of the United States. The forging of all writings other than those made for the purpose of obtaining money of the United States being found to be unpunished by the act of 1823, the act of 1866 was passed almost immediately thereafter, and in consequence of the announcement of that decision. The object of the act was to cover the forging of writings found to be without the scope of the act of 1823. This is made apparent by comparing the title and the language of the act of 1866 with the act of 1823.

It is further to be observed, that the act of 1823 considered by the court in the Case of Barney, contains the same general words found in the act of 1866, used in the same way. But it was not contended in that case that the bond counted upon was not covered by these general words, while the tenor of the opinion of the court plainly shows that the general words "other writings," in the act of 1823, were considered as having their natural and general meaning, and not as restricted by the particular words used in connection therewith. The opinion of the court upon the act of 1823 affords, therefore, strong support to this indictment.

Furthermore, inasmuch as the act of 1866, enacted under the circumstances stated, uses

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

the words of the act of 1823, now under consideration, the inference must be, that those words were intended to be understood in the new act as they had been understood by the court in the former act. The intention of the legislator being thus disclosed, there is no room, therefore, for the application of the rule of ejusdem generis.

But, it is said, some limitation of the general words of the act of 1866 is rendered necessary by the provisions found in the third section of the act of March 3, 1863 (12 Stat. 739), reproduced in section 5445 of the Revised Statutes. The argument is this: The act of 1863 punishes as a misdemeanor all acts done in effecting an entry of goods. The writings set out in this indictment appear, on their face, to be elements of the act of entering goods, and, if held to be covered by the act of 1866, an absurdity will result, because, while the completed transaction is punished as a misdemeanor, a part of it may be selected out and be punished as a felony. Therefore, it is said, the statute of 1866 must be construed as not applicable to any writing within the scope of the statute of 1863, according to which the act here complained of would be punishable under the act of 1863, and not under the act of 1866. In respect to this argument, assuming, for the present, that the offences created by the statute of 1863 are misdemeanors, and those created by the statute of 1866 are felonies, it is to be observed, that the statute of 1863 does not necessarily include an act of forgery, nor, indeed, any act done in the preparation of papers preliminary to an entry of goods. A full and proper effect is given to the act of 1863, by construing it as applicable to the act of entering goods, and of aiding in making an entry. Moreover, the entry, to be punishable under the statute of 1863, must be made at less than the true weight or measurement, or by a false classification as to quantity or value, or by the payment of less than the amount of duties legally due. But, none of these features appear here, and it cannot, therefore, be said, that the acts here complained of are punishable under the statute of 1863. Besides, it is plain that an act which, under some circumstances, may be an element of a transaction also punishable as a substantial offence, may, by itself, be an offence when made such by a statute. It would hardly be supposed that a defence to an indictment for forgery would be made out by showing that the forged paper was used to extort money, although, in such case, an indictment would lie for the misdemeanor as well as for the felony; and no absurdity arises although the punishment attached to the felony be greater than that prescribed for the misdemeanor.

It must also be remarked, that, to complete the offence created by the statute of 1866, it is not necessary that the United States should have been actually defrauded. The act of forgery, done with the intent to defraud the United States, is the act punishable by the statute of 1866, and the statute takes effect when the forgery is committed, although no entry of goods be made, or any other act done towards the completion of the fraud; and this consideration appears to answer the remaining ground urged in support of this demurrer, that the indictment is bad because it does not aver the existence of such goods subject to duty as are referred to in the writings set out. The existence of such goods would naturally appear in proving an intent to defraud the United States, but it is possible that the forgery of those writings with the purpose of defrauding the United States, may be shown without proof that, in fact, there were at the time any such goods.

Moreover, in determining whether the writing set forth is sufficient, without extrinsic averments, to sustain a charge of forgery, "all the extrinsic circumstances tending to the fraud, which are implied in the writing, shall be taken to exist." People v. Stearns, 21 Wend. 409. Certainly, the existence of such goods is implied in the writings set forth in this indictment. It is not necessary, in an indictment for forgery, to set out such a state of things existing in fact, that the writing, if genuine, would necessarily or probably affect a right of the United States. When the writings appear, by their language, to be such that they might have the effect to defraud the United States, it is sufficient to set them out, averring generally the intent to defraud the United States, but omitting all extrinsic circumstances. See People v. Stearns, above referred to, and the cases there cited.

For these reasons I am of the opinion that the demurrer must be overruled.

[For further proceedings under this indictment, see Case No. 15,573.]

Case No. 15,573.

UNITED STATES v. LAWRENCE.

[13 Blatchf. 295.] [1]

Circuit Court, S. D. New York. March 28, 1876.

CRIMINAL PLEADING — FIRST FAULT IN PLEADING — EXTRADITION — IMMUNITY FROM TRIAL FOR OTHER OFFENCES — PRESIDENT'S ORDER — EFFECT OF.

1. L., to an indictment for forgery, pleaded want of jurisdiction in the court, setting up that he was arrested in Ireland, upon a requisition made by the United States, and was charged with the crimes of forging and uttering a bond and affidavit; that, in pursuance of the British extradition act of August 9, 1870 (33 & 34 Vict. c. 52) by arrangement between the United States and Great Britain, it was agreed, in respect to his surrender, that he should not, until he had been restored, or had an opportunity of returning, to the British dominions, be detained or tried within the United States for any offence committed prior to his surrender, other than the extradition crimes of forging and uttering said bond and affidavit; that, on the faith of said agree-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

ment, he was conveyed within the United States, under an extradition warrant which recited that he was accused of said crimes; that he is subject to be tried for said crimes, and for none other; that the president had directed the district attorney to proceed against him on no charges except those on which he was extradited; that the offences in the indictment are not those on which his surrender was grounded, and not those specified in the said warrant; that he has been held in custody for the crimes specified in said warrant, but was not tried for either of them; and that the court has no jurisdiction to try the indictment, until a reasonable time shall have elapsed, after his trial for crimes specified in said warrant, that he may have an opportunity to return to the British dominions. To this plea there was a replication; to the replication there was a rejoinder; and to the rejoinder there was a general demurrer. *Held*, in a criminal case, on a demurrer to a pleading, judgment is to be given against the party who has committed the first fault in pleading.

[Cited in U. S. v. Rauscher, 119 U. S. 425, 7 Sup. Ct. 243; Re Fitton, 45 Fed. 472.]

[Disapproved in Re Hope (Ex. Ch.) 10 N. Y. Supp. 30. Cited in Ker v. People, 110 Ill. 632; People v. Eberspacker, 29 N. Y. Supp. 796.]

2. Extradition proceedings do not, by their nature, secure to the person surrendered, immunity from prosecution for offences other than the one upon which the surrender was made.

[Cited in U. S. v. Johnson, Case No. 15,487; Re Miller, 23 Fed. 33; Ex parte Hibbs, 26 Fed. 429.]

[Cited in State v. Stewart, 60 Wis. 590, 19 N. W. 430; Com. v. Hawes, 13 Bush, 703; Hackney v. Welsh, 107 Ind. 255, 8 N. E. 142; State v. Plants, 25 W. Va. 122; State v. Vanderpool, 39 Ohio St. 276.]

3. There is no provision in the treaty between the United States and Great Britain, of August 9, 1842 (8 Stat. 572), which confers such immunity; nor is it conferred by the act of August 12, 1848 (9 Stat. 302), or by the act of March 3, 1869 (15 Stat. 337).

4. The British extradition act of August 9, 1870 (33 & 34 Vict. c. 52), has no binding force on the courts of the United States, in regard to the construction of the treaty of 1842.

5. It does not appear that the executive department of either the United States or Great Britain has construed the treaty of 1842 as conferring such immunity.

6. No order of the president can have any legal effect to restrict or enlarge the jurisdiction conferred by law on the courts.

7. The agreement set up in the plea is of no avail as an objection to the jurisdiction of the court.

[Cited in Ex parte Ah Men, 77 Cal. 202, 19 Pac. 381; State v. Brooks (Mo. Sup.) 5 S. W. 263.]

[This was an indictment against Charles L. Lawrence upon the charge of forgery. Demurrer to the indictment was previously overruled. Case No. 15,572.]

Benjamin B. Foster, Asst. U. S. Dist. Atty.

Benjamin F. Tracy, for defendant.

BENEDICT, District Judge. This case comes before the court upon a demurrer interposed by the United States to a rejoinder filed by the defendant. The proceedings commence with an indictment charging the accused with several offences, all being forgeries, alleged to have been committed within the jurisdiction of this court, and all, by statute, offences against the United States. The accused was arrested within this district, by virtue of a bench warrant issued out of this court upon the indictment found, and thereupon, and on being required to plead, interposed a special plea to the jurisdiction of the court, in which he sets up that he was born a citizen of Great Britain, but had resided within the United States from the year 1847 to the year 1875, when he departed from the United States with intent to take up his residence in Great Britain and resume his duty and allegiance as a subject of her majesty the queen of Great Britain and Ireland; that, on the 7th day of March, 1875, in Ireland, upon a requisition made in behalf of the government of the United States, he was seized and thereafter charged with the crimes of forging and uttering a bond and affidavit purporting to be the bond and affidavit of one F. L. Blanding, and thereupon such proceedings were had upon said charge, that, in pursuance of the extradition act of the parliament of Great Britain, passed August 9, 1870 (33 & 34 Vict. c. 52), by arrangement between the government of the United States and the government of Great Britain, it was agreed, in respect to his surrender, that he should not, until he had been restored, or had an opportunity of returning, to her majesty's dominions, be detained or tried within the United States for any offence committed prior to his surrender, other than the extradition crimes of forging and uttering the said bond and affidavit, and thereafter, by force of said arrangement and agreement, and upon the faith thereof, an extradition warrant was issued, reciting that the defendant was accused of the crimes of forging and uttering a certain bond and affidavit within the United States, by virtue of which warrant the accused was conveyed within the jurisdiction of the United States, where he is subject to be tried for the crimes of forging and uttering the said bond and affidavit, and for no other crime or charge whatsoever. In this plea reference is also made to the act of congress of March 3, 1869 (15 Stat. 337), in pursuance of which it is averred, that the president of the United States, on the 21st of May, 1875, issued his order directly to the district attorney of the United States for the Southern district of New York, wherein said attorney was directed to stay all proceedings against the accused, except upon the charges upon which he was extradited, until further order. After setting out the order in full, and averring that no further order has been made by the president, the plea goes on to set out a direction from the attorney general of the United States, addressed to the district attorney for the Southern district of New York, bearing date December 22, 1875, which order of the president and direction of the attorney general

the plea avers were made for the purpose of giving the defendant security against "lawless violence," and for the purpose of enforcing in his favor the rights to which he is entitled by virtue of the treaty of 1842, the act of congress of 1869, the act of parliament of 1870, and the arrangement entered into as aforesaid. The plea then avers, that the offences with which the accused is charged in the indictment are not the offences on which his surrender to the United States was grounded, but are other and different crimes from those specified in said warrant of extradition; and that he has been held in custody for the crimes specified in the warrant of extradition, but he has not been tried for either of said offences; wherefore the accused insists that this court has no jurisdiction to try the present indictment, until a reasonable time shall have elapsed, after his trial for the crimes specified in the extradition warrant, that he may have an opportunity to return to her Britannic majesty's dominions.

'To this plea the United States filed a replication wherein it is admitted that the accused has been held in custody for the crimes specified in the warrant of extradition, and that he has not yet been tried for the said crimes. It is then averred, that, in the extradition proceedings against the accused, he was not, as in the plea alleged, charged with forging and uttering a bond and affidavit purporting to be the bond of one F. L. Blanding, but that, in said proceedings, evidence of the forging of twelve bonds was offered and admitted and made the basis of the claim of the United States for his surrender. It is then averred, that no arrangement was made between the government of the United States and the government of her Britannic majesty, express or implied, whereby it was provided and agreed that the accused should not, until he had been restored to, or had an opportunity of returning to, her majesty's dominions, be detained or tried for any offence other than the extradition crime on which his surrender was claimed; and it is insisted, that, by the laws of Great Britain and of the United States, as well as by the practice of both parties to the treaty, no limitation exists as to the number and character of the offences for which a person extradited may be tried. The order of the president, set out in the plea, is admitted, but it is denied that such order was issued, or intended to be issued, in pursuance of the act of congress of March 3, 1869, and, after admitting the direction of the attorney general of the United States, of December 22, 1875, set out in the plea, the replication proceeds to set out various and sundry other subsequent communications from the attorney general to the district attorney, and from the district attorney to the attorney general, by letter and by telegraph, in respect to the accused, whereby it is claimed the last instructions of the attorney general are shown to be to move the trial of the present indictment; and the plea concludes with a general averment, that the offences in the indictment are the same specified in the warrant of extradition, and are not other and different offences, and that the district attorney is not prohibited by any order or direction, nor is there any contract which should or can restrain him, from moving the trial of this indictment. To this replication the defendant filed a rejoinder, in which the facts set forth in the plea are again set forth, without substantial change. To this rejoinder the government filed a general demurrer; and the cause is thus before the court on the demurrer.

In determining the questions of law thus presented by these extraordinary pleadings, it is necessary, at the outset, to ascertain what questions are open for determination, inasmuch as it is urged in behalf of the defendant that only the pleading demurred to is before the court for its judgment upon it, and it is insisted that the rule of pleading in civil cases, that judgment is to be given against the party committing the first fault, is not the rule in criminal cases. Upon this question my opinion is, that the rule of pleading in criminal and civil cases is the same. The same reason for the rule exists in both classes of cases; and, although no criminal case has been cited where the rule has been applied, the rule is stated by Archbold, without qualification, as the rule applied in criminal cases. He says (16th Eng. Ed. p. 122): "A demurrer has the effect of laying open to the court not only the pleading demurred to, but the entire record, for their judgment upon it as to the matter of law; and, if two or more of the pleadings be bad in substance, the court will give judgment against the party who committed the first fault." This rule is applied the more readily in the present instance, because the examination of the issues of fact raised by the plea and replication is unnecessary, and ought not to be pursued unless it were indispensable to the protection of the legal rights involved. The entire record being thus before the court, I pass at once to the plea, and proceed to determine whether the facts there stated are sufficient in law to show that this court has no jurisdiction to try the present indictment.

In disposing of the questions argued before me upon this demurrer, I first notice the position taken, that all extradition proceedings, by their nature, secure to the person surrendered immunity from prosecution for offences other than the one upon which his surrender was made. This question is not open in this court. It was decided in U. S. v. Caldwell [Case No. 14,707]. That determination has since received strong support from the decision of the court of appeals of this state, in Adriance v. Lagrave, 59 N. Y. 110, where the existence of any such immunity was denied in a civil case; and it

should be noticed that the present circuit judge of this circuit took part in the decision of the court of appeals, being then a member of the court. This ground of defence is, therefore, dismissed, with the remark, that an offender against the justice of his country can acquire no rights by defrauding that justice. Between him and the justice he has offended no rights accrue to the offender by flight. He remains at all times, and everywhere, liable to be called to answer to the law for his violations thereof, provided he comes within the reach of its arm.

But, here it has been contended, that the accused has such immunity by reason of the provisions of the treaty of August 9, 1842 (8 Stat. 572), under which his surrender was made, which, it is correctly said, is a law of the United States binding upon the courts. The decision in Caldwell's Case is decisive of this question also, for, Caldwell was surrendered under the treaty of 1842. But, as no argument was made in Caldwell's Case based upon the provisions of this particular treaty, the argument now made in support of this construction of the treaty may properly be examined.

At the outset, let it be noticed, that no language is used in the treaty which can be supposed to confer the immunity here claimed. On the contrary, the language of the treaty is calculated to repel the idea, for, it declares that the offender shall be "delivered up to justice"—a significant and comprehensive expression, plainly importing that the delivery is for the purposes of public justice, without qualification.

It is, however, argued, that both the parties to this treaty have placed a construction upon its provisions, which confers the immunity for which the accused contends; and reference is made to the acts of congress of August 12, 1848 (9 Stat. 302), and March 3, 1869 (15 Stat. 337; Rev. St. U. S. §§ 5270–5277), and to the British extradition act of August 9, 1870 (33 & 34 Vict. c. 52), as supporting the assertion.

The act of congress of 1869 is a general law intended for the protection of extradited offenders; but, the protection it confers is expressly limited to cases of "lawless violence." It is true, that it assumes, as well it may, that the offender will be tried for the offence upon which his surrender is asked, but there are no words indicating that he is to be protected from trial for all other offences. The absence of any provision indicating an intention to protect from prosecution for other offences, in a statute having no other object than the protection of extradited offenders, is sufficient to deprive of all force the suggestion that the act of 1869, as a legislative act, gives to the treaty of 1842 the construction contended for by the accused.

So of the act of 1848, the provision of which relied upon (section 3) is, that it shall be lawful for the secretary of state to order the offender "to be delivered to such person or persons as shall be authorized, in the name and on behalf of such foreign government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly." It does not seem reasonable to suppose that it was the intention of congress, by the above language, to give a legislative construction to the existing treaty of 1842. The provision of the act of 1848 is within the broad provision of that treaty, but does not restrict the operation of that provision; and it may be safely assumed, that, if the intention to limit the effect of, or give a construction to, that or any other treaty, had been entertained—assuming such a function to belong to a statute of this character—that intention would have been plainly expressed.

The acts of congress referred to, therefore, fail to afford a legislative construction of the treaty, in the particular under consideration. It is still more difficult to find support for the doctrine of the defence in the provisions of the British extradition act of 1870. How can it be, that, without any action on the part of the treaty-making power of the United States, the parliament of Great Britain, by a statute of Great Britain passed 28 years after the treaty of 1842, can engraft upon that treaty a provision of immunity not found in the treaty, and which must thereafter be enforced by courts as part of the laws of the United States? The effect proper to be given by the executive department of the government to any condition found in an extradition statute of Great Britain, to which the government of the United States has assented in any particular case, is not under consideration. Here, the question is judicial, and it is, whether the British act of 1870, by reason of its subject-matter, becomes a law of the United States, and, as such, affords a legislative construction of this treaty, binding upon the courts of the United States. Upon such a question no time need be spent, and it is dismissed with the observation, that it would appear that the English courts incline to the opinion that the act of 1870 has no effect in England, even, to limit the operation of the treaty of 1842, as is seen by the opinions delivered in the court of queen's bench, in Ex parte Bouvier, 27 Law T. 844. The words of the lord chief justice, in that case, are: "I see plainly what was the intention of the legislature—that is to say, it was intended," by the act of 1870, "while getting rid of the statutes by which the treaties were confirmed, to save the existing treaties in their full integrity and force."

Nor is it made to appear that any such construction of the treaty of 1842 has been adopted by the executive department of either government. An agreement for such immunity in the present instance is set up by the plea. But, it is competent for the government of the United States to enter in-

to such an agreement with the government of England, in the absence of any provision for immunity in the treaty; and the demand for such an agreement on the one side, as well as the giving thereof on the other, leads to the inference that no such protection is afforded by the treaty itself. A single instance of such an agreement does not, therefore, help the argument. The understanding of the treaty by the executive department, is better shown by the action taken or omitted in the cases that have arisen where there has been no agreement. Thus, in the case of Heilbronn, who was surrendered by the United States upon the request of England, for an extradition crime, a trial was had in England for an offence not provided for in the treaty, without interference by the executive there, and without complaint from the government of the United States. So, also, Burley, an offender surrendered by England to this government, was put upon trial in this country for an offence other than the one upon which he was extradited, and, the case being called to the attention of the law officers of the crown, it was considered, that, "if the United States put him bona fide upon his trial for the offence in respect of which he was given up, it would be difficult to question their right to put him upon his trial also for piracy, or any other offence which he might be accused of committing within their territory, whether or not such offence was a ground of extradition, or even within the treaty." Clarke, Extr. (2d Ed.) p. 90, note. No case has been referred to where the right above spoken of has been questioned by the British government. On the contrary, if I am correctly informed, such right has not hitherto been denied in England.

As to the effect of the fact of a previous trial for the offence for which the offender was given up, to which allusion is above made, it is plain that such fact is immaterial in determining the judicial question, where legal immunity is set up by way of defence in a prosecution for other offences, however important that fact might be, as evidence of good faith, in determining the political question, when it arises.

It may be added, that the action of the executive department of the government of the United States, in the cases where extradicted offenders have been tried in this country for offences other than those upon which their surrender had been asked, has a significant bearing upon the legal question under consideration, because, in criminal cases, as distinguished from civil cases, the executive, by reason of the power conferred by law to control the prosecuting officer, as also its power to pardon, is not confined to a consideration of the political question alone, but may also act upon a determination of the judicial question.

But, it is further said, that the British act of 1870 amounts either to an abrogation of the extradition section of the treaty of 1842, or to a modification of the provisions; and that, inasmuch as, by the eleventh section, the government of Great Britain could at any time abrogate that portion of the treaty, the act of 1870, if considered by the government of the United States as an abrogation, would have been so declared, and, in the absence of such a declaration, must be considered to be acquiesced in by the government of the United States, as its construction of the treaty, and becomes a part of the treaty, binding upon the courts. This proposition is answered by what has been already said in regard to the effect of the British act of 1870, and the action of the government of the United States in the cases which have hitherto arisen. Moreover, if the action of the two governments, and the act of 1870, be given the utmost effect possible in favor of the accused, all that can be extracted from them is an implied engagement to afford protection to persons extradited in pursuance of the treaty, from prosecution for causes other than those upon which their surrender was asked —which addresses itself to the political, not to the judicial, department. It is not intended to suggest that such can be their effect, but simply to express the opinion, that, in any aspect, they have no greater effect, and in view of the language of the treaty, cannot be relied on as affording a legislative or executive construction of that instrument, binding upon the courts.

It may, therefore, without hesitation, be declared, that the claim of legal immunity, here made, is without foundation in the treaty of 1842. In support of this conclusion, reference is made to the authority of the court of appeals of the state of New York, which high court, in Lagrave's Case, was called on to consider the effect of this same treaty.

There remains to be examined that portion of the defence which is based upon the order of the president and the direction of the attorney general, set out in the plea. In regard to this defence, it is sufficient to say, that no order of the president, nor direction of the attorney general, can have any legal effect to restrict or to enlarge the jurisdiction conferred by law upon the courts. The courts, in determining the extent of their jurisdiction, look to the law, and, within that jurisdiction, they are absolutely free from the control of any other department of the government. See the remarks of Blatchford, J., in U. S. v. Blaisdell [Case No. 14,608]. It should be observed, in this connection, that it is evident that neither the order of the president, nor the communication of the attorney general to the district attorney, of December 22, 1875, set out in the plea, were intended to be resorted to as matter of defence, but are official communications intended solely for the consideration and guidance of the officer to whom they were addressed, and, presumably, have no reference whatever to judicial action. The mass of letters and telegrams with which the record is encumbered are,

therefore, to be considered as wholly irrelevant. They are outside the case and constitute no ground of objection to the jurisdiction of the court.

It may be added, that the presence of this indictment before the court, and moved for trial by the district attorney, by whom the government is represented before the court, as also it may now be by the attorney general in person, by virtue of the act of June 22, 1870 (16 Stat. 162, now Rev. St. U. S. § 359), is inconsistent with the averment that the trial is moved in opposition to the directions of the attorney general. When the attorney general of the United States, having knowledge of the moving of a criminal trial, permits the moving thereof, in law he directs the same, and the court must consider the trial to be moved by the government.

All the positions taken in behalf of the accused have now been examined, except that based upon the fact set up in the plea, that, in the case of the accused, an express agreement was made between the government of the United States and the government of Great Britain, by which it was provided and agreed, that the accused should not, until he had been restored, or had an opportunity of returning, to her majesty's dominions, be detained or tried within the United States, for any offence committed prior to his surrender, other than the crime of forging and uttering the said bond and affidavit, on which his surrender was thus claimed. Upon this point the argument made is, that, the existence of such an agreement being admitted by the demurrer, it must be recognized by the court, and the accused be protected by the court from prosecution upon an indictment charging offences other than those mentioned in the agreement, as stated. This position is supposed to be supported by the rule applied in civil cases, when a defendant has been inveigled within reach of the process of the court. But, the rule referred to has no application in criminal cases. The duty of the courts in criminal cases is stated by the court of king's bench, in Ex parte Scott, 9 Barn. & C. 447. Scott was indicted in England for perjury, and a warrant for her arrest issued. The officer proceeded to Brussels, and, there finding Scott, seized her without resort to extradition proceedings or other legal process. Application for assistance was then made by her to the British ambassador at Brussels, who refused to interfere, and she was carried to London, where she was brought before the court upon habeas corpus, and the above facts made to appear. Lord Tenterden, C. J., in delivering the opinion of the court, thus lays down the rule in criminal cases: "The question is, whether, if a person charged with a crime is found in this country, it is the duty of the court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them." These words express the opinion of this court. A different rule would seriously embarrass the administration of the criminal laws, and cannot be permitted here to obtain, until it has received the sanction of controlling authority. If, then, an agreement exists between the government of the United States and the government of Great Britain, such as is set forth in the plea, the performance thereof is within the power of the government, by reason of its legal control over the prosecuting officer; and all that need be said here is, that such an agreement can avail nothing to a defendant setting it up by way of plea to the jurisdiction of the court before which his trial is moved by the government.

The decision, therefore, must be, that the plea to the jurisdiction, and all subsequent pleadings in this case, be set aside, with liberty to the defendant to plead anew to the charges is the indictment contained.

Case No. 15,574.

UNITED STATES v. LAWRENCE et al.

[14 Blatchf. 229.] [1]

Circuit Court, E. D. New York. May 23, 1877.

PLEADING—SEVERAL LIABILITY—NEW YORK PRACTICE—EXHAUSTING REMEDIES.

1. A bond to the United States, signed and sealed by W., G., C., and M., and acknowledged by each as his act, recited that W. and G., composing the firm of A. & Sons, as principals, and C. and M., as sureties, were held, &c., jointly and severally, to the United States, in the sum of $9,000, and was conditioned that the firm of A. & Sons should pay all taxes assessed upon tobacco manufactured by the firm. W. and C. died, and H. was appointed administratrix of W. The United States then brought suit on the bond against H., as administratrix of W., and G. and M., claiming a judgment for $9,000. On demurrer to the complaint, by H., *held* that, as the complaint set forth a several obligation by the obligors, it was good, because, by the law of New York, a several liability could be enforced, in one suit, against all the defendants.

2. This was so, although H. was sued as administratrix, and the others as individuals.

3. The bond was not the obligation of the firm, and that, therefore, it was not necessary to exhaust all remedies against G., as surviving partner of the firm, before suing on the bond.

At law.

Asa W. Tenney, U. S. Dist. Atty.

George W. Denton, for defendant Lawrence.

BENEDICT, District Judge. This cause comes before the court upon a demurrer to the complaint. The allegations of the complaint are, that, on the 25th of January, 1867, William E. Lawrence, George B. Mickle, Charles Vandervoort and William D. McGregor executed a bond, whereby they bound themselves, jointly and severally, unto the United States, in the sum of $9,000, upon condition that, if the firm of A. H. Mickle & Sons, of

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

which firm the said Lawrence and the said Mickle were partners, should pay all taxes assessed upon tobacco, snuff or cigars manufactured by the firm, the said bond should be void. A breach of the condition of the bond is then correctly stated, and the complaint then proceeds to aver the death of Charles Vandervoort, one of the obligors, and also the death of William E. Lawrence, another of the obligors; and that the defendant Hannah T. Lawrence was thereafter, and before the commencement of this action, duly appointed administratrix, with the will annexed, of the goods and chattels which were of the said William E. Lawrence, deceased, wherefore judgment is prayed against the defendants in the sum of $9,000.

To this complaint the defendant Hannah T. Lawrence demurs, and contends, first, that the plaintiff has, in this action, elected to treat the bond in suit as a joint obligation, and that, as such, it was discharged by the death of Lawrence. But, the complaint sets forth a several obligation on the part of the obligors. It cannot, therefore, be said that the plaintiff has elected to treat the liability as joint, and, if a several liability can be enforced against the defendants, in this action, the complaint is good. The Code of Procedure of the state of New York (section 120) provides, that persons severally liable upon the same obligation or instrument may, all or any of them, be included in the same action. This provision of the law of the state must be considered as the law for this court, (Sawin v. Kenny, 93 U. S. 289; see, also, Chemung Canal Bank v. Lowery, Id. 72); and by virtue thereof an action against all the obligors upon a bond like this can be maintained. By a further provision of the law of the state (2 Rev. St. 113, § 2), all actions upon contract may be maintained by and against executors, in all cases in which the same might have been maintained by or against their respective testators; and, by a still further provision of the same law (Id. § 3), administrators are accountable to others to whom the estate was holden or bound, in the same manner as executors. The liability of the defendant Lawrence, as administratrix, to be sued upon this bond, is determined by those provisions of law.

The remaining question is, whether an action will lie, in the courts of the United States, against several defendants, upon a several liability arising out of the same instrument, where the defendants are sued in different characters, and the judgment, although the same in amount, must be otherwise different, as here, where one of the defendants is sued as administratrix. This question, also, must be determined according to the law of the state, and, by the laws of the state, such an action is permitted. Churchill v. Trapp, 3 Abb. Prac. 306.

A further point has been suggested, not arising upon the face of the complaint, but which, as it has been discussed by counsel with reference to the terms of the bond, and the bond itself has been, by consent, submitted for consideration, may here be disposed of. The point is this, that the bond sued on is the obligation of the firm of A. H. Mickle & Sons, and no action upon a partnership liability can be maintained against the representative of a deceased partner, without first exhausting the remedy against the surviving partner. No doubt exists, that, if this bond be the bond of the firm, it is impossible to maintain the action without averring in the complaint that Mickle, the surviving partner, is insolvent, and that all remedies against him have been exhausted. But the bond is not the bond of a firm. No firm name is attached to it, only the names of several persons. The fact that some of those persons were members of a firm does not alter the nature of the obligation nor create a liability on the part of the firm. The recital of the bond is, "We, William E. Lawrence and George B. Mickle, composing the firm of A. H. Mickle & Sons, as principal, and Charles Vandervoort and William D. McGregor, as sureties, are held," &c.; and this recital is relied on as conclusive to show that the obligation is that of the firm of A. H. Mickle & Sons, but I do not think the recital can control. The bond is executed by four different persons, each of whom has attached his seal and each of whom acknowledged the execution thereof, as his act. Each of these persons, by executing this bond, assumed a personal obligation to the United States, which can be enforced against him personally, notwithstanding the fact that the bond was given in the interest of the firm and to secure taxes that the firm might become liable for.

The demurrer is, therefore, overruled, with leave to plead, on payment of costs.

Case No. 15,575.

UNITED STATES v. LAWRENCE.

[1 Cranch, C. C. 94.] [1]

Circuit Court, District of Columbia. Nov. Term, 1802.

SEAMEN—REVOLT—ASSAULT UPON MASTER.

Assault and battery by a seaman upon the master of a vessel, does not amount to a confinement of the commander, nor an attempt to excite a revolt within the act of congress.

Indictment [against William Lawrence] for assaulting and beating the master of the brig Neptune (G. Colman), at sea, and attempting to excite a revolt. See the act of congress of April 30, 1790, c. 9, § 12 (1 Stat. 112).

Mr. Jones, for the defendant, moved the court to instruct the jury that proof of a mere assault and battery, committed at sea by a seaman upon his commander, does not amount to a confinement of the commander,

[1] [Reported by Hon. William Cranch, Chief Judge.]

nor to an attempt to excite a revolt, within the act of congress, which instruction was given by KILTY, Chief Judge, and CRANCH, Circuit Judge

MARSHALL, Circuit Judge, thinking the question did not apply to the case, refused to give an opinion.

Case No. 15,576.

UNITED STATES v. LAWRENCE.

[4 Cranch, C. C. 514.] [1]

Circuit Court, District of Columbia. March Term, 1835.

INSANITY — EXAMINATION OF WITNESSES BEFORE GRAND JURY—PRESUMPTIONS.

1. In a criminal case it is not necessary, on the part of the prosecution, to summon witnesses to the grand jury to prove the sanity of the accused, as every person is presumed to be of sound mind until the contrary is proved.

2. The accused has no right to send witnesses to the grand jury to prove merely exculpatory matter.

On Monday, the 30th of March, 1835, the grand jury handed to the court the following paper, namely:

"The grand jury beg leave to represent to the honorable court, that Doctors Causine, Bohrer, Sewall, and Clark, were directed to be summoned to testify in the case of Richard Lawrence (who attempted to shoot the president of the United States), to prove the sanity or insanity of the accused. The district attorney has told the jury that the examination of these witnesses, for that purpose, is improper. The jury, therefore, ask the opinion and instruction of the court upon this point. Thomas Carbery, Foreman. March 30, 1835."

THE COURT (THRUSTON, Circuit Judge, absent) took time, till this day, to consider the matter, when—

CRANCH, Chief Judge, delivered the opinion of the court, as follows:

The grand jury having represented to the court that several witnesses were directed to be summoned to testify in the case of Richard Lawrence, to prove the sanity or insanity of the accused, and that the district attorney had informed the grand jury that the examination of those witnesses, for that purpose, was improper; wherefore they asked the opinion and instruction of the court upon that point.

The court is of opinion, that every person is presumed, in law, to be of sound mind until the contrary is proved; and therefore it is unnecessary to summon witnesses on the part of the prosecution to prove the sanity of the accused; that every man is presumed to intend to do what he does; and is primâ facie responsible for his actions, and for the probable and natural consequences of them; that if those actions are, in themselves, unlawful, the burden of proof is on the accused, to excuse or justify them; but the accused has no right to send witnesses to the grand jury to prove mere exculpatory matter; he must wait until he is put upon his trial; when the petit jury is the proper tribunal to hear and decide upon the matter of defence.

If the evidence, on the part of the prosecution, shows a full primâ facie case of guilt, we have never known a case in which the grand jury have been permitted to examine witnesses not required on the part of the prosecution, to prove mere matter of excuse or justification. Chitty (volume 1, p. 318) lays down the law thus: "The grand jury, in general, hear evidence only in support of the charge, and not in exculpation of the defendant; and it has been said that they ought never to hear any other than that which is produced for the crown. But it may be doubted whether, as they are sworn to present the truth, which necessarily requires investigation, in case they may not be able to elicit truth from the witnesses for the prosecution, and are actually convinced of that circumstance, they may not require other testimony to assist them in forming their decision. The true intention seems to be that, primâ facie, the grand jury have no concern with any testimony but that which is regularly offered to them, with the bill of indictment; on the back of which the names of the witnesses are inserted; their duty being merely to inquire whether there be sufficient ground for putting the accused party on his trial before another jury of a different description. But if they are unable to satisfy themselves of the truth sufficiently to warrant their determination, they may properly seek other information relative to mere facts; but further than this they cannot proceed."

And Chief Justice McKean, in Schaffer's Case, 1 Dall. [1 U. S.] 236, in answer to an application that witnesses might be sent to the grand jury in behalf of the accused, said to the grand jury: "Were the proposed examination of witnesses on the part of the defendant to be allowed, the long-established rules of law and justice would be at an end. It is a matter well known and well understood that by the laws of our country, every question which affects a man's life, reputation, or property must be tried by twelve of his peers; and that their unanimous verdict is, alone, competent to determine the fact in issue. If then you undertake to inquire, not only upon what foundation the charge is made, but, likewise, upon what foundation it is denied, you will, in effect, usurp the jurisdiction of the petit jury, you will supersede the legal authority of the court in judging of the competency and inadmissibility of witnesses, and having thus undertaken to try the question, that question may be determined upon a bare

[1] [Reported by Hon. William Cranch, Chief Judge.]

majority, or by a much greater number of your body than the twelve peers prescribed by the law of the land. This point has, I believe, excited some doubts upon former occasions, but those doubts have never arisen in the mind of any lawyer, and they may be easily removed by a proper consideration of the subject; for the bills or presentments, found by a grand jury, amount to nothing more than an official accusation in order to put the party accused upon his trial; till the bill is returned there is, thererore, no charge from which he can be required to exculpate himself; and we know that many persons, against whom bills were returned, have been afterwards acquitted by a verdict of their country. Here then is the just line of discrimination. It is the duty of the grand jury to inquire into the nature and probable grounds of the charge; but it is the exclusive province of the petit jury to hear and determine, with the assistance and direction of the court upon points of law, whether the defendant is or is not guilty on the whole evidence for, as well as against, him; you will therefore readily perceive that if you examine the witnesses on both sides, you do not confine your consideration to the probable grounds of charge, but engage completely in the trial of the cause; and your return must, consequently, be tantamount to a verdict of acquittal or condemnation. But this would involve us in another difficulty; for, by the law, it is declared that no man shall be twice put in jeopardy for the same offence; and yet it is certain that the inquiry now proposed by the grand jury, would necessarily introduce the oppression of a double trial. Nor is it merely upon maxims of law, but I think, likewise, upon principles of humanity, that this innovation should be opposed. Considering the bill as an accusation grounded entirely upon the testimony in support of the prosecution, the petit jury received no bias from the sanction which the endorsement of the grand jury has conferred upon it. But on the other hand would it not, in some degree, prejudice the most upright mind against the defendant, that on a full hearing of his defence, another tribunal had pronounced it insufficient, which would then be the natural inference from every true bill. Upon the whole the court is of opinion, that it would be improper and illegal to examine the witnesses on behalf of the defendant while the charge against him lies before the grand jury."

In regard to the question of law submitted to this court by the grand jury the court instructs them, that if, in any case before them, they shall be satisfied by the evidence adduced on the part of the prosecution that the party accused committed the unlawful act with which he is charged, they have no right to send for and examine witnesses to prove mere matter of justification or excuse. If such a course could be permitted it would require the United States to produce other witnesses either to discredit those thus produced on the part of the defendant, or to disprove the facts to which they are called to testify, and thus the whole trial of the cause would be drawn before the grand jury, out of the presence of the court and the counsel of the parties. In regard to the particular case which has been the cause of this application to the court we can say nothing, as we are not judicially acquainted with its circumstances. The instruction which the court gives is intended to be general.

[The prisoner was found not guilty because of insanity. Case No. 15,577. See same case for opinion previously delivered in habeas corpus proceeding.]

Case No. 15,577.

UNITED STATES v. LAWRENCE.

[4 Cranch, C. C. 518.] [1]

Circuit Court, District of Columbia. March Term, 1835.

BAIL—EXCESSIVE BAIL—INSANITY—HABEAS CORPUS.

1. In a case clearly bailable by law, to require larger bail than the prisoner can give, is, in effect, to refuse bail.

2. The discretion of the magistrate, in taking bail in a criminal case, is to be guided by the compound consideration of the ability of the prisoner to give bail, and the atrocity of the offence.

3. The prisoner having been fully committed for trial upon a charge of an assault upon the president of the United States, with intent to kill and murder him, the chief judge refused to issue a habeas corpus to bring him up for the purpose of examining witnesses to prove his insanity; and, for that cause "to discharge him from imprisonment in the common gaol, and to secure the public peace by proper restraint."

[Cited in Parsons v. State, 81 Ala. 577, 2 South. 862.]

4. If the prisoner be acquitted by the verdict of the jury, on the ground of insanity, the court will remand him to the custody of the marshal; on being satisfied that it would be dangerous to permit him to be at large while under mental delusion.

On the 30th of January, 1835, the prisoner, Richard Lawrence made an assault upon the president of the United States (General Jackson), with intent to murder him, by shooting him with a pistol as he came out of the rotunda of the capitol, after having attended the funeral service of Warran R. Davis, a member of the house of representatives. Both pistols missed fire, although the percussion caps of both exploded, and both were well loaded with powder and ball. He was arrested in the very act, and was immediately brought before the chief judge at his chambers. The assault with intent to kill was proved by the clearest possible evidence. There was no evidence then produced of his insanity. The prisoner's manner was calm, and he seemed indifferent as

[1] [Reported by Hon. William Cranch, Chief Judge.]

to the testimony; declined cross-examining the witnesses, and when informed by the chief judge that he might make any remarks which he thought proper to make, said he could not contradict what the gentlemen had said. After inquiring as to his property and circumstances, the chief judge said to Mr. Key, the district attorney, that he supposed bail in $1,000 would be sufficient, as it was not a penitentiary offence, there being no actual battery, and as he did not appear to have any property. Mr. Key seemed, at first, to acquiesce, but having conversed with some of the president's friends who stood round him, he suggested the idea that it was not impossible that others might be concerned who might be disposed to bail him, and let him escape to make another attempt on the life of the president, and therefore thought that a larger sum should be named. The chief judge then said that there was no evidence before him to induce a suspicion that any other person was concerned in the act; that the constitution forbade him to require excessive bail; and that to require larger bail than the prisoner could give would be to require excessive bail, and to deny bail in a case clearly bailable by law. 1 Chitty, Cr. Law, 131. That the discretion of the magistrate in taking bail in a criminal case, is to be guided by the compound consideration of the ability of the prisoner to give bail, and the atrocity of the offence. That as the prisoner had some reputable friends who might be disposed to bail him, he would require bail in the sum of $1,500. This sum, if the ability of the prisoner only were to be considered is, probably, too large; but if the atrocity of the offence alone were considered, might seem too small; but taking both into consideration, and that the punishment can only be fine and imprisonment, it seemed to him to be as high as he ought to require. The prisoner not being able to find bail to that amount, was committed for trial, by warrant of the chief judge. A few days afterward, namely, on the 5th of February, 1835, a petition for a writ of habeas corpus, signed by Mr. William L. Brent and his son as counsel for the prisoner, and supported by affidavit, was presented to the chief judge, to bring up the prisoner for the purpose of examining witnesses to prove his insanity, and that he may be discharged from imprisonment "for the cause for which he is now confined," "and that your honor do then in the premises what belongs to humanity and the unfortunate Richard Lawrence, and also to secure the public peace by proper restraint."

The chief judge having expressed a doubt of the propriety of issuing the habeas corpus, upon that ground, the prisoner's counsel addressed to him the following letter:

"Thursday Evening, February 5th, 1835. Sir: Since I saw you this morning I have conversed with several of our most eminent jurisconsults, who are of the opinion that the case of Lawrence is a fair and proper one for an application for a habeas corpus, and that cases of insanity are an exception to general principles; moreover, that upon an habeas corpus, the judge at his chambers ought not to confine his investigation to the commitment alone, but ought to look at the cause of it; and upon looking at the act of congress I find it expressly declares that a judge at his chambers 'shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment.' If this be the object, most certainly you have the right, upon the application I have made, to inquire into the cause; and if you find that the cause is the assault by an insane and deranged man, it is insufficient. I find this principle also laid down in Bollman's Case, 2 Pet. Cond. R. 43, or 4 Cranch [8 U. S.] 75. It is also decided, in the same case, 2 Pet. Cond. R. 46, at the bottom, that the writ of habeas corpus is, in its nature, a revision of the decision to commit for an offence; and the court there say: 'This writ (habeas corpus) must always be for the purpose of revising that decision;' (meaning the cause for the commitment). The application is urged by the friends of the unfortunate man, and Mr. Key states to me that he has no objection to it, and intimates an opinion that it would be but right that the habeas corpus should issue. Independent of the rights of the individual, and the injustice of his present confinement, upon the grounds upon which it has been made, the committing judge not knowing of his insanity, and there being no counsel appointed to represent him at the examination, I do think that the public feeling ought to be allayed, if possible, by a true statement and understanding of the case. It is impossible the law can sanction an insane man's being confined for a crime that he is incapable of committing, when the fact of his insanity can be established without a doubt, and was not known at the time he was committed, and the insane man incapable of making it known. Such a construction of the law, I humbly conceive, would be attended by the most injurious consequences, and great oppressions might arise. Yours most respectfully, W. L. Brent. P. S. Should you refuse the habeas corpus, I will thank you to give your reasons on the back of the petition. It is thought, by those who take an interest in the application, and by me also, that it may aid in another course that will be pursued; and as it is a high privilege secured to the citizen, the refusal ought to be accompanied by the reasons. Will you say to my son when we can call upon you again? William L. Brent."

Upon the 14th of February, 1835, the petition for the habeas corpus was returned to the prisoner's counsel with the following opinion (CRANCH, Chief Judge):

"On the petition of Richard Lawrence for

a writ of habeas corpus. I have attentively considered the within petition, and have taken time to look into the authorities on the subject. The petition is not accompanied by a copy of the warrant of commitment, probably because it was presumed that it was fresh in my recollection, as it was issued by myself. As well as I recollect, it states that I had probable cause, supported by the oaths of certain witnesses therein named, to believe that Richard Lawrence, who was then before me in the custody of the marshal, had, on that day (30th of January, 1835), in the county of Washington, in this District, made an assault upon Andrew Jackson, president of the United States, with intent to kill him, and therefore commanded the marshal to keep him in safe custody, until he should be discharged in due course of law. Upon the best consideration which I have been able to give to the subject, I am of opinion that I ought not to grant the prayer of the petition: (1) Because it appears by all the authorities that a writ of habeas corpus is not to be granted of course in the first instance, upon application merely; and the obligation to issue it ineffectually, can only exist when the commitment is so general, that the court cannot know the real occasion from the terms in which it is worded; for it is not to be awarded without some reasonable ground shown by affidavit. And in Hobhouse's Case, 3 Barn. & Ald. 420, it was decided by the court of king's bench in England, as late as 1820, that the court will not, in the first instance, grant a habeas corpus, when they see that, in the result, they must inevitably remand the party. See, also, 10 Petersd. 289 (Eng. Ed.) Habeas Corpus, B, in the note; 1 Chit. Cr. Law, 118, 123, 124; and Watkins' Case, 3 Pet. [28 U. S.] 201, where Chief Justice Marshall says: 'The writ ought not to be awarded, if the court is satisfied that the prisoner would be remanded to prison.' (2) Because the affidavit accompanying the petition for the habeas corpus, does not show sufficient ground for issuing it. The only fact stated as the ground of discharge, is, the insanity of the prisoner; and, for that cause, I am requested to discharge him, and 'to do what belongs to humanity' and to the prisoner, and 'to secure the public peace by proper restraint.' I would remark, here, that if the prisoner is a dangerous maniac, the only manner in which I could secure the public peace (or rather secure the public safety) would be, to remand him to the prison where he now is. His imprisonment then would be interminable; he would have no day in court; no means to compel a trial; no right to apply for a discharge for want of trial, and no right to bail. He could not be bound to keep the peace. If sureties should be bound for his keeping the peace, it is doubtful whether they could ever be liable upon their recognizances, whatever acts he might do; as I apprehend, a madman cannot be guilty of a technical breach of the peace. I have said that I could only remand him to the prison where he now is. Unfortunately, the claims of humanity upon this subject have not yet been duly appreciated by our legislators, although they have had before them for more than thirty-four years, the example of the British parliament, in the act of 39 & 40 Geo. III. c. 94, which was introduced in consequence of the case of Hadfield (who shot at the king in the theatre), and was passed about a month after the judgment of the court in that case. That act was so framed as to reach back and cover the case of Hadfield, who had been acquitted by the jury on account of his insanity, and who had been remanded to the prison from whence he came. It was stated by the court, and admitted by the attorney-general, and the prisoner's counsel, Mr. Erskine, that, by the common law, the court might do this in such a case, but it was all they could do. They could not change the place or manner of his confinement. Hadfield was tried on the 26th of June, 1800; and on the 30th, in the house of commons, the attorney-general moved for leave to bring in the bill which resulted in the act of 39 & 40 Geo. III. c. 94. In support of his motion he observed, that, 'by the common law, when a person of this kind is acquitted, the court before which he is tried, have full power to direct the safe custody of such a person; but then the law has so little regulated that custody, and is so silent as to the rules to be observed with regard to it, that it may be said to be defective in that particular.' The 1st section of the act relates to cases of treason, felony, and murder only; and is applicable as well to persons who had been already remanded upon acquittal on the ground of insanity, as to future cases. It provides that in all such cases, if evidence of insanity be given upon the trial, and the party be acquitted on the ground of insanity, and it shall be so stated by the jury, the court shall order him to be kept in strict custody, in such place, and in such manner as to the court shall seem fit until his majesty's pleasure shall be known; and that his majesty may give order for the safe custody of such person during his pleasure, in such place and manner as to him shall seem fit. The 2d section provides, that if any person indicted for any offence, shall be insane, and shall, upon arraignment, be so found by a jury impanelled for that purpose, so that he cannot be tried; or if, upon the trial of any person, so indicted, the jury shall find him insane, the court may make a like order, as provided in the 1st section. And if any person, charged with any offence, shall be brought before any court to be discharged for want of prosecution, and such person shall appear to be insane, it shall be lawful for such court to order a jury to be impanelled to try the sanity of

such person, and if found insane, the court may make a like order. By the 3d section, 'for the better prevention of crimes being committed by persons insane,' it is enacted, that if any person shall be discovered and apprehended under circumstances that denote a derangement of mind, and a purpose of committing some crime, for which, if committed, such person would be liable to be indicted, and any of his majesty's justices of the peace, before whom such person may be brought, shall think fit to issue a warrant for committing him or her as a dangerous person, suspected to be insane, such cause of commitment being plainly expressed in the warrant, the person so committed shall not be bailed, 'except by two justices of the peace, one whereof shall be the justice who has issued such warrant; or by the court of general quarter sessions, or by one of the justices of his majesty's courts of Westminster hall, or by the lord chancellor, or lord keeper, or commissioner of the great seal.' It is evident, from the provisions of this act, that by the common law, a judge could not do what is asked by this petition, viz., 'to do what belongs to humanity' in regard to an insane prisoner, by confining him in any other place than the common gaol, or in any other manner than as a person charged with an offence, or committed for want of giving surety for the peace or good behavior. If, therefore, the prisoner should be brought up by habeas corpus, and I should remand him at all, it must be to the same custody in which he now is. The suggestion, therefore, in the petition and affidavit, that I can, by committing the prisoner as an insane person, meliorate his condition, or change his custody, is not supported by law, and furnishes no sufficient ground for issuing the writ.

"The only fact alleged in the petition and affidavit as the ground of the prisoner's discharge, is his insanity at the time of committing the act; which fact was not made known at the time of his commitment, but can now be proved by witnesses whose names are indorsed on the petition. After a diligent search, I have found no case in which a court or a judge has, upon habeas corpus sent for and examined witnesses on the part of the prisoner, to prove exculpatory matter, or any other matter when the warrant of commitment was regular, and bore upon its face sufficient cause of commitment. Matter of defence must, after commitment, be left for the jury. The judge cannot try the cause upon habeas corpus. The matter of the return must be taken to be true. The utmost extent to which courts have gone, upon habeas corpus, is to examine the depositions taken by the committing magistrate, upon the examination of the party under the statutes of Philip and Mary, in order to see whether the party may be admitted to bail. In the Case of Bollman, 4 Cranch [8 U. S.] 75, the supreme court, upon habeas corpus, examined the depositions taken upon the motion to commit; the same having been referred to in the order for commitment, and brought up by certiorari as part of the record; but it was never suggested that that court could receive new evidence. Chitty (1 Chit. Cr. Law, 89) says: 'In modern practice, though exculpatory evidence is received at the instance of the prisoner, and certified with the other depositions' (and therefore taken before commitment), 'unless it appear in the clearest manner that the charge is malicious, as well as groundless, it is not usual for the magistrate to discharge him, even when he believes him to be altogether innocent.' In 1 Leach, Crown Law, 270 (10 Petersd. 284), it is said: 'The court will look into the depositions to see if there be sufficient ground laid to detain the party in custody, and if there be not, they will bail him.' Chitty (1 Chit. Cr. Law, 130) says: 'It is, in fact, to the depositions alone, that the court will look for their direction; for when a felony is positively charged they will refuse to bail, though an alibi be supported by the strongest evidence. 2 Strange, 1138. Nor will the court at all admit of extrinsic evidence; so that they refused to examine whether a man brought up before them, had been previously acquitted of a charge precisely similar. Id. 851. And the court refused to bail a person for receiving stolen goods, the defendant's affidavit admitting the receipt of the goods, but denying that he knew they were stolen, because that was a fact triable only by a jury; and it would be of dangerous consequence to allow such proceedings, as it might induce prisoners generally to lay their case before the court, who, instead of the jury, would be called upon it to try the truth of the fact for which they were committed.' Cases, K. B. 96; 1 Salk. 104. On an indictment for murder, the prisoner moved to be bailed. 'Rokesby and Turton were for bailing him, because the evidence upon the affidavits read, did not seem to them sufficient to prove him guilty. Holt, C. J., and Gould, contra. The evidence does affect him, and that is enough. The allowing the favor of bail may discourage the prosecution; therefore it is not fit the court should declare their opinion of the evidence beforehand; for it must prejudice the prisoner on the one side, or the prosecutor on the other.' Mr. Chancellor Kent, in his Commentaries (volume 2, p. 26), says: 'Upon the return of the habeas corpus, the judge is not confined to the face of the return, but he is to examine into the facts contained in the return, and into the cause of the imprisonment, whether the commitment be for any criminal or supposed criminal matter, or not. This power of revising the cause of commitment is given by the act of this state,' (New York,) 'and it authorizes the judge to re-examine all the testimony taken before the magistrate who originally committed, and to take further proof on the subject, for he is to examine into the facts; and it is a new power, not found in the English statute.'

"If I were to examine the witnesses now offered by the friends of the prisoner to prove his insanity, I should feel myself bound to give notice to the attorney of the United States, and summon witnesses on the part of the prosecution, which would lead to the trial of the whole cause without a jury. No such case has been found in all my researches, and the impropriety of it seems too evident to admit of argument. But if I could, in any case upon habeas corpus, hear witnesses for the prisoner, it seems to me that the case of insanity would be an exception. The fact charged if the commitment being proved to the satisfaction of the committing magistrate, the allegation of insanity is matter of defence or excuse proper for the consideration of the jury, who are the judges of the fact. Every person, of the age of discretion, is presumed to be of sane memory unless the contrary be proved. It is a very nice point to decide what degree of insanity will render a person irresponsible for his acts; and it is the peculiar province of the jury to say whether the prisoner's insanity is of that degree. If, therefore, the witnesses were to satisfy me that the prisoner was insane it would be impossible for me to say that the jury also would be satisfied that the insanity was of such a degree as rendered the prisoner wholly irresponsible. In such a case I could not discharge him; and it is very doubtful whether I could bail him, as he could not bind himself in a valid recognizance; and I am not certain that the sureties of a madman would be held bound to produce him: and if they were, yet surety of the peace or good behavior would be wanting; the validity of which, if given, would be still more doubtful, as before suggested. Lord Hale (1 Hale, P. C. 32, 33), speaking of insanity, says: 'Now, touching the trial of this incapacity, and who shall be adjudged in such a degree thereof as to excuse from the guilt of capital offences, this is a matter of great difficulty, partly from the ease of counterfeiting this disability when it is to excuse a nocent, and partly from the variety of degrees of this infirmity, whereof some are sufficient and some are insufficient to excuse persons in capital offences. Yet the law of England hath afforded the best method of trial, that is possible, of this and all other matters of fact, namely, a jury of twelve men all concurring in the same judgment, by the testimony of witnesses, viva voce, in the presence of the judge and jury, and by the inspection and direction of the judge.' 'Therefore, the trial of the incapacity of the party indicted or appealed of a capital offence, is upon his plea of not guilty, by the jury upon his arraignment, who are to inquire thereupon touching such incapacity of the prisoner, and whether it be to such a degree as may excuse him from the guilt of a capital offence.' And in page 34 he says: 'If a man, in his sound memory, commits a capital offence, and before arraignment he becomes absolutely mad, he ought not by law to be arraigned during such frenzy; but be remitted to prison, until that incapacity be removed.' And in page 35 he says: 'If a person of non-sane memory commit homicide during such his insanity, and continue so to the time of his arraignment, such person shall neither be arraigned nor tried, but remitted to gaol, there to remain in expectation of the king's grace to pardon him But it seems in such a case it is prudence to swear an inquest, ex officio, to inquire touching his madness, whether it was feigned, and thus it was done in 3 Edw. III., and in Somerville's Case, And. pt. 1, No. 154. But in case a man, in a frenzy, happen, by some oversight, or by means of the gaoler, to plead to his indictment, and is put upon his trial; and if appear to the court, upon his trial, that he is mad, the judge, in his discretion, may discharge the jury of him, and remit him to gaol, to be tried after the recovery of his understanding, especially if any doubt appear upon the evidence touching the guilt of the fact, and this in favorem vitæ. And if there be no color of evidence to prove him guilty, or if there be pregnant evidence to prove his insanity at the time of the fact committed, then, upon the same favor of life and liberty, it is fit it should be proceeded in the trial, in order to his acquittal and enlargement.'

"Upon the whole, therefore, being perfectly satisfied that I have no authority to discharge the prisoner upon the alleged ground of insanity, if it were established; and that if brought up by habeas corpus he must be immediately remanded, it seems to me that it would be useless to issue the writ, and that it is my duty to refuse it."

On the 11th of April, 1835, the cause came on for trial before the circuit court. The indictment was at common law, for an assault upon Andrew Jackson, president of the United States, with intent to kill and murder him.

Mr. Key, for the United States, admitted the law respecting insanity to be correctly stated by Mr. Erskine in Hadfield's Case, 27 How. State Tr. p. 1300, &c. The fact that the prisoner was under a mental delusion, in supposing himself to be king of England, and of the United States as an appendage to England, and that General Jackson stood in his way in the enjoyment of his right, and that the act was done under that delusion, was fully proved; and the jury, in five minutes, returned the following verdict: "We find the prisoner not guilty; he being under the influence of insanity at the time he committed the act."

THE COURT (THRUSTON, Circuit Judge, absent) remanded the prisoner, being of opinion, from the evidence, that it would be extremely dangerous to permit him to be at large while under this mental delusion.

[See Case No. 15,576.]

Case No. 15,578.

UNITED STATES v. The LAWRENCE.

[See Case No. 8,122.]

UNITED STATES v. The LAWRENCE. See Cases Nos. 8,121 and 8,122.

UNITED STATES (LAWRENCE v.). See Case No. 8,145.

Case No. 15,579.

UNITED STATES v. LAWS.

[2 Lowell, 115.] [1]

District Court, D. Massachusetts. April, 1872.

OFFENSES UNDER POSTAL LAWS—EMBEZZLEMENT FROM MAIL—INDICTMENT—AVERMENTS.

1. In an indictment under section 12, St. July 1, 1864 (13 Stat 307), against a clerk in the post-office for secreting and embezzling a letter containing a bank-note, which describes the letter according to its direction, which is to some one other than the defendant, it is not necessary to allege that the letter or the note was the property of any one.

[Cited in U. S. v. Falkenhainer, 21 Fed. 627; U. S. v. Atkinson, 34 Fed. 318.]

2. If the letter was enclosed in an envelope, and the envelope was directed to A. B., the letter is well described as directed to A. B.

3. The indictment need not allege that the clerk obtained the letter by virtue of his employment: it is enough that, being a clerk, he has obtained possession of the letter.

4. It is not necessary to set out the places from and to which the letter was to be carried by post.

5. The indictment need not allege that the grand jury was duly organized, and that twelve concurred in the finding.

The first count of this indictment charged that the defendant [M. S P. Laws], on a certain day, at Boston, did secrete and embezzle a certain letter, then and there directed to Sarah E. Dalzell, in the words and letters following, "Mrs. Sarah E. Dalzell, Ellsworth, Maine," with which he was then and there intrusted, and which had come to his possession, and was then and there intended to be conveyed by post, containing a certain bank-note for the payment of two dollars, he, the said Laws, at the time, &c., being then and there employed in one of the departments of the post-office establishment, to wit, being a clerk, &c. The second count described the bank-note, and alleged that it was of the value of two dollars, and that the letter came into the possession of the defendant "so then and there employed as a clerk in the said post-office," and that the letter with the said article of value having so come into his possession, he did then and there secrete and embezzle the letter then and there containing the said article of value. At the trial, a verdict of guilty was found; and the defendant moved for a new trial, and in arrest of judgment.

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

G. Sennott, for defendant.

(1) It is not averred that the defendant obtained the letter "by virtue" of his employment. It is said, and repeated, that he was a clerk, and that being such clerk he secreted and embezzled the letter; but this is not enough: he must be shown to have broken the trust confided to him by the government.

(2) The property in the letter and the bank-note ought to be set out. It may be that the address of the letter was fictitious, and intended to mean the defendant, and the money may have been his.

(3) The letter is not described at all. It appears on inspection to be enclosed in an envelope, which is directed in the manner charged, but the letter is not directed.

(4) The indictment should aver the due organization of the grand jury, and that twelve concurred in the finding.

E. P. Nettleton, Asst U. S. Dist. Atty., cited U. S. v. Mills, 7 Pet. [32 U. S.] 138; U. S. v. Nott [Case No. 15,900]; U. S. v. Martin [Id. 15,731]; U. S. v. Lancaster [Id. 15,556]; U. S. v. Patterson [Id. 16,011]; U. S. v. Clark [Id. 14,801]; U. S. v. Okie [Id. 15,916]; and on pleading generally in misdemeanors, U. S. v. Gooding, 12 Wheat. [25 U. S.] 460, 474.

LOWELL, District Judge. Much more laxity of pleading has been permitted in seting out the offences created by acts of congress than obtained under the system of the common law, even when that system was applied to new statutes. The cases cited by the district attorney all agree that this offence may be charged substantially in the words of the statute. Were it not for these authorities, there would seem to be much force in the objection that the property in the bank-bill should be laid in some one other than the defendant. Such is the usual rule in embezzlement as well as larceny. And if the indictment were for stealing the money from the letter, it may be that the analogy would hold good. Such appears to be the opinion of Mr. Justice Curtis, as indicated by the marginal note to the case of U. S. v. Foye [Case No 15,157], though the judgment is silent on this point. And the supposed decision in that case, which had not then been reported, appears to have been followed in Cummings' Case [Id. 14,901]. But where the charge is, that a clerk secreted and embezzled a letter, which is described as having been addressed to some one else, and was intended to be conveyed by post, the gist of the offence is in the breach of trust as applied to the letter, and it has not been usual to lay the property in the letter in any one. Two of the cases cited at the bar decide this point. There is no real hardship in this decision, because the property might be laid in the United States as bailees, and then precisely the same evidence would be sufficient for a conviction as

would be received under the counts of this indictment, and the defendant would still be left to rebut the presumption arising from the fact of his dealing with a letter which did not appear to be his.

It was argued that the envelope is no part of the letter, and that, therefore, there is a variance. This was duly reserved at the trial, and comes up regularly on the motion. So far as the argument rested on the assumed fact, concerning which there was no evidence on either side, that the use of envelopes was unknown, or was rare, when the post-office act of 1825 was passed, both parties appear to have been under the impression that this indictment must be founded on that statute. Undoubtedly it was so intended. But section 21 of that act has been repealed or remodelled by the statute of July 1, 1864 (13 Stat. 337), which copies the section in many parts with great exactness, but adds to the list of securities that may be secreted or embezzled many that have come into use since 1825, such as stamps of various kinds, and adapts the law in other respects to the changes in the service. It is by this statute that the indictment must be tried, whatever may have been the intent of the pleader who drew it; and it is not contended that in 1865 envelopes were not in common use and popularly considered a part of the letters which they enclosed. The other answer of the district attorney appears to be equally strong, that when a letter is in fact put in an envelope which is directed to a certain person, the letter is directed to that person whether the envelope forms part of the letter or not.

Another very ingenious point much dwelt on by counsel is, that the charge does not contain the technical and precise averment, that the defendant came into possession of these letters by virtue of his employment. Possibly the indictment is open to this criticism; but, if so, the statute is equally deficient. The law appears to avoid with care this limitation. The language, both in the act of 1825 and in that of 1864, is, which shall have been intrusted to him, "or which shall have come to his possession," intending, no doubt, to punish all such acts committed by persons employed in the department, whether the letters were regularly in their possession or not. For instance, if a clerk takes the letters from some box or bag in charge of another clerk, or any with which he has no concern whatever, he is within the statute. If there is any implied limitation in the statute, such as of a letter picked up in the street, it may equally be left to implication in the indictment, and would be excluded by not conforming to the allegation that it was intended to be conveyed by post.

The objection that the places between which the letter was intended to be conveyed are not set out, was fully considered by Judge Benedict in the case of U. S. v. Okie [Case No. 15,916], and in that decision, overruling the objection, and in the reasons given for it, I concur.

Indictments never allege the organization and action of the grand jury further than is done in this case. The signature of the foreman vouches for the regularity of the proceedings after the jury are impanelled, and the records of the court show the venire, &c.

Motions denied.

Case No. 15,580.

UNITED STATES v. LEARNED et al.

[1 Abb. U. S. 483;[1] 11 Int. Rev. Rec. 149.]

District Court, E. D. Michigan. March Term, 1870.

INTERNAL REVENUE — STAMPS — CRIMINAL PROSECUTION.

1. An instrument in the following form, "Due the bearer or" (naming a payee) "——— dollars in merchandise out of our store," signed on behalf of an employer, by his bookkeeper, under his general instructions, and delivered to a person employed to enable him or any one to whom he may transfer it to obtain the goods, in payment for services rendered, is a contract, and requires a five-cent stamp.

2. Upon trial of an indictment for issuing instruments without stamping them as required by law, proof of issuing an instrument unstamped which by law should have been stamped, is sufficient, in the first instance, to warrant a conviction. The jury are to presume that the defendant knew the requirements of the law and intended to evade it, in the absence of some explanation from him.

Motion to set aside a verdict of guilty and for a new trial.

Charles G. Learned and Frederick S. Ayres were brought to trial upon an indictment for issuing an unstamped agreement. Under the instructions given, the jury found a verdict of guilty. The defendants now moved to set aside the verdict, and for a new trial, on the ground of refusal to give certain charges to the jury, and of misdirection in the charges which were given.

On the trial, it appeared that the defendants had been for years extensive manufacturers of lumber at Port Austin, in the district, and that in the prosecution of their business they employed a large number of men. They also dealt in merchandise. They employed a bookkeeper for their general business, and clerks in their store. The books were kept at the store. From about the time of their starting in business, dating back to a period anterior to the passage of the first internal revenue law, they had been in the practice of issuing to their men due bills, payable in merchandise out of their store, in the following form:

"No. 1550.

"Port Austin, Mich., Oct. 28, 1868.

"Due the bearer, or J. L. Coy, Seven Dollars, in merchandise out of our Store.

"(Signed) Ayers, Leonard & Wiswall.

"Van Wart."

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

The above is an exact copy of the instrument upon which the prosecution in this case was founded. These due bills were issued by the bookkeeper, but never in excess of the amount appearing to be due, and in all cases were charged to the men in their accounts as so much money. Large numbers of them were so issued. One of the clerks testified that he thought as many as four thousand, during the year 1868. In some instances, the men, or members of their families, would come to the store of defendants and select what goods they wanted to purchase, and then one of the clerks in the store would go to the bookkeeper and get one of these due bills for the amount of goods selected,—the due bill being charged to the man by the bookkeeper, and retained by the clerk as his voucher for the goods thus disposed of—thus operating as a check upon the men, against their getting goods at the store, at any time, to a greater amount than what was due them from the defendants. About one-fourth of all the due bills issued were issued and used in this manner. The other three-fourths were issued directly to the men and taken away by them, and either sold to others, or traded out afterwards by themselves or their families as they might need the goods. They were issued in small amounts, and were often used by the men for other purposes than that of getting goods at defendants' store. They disposed of them sometimes to farmers for produce, and sometimes to other merchants for goods. One merchant doing business some eight miles distant testified that he had seven hundred dollars of them at one time. They were so issued and used with the full knowledge and acquiescence of the defendants, and by their authority and direction. These due bills, including the one in question, were so issued unstamped, and, on the trial, it was conceded by the defendants that they were so issued, with their knowledge and intention. There was no direct evidence, and in fact no evidence at all, except what may be guessed at or inferred from the circumstances surrounding the transactions, explaining or tending to explain why stamps were so omitted. Reasons and excuses for omitting to stamp were offered by counsel, by way of argument, as will hereinafter appear, but none whatever in the proofs.

Upon this state of facts the court charged the jury, among other things, substantially as follows: (1) That, by the law of the land, the instrument in question is a contract. (2) And that as such, an adhesive stamp of five cents was required by the internal revenue law. (3) That the defendants are presumed to know the law. (4) That the omission of a stamp was an evasion of the law, and unless explained, it must be presumed that the defendants so intended.

The defendants' counsel requested the court to charge the jury, among other things, as follows: "(2) That if the defendants made the paper in this case, intending it only as a voucher to the clerks in the store that Coy's account was good for seven dollars, then the defendants are not liable." Which request the court granted, with this qualification: Insert after the word dollars, in next to last line, the following: "And if it got afloat without their knowledge or intention." And in this connection, the court further charged the jury that if the paper in question was actually used as a matter of convenience merely between the bookkeeper and the clerks in the store, and did not go into the hands of Coy or other persons, then it never became an agreement or contract for want of delivery, and no stamp was required. But, whether it was originally intended for such matter of convenience merely, or not, if it went into Coy's hands, or otherwise got afloat, by the authority, intent, or acquiescence of the defendants, then it did become such agreement, and did require a stamp.

Defendants' counsel further requested the court to charge: "(3) That if the defendants did not understand or believe that the paper in this case was a contract, but supposed it was only a voucher, then the defendants are not liable." Which request the court refused.

The reasons assigned in support of the motion to set aside the verdict, and for a new trial, were the following: "Because the court refused to instruct the jury as requested in defendants' second and third requests; and because the court erred in instructing the jury: (1) That the paper mentioned in the indictment was one which required to be stamped under the revenue law. (2) That the defendants must be presumed to know that said paper was one required to be stamped, and that it was their duty to stamp it, and that therefore the law presumes that if they omitted to do so, they intended to evade the provisions of the revenue law. (3) That if said paper went into Coy's hands with the defendants' knowledge, or by their authority, the defendants were required to stamp it."

G. V. N. Lothrop, for the motion.

A. B. Maynard, U. S. Dist. Atty., opposed.

LONGYEAR, District Judge. The questions arising upon this motion will be taken up in the order in which they arose in the charge, rather than the order in which they are presented in the motion. The first and second charges given present the question: Is the instrument mentioned in the indictment—(see copy, ante)—such an one as was required by the internal revenue law to be stamped? If covered by the law at all, it is covered by the first clause of Schedule B, under the head of "Agreement or Contract." 13 Stat. 298.

The question, then, resolves itself simply

into this: Is it an agreement or contract? The answer to this question seems too apparent to admit of argument. But as the question is presented, I shall proceed to consider it.

First. Upon the face of the instrument. The word "due" imports a consideration—an indebtedness; it is between parties capable of contracting, named in the instrument; the amount of the indebtedness or consideration is fixed and definite; the manner and place of payment is clearly defined; a promise to pay is clearly implied; and it was signed by the defendants and delivered. Here are all the elements of a contract, and it is pronounced to be such by the laws of the land. An action could be maintained upon it without any other proof than that of demand and refusal.

Second. Upon matters outside the instrument. The defendants owed Coy the amount in money, for work and labor; the due bill was charged to Coy as so much money, and thereby canceled the indebtedness in that form. Here was an actual consideration. It was due on open account in money; it became due on written contract, in merchandise. Here was a new undertaking on both sides, as to the manner of payment. It is true, it was testified by one of the bookkeepers, that if any of these due bills should have been brought back and delivered up, by the man to whom it was payable, he would, if requested, have canceled it and credited it back to the man in his account, and so change the obligation back to a cash obligation; but there was no pretense that there was any such agreement or understanding with the men; and even if there had been, it could not change the character of the instrument, so long as it was out, as it was not expressed upon its face. Neither could any such verbal understanding be relied on to change the written agreement. Therefore, by the law relating to contracts, the instrument was an agreement, and by the internal revenue law it was required to be stamped. There was, therefore, no error in the first and second charges given.

Third. That every man is presumed to know the law, and that ignorance of the law is no excuse, as general propositions, are too well established to admit of dispute, and their correctness is virtually conceded by defendants' counsel. Now, apply these maxims to this case. It was clearly proven, in fact it was conceded, that defendants authorized the instrument to be made and delivered in the form and manner in which it was made and delivered, and of course they knew it was so issued. As we have already seen, by the laws relating to contracts, the instrument, by having been so made and delivered, became and was an agreement or contract. The defendants are presumed to have known this law. Therefore, knowing as they did, all the facts constituting the instrument an agreement, they are presumed to have known it was such. Again, the instrument being an agreement, the internal revenue law made it the duty of the defendants to stamp it. Therefore, knowing, as we have seen, that it was an agreement, the defendants are presumed to have known that such was their duty. There was, therefore, no error in the third charge given.

Fourth. As to the intent. It is a maxim of the law that every man must be presumed to intend the necessary legal or legitimate consequences of his acts. In this case, the omission of a stamp was a violation or evasion of the internal revenue law. Therefore, the defendants knowing the law, their omission to obey it must be presumed, in the absence of explanation, to have been with intent to evade its provisions. It has been so held in two recent cases in the state of New York, in each of which this precise question was under consideration. See Beebe v. Hutton, 47 Barb. 187, 193; Howe v. Carpenter, 53 Barb. 382, 385. In the case of U. S. v. Conner [Case No. 14,847], a similar question was under consideration. Conner was prosecuted under the bankrupt act of 1841, for perjury, in swearing to a false schedule of property with intent to defraud his creditors. In deciding the case, Judge McLean makes use of this language: "The maxim is admitted that ignorance of the law constitutes no excuse for the commission of a crime." And further on he says, "To constitute perjury under the law" (the bankrupt law above mentioned) "the false schedule must have been made corruptly by the bankrupt, and with intent to defraud his creditors. The falsity of the schedule being established, the mitigating circumstances must be shown by the defendant; and if no excuse be proved, the fraudulent intent will be inferred from the act, it being prima facie in violation of the law." So, too, in Com. v. Bradford, 9 Metc. (Mass.) 272, cited by defendants' counsel, the knowledge of defendant that he had not the right to vote, was treated as a presumption to be rebutted by him, the fact that he had not such right having been first established. The distinction between the two classes of cases, that in which the intent will not be presumed, and that in which it will be, is clearly drawn in 3 Greenl. Ev. § 13, quoting Lord Mansfield in Rex v. Woodfall, 5 Burrows, 2667, in the following language: "When an act, in itself indifferent, becomes criminal if done with a particular intent, then the intent must be proved and found; but when the act is in itself unlawful, the proof of justification or excuse lies on the defendant, and in failure thereof the law implies a criminal intent." In this case the omission of the stamp was an unlawful act—an evasion of the provisions of the internal revenue law, and it must be deemed presumptively so intended. It comes clearly within that class of cases in which proof of justification or excuse lies on the party transgressing. It appears, therefore, that

there was no error in the fourth charge given.

Fifth. The qualification made by the court to the second request of defendant, viz: "That if the instrument got afloat without defendants' knowledge, authority or intent, they are not liable," has been fully disposed of in considering the converse of the proposition, ante, viz: that if the instruments went into Coy's hands, by defendants' authority or intent, then it was an agreement, and required a stamp. For the reasons there given there was no error in refusing to grant the request without such a qualification.

Sixth. The third request of defendants, which was refused by the court, was in the following words: "(3) That if defendants did not understand or believe that the paper in this case was a contract, but supposed it was only a voucher, then the defendants are not liable." It might suffice to sustain the refusal to charge as above requested, to simply state the fact that there was no evidence in the case as to what the understanding or belief of the defendants was in relation to the character of the particular paper in question, or even as to the class of paper to which it belonged, and therefore it might have misled the jury to have submitted such a question to them. It may be said, however, that evidence of their understanding and belief as to the character of the paper is to be found in presumptions arising from their course of business, in relation to this class of paper, as proven on the trial. Relying upon such presumptions alone for proof of what defendants' understanding and belief in this respect was, the case would stand as follows: so far as this class of paper was actually used as vouchers merely between the bookkeeper and the clerks in the store, the defendants would be presumed to have understood and believed them to be vouchers merely, and not contracts; but so far as such paper was delivered to the parties, and thereby became outstanding evidences of indebtedness and agreements to pay as therein specified, the defendants must be presumed to have understood and believed them to be what they actually were, contracts. And this latter presumption gains great force from two other facts in the case: (1) The fact that a large proportion of these papers,—the head clerk in the store says three-fourths of them,—were delivered to the parties, and that only a small proportion of them were used as vouchers merely, from the bookkeeper to the clerks in the store. (2) The use of the word "bearer" in the instrument. Although that word has no effect to make the paper negotiable, yet it may be resorted to, to arrive at the intent, belief, or understanding of the parties, as to the use to be made of the paper. That word could be of no possible use in a paper to be used as a voucher merely; but it is just the word the parties would use if they intended the paper for circulation, however mistaken they may have been as to its legal effect. It is in proof, also, that these papers did circulate, and were bought and sold to a considerable extent, to the knowledge of defendants. Presumptions, conclusions, and inferences must always be consistent and in harmony with the facts upon which they are founded and from which they are drawn. It might not have been error to have charged as requested; but if the court had so charged he would have been compelled, at the same time, to charge further, as above stated, which would have rendered the charge requested worse than nugatory. Therefore, whether the refusal to give this charge was right or wrong, it has worked the defendants no injury, and could not, in any event, constitute ground for a new trial.

But it is claimed on behalf of defendants that such understanding and belief on their part, as to the character of the paper in question, was induced by or was the result of their construction of the law in its application to said paper, and that therefore the charge should have been given as requested. Or, in other words, that notwithstanding the defendants knew all the facts in the case, and notwithstanding that the law does make the paper a contract and liable to be stamped, yet if the defendants so construed the law for themselves as to lead them to understand and believe that said paper was not a contract, and therefore not required to be stamped, then the intent to evade the provisions of the law did not exist, and they are not liable. In the first place, this proposition has no standing in the proofs. There was no evidence whatever as to what construction the defendants put upon the law, or that they, in fact, put any construction whatever upon it. The argument seems to be: (1) That such construction of the law is a reasonable construction. (2) The action of defendants in omitting the stamp is consistent with such construction. (3) Therefore, they must be presumed to have adopted it. A moment's reflection will show the entire fallacy of this argument. It has already been shown that such construction of the law is not correct, and therefore it is not reasonable, and the first proposition falls to the ground, and with it, of course, the second and third.

But aside from all this, the proposition is not a sound one in law. No man has a right to set up a construction of the law for himself, and then plead it in justification of his violation of the law. See, also, Judge Blatchford's opinion in Quantity of Distilled Spirits [Case No. 11,495]. The distinction between what will, and what will not excuse, is very clearly drawn in McGuire v. State, 7 Humph. 56. Apply the principles there and elsewhere laid down, to this case, and the following conclusions are inevitable. If the defendants knew, as they did know, of the existence of the state of facts which made the instrument liable to a stamp, and yet believed that the instrument was not so liable,

in point of law, such ignorance of the law will not excuse them. With a full knowledge of all the facts before them, and of the consequences of a violation of the law, they assume to construe the law for themselves, and having misconstrued, they must abide the consequences. In the case of U. S. v. Conner (above cited), cited also by defendants' counsel, the facts relied on to rebut the intent to defraud, &c., were: (1) That defendant stated the facts fully to counsel for advice in the premises; (2) that he was advised by such counsel on such statement, as matter of law, that the omission complained of was not contrary to the law claimed to have been violated; and (3) that the defendant acted upon the advice so obtained, in making out and swearing to his schedule; and this was allowed as tending to rebut the presumption of intent to violate the law, for the reason, as stated by the judge in his opinion, that "the defendant thereby showed a desire to conform to the law." That is very different from a case like the present, in which the defendants are claimed to have simply set up a construction of the law for themselves, without the aid of counsel or legal advice, or showing in any manner a desire to conform to the law. If parties may do this, and thus shield themselves from violations of law, then it is far safer for them never to take advice.

In view of the importance of these questions to the government and to the defendants, as well in their application to the case now under consideration as to other like cases, I have given them a careful consideration, with an earnest desire and determination to arrive at correct conclusions, and have settled down upon the conclusions above given with a feeling of confidence that they are correct. The motion to set aside the verdict and for a new trial must be denied.

Case No. 15,581.

UNITED STATES v. LEATHERS.

[6 Sawy. 17;[1] 11 Chi. Leg. News, 354.]

District Court, D. Nevada. July 1, 1879.[2]

INDIAN COUNTRY—RESERVATION—NEVADA—CRIMINAL INTENT.

1. The laws of the United States extending the laws regulating intercourse with Indian tribes over the tribes in Utah, Nevada at the time of their passage being a part of Utah, do not make Nevada Indian country.

[Cited in State v. M'Kenney, 2 Pac. 172.]

2. The tract of country called the "Pyramid Lake Indian Reservation" has been set apart by competent authority for the use of the Pah Utes and other Indians residing thereon. It is Indian country within the meaning of sections 2133 and 2139 of the Revised Statutes.

[Cited in U. S. v. Bridleman, 7 Fed. 903; U. S. v. Payne, 8 Fed. 888; U. S. v. Martin, 14 Fed. 821.]

3. Where the statute contains nothing requiring acts to be done knowingly, and the acts are not malum in se, nor infamous, but only wrong because prohibited, a criminal intent need not be proved. The offender is bound to know the law, and obey it, at his peril.

[This is an indictment against John Leathers.]

Charles S. Varian, for plaintiffs.
Robert M. Clarke, for defendant.

HILLYER, District Judge. This is a criminal case, in which the indictment charges the defendant with attempting to reside as a trader, and to introduce goods, and to trade in the Indian country, without a license, in violation of section 2133 of the Revised Statutes, and also with introducing liquor into the Indian country, contrary to section 2139. The indictment alleges this Indian country to be the Pyramid Lake Indian reservation.

Special issues of fact were by agreement of parties submitted to the jury, and the United States attorney now moves for judgment on the facts found by the jury. The questions in the case are: (1) Whether the now state of Nevada is Indian country in the sense of the sections above mentioned; (2) whether the tract of country called the "Pyramid Lake Indian Reservation" has ever been set apart by competent authority as an Indian reservation; (3) whether, admitting it is an Indian reservation, it is Indian country, in the sense of the laws of congress; and, (4) the jury having found the defendant's place of business to be outside the lines of the reservation as shown on the ground, by certain posts set up by the Indian agent and certain stone monuments set up by the surveyor, but within the limits as established by the executive order, whether the defendant is guilty of the offense charged.

Upon the first point it is argued, on behalf of the United States, that the whole state of Nevada is Indian country, by virtue of the Indian intercourse act of 1834 (4 Stat. 729), and section 7 of the appropriation act of 1851 (9 Stat. 587), which enacts "that all the laws now in force regulating trade and intercourse with the Indian tribes, or such provisions of the same as may be applicable, shall be, and the same are hereby extended over the Indian tribes, in the territories of New Mexico and Utah,"—Nevada, at that time being a part of Utah; and also by virtue of section 16 of the act of March 2, 1861, organizing the territory of Nevada, and section 11 of the act of March 21, 1864, enabling the people of Nevada to form a state, extending the laws of the United States not locally inapplicable over the territory and state of Nevada respectively.

It seems to me apparent that these enactments did not and do not make either the ter-

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

[2] [Affirmed by circuit court. Case unreported.]

ritories of Utah or Nevada or the state of Nevada Indian country. The act of 1834, which, in 1850, contained nearly all the law regulating intercourse with Indians, defines the term "Indian country," and fixes its boundaries. Utah was not then a part of the United States, and did not become Indian country by the act of 1834. U. S. v. Tom, 1 Or. 26; U. S. v. Seveloff [Case No. 16,252].

The act of 1851, extending the laws regulating intercourse with Indian tribes over the Indian tribes in Utah, does not, in terms, certainly make Utah Indian country. Certain laws which before that enactment had been confined in their operations to the country described and designated as Indian country by those laws, were extended over the tribes in Utah. The provisions of law applicable to those tribes may be enforced without first being obliged to declare the territories in which those tribes live Indian country. The laws, too, are extended over the tribes and not over any specified territory. So that intercourse with those tribes is regulated even after the territory and state of Nevada has been set off from Utah. The general provisions extending the constitution and laws over Nevada, if they are to be regarded as extending the intercourse laws so far as applicable over the state, do not make it Indian country, but only give force to laws which before were confined to the Indian country as defined by congress.

In my judgment, then, Nevada is not Indian country. If, however, it is admitted to be such it would hardly be necessary to make any argument to show that the sections under which the defendant is prosecuted, are not applicable to the tribes in Nevada outside of the Indian reservations.

The defendant, in one count, is charged with attempting to reside and trade in the Indian country. If Nevada is Indian country, then every trader and every man who introduces goods here is liable to the penalty, unless he has a license from an Indian agent. This is, of course, absurd. The organization of the state and its admission into the Union require population. Congress has invited all citizens to explore the public mineral lands, and to make homes upon the agricultural lands. Traders must come with the rest, and goods must be introduced. It is the same as to the charge of introducing liquor into the Indian country. All over the state, dealers in spirituous liquors are licensed by the United States, and revenue thus collected. If Nevada is an Indian country, every liquor dealer therein is guilty of a violation of section 2139. It was argued that these sections were so far applicable here as trade with the Indian tribes themselves is concerned. But the answer is, that trading and introducing liquors into the Indian country are offenses which are complete without alleging or proving any dealing directly with the Indians.

We are next to determine whether the Pyramid Lake Indian reservation is legally an Indian reservation. It is said in behalf of the defendant that there is no law of congress setting it apart or giving the president authority to do so. The United States attorney claims that the reservation has been legally established by the following executive order inscribed upon a diagram purporting to be a map of the Pyramid Lake Indian reservation, viz.:

"Executive Mansion, March 23, 1874.

"It is hereby ordered that the tract of country known and occupied as the Pyramid Lake Indian reservation in Nevada, as surveyed by Eugene Monroe in January, 1865, and indicated by red lines according to the courses and distances given in tabular form on accompanying diagram, be withdrawn from sale or other disposition and set apart for the use of the Pah Ute and other Indians residing thereon.

"(Signed) U. S. Grant."

In Walcott v. Des Moines Co., 5 Wall. [72 U. S.] 681, it was held that land reserved from sale by the secretary of the interior for the special purpose of aiding in the improvement of the Des Moines river, and continued by the president and cabinet, was reserved by competent authority for that special purpose. The power of reserving lands is spoken of as a power which has been exercised ever since the establishment of the land department down to the present time.

In Grisar v. McDowell, 6 Wall. [73 U. S.] 363, the land in question had been exempted from sale and reserved for public purposes by an order of the president. The court say: "From an early period in the history of the government it has been the practice of the president to order lands to be reserved from sale and set apart for public purposes, and that numerous acts of congress recognized the authority of the president in this respect as competent authority. In that case the reservation was used for military purposes, but establishing a reservation for Indians is equally for a public purpose, and both these cases are authority in support of the legality of the president's order setting apart the reservation in question in this case."

No direct authority to the president to reserve lands and set them apart for public purposes is found in either case, but in each the president's authority is recognized by acts of congress which proceed upon the ground that he has it, and that the reservations so made are made by competent authority.

For instance, the act appropriating money for the Indian service in Nevada, in 1878, appropriates money for the support and civilization of Indians located on the Pyramid Lake reservation. 20 Stat. 85. The same provision occurs in 1879 (20 Stat. 314), congress thus recognizing the reservation in question by name.

Again, in 1874, money is appropriated to assist the Indians in Nevada to locate in permanent abodes. By section 462 of the Revised Statutes the commissioner of Indian af-

fairs "shall, * * * agreeably to such regulations as the president may prescribe, have the management of all Indian affairs and all matters arising out of Indian relations." Again (section 465): "The president may prescribe such regulations as he may see fit for carrying into effect the various provisions of any act relating to Indian affairs."

Many other acts of congress might be cited of like tenor, but these show, it seems to me, enough to warrant and require the conclusion that the Pyramid Lake reservation has been established by competent authority.

The very extensive powers given to the president by sections 462–465 in the management of Indian affairs might well be held to include the power to establish a reservation if there were no other acts in relation to the matter. The authority given the president to set apart five military reservations for Indian purposes by the act of March 3, 1852, had especial reference to the Indians in California. 10 Stat. 238, 332, 699, and 13 Stat. 39. But were this not so, the repeated recognition by congress of the reservations established in Nevada by the president would be enough, along with the general powers given the president in Indian affairs to show his authority.

The third point made by the defendant is that if this be an Indian reservation it is not "Indian country," as that term is used in sections 2133 and 2139 of the Revised Statutes. It must be conceded that there is no act of congress making the reservation in terms "Indian country," and that it is not within the boundaries established by section 1 of the act of 1834.

A large portion of the act of 1834 is included in the Revised Statutes, but section 1, defining the boundaries of the Indian country, is not. The act of 1834 is therefore repealed by section 5596, Rev. St., and section 1, not being incorporated into the Revised Statutes, is repealed also, unless it is a provision of a "private, local, or temporary character," and so, by virtue of the proviso to section 5596, still in force.

Section 1 is in these words: "Be it enacted, that all that part of the United States west of the Mississippi and not within the states of Missouri and Louisiana or the territory of Arkansas, and also that part of the United States east of the Mississippi river and not within any state, to which the Indian title has not been extinguished for the purposes of this act, be taken and deemed to be the Indian country." 4 Stat. 729.

This is neither private nor temporary, certainly. Then is it local? The act of which it is a part is entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." This title indicates an act of a general and permanent character, and not local and temporary. Although the first section defines Indian country, it is not restricted in its operation to that locality. It is, it seems to me, a part of the general law applicable everywhere in the nation as a definition of Indian country.

The case of Bates v. Clark, 95 U. S. 204, arose before the adoption of the Revised Statutes, and before December 1, 1873, while section 1 of the act of 1834 was in force, and can not be regarded as recognizing the definition of Indian country in that statute as still a part of our law.

I consider that the provisions of section 1 of said act are not within the proviso of section 5596, Rev. St., and must therefore be considered as repealed. It seems to me that the changed condition of the region embraced in that definition of Indian country no doubt induced congress to leave it out as no longer applicable.

There is, then, if I am right in this, no longer any statutory definition of Indian country, and at the same time the term is retained in a number of important sections of the Revised Statutes, and the question is, to what does the term now apply, and does it include an Indian reservation?

As early as July 22, 1790 (1 Stat. 137), congress used the expression "Indian country" in the first act "to regulate trade and intercourse with Indian tribes." No definition of it is given, but the tenor of the act shows that it was used as meaning country belonging to the Indians, occupied by them, and to which the government recognized them as having some kind of title and right. In the next act of 1793 (1 Stat. 329), Indian country and Indian territory are used as synonymous. The act of 1796 fixed a line, according to Indian treaties, from Lake Erie down St. Mary's river, and speaks of the country over and beyond said boundary line as Indian country. 1 Stat. 459, § 16. The act of 1799 (1 Stat. 473) fixed same line and prescribed a penalty for crossing or going within the boundary line to hunt, etc., or driving stock to range on "any lands allotted or secured by treaty with the United States to any Indian tribes." The territory over the line is called "Indian country." In some sections territory belonging to Indians is spoken of. So the act of 1802 (2 Stat. 139) uses the words "Indian country" and "Indian territory" as meaning the same thing, and in both instances it is the country set apart by treaties or otherwise for the Indians,—lands to which the Indian title had not been extinguished. By the act of 1816 [3 Stat. 333], foreigners are excluded from any country allotted to Indian tribes secured to them by treaty, or to which the Indian title has not been extinguished. By the act of 1822 (3 Stat. 682), the president was authorized to cause to be searched the packages of traders suspected of carrying ardent spirits into the Indian countries, in the plural. Next comes the act of 1834, defining Indian country particularly in its first section. Section 9 of the appropriation act of March 3, 1865 (13 Stat. 563), authorizes certain agents residing in said terri-

tory to sell cattle for the tribes under certain regulations. The context shows that by "Indian territory" is meant the country south of Kansas known by that name.

When this section is incorporated into the Revised Statutes, it is the same except the words "Indian territory" have become "Indian country." In section 8, making it a felony to drive cattle out of the Indian Territory, the same change occurs. Rev. St. §§ 2127–2138. Chapter 4, tit. 28, Rev. St., is headed "Government of Indian Country" (not the Indian country). In the act of 1863 (12 Stat. 793) this occurs: Treaties may be made with tribes residing in the country south of Kansas and west of Arkansas, commonly known as the Indian country. In Nevada there are four tribes of Indians, the Pah Utes, Shoshones, Washoes, and Goshutes. So far as I can discover, no formal written treaties have ever been made with any of these, except the Shoshones (18 Stat. 689), and in that there is no cession of Indian title, though there is a sort of recognition of some right to the soil in the Indians. Section 2 of the act of 1856 (11 Stat. 80), provides that if any person removed from the Indian country shall return or be found in the Indian territory, etc. In section 2148, Rev. St., "Indian territory" is changed to "Indian country."

Reference to these various statutes in which the words "Indian country" and "Indian territory" have been used, is made that it may be seen in what senses congress has used the words before the revision of the statutes. The act of 1834, as interpreted in Bates v. Clark, fixed plainly the boundaries of Indian country. But in this case the Revised Statutes must control, and in them there is no definition of Indian country. What led to the omission of section 1 of the act of 1834 from the Revised Statutes was no doubt the consideration that it was no longer applicable to the present state of things,—was, in fact, obsolete. From the earliest period of our history the boundaries of the Indian country have been narrowing. It has been done by the encroachments of the white races. For many years, up to March, 1871, the policy of the United States had been to make treaties with the various Indian tribes, and in them to adjust the claims of the various tribes to the soil, extinguish the Indian title to the same, and set apart tracts of country by metes and bounds for the exclusive occupation of the tribe making the treaty. In some instances, as in case of the Cherokees, Creeks, Choctaws, etc., the tribe acquired a fee-simple title to the lands set off to them, except that it reverted to the United States whenever the tribe should become extinct.

The policy has been to separate the Indian tribes from the rest of the people, and to set apart for their exclusive use specific portions of the public domain. The statutes cited show that "Indian country" is the term used generally to describe country in the occupation of the Indians, to which their title or right of occupancy—a right always hitherto recognized by the United States—has not been extinguished.

At the time the Revised Statutes were adopted, all the country, except the Indian Territory proper, embraced by the definition of Indian country in the act of 1834, was organized into states and territories, to which the world generally was invited to come and settle. The same was true of all that portion of the United States lying west of the Rocky mountains. So far as I can ascertain, all the tribes, certainly all the tribes of note, within this vast territory, have been, either by treaties or agreement, dealt with by the government. The tribes, in consideration of money, goods, annuities, etc., have ceded their right to the occupation of the regions over which they had been roaming and hunting, and have had a specific portion of land or territory, or country allotted to them for their exclusive use, called Indian reservations. On these it was, and is, the policy, so far as possible to induce the tribes to settle permanently and cultivate the soil as a means of living, in lieu of their former roaming life, hunting and fishing.

This is the general situation of Indian affairs. It follows that unless these various Indian reservations are Indian country, and if we are still bound by the definition in the act of 1834, there is little or no country to which the various sections of the Revised Statutes for the government of the Indian country can apply. But if we regard section 1 of the act of 1834 as repealed, and these portions of the public lands allotted to the use and occupation of the Indians as Indian country, the sections of the Revised Statutes in which those words occur will have such operation as to carry out what I think congress intended should be accomplished by their adoption. It is as important now as ever that the introduction of liquor into the reservations set apart for the Indians should be prevented, and trading and settling among them also. I am constrained to adopt this as the true construction of the present law, and therefore hold the Pyramid Lake Indian reservation to be Indian country.

The remaining question relates to the finding of the jury, that the defendant's place, though within the red line on the map, is without the monuments put up by Monroe, the surveyor, and outside of the posts set up by order of the Indian agent, Bateman.

The true result of the verdict of the jury is to establish the trading post of the defendant a half mile or more within the reservation. The language of the executive order on the map is such that the courses and distances mentioned must control. They are on the map, and a part of the order, so that the boundaries of the reservation are those courses and distances as indicated by the red lines on the diagram or map.

No reference is made in the order to either natural or artificial boundaries, and, therefore, neither the monument nor the wooden posts can control the courses and distances. The survey was made by triangulation, and the monuments were set upon mountain peaks for the most part. These are at the angles of the survey, and where they are not marked by a stone monument, a peak itself is the substitute.

At one time, by Bateman's order, he being Indian agent at the time, one Fraser set up a line of wooden posts marked "Pyramid Lake Indian Reservation." Fraser said he was told to put them up as near the line as he could. The defendant's place being, in fact, within the reservation, the only bearing these facts—that he was outside the line as shown by the monuments and posts—can have, is in regard to his intent.

I take it for granted that the defendant thought he was outside the reservation line, and that he came to this conclusion because of the posts, and the line as it appeared to be marked by the moutain peaks.

The act of the Indian agent, or his subordinate, Fraser, in setting up the posts, was, so far as fixing a boundary line of the reservation is concerned, beyond the scope of the authority of either, and, of course, so far void, and in no way binding the government, by estoppel in pais, or otherwise.

The defendant is charged with trading in the Indian country in one count, and with introducing liquors there contrary to the statutes of the United States in another. The statute contains nothing requiring these acts to be done knowingly. The acts themselves are not malum in se. The object of the law is not to punish men for these acts as crimes, so much as to prevent trading and intercourse with the Indians otherwise than as the law permits. There is nothing infamous in the punishment prescribed. Under these circumstances, I think it is immaterial with what intent the acts were done. They belong to that class of acts which, in the absence of the statute, might be done without culpability (3 Greenl. Ev. § 21), and being, such ignorance of the lines of the reservation will not excuse, nor will a sincere belief by the defendant that he is outside the lines. He is bound to know the facts and obey the law at his peril. Id.; Reg. v. Woodrow, 15 Mees. & W. 404; Attorney General v. Lockwood, 9 Mees. & W. 378; 1 Bish. Cr. Law (4th Ed.) 1031, etc.

In the case of U. S. v. Anthony [Case No. 14,459], the defendant was charged with illegal voting. The case was tried by Mr. Justice Hunt, and although it appeared that the defendant sincerely believed she had a right to vote, it was held that this did not excuse her. So, on the trial of the inspectors of election for receiving her vote, they proved their good faith, but their ignorance of the want of proper qualifications was held to be no excuse. Cited in Whart. Cr. Law, § 82.

In the case of Com. v. Mash, 7 Metc. (Mass.) 472, a woman who honestly believed her first husband to be dead was convicted of bigamy, he not being in fact dead when she married a second man. In this case sentence was reserved and a full pardon obtained. The same doctrine is maintained in England. 3 Whart. 84. So in State v. Ruhl, 8 Iowa, 447, the defendant was not allowed to prove that he believed, or had good reason to believe, the girl he enticed away was over fifteen, the law confining the offense to girls under that age. The same principle was asserted in Reg. v. Olifier, 10 Cox, Cr. Cas. 402, one judge saying a man dealt with the girl at his peril, and that it made no difference that the girl told him she was over sixteen.

The following cases are cited in section 8, 3 Whart. Cr. Law: It is no defense to an indictment for voting without the proper qualifications, that the defendant believed he had them. No matter how honest his belief is, unless the statute excepts cases of honest belief. To an indictment for publishing a libel it is no defense that the defendant did not know of the publication. Nor to one for selling liquors to a minor, that the defendant believed the vendee to be of full age. Nor to one for abduction, that the motives were philanthropic, or that the defendant mistook the girl's age.

In this class of cases the offending party is subjected to the penalty for the act done irrespective of his intent, as in civil cases he is required to answer for an act which injures another, however innocent of intentional wrong he may be. My conclusion is, that defendant must be adjudged guilty on both counts. The belief of the defendant in connection with the acts of government agents in setting up the posts can only be considered to determine whether a prosecution shall be begun in the first place, or the degree of punishment in case of conviction, or as ground for a pardon or remission of the forfeitures and penalties.

The defendant, Leathers, is, therefore adjudged guilty of the offenses charged, and will appear for sentence.

Affirmed on appeal to the circuit court. [Case unreported.]

Case No. 15,582.

UNITED STATES v. LEAVENWORTH, L. & G. R. CO.

[1 McCrary, 610;[1] 1 Cent. Law J. 425.]

Circuit Court, D. Kansas. June, 1874.[2]

LAND PATENTS—SUIT TO SET ASIDE—INDIAN LANDS.

1. Where patents for lands have been issued without authority of law, the United States may, in their own name, maintain a bill in equity, in

[1] [Reported by Hon. Geo. W. McCrary, Circuit Judge, and here reprinted by permission.]

[2] [Affirmed in 92 U. S. 733.]

the circuit court, to annul and set aside the patents.

2. On a construction of the treaty of the United States with the Osage Indians, of June 2, 1825 (7 Stat. 240), and the subsequent treaty with the same Indians, proclaimed January 21, 1867 (14 Stat. 687), and of the act of congress of March 3, 1863 (12 Stat. 772), granting lands to the state of Kansas to aid in the building of railroads, *held*, that lands which, under the said treaty of 1825, had been set apart and reserved for the said Indian tribe, and which were in their actual use and occupancy, did not pass under the said railroad grant, and that the United States were entitled to have cancelled patents which had issued to the railroad company under the erroneous assumption that the lands were embraced in the railroad grant.

This is a bill in equity in the circuit court, filed by the direction of the attorney general, to set aside patents issued by the executive officers of the United States to the defendant company. The ground of the bill is that the patents were issued without authority of law and are void. The substantial question in the cause is whether the defendant company is entitled to the land patented to it. The claim of the defendant to the land is under the land grant act of March 3, 1863 (12 Stat. 772), which is in the usual form, and under the treaty of 1865, proclaimed January 21, 1867 (14 Stat. 687), which it is contended ratified or conferred the right. These acts and treaties, so far as material, are referred to in the opinion of the court. The lands in controversy are within a tract thirty by fifty miles in extent, containing about 960,000 acres, and embraced in the counties of Neosho and Labette, and part of the counties of Bourbon, Crawford, Allen, Wilson and Montgomery, in the state of Kansas, and were part of the reservation occupied by the Osage Indians, who have been in possession of it since 1808, until after the treaty of January 21, 1867, when they removed to their new home in the Indian Territory.

By treaty of June 2, 1825 (7 Stat. 240), the Osage Indians, by article 1, relinquished to the United States their title to a large quantity of lands. The second article of that treaty then provides that, "within the limits of the country above ceded and relinquished, there shall be reserved to and for the Great and Little Osage Tribe or Nation, aforesaid, so long as they may choose to occupy the same, the following described tract of land:" (Here describing the reservation.) The above tract of country thus reserved to the Osages, facing on the east fifty miles and running back to the western boundary of the tract described in the first article of the above treaty, continued to be the Osage Indian reservation, and was used and occupied by them as such, and used by the government as provided in the second article of said treaty, until they relinquished their right thereto in 1867. The land in dispute is part and parcel of the reservation described in the second article of the treaty of 1825, and was used and occupied by the Osage Indians and the government until the treaty of 1865 was proclaimed, which took place the 21st of January, 1867. This last named treaty is dated the 29th of September, A. D. 1865, and was ratified on the 26th of June, 1866, with the addition of certain amendments thereto advised by the senate, and which amendments were accepted by the Indians on the 26th day of September, 1866, and the said treaty was proclaimed by the president on the 21st of January, 1867. There is an express provision in the seventeenth article of the treaty that it shall not go into operation until proclaimed by the president. 14 Stat. 687. The nature of this treaty, and the senate amendment relied on by the defendant, sufficiently appears in the opinion of the court.

On the 10th day of April, 1869, congress passed an act authorizing bona fide settlers upon any lands ceded to the United States by the treaty proclaimed January 21, 1867, to purchase the same in limited quantities, within two years, at $1.25 per acre, whether odd or even numbered sections, saving, however, the legal rights of others. 16 Stat. 55. Under this joint resolution a large number of settlers went on the land, made the required improvements, proved up their settlements before the local office, paid their money and received their certificates of entry. Three hundred and fourteen thousand, two hundred and twenty-eight acres of this land was entered under this joint resolution, and the settlers thereon, in addition to the fees and expenses of entering the same, paid the government therefor the sum of $454,072.10. Nearly all the rest of these lands have been settled upon; some under the joint resolution, by persons who were not able to make payment within the two years it was in force, and others under the belief that the trust specified in the Osage treaty, that these lands were to be sold on the most advantageous terms for cash, would be carried out by the government, and that consequently they would be able to purchase their lands for cash when the government executed the trust. There are between thirty thousand and forty thousand of these settlers upon the land in controversy, who are indirectly interested in the result of the present suits.

The entries of the land under the joint resolution have been ordered to be set aside and cancelled by the secretary of the interior, on the sole grounds that these railroads had a prior grant of these lands. They have nearly all been cancelled, and are being cancelled as they are reached in the regular course of business in the land department. The interior department at different times has been divided in opinion whether the railroad grants include the land in question.

Geo. R. Peck, U. S. Dist. Atty., Wilson Shannon, and McComas & McKeighan, for the United States.

S. O. Thatcher, T. C. Sears, and N. T. Stephens, for defendant.

Before MILLER, Circuit Justice, and DILLON, Circuit Judge.

MILLER, Circuit Justice. This case, with that of the same plaintiffs against the Missouri, Kansas & Texas Railroad Company, is submitted to the court on the bills, answers, replications, documentary evidence, and agreed statements of facts. The facts are undisputed, and without complication. The questions to be considered are exclusively questions of law.

The bill is filed by the United States, under the direction of the attorney general, to set aside and annul certain patents for lands, issued to the defendant by the secretary of the interior; on the ground that they were issued without authority of law. The case of U. S. v. Stone, 2 Wall. [69 U. S.] 525, is conclusive, so far as any authority is necessary, of the right to the relief sought, if this statement be true.

The defendant, a corporation which has built a road through the lands in controversy, and received of the United States the patents which are assailed in the bill, asserts the validity of these patents under an act of congress of March 3, 1863, and the treaty with the Osage tribe of Indians, proclaimed January 21, 1867.

In addition to the very able oral arguments on both sides at the bar, and the printed arguments of counsel engaged in the present case, there have been filed copies of printed arguments before the secretary of the interior, which show that his action in issuing the patents was not hasty, or wanting in reflection, but was the result of deliberate judgment after hearing counsel. This circumstance is not without embarrassment in the minds of the court now called on to consider the same question. But the constitutional adviser of the government, the attorney general of the United States, has felt it to be his duty to ask for a cancellation of these patents, and, as the only question raised is upon the proper construction of the act of congress and the treaty aforementioned, it is eminently a judicial one, which the court cannot avoid, or decline to decide; how high soever may be its respect for the decision of the department of the interior.

The act of congress referred to, found in 12 Stat. 772, by its first section, grants to the state of Kansas, for the purpose of aiding in the construction of certain railroads and branches, every alternate section of land designated by odd numbers, for ten sections in width on each side of said road, and each of its branches.

The road, so far as the matter now in issue is concerned, is described in the act as one from the city of Leavenworth, by way of the town of Lawrence and the Ohio City crossing of the Osage river, to the southern line of the state, in the direction of Galveston Bay, in Texas. This description would carry the road through a large body of land, then in the peaceful possession and occupancy of the tribe of Osage Indians, lying within the border of the state of Kansas. By a treaty between the United States and this tribe, made September 29, 1865, before the line of said railroad was located, the tribe ceded to the United States a large body of lands, embracing those in controversy.

The first question, therefore, which presents itself for solution, is whether the grant of lands, as made by congress in 1863, includes the lands then held by the Osage Indians, by the ordinary tenure by which Indian tribes hold lands in the United States, but afterwards ceded by treaty to the government. I say, by the ordinary tenure by which Indians hold lands, because I do not find anything in the language of the treaty of 1825 with that tribe which changes the nature of their title.

Counsel for defendants have supposed that in considering the effect of the grant under the act of 1863 upon these lands, a material consideration, favorable to their claims, is that the grant is to be construed with reference to the condition of the title of these lands when the line of the road was located and adopted by the company. This argument is based upon what must be conceded to be true, that the particular congressional subdivisions of alternate sections of odd numbers which are to constitute the specific lands granted by the act, must be determined and can only be determined by the location of the line of the road, by an actual survey, showing its relation to those sections. The counsel have, therefore, argued with much force that the act of congress is not a grant in presenti, but a grant in futuro, and that as the particular sections granted must await the location of the road to determine where they would fall, therefore that time, and that location, must govern or be looked to as governing all other considerations bearing upon the extent or limits of the grant.

This proposition, however, is obviously unsound, in view of the general course of the road established by the grant. It must be a road from Leavenworth to the southern boundary of the state, in the direction of Galveston Bay, in which Lawrence and the Ohio City crossing are points and the lands upon which it must operate; or, in other words, the general location and character of the lands which may be taken under the grant, are either definitely laid down in the act, or are to be inferred from considerations existing at the time the act was passed. And this is true, whether in technical language we call it a grant in presenti or a grant in futuro. In point of fact it has some of the characteristics of both classes of grants.

As these lands, though then in possession of the tribe, are in the line of the proposed road, and between Leavenworth and the southern boundary of the state, they are lands within the general descriptive terms of the grant, unless they are excepted out of them by other

parts of the act, or by other paramount considerations.

I am of opinion that on both these grounds the act cannot be held to include these lands.

When the act was passed the lands were, and had been for a very long time, in the peaceful and undisputed possession of the Osages. And though the treaty of 1825 between them and the United States did not so far vary their tenure as to give them a fee simple title, or, indeed, anything but a usufructuary right, it did guaranty to them the exclusive possession and use of these lands "so long as they may choose to occupy the same." This treaty was in full force when the act under which defendant claims was passed, and it is not believed that at that time any proposition to relinquish this possession had been made by the tribe, or any effort by the United States to induce them to do so. To hold, then, as argued by the defendants, that whenever they might choose to locate the line of their road through the Indian Territory, the title to the land, with all that full title implies, passed to them by virtue of this act, so far as odd sections for ten sections in width on each side would go, is to hold that congress had violated this treaty provision, had disregarded the generally conceded rights of Indians in such lands, and had authorized a gross injustice to a feeble and ignorant ward of the government. For if the lands were subject to the grant at all, it must be admitted that no provision whatever is made in the act for the protection of Indian rights, nor even for delay in enforcing the title thus passed to defendants.

When I consider that in the many grants of this character made by congress they have never, unless in this case, intended to include lands which, by treaty, or any other contract, or indeed any other equitable consideration, they should not grant, I can hardly believe that they intended, by the use of general terms necessary to a description of the route of the road, to grant away the lands which by all these considerations they were bound to retain within their own control.

In saying this, I do not consider the question of the power of congress over lands thus situated. I consider only the question of intent, of the actual will of the legislative body, which they designed to put into the form of a statute. It is this, as in all cases of construction, which must govern; and if it were a question now for the first time presented to my consideration, on these general words of description alone, in the grant, I do not see how I could hold that congress intended to include these Indian lands.

But the case does not rest on these general words of description alone. This was by no means the first act of congress donating lands to aid in construction of railroads. Millions of acres had been previously granted for the same purpose, and so many statutes of that kind had been passed, that the language in which the grants were made had become reduced to settled formulæ, and one of these formulæ designed to protect rights previously acquired, as found in every other statute of a similar character, is found in this. It is in the shape of a proviso to the granting section, in the following words:

"That any and all lands heretofore reserved to the United States by any act of congress or in any other manner, by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said road and branches through such reserved lands; in which case the right of way only shall be granted, subject to the approval of the president of the United States."

It will be thus seen that from the operation of this act, as of all others of like character, and by the settled policy of the government, there is excepted any and all lands which, by act of congress, or in any other manner, by competent authority, for any purpose whatsoever, is reserved to the United States.

I cannot adopt the criticism of distinguished counsel, that the exception here provided for is limited to lands set apart and reserved for some special use which the government of the United States may have for them. These acts are all dealings with lands which belong to the United States—lands over which its ownership and dominion are absolute. There is no occasion, therefore, to make of such lands a reservation for the benefit of the United States. But there were many cases in which, while retaining the title, the government, by some of its branches, had set apart, had reserved for special uses of others, and for other uses than those of the government, lands of the United States. Such is the construction placed upon this clause in the cases of Wolcott v. Des Moines Navigation Co., 5 Wall. [72 U. S.] 681, and fully reconsidered and adopted in the more recent case of Williams v. Baker, 17 Wall. [84 U. S.] 144. Can it be said, with any show of reason, that the lands under consideration in those cases, which were withdrawn from sale by reason of the disputed claims of the state of Iowa, were reserved to the use of the United States?

If, however, this criticism has any just foundation in its application to the general clause of exception founded in this and in all other land grants, it cannot affect the present grant; for in proceedings for the probable failure of the grantee, from various causes, to obtain all the odd sections on each side of the road within the prescribed limits, by giving other land in place of them, among the causes of such failure are mentioned previous sales, or grants, homestead rights, "or that the same has been re-

served by the United States for any purpose whatsoever." Now if the solemn covenant in a treaty made by the United States with a tribe of Indians, that these lands "shall be reserved to and for the Great and Little Osage tribes or nations aforesaid, so long as they may choose to occupy the same," is not a reservation by the United States for another purpose than building railroads, it is difficult to comprehend the use of language or what kind of reservation that clause was meant to cover.

I am, therefore, of opinion (1) that, by the necessary outlook at the condition of this land when the grant was made, and the gross violation of justice and solemn treaty rights in the Osages which a grant so construed necessarily implies, congress did not intend to include these lands in the grant; and (2) that in each of the two clauses reserving lands from the operation of the act they have by apt words expressed the intention that these lands should not be included in the grant.

The treaty with the Osage Indians, of which we have been speaking, contains a clause which is relied on by defendants as sufficient to remove any doubt which may arise from the foregoing views, and I now come to consider that branch of the subject. By the first section of that treaty as originally negotiated and signed on the 29th day of September, 1865, the Osages sold to the United States that part of their lands which includes the land now in controversy, with others. And in consideration of this grant and sale to the United States, the government agreed to pay the sum of $300,000, to be placed to the credit of the tribe, in the treasury of the United States, and that interest thereon at the rate of five per cent. per annum should be paid to the tribes. The lands were to be surveyed and sold for cash as public lands are surveyed and sold under existing laws. After reimbursing the United States, the cost of survey and sale and the sum of $300,000 above mentioned, the remaining proceeds of sale were to be placed in the treasury to the credit of the civilization fund, to be used under the direction of the secretary of the interior, for the education and civilization of Indian tribes residing within the limits of the United States.

When the treaty was under consideration in the senate, that body made numerous verbal amendments, and among others not merely verbal, they inserted after the word "laws" the words, "including any act granting lands to the state of Kansas in aid of the construction of a railroad through said lands." To this amendment, made June 26, 1866, the Indians consented. So that this part of the treaty, as finally proclaimed January 21, 1867, reads as follows:

"Said lands shall be surveyed and sold under the direction of the secretary of the interior, on the most advantageous terms for cash, as public lands are surveyed and sold under existing laws, *including any act granting lands to the state of Kansas in aid of the construction of a railroad through said lands*, but no pre-emption claim or homestead settlement shall be recognized." 14 Stat. 687.

The phrase thus inserted and here italicised, is supposed by the defendant's counsel to have reference to the lands now in controversy, and to have the effect of subjecting them to the railroad grant. The difficulty of determining what is their precise meaning in the connection in which they are employed, is very great. As regards their influence on the decision of the question before us, they may be, or rather must be, considered in one of these lights: (1) As granting by treaty, and by force of their own meaning, lands to aid in the construction of this railroad which had not been so granted before. (2) As placing, by means of a treaty with these Indians, a construction upon the doubtful language of the act of congress which we have already considered. (3) As a recognition, by competent authority, of the existence of such a grant, which must necessarily be the act aforesaid.

1. The first of these propositions is wholly inadmissible. Conceding the doubtful proposition that it was within the power of the president and senate and this tribe of Indians, without the assent of the house of representatives, to have appropriated these lands to such a purpose, they have expressed no such intention. Whatever the language may or may not mean, it is clear that it was not intended to go beyond existing laws. It did not design to make any new law or confer any new right.

2. Nor is it easy to believe that the senate of the United States would undertake, in a treaty with Indian tribes, to construe an act of congress. If they did, they certainly could intend to go no further than to express their own understanding of the meaning of the statute, without designing to give to that expression the authority of a legislative construction. Neither the senate alone, nor in conjunction with the president, is authorized to construe acts of congress so as to bind the legislative and judicial departments of the government. In saying this it is not intended to deny that any contract in such a treaty, by which rights are conferred on either party to the treaty, based upon a construction of an existing act of congress, may be valid, and the contract be construed as it was understood by the parties. But in this case neither the state of Kansas nor the defendant corporation were parties in the treaty, nor was it the purpose of the treaty as amended, to confer any new right on these or either of them. Nor do the words inserted, or the language of the treaty as amended, imply any intention to construe the act of congress granting lands to this road. The act is not recited or referred to, except inferentially. No doubt or

question of its construction is raised or decided. If referred to at all, it is hypothetically, as "any law granting lands to aid in constructing a railroad through said lands." Of course, if there was no such law, this treaty did not undertake to make one.

3. But the force of this phrase in the treaty must rest on the third proposition I have suggested, namely, that it is a recognition of the act we have been considering as a grant of these lands. I have no hesitation in expressing my belief that the senator, whoever he may have been, that suggested that amendment, had in his mind the act which we have already construed, and that his purpose was to incorporate into the treaty a recognition of the validity of the grant, so that the treaty should not defeat it. There may have been in his mind, there probably was, a doubt of the right of congress to make such a grant in the face of the treaty of 1825. The treaty now under consideration, originally presented to the senate, provided for the sale of all these lands, and for the disposition of all the money arising from such sales, in a manner inconsistent with such a grant. With these two treaties staring him in the face, he must have felt the doubt whether the grant, even if by its terms it had included these lands, would be upheld as valid. To remove the argument which might be drawn from this treaty as originally made, it was easy to induce the senate and the Indians to recognize any right which may have been acquired by that act, or any other which was an existing law when the treaty was ratified by the senate. In consenting simply to this, the senate would feel that no wrong was done, because no new right was conferred by or concealed in the amendment. At the same time, as the new words introduced designated no specified statute or law, the attention of the senate was not, probably, directed to this particular statute. But as no other law was then in existence, so far as is shown to us, which, by remotest inference, granted lands to aid in constructing a road through these lands, I must believe that the framer of the amendment had this one in his mind.

The true intent and meaning of the clause in the mind of the senate seems to have been this: That, as the treaty directed all these lands to be sold, and made provision for the disposition of all the proceeds, and, as it was suggested that there might be a railroad grant or grants which covered some of the lands thus directed to be sold, this provision was inserted to remove or prevent a conflict between the treaty and the statute, if any such existed.

But this provision, intended to prevent the treaty from defeating the statute, if such existed, is now relied on to give the statute a construction which we have already said was forbidden by its own terms. Leaving out of the case the want of authority in the treaty-making power to construe statutes for the courts, and the improbability that the senate would attempt in this mode to give a construction to the act of congress, it is clear that they did not intend to do this. They meant to say that this treaty shall not, by reason of its comprehensive terms in disposing of these lands, destroy existing rights. It recognizes existing laws, and, in the sale of these lands and disposal of the proceeds, existing laws shall be respected, if any exist, appropriating any part of these lands. But it certainly did not intend to declare what rights existed, or to construe statutes on which rights might depend, or to create rights in that regard which did not exist independent of the treaty.

As I have already expressed my clear conviction that the act of congress did not grant any of these lands, but by express language excepted them out of the grant, I cannot give to this ambiguous phrase in the treaty, after conceding to it the meaning most favorable to defendants of which it is susceptible, the effect of creating a grant of these lands where none existed before.

These propositions, in my judgment, dispose of the case. They require that the patents issued by the United States for these lands be set aside, annulled and held for naught, and that the defendants be decreed to have no title in any of the lands in question, and perpetually enjoined from asserting such title.

DILLON, Circuit Judge. I fully concur in the conclusion reached in the foregoing opinion, and in the reasons advanced to support it.

Decree accordingly.

[The case was taken on an appeal to the supreme court, where the decree of this court was affirmed, Mr. Justice Field, Mr. Justice Swayne, and Mr. Justice Strong, dissenting. 92 U. S. 733.]

Case No. 15,583.

UNITED STATES v. LECKIE.

[1 Spr. 227.] [1]

District Court, D. Massachusetts. March, 1854.

CRIMINAL LAW — TRIAL — APPEARANCE BY ATTORNEY.

1. Persons charged with a misdemeanor, may, in the discretion of the court, be allowed to plead and defend, in their absence.

2. The conditions stated, upon which this privilege will generally be allowed.

This was an indictment of [Edmund Leckie] the master of the American bark Ithona, under the act of 1835, c. 40, § 3 [4 Stat. 776], for beating and wounding the second mate. [See Case No. 5,023.] At the arraignment, the counsel for the defendant appeared and

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

offered, as the attorney of the defendant, to enter a plea of not guilty, and claimed the right to have the trial proceed, in the defendant's absence. Proof by affidavit was offered, that the defendant had been obliged to go to sea, a few days before the bill was found by the grand jury, or lose the command of a valuable vessel and be put to great pecuniary loss; and that he had endeavored to obtain the consent of the district attorney to his so doing.

R. H. Dana, Jr., for defendant.—(1) In misdemeanors, the defendant may plead by attorney, and be tried in his absence, by his own consent. 1 Rolle, Abr. 289, "Attorney, F," 3; 1 Bac. Abr. 185, "Attorney B"; Bacon's Case, 1 Lev. 146; Keilw. 165; Reg. v. Tanner, 2 Ld. Raym. 1284; Dyer, 212, 346; Rex v. Haddock, 2 Strange, 1100; Com. Dig. "Attorney, B," 5, 6; Cook's Case, Litt. 2; 1 Chit. Cr. Prac. 411, 436; Fight v. State, 7 Ham. (Ohio) 180; Jacobs v. Com., 5 Serg. & R. 317; Canada v. Com., 9 Dana, 304. (2) The court will follow the practice of the state in which it sits, in doubtful cases, and in cases of discretion. By Rev. St. Mass. c. 137, § 9, such a course of pleading and trial is allowed. At least the authorities show that the court has the discretion to allow such a plea and trial.

B. F. Hallett, Dist. Atty., said that he would put no obstable in the way of the defendant, but, on the contrary, was desirous that the court would adopt some rule for the relief of masters and officers, in these cases, which should yet secure the ends of public justice. The court took time for consideration.

At a subsequent day, SPRAGUE, District Judge, said: The party charged with a misdemeanor may, in the discretion of the court, be allowed to plead by attorney, and be tried in his absence. It is often highly proper, that this discretion should be exercised in favor of the accused. As it is very desirable that the rules by which this discretion will be guided, so far as any can be laid down, should be the same in the circuit and district courts, I have consulted with Mr. Justice CURTIS, of the supreme court, and we have concurred in the following:

Where the punishment may be only a fine, and there is no special reason to suppose that imprisonment will be necessary, the court will allow the party charged with a misdemeanor to plead, by an attorney specially authorized thereto, by a power of attorney filed in court; and to be tried in his absence, if the necessity for such absence be made to appear by affidavit, and the district attorney consent thereto. If the district attorney should withhold his consent, without sufficient cause, the court will, notwithstanding such refusal, allow the party to plead and be tried in his absence. Where the punishment must, by law, be imprisonment, or the court has good reason to believe that it will be their duty, in case of conviction, to inflict that punishment, the court does not think fit to indicate any general rule for allowing the party to plead and defend in his absence, but will exercise its discretion upon the circumstances of each case.

Case No. 15,584.

UNITED STATES v. LEE.

[2 Cranch, C. C. 104.] [1]

Circuit Court, District of Columbia. Nov. Term, 1814.

TREASON — DECLARATION OF INTENTION — OVERT ACTS — CONFESSION.

1. The declaration of the prisoner of his intention as to any of the overt acts of treason charged in the indictment, may be given in evidence before evidence is offered of such overt acts.

2. The declaration of the prisoner, accompanying the overt act laid in the indictment, may be given in evidence to show his intention in doing the act; but his confession of having committed the overt act charged cannot be given in evidence.

The defendant [Richard H. Lee] was indicted for treason against the United States, by adhering to their enemies, giving them aid and comfort, by supplying them with fruit and melons, showing them the channel of the river Potomac, and informing them of the situation of the troops of the United States.

E. J. Lee, on the trial, objected to evidence of conversations held by the prisoner with the witness, before proof of some overt act. Such conversations cannot be given in evidence as confessions; for by Const. art. 3, § 3, no confession can be admitted but a confession in open court. Willis' Case, Fost. Crown Law, 241, 244; Respublica v. Roberts, 1 Dall. [1 U. S.] 39; 4 Tuck. Bl. Comm. 357, note. Corroborative evidence cannot precede the principal evidence. Id. Append. 11, 12.

Mr. Jones, for the United States, contra. In Burr's Case [Case No. 14,694], the court said that the order of evidence is a matter of discretion with the attorney of the United States. And the chief justice, in what he said respecting corroborative testimony, alluded to evidence of general evil intent; not of his intent in relation to the act charged.

THE COURT (THRUSTON, Circuit Judge, absent) said that the witness (Mrs. Alexander) might be examined as to the prisoner's declarations of his intention as to any of the overt acts charged in the indictment, although no evidence was yet offered of such overt acts. Mrs. Alexander and other witnesses then proved, that the prisoner wanted to buy watermelons; and said that the British commodore had suffered him to pass upon condition that he would bring them watermelons, which he promised to do; that he had shown a British vessel how to get off the flats; and that he wanted to get information respecting

[1] [Reported by Hon. William Cranch, Chief Judge.]

the militia, to communicate it to the British. The witnesses also proved that he bought watermelons and apples of Mrs. Marshall; that he had a schooner in the channel, and that he said he preferred the English government to ours.

E. J. Lee, for defendant, moved the court to instruct the jury that this evidence was not to be regarded; as no overt act of adherence to the enemy had been proved.

Mr. Jones, contra, contended that there is sufficient evidence of an open act. That the purchase of melons, and collecting information to be sent to the enemy, and his actually setting off to carry it, is a sufficient overt act, although he was intercepted and prevented from carrying it to the British. Fost. Crown Law, 217; Id. c. 3, § 8.

E. J. Lee, in reply. The only facts proved are that he purchased melons, and inquired about the militia. There is no evidence of his intent. His confession upon that subject cannot be given in evidence.

THE COURT (THRUSTON, Circuit Judge, absent) were of opinion that the declaration of the prisoner accompanying the overt act laid in the indictment may be given in evidence to show the intent with which the act was done; but that his confession of having given information of the channel, and of his having been on board the fleet, was not evidence.

The jury, after retiring a few minutes, found the prisoner not guilty.

Case No. 15,585.

UNITED STATES v. LEE.

[2 Cranch, C. C. 462.] [1]

Circuit Court, District of Columbia. April Term, 1824.

RECEIVER OF PUBLIC MONEY—WHO IS.

A public officer who receives money in advance for the contingencies of his office, is a receiver of public money, within the meaning of the act of congress of the 3d of March, 1797 [1 Stat. 512].

This was a suit against the defendant [R. B. Lee], who was commissioner of claims under the act of congress of the 9th of April, 1816, § 11 (3 Stat. 261).

Mr. Swann, for the United States, offered two accounts settled and certified by the proper officers of the treasury department, according to the act of the 3d of March, 1797.

Mr. Jones, for defendant, objected, because, as he contended, the defendant was not a receiver of public money within the meaning of that act.

THE COURT said they had decided, in the case of U. S. v. King [Case No. 15,534], that accounts, so certified, were evidence where the defendant was charged with money advanced to him by the United States, for which he was to account. In that case money had been advanced to King upon a contract for gun-locks. The present defendant was commissioner of claims and received money in advance for the contingencies of his office, for which he is called upon to account.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,586.

UNITED STATES v. LEE.

[4 Cranch, C. C. 446.] [1]

Circuit Court, District of Columbia. March Term, 1834.

CRIMINAL LAW—VARIANCE—PROMISSORY NOTE—BAR—WITNESS—BELIEF IN GOD.

1. A note at sixty days with interest, will not be admitted in evidence to support an averment of a note at sixty days without interest.

2. A man who does not believe in the existence of a God, other than Nature, nor in a future state of existence, is not a competent witness.

3. Quære, whether a promissory note found in the hands of the maker, with two blank indorsements, can be considered as the property of the maker, and whether it be of any value to him?

4. If the note was in the pocket-book of the maker of the note at the time the defendant stole the pocket-book, a conviction of stealing the pocket-book is a bar to a subsequent indictment for stealing the note.

Indictment [against John Lee] for stealing a pocket-book, of the value of seventy-five cents, and a promissory note for $200, at sixty days, made by William Emmons, payable to Colonel Ambrose H. Sevier, and indorsed by him and F. E. Plummer, in blank, of the promissory notes and of the goods and chattels of one William Emmons.

The United States attorney called William Emmons as a witness.

Mr. Bryce, for the defendant, objected to the witness on account of his religious opinions, and proposed to examine him on the voir dire, and cited 2 Russ. 590; Jackson v. Gridley, 18 Johns. 99; Norris, Peake, Ev. 261; and Hunscom v. Hunscom, 15 Mass. 184.

THE COURT, however, inclined to refuse to examine the witness on the voir dire, and the counsel for the defendant did not press it; and Mr. Bryce himself was sworn and testified, that in conversation with Mr. Emmons, some weeks ago, in answer to a question, he said that he did not believe in the existence of a God or of a future state of rewards and punishments.

Mr. Emmons was permitted, at his own request, to explain his belief. He said he believed Nature to be God, and God to be

[1] [Reported by Hon. William Cranch, Chief Judge.]

Nature, and that in him we live and move and have our being. That he did not think himself more bound to speak the truth by being sworn on the Bible, than on any other book. That when a man died, he died like a tree, and was resolved into his original elements, and that intelligence was the consequence, and not the cause, of organization.

THE COURT (CRANCH, Chief Judge, and THRUSTON, Circuit Judge, doubting) rejected the witness, and did not suffer him to be sworn.

Mr. W. S. Brent, for the defendant, objected to giving the note in evidence because it is for $200 at sixty days with interest, and the note is described in the indictment as a note for $200 at sixty lays without interest; and because there is no evidence that it is the property of Emmons. It is indorsed by Colonel Sevier and Mr. Plummer in blank, so that it appears to be the property of Plummer or his indorsee, not of Emmons the maker of the note.

Mr. Key, U. S. Atty., contra. The description is true as far as it goes. It is a note for $200. It is valuable to Emmons as a letter of credit; and because he could raise money upon it.

THE COURT (THRUSTON, Circuit Judge, contra) refused to let the note go in evidence, it not being such a note as is described in the indictment.

MORSELL, Circuit Judge, was also of opinion, that it was not a promissory note because never uttered or delivered, and remaining in the hands of the maker.

THRUSTON, Circuit Judge, was of opinion that it was a promissory note within the penitentiary law, and was valuable to the maker because he could raise money upon it, for sixty days; and that it was also valuable to the thief, who might have sold it. He also thought that the note offered in evidence, namely, at sixty days with interest, supported the averment of a note at sixty days without interest; as if the averment had been of a cow: and the cow stolen had been a red cow; the proof of stealing a red cow would have supported the averment of stealing a cow.

CRANCH, Chief Judge, was of opinion that a note for $200 at sixty days with interest, did not support the averment of a note for $200 at sixty days without interest.

Verdict, guilty of stealing the pocket-book only; and not guilty of stealing the note.

The grand jury, afterwards at the same term found another indictment for stealing the note, upon the trial of which—

THE COURT (nem. con.) at the prayer of the defendant's counsel (Mr. W. L. Brent), instructed the jury that if, from the evidence, they should find that the note was in the pocket-book when it was stolen by the defendant, and that he has been convicted of stealing the pocket-book, they ought to find their verdict for the defendant; which they did.

Case No. 15,587.

UNITED STATES v. LEE.

[1 Hayw. & H. 208.] [1]

Circuit Court, District of Columbia. Dec. 21, 1844.

ARMY OFFICER—PAY—VOLUNTEER COMMISSION.

An officer of the regular army of the United States was ordered, during the Florida war, to command a company of Indians, and was commissioned as captain of volunteers, for which he received pay as such captain. On his return to his regiment, he received full pay for the time he was absent in command of the Indians. He refunded all but the difference between his pay as a regular army officer and the pay he received as an officer of volunteers. The United States claimed that he was only entitled to his pay as a volunteer officer. *Held*, that he was not barred from claiming the pay proper annexed by law to his commission in the regular army.

[This was an action by the United States against John F. Lee.]

P. R. Fendall, for the United States.

J. M. Carlisle, for defendant.

This suit is docketed by consent, to try the right of the defendant to certain pay claimed by him as hereinafter set forth.

The said claim of army pay is agreed to depend upon the following facts, to wit: (1) On and prior to the 1st day of December, 1836, the defendant was a second lieutenant in the first regiment of artillery in the army of the United States and was serving with his said regiment in Florida in the Indian war. (2) On the 22d day of February, 1837, he received a commission of first lieutenant of said regiment, making him such first lieutenant by relation from the 17th day of December, 1836, prout the said commission exhibited. (3) On the 23d day of August, 1842, he received the brevet exhibited, conferring on him as such first lieutenant the brevet rank of captain to take rank as such from the 27th day of January, 1837, for gallantry and good conduct in the war against the Florida Indians. (4) He has received no pay as an officer of the army from December 1, 1836, to September 17, 1837, nor any pay, whatever, for that period out of the army appropriations, or out of any fund applicable to pay off the army. (5) On the said 1st day of December, 1836, he was permitted by the commanding general in the field to leave his company and to join a regiment of Creek Indians under the circumstances and in the manner stated by the said commanding general and of the adjutant general of the army. That such absence from his company was of the nature and under the circumstances set forth in such statement and continued the same from said 1st day of December, 1836, to said 17th day of September, 1837, at which latter date he was recalled to his regiment and served therein as first lieutenant, he having been in the meantime promoted as aforesaid to be such first lieutenant. (6) That he was

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

paid from said 1st of December, 1836, to the 17th day of September, 1837, with the Indians, and volunteers according to the rank which he temporarily exercised there as a volunteer captain of Creek Indians, which special pay was allowed to him by the executive and which said special appropriation was not applicable to the pay of the army proper, and that he also for the same period drew in the regular way his army pay, but he refunded the same, holding the sum of $55.37 upon the account filed to try in this action his right to said army pay, the same having been disallowed by the accounting officers of the treasury. (7) And it is agreed that during the said period, from 1st of December, 1836. to 17th of September, 1837, he was not under suspension or other legal disability, but continued on the rolls of the regular army, and held the said commissions hereinbefore referred to respectively and none other, but rendered no actual service under such commissions, and that he is entitled to the pay annexed by law thereto respectively unless the court shall be of opinion that by reason of his absence from his regiment under the circumstances stated, and his having earned and received the special pay aforesaid by the said voluntary duty, he is legally barred from claiming the pay proper, annexed by law to his said commissions respectively in the army of the United States.

It is agreed that judgment be entered for the United States for the sum of $55.37, if the court shall be of the opinion that the defendant is not legally entitled to the army pay claimed by him, otherwise, judgment for the defendant.

Judgment for defendant on case stated.

Case No. 15,588.

UNITED STATES v. LEE.

[4 McLean, 103.] [1]

Circuit Court, D Illinois. June Term, 1846.

ACCOMPLICE AS WITNESS—IMMUNITY FROM PROSECUTION—BONA FIDES.

1. An accomplice may be used as a witness, from the necessity of the case, in many instances.

[Cited in U. S. v. Hinz, 35 Fed. 280.]

2. And if so used, and from his testimony, he appears to have acted in giving testimony in good faith, the government can not further prosecute him.

[Cited in U. S. v. Ford, 99 U. S. 605.]

[Cited in Nickelson v. Wilson, 60 N. Y. 367.]

3. It is bound in honor to discontinue the prosecution. In testifying he implicated himself, and although the person on whose trial he gave evidence was acquitted, that does not alter the case of the witness. If he acted in good faith, as the court think he did, in giving testimony, he should be discharged.

[Cited in State v. Graham, 41 N. J. Law, 20.]

4. If the prosecuting attorney shall not enter a nolle prosequi against him, which the court think is the better course, they will continue the case until a pardon shall be procured.

[Cited in U. S. v. Hinz, 35 Fed. 280.]

[Cited in Dawley v. State, 4 Ind. 129.]

Mr. Gregg, U. S. Dist. Atty.

Mr. Butterfield, for defendant.

OPINION OF THE COURT. The defendant was indicted for stealing from the mail. And having been used as a witness on the trial of Warner, an accomplice, a motion is now made that he be discharged on that ground. The prosecuting attorney opposes this motion on the ground that, at most, the defendant has only an equitable claim to a pardon, and that on this ground the cause may be delayed; but the defendant cannot be discharged. Rose. Cr. Ev. 147; 2 Russ. Crimes, 598.

An accomplice is used by the government, because his evidence is necessary to a conviction. Being called as a witness, there is an implied obligation by the government, if not expressed, that if the witness shall make a full and honest disclosure of the facts, which have a direct bearing on the case, he shall not be prosecuted. Mr. Greenleaf, in his treatise on Evidence, says (volume 1, § 363): "In regard to defendants in criminal cases, if the state would call one of them as a witness against others in the same indictment, this can be done only by discharging him from the record; as, by the entry of a nolle prosequi, or, by an order for his dismissal and discharge where he has pleaded an abatement, etc.; or by a verdict of acquittal where no evidence, or not sufficient evidence, has been adduced against him." 1 Bull. N. P. 285; Cas. t. Hardw. 163; 9 Cow. 708; 2 Stark. Ev. 11; Com. v. Knapp, 10 Pick. 477. In section 379, Mr. Greenleaf says, "The admission of accomplices, as witnesses for the government, is justified by the necessities of the case, it being often impossible to bring the principal offenders to justice without them. The usual course is, to leave out of the indictment those, who are to be called as witnesses; but it makes no difference as to the admissibility of an accomplice, whether he is indicted or not, if he has not been put on his trial, at the same time with his companions in crime." And again: "But whether an accomplice already charged with the crime, by indictment, shall be admitted as a witness for the government, or not, is determined by the judges, in their discretion, as may best serve the purposes of justice." "If he appears to have been the principal offender, he will be rejected." People v. Whipple, 9 Cow. 707.

In the case of Lee, he was used as a witness with an understanding, that he would not be prosecuted to conviction, provided he made a full disclosure in regard to the acts of Warner. The court have heard his evidence, and there seems to be no doubt that the disclosures made by the witness were true. He implicated himself, being the

[1] [Reported by Hon. John McLean, Circuit Justice.]

driver of the mail stage, but he was instigated to do the act by Warner, who was a much older and more experienced person. The court think that Lee, as a witness, has acted in good faith, and that the acquittal of Warner by the jury, in no respect affects the right of the witness to claim an exemption. The government is bound in honor, under the circumstances, to carry out the understanding or arrangement, by which the witness testified, and admitted, in so doing, his own turpitude. Public policy and the great ends of justice require this of the court.

If the district attorney shall fail to enter a nolle prosequi on the indictment against Lee, the court will continue the cause until an application can be made for a pardon. The court would suggest that to discontinue the prosecution is the shorter and better mode.

UNITED STATES v. LEE. See Case No. 922.

Case No. 15,589.

UNITED STATES ex rel. THOMPSON v. LEE COUNTY.

[2 Biss. 77;[1] 1 Chi. Leg. News, 121; 9 Int. Rev. Rec. 25; 2 Balt. Law Trans. 378.]

Circuit Court, N. D. Illinois. Jan., 1869.

CONFLICT OF JURISDICTION — FEDERAL COURTS — REMOVAL OF CAUSES—MANDAMUS—COUNTY BONDS.

1. To a writ of mandamus issuing from this court it is not a sufficient answer that the respondents had been enjoined by a state court from doing the act which the writ of mandamus commanded.

2. Federal courts supreme, when acting within their sphere, and wherever they come in conflict with the state courts, the latter must give way.

3. Where county bonds had been sold upon the faith of decisions of the supreme court of the state declaring their validity, the fact that the court afterwards reversed its decision does not invalidate those previously purchased in good faith and before maturity.

4. State courts have not the right to interfere with the process of this court to collect judgments therein rendered on such bonds.

5. Where the United States circuit court and the supreme court of the state have ruled differently upon the same questions, and the supreme court of the United States has sustained the circuit court, neither the state courts of that state nor litigating parties can disregard the mandate of the circuit court.

6. A writ of mandamus is the proper process against a board of supervisors, to compel the levy of a tax and payment of a judgment obtained against the county, in this court.

7. Where the respondents make no return to the writ, or refuse to obey it, this court will issue an attachment.

8. Where a suit in the United States circuit court has been removed to the circuit court in another circuit, the latter court has the same power over the parties which the first court would have otherwise had.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

Motion for an attachment [by the United States, on the relation of J. Edgar Thompson] against the members of the board of supervisors of Lee county, Iowa, for contempt in disobeying a writ of mandamus from this court.

Grant & Smith, for relator.

J. C. Hall and Frank Sample, for respondents.

DRUMMOND, District Judge. The facts are these: The county of Lee, Iowa, in pursuance of a statute of that state, and a vote of the people of the county to that effect, issued coupon bonds in aid of the construction of certain railways. A question was made in the courts of Iowa as to the authority of counties under the law to issue such bonds, and it was held by the highest court of the state, in several cases, that such authority existed. These bonds, therefore, had the popular, the legislative and the judicial sanction. The bonds thus fortified, being delivered to the railway companies, were sold in the market, and the relator, among others, became, in the ordinary course of business, a purchaser for value before maturity.

Some of the coupons on bonds held by the relator not being paid, suit was brought thereon in the circuit court of the United States for the district of Iowa. Under the law of congress these suits were transferred to this district, and at the October term, 1864, of this court, the relator recovered three several judgments against the county of Lee, amounting in the aggregate to $8,764.09 and costs. These judgments were unpaid, for the reason, as alleged, that there was no property on which an ordinary execution could operate. In the meantime the supreme court of Iowa had reversed its rulings, and had held all these county bonds invalid, as issued without authority of law. And the statutes of Iowa having provided that a tax should be levied by the board of supervisors, to pay these bonds and interest, injunctions were issued against these defendants, among others, restraining the levy of such tax. The effect of the overruling of their prior decisions by the supreme court of Iowa upon bonds issued and purchased on the faith of the original position taken, has repeatedly come before the supreme court of the United States, and it has been uniformly held by that court that bonds in the hands of a bona fide holder, purchased for value before maturity, while the courts of Iowa sustained their validity, were a just claim against the parties issuing them. It has always seemed to me that this doctrine rested upon the plainest principles of right and equity. The bonds were in market, for sale, decided to be good and effectual in law, by every authority that could speak in the state; the money was paid and received. It would be difficult to imagine a contract made under more solemn and binding guarantees.

The effect of an injunction issued by the tribunals of Iowa prohibiting the levy of a tax, has also several times recently been before the supreme court of the United States, and it has been decided that they cannot, by injunction or otherwise, interfere, in any way, with the appropriate process of the federal courts for the collection of judgments. And in cases like that we are now considering, it is also settled that a mandamus is such process.

Such being the state of the case, on the 10th of July, 1868, the relator obtained an alternative writ of mandamus from this court, requiring the board of supervisors of Lee county to levy a tax to pay off the three judgments and costs recovered by him, or to show cause, on the first Monday of October next thereafter, why they did not make such levy. This writ was duly served on the supervisors by the marshal of Iowa, in the month of September. No cause was shown or apparent notice taken of this writ by the board of supervisors, and their default was entered on the 14th of October. On the 29th of October, 1868, the relator obtained from this court a peremptory writ of mandamus against the supervisors of Lee county, it having been shown that the levy had not been made, requiring them to forthwith impose and to collect without delay the tax for the payment of the judgments, and in this they were "to fail not, under the peril of the law." On the 10th of November last the marshal duly served the peremptory writ of mandamus on the president of the board, and gave a true copy of the same to each member while the board was in open session. No return has ever been made by the defendants to this writ. On the same day that the writ was served, the board, as appears by the published minutes of their proceedings, on the suggestion "of counsel for Lee county in railroad bond suits," adopted the following preamble and resolutions: "Whereas, a peremptory writ of mandamus, issued by the circuit court of the United States for the Northern district of Illinois, sitting at Chicago, in the case of the United States ex rel. J. Edgar Thompson against Lee county, has this day been served upon the members of this board, commanding the levy of taxes for the payment of a certain judgment in favor of said Thompson and against Lee county, rendered upon certain bonds issued by said county to aid in the construction of a certain railroad; and whereas, this board has been heretofore perpetually enjoined by the supreme court of Iowa from levying any taxes for the payment of any of said bonds, and the said injunction was in force and duly served upon this board before the said mandamus was applied for or issued: Resolved, that we believe our oaths require us to obey the said injunction, issued by the supreme court of Iowa, and duly served as aforesaid. Resolved, that we are therefore unable to comply with the order contained in said writ of mandamus without violating the constitution or laws of Iowa as construed by the courts of Iowa, and also doing violence to our oaths of office as we understand it, and rendering ourselves liable to punishment for contempt and violation of our sworn duty. Resolved, that we earnestly desire to obey all orders of the courts of our country, and do not wish to be in contempt of any, but, situated as we are, we are compelled to obey said injunction and decline to levy said tax, and to rely upon the justice of our government and the courts, both state and federal, for protection."

The sixteen members who appear to have been present that day, and who, it will be borne in mind, were parties to this suit, and had been served with process, all save one—and I name him to his honor, B. S. Merriam—voted for the resolutions. The presiding officer, apparently not being required by the rules in such case to vote, did not vote.

I have given the whole of the preamble and resolutions in order that the defendants may have the benefit of their entire justification; and the substance of it all is this, viz.: that in a matter where they, as citizens of Iowa and the United States, are to decide whether they will submit to the authority of the courts of that state or to the nation, they will yield obedience to the commands of the courts of Iowa, and disregard those of the United States. And they adopted this course after it had been decided by the highest court of the nation, in a similar case, that it was against law, and upon the suggestion of counsel who must at the time have known that the supreme court of the United States had so decided. It was supposed that the dogma contained in the resolutions just cited was exploded by the issue of the late Rebellion. But it seems hydra-headed, and we now encounter it within the borders of the patriotic state of Iowa, which struggled as hard as any other state to extirpate it. It would seem to need no argument to show that the position taken by the board of supervisors of Lee county is unsound. If tenable, then the federal courts are enchained by state authority, and cannot execute their own decrees. They act within the states and upon the people of the states. That is the very law of their being. But it is a fundamental principle that within their sphere they are supreme. Whether or not they are in the path pointed out by the constitution and law depends, by the very terms of the instrument itself, upon the adjudications of the supreme court of the United States. Then, when that court, in a given case, has decided that the parties should obey the mandate of a federal court, state courts must yield. This has been the rule from the foundation of the government, and, therefore, in certain controversies writs of error issue to the highest court of a state to revise its judgment or decree, under the twenty-fifth section of the judiciary act of

1789 [1 Stat. 85]. It is upon the same principle that the act of March 2, 1833 (4 Stat. 634), was passed at the time of the South Carolina troubles. The courts of the United States have constantly followed it since their organization. To take a very recent example: The bankrupt law of 1867, in various ways, interferes with the proceedings of the state courts. By what right? By virtue of the power in congress "to establish uniform laws on the subject of bankruptcy." Whenever, in carrying out this power, the courts of the United States act upon the courts of the states, the latter must give way, and for the simple reason that the authority of the former is paramount. It must be so under our system, for it is very clear, if the doctrine now sought to be maintained by the defendants prevailed generally, the tie that binds the states, in the administration of justice at least, would be severed at once. What, therefore, the defendants are required to do in this case is nothing new. State courts and judges have done it often, and because they believed their oaths of office required it under the sixth article of the constitution, which declares that the laws of the United States "made in pursuance thereof * * * shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The mandate issued from this court is a law to these defendants, expressly decided so by the supreme court of the United States. The judges of Iowa are bound to obey and respect it. On what higher ground can the board of supervisors of Lee county, in that state, place themselves to escape its binding obligation? It is the undoubted right of the courts of Iowa, in suits therein, to decide all legal questions properly coming before them under the constitution and laws of that state, and the parties thereto are concluded by such decision; but when they decide differently, in different cases, upon the same point, and the supreme court of the United States has adopted one course of decisions and rejected the other, neither the courts of that state nor the parties to controversies in the courts of the United States, can ignore or disregard the judgments of the federal courts, merely because they suppose the right ruling has not been followed. It has sometimes happened that the supreme court of the United States has overruled its own previous decision, made in accordance with the judgment of a state court, in order to follow the guide there set up, but it is obvious that there must be a limit to such deviations, and that court has frequently failed to see sufficient reason for the change. These cases from Iowa furnish one instance where it has refused to adopt the last decision of a state court. It is true there was not complete harmony of opinion among the judges of the supreme court of Iowa, nor has there been among the judges of the supreme court of the United States, upon the question in controversy between these parties, but that is not uncommon. It is a difference of opinion upon the law among lawyers and even judges that gives rise to most if not all of the litigation in our courts. Courts are created to settle these differences and adjudicate on the rights of parties. Many of the rules now of daily practice in the courts of the United States have been established, not by a unanimous court; of which much of the jurisdiction in admiralty is an example. It is a maxim of the law that the public interest demands there should be an end of legal controversy, and, therefore, when the decision of a competent court of final resort in a case within its jurisdiction is given, as to that, the door is closed.

I infer from an opinion which has just been published of the supreme court of Iowa, and which I suppose to be authentic, the judges of that court intend to adhere to its later rulings on the validity of these county bonds. No one can question their right to do so, but it seems to me no intimation even should be given from which it could be inferred that in a conflict in such a case, between the courts of the state and of the United States, the decisions of the state court are paramount. It is clear that is the view taken of the subject by the defendants, and, it would seem, inspired by counsel and not discouraged by judges. It is inconceivable that these defendants could have taken their course without some reason for believing that they would be sustained. Indeed, they distinctly say, situated as they are, they rely upon the courts of the state, as well as of the nation, for support. It is difficult to comprehend by what mode of reasoning they reached the conclusion they could rely upon a federal court for protection against the consequences of their own disobedience of its orders; for a court that cannot and will not enforce its decree is shorn of one of its principal attributes. The judgments of the relator would become valueless without the means of compelling payment, and when he asks for any appropriate and legal process to effect that result, the court ought not to withhold it. If there had been any steps taken to remove the case to the supreme court of the United States, to the end that questions of so much doubt, and about which there has been so great a difference of opinion at the bar and on the bench, might be re-examined, then, perhaps, there would be some grounds for declining to act. But nothing of the kind has been attempted. The parties have contested, unsuccessfully, all these points so often before the courts of the United States, that they have abandoned further controversy in argument, and now hope to interpose as a shield the order of a state court. As has been seen, such order is of no avail, and the

hope, to every one who can examine the subject unaffected by feeling, must appear to be founded on a mere fallacy. Other cases, similar to these now under consideration, were transferred from Iowa to this state some years since, because of the alleged interest of the judges of the circuit court of the United States for that district in the questions involved, and thus this court has been connected with the untoward controversy which has arisen between the courts of the United States and of that state, and in which at that time, in order to execute the judgments rendered, the judges of this court were called on to issue a peremptory writ of mandamus to parties under injunction from the state court, and though admitting it was an appropriate process, they, under the circumstances, were unwilling to do anything to produce a conflict, and therefore declined to issue the writ; requesting the parties, in the first place, to go before the courts of Iowa and apply for a removal of an apparent obstacle to the process of this court. But that was not done, or if it were, the application was unsuccessful, and the supreme court of the United States has since decided, as has been shown, that the obstacle was not a real one, and that the process should issue and be executed. Upon what principle is it that the judges of this court, administering in these cases under the constitution of the United States the laws of Iowa, must obey the mandates of the supreme court, and the defendants, parties in the very cases where the mandates issue, must not obey them? It would be difficult by any train of reasoning within the scope of ordinary intelligence to name it.

The question has occurred whether before a writ of attachment is ordered a rule to show cause should be served on the defendants. If it did not clearly appear that the defendants had deliberately taken their line and resolved to abide the results of a violation of the orders of the court, that course would be adopted But it is plain from what has been stated that the only cause has already been shown. And it would seem, therefore, that a rule to show cause would serve no useful purpose. The object is to oblige the defendants to obey a lawful order of this court, and if they will do that, there is no desire to impose mere penalty. And besides, as parties to a suit in this court, on their own showing, they are guilty of contumacy. They allege, indeed, that they desire to obey all orders of the courts of the country, and do not wish to be in contempt of any, but an open, willful, deliberate violation of a lawful order of a court, duly served on a suitor, is itself a contempt, and, therefore, while they disclaim the wish to be in contempt, they expressly admit they have committed it. It has been hinted that the officer may be resisted in the service of the attachment, in this case; but though there does not seem to have been that complete acquiescence in the judgments of the federal courts expected by the supreme court of the United States, yet it is to be hoped all such apprehensions are groundless, for under the law of congress this court has precisely the same power over the parties in Iowa as the circuit court of that district would have had if the cases had not been transferred. I am not insensible of the gravity of this case, and have stated, somewhat at length, the reasons upon which the action of the court is based, and with the hope that the defendants may reconsider the circumstances of their position and act in conformity with law. The principles presented are established by the highest judicial authority in the country, and indeed are familiar. [For when it is once settled, as it has been by many decisions, and in these Iowa cases, among others, that mandamus in such a case as this is a lawful process of this court, then it comes within a rule that would seem to be without exception, viz. that no state court can obstruct or interfere with it.] [2] They have been thus referred to because they seem to be either unknown, forgotten, or repudiated by the defendants and their legal advisors.

In granting the writ of attachment in this case, I submit, in conclusion, whether, after all the various matters involved in this litigation have been repeatedly before the supreme court, of the United States, and as often determined against the claims set up by the persons and corporations of Iowa, who are parties to suits in the federal courts, it is not the duty of those parties, at least as to the cases in the courts of the United States, to yield obedience as good citizens, to the orders of the final arbiter of the law.

NOTE. The decisions of the supreme court of Iowa on the question of these municipal bonds are numerous, and many of them are elaborately argued. Dubuque County v. Dubuque & P. R. Co., 4 G. Greene, 1; State v. Bissell, Id. 328; Clapp v. Cedar County, 5 Iowa, 15; Ring v. Johnson County, 6 Iowa, 265; McMillen v. Boyles, Id. 304; Games v. Robb, 8 Iowa, 193; Stokes v. Scott County, 10 Iowa, 166; Whittaker v. Johnson County, Id. 161; State v. County of Wapello, 13 Iowa, 389; Myers v. Johnson County, 14 Iowa, 47; McMillan v. Boyles, Id. 107; Rock v. Wallace, Id. 593; Smith v. Henry County, 15 Iowa, 385; Ten Eyck v. Mayor of Keokuk, Id. 486; Chamberlain v. City of Burlington, 19 Iowa, 395. And later, in the case of McClure v. Owen, 26 Iowa, 243, the supreme court of Iowa review the decisions, and deny the binding authority of the decisions of the United States supreme court on the questions involved. That mandamus is the proper remedy to enforce the judgment, see U. S. v. Treasurer of Muscatine County [Case No. 16,538]. The doctrine that an injunction from a state court is inoperative to restrain the acts commanded by a mandamus from a federal court is approved in Riggs v. Johnson County, 6 Wall. [73 U. S.] 166; U. S. v. Keokuk, Id. 514.

The decision of the supreme court of the United States that bonds issued while the state courts held that they were legally issued and valid can-

[2] [From 9 Int. Rev. Rec. 25.]

not be afterwards invalidated by a change in the decisions by the same courts, was rendered at the December term, 1865, and is reported Thompson v. Lee County, 3 Wall. [70 U. S.] 327.

The federal courts will not necessarily follow the decisions of the state courts in questions of common law (City of Chicago v. Robbins, 2 Black [67 U. S.] 418; Williamson v. Berry, 8 How. [49 U. S.] 495; Lane v. Vick, 3 How. [44 U. S.] 464); nor in questions of commercial law (Swift v. Tyson, 16 Pet. [41 U. S.] 1; Carpenter v. Providence-Washington Ins. Co., Id. 495; Neves v. Scott, 13 How. [54 U. S.] 268; Foxcroft v. Mallet, 4 How. [45 U. S.] 353). The distinction is also made that the federal courts will not so follow state constructions as to render invalid contracts entered into with citizens of other states (Rowan v. Runnels, 5 How. [46 U. S.] 134); or where a different construction had become the basis of contracts (Pease v. Peck, 18 How. [59 U. S.] 595). In the case of Talcott v. Pine Grove [Case No. 13, 735], Emmons, J., gives an exceedingly elaborate review of the authorities in both the state and federal courts on several of the questions involved in this case. The supreme court, in the case of Olcott v. Fond du Lac County, 16 Wall. [83 U. S.] 678, which was a suit upon county bonds, has ruled that a decision of the state supreme court that the bonds were invalid, the act under which they were issued being unconstitutional, was not binding upon the federal courts; that if a contract is valid under the constitution and laws of a state as expounded by its judicial tribunals at the time, no subsequent action by the legislature or judiciary can invalidate it; and that bonds issued in aid of a railroad, when such purposes were construed to be for the public good, and to warrant the imposition of taxes, a subsequent decision that no taxes can be imposed for such purposes cannot affect the rights of bona fide holders.

Consult also Leffingwell v. Warren, 2 Black [67 U. S.] 599; Cohens v. State of Virginia, 6 Wheat. [19 U. S.] 264; Carroll v. Carroll, 16 How. [57 U. S.] 275; Mitchell v. Burlington, 4 Wall. [71 U. S.] 270; City v. Lamson, 9 Wall. [76 U. S.] 477.

Case No. 15,590.

UNITED STATES v. LEESE.

[Hoff. Land Cas. 124.] [1]

District Court, N. D. California. Dec. Term, 1855.

MEXICAN LAND GRANT—OCCUPATION.

This claim undoubtedly valid.

Claim for five leagues of land in Sonoma county, confirmed by the board, and appealed by the United States.

[This was a claim by Jacob P. Leese for the Rancho Huichicha. Claim filed April 6, 1852. Confirmed by the commission April 18, 1853.]

S. W. Inge, U. S. Atty.

Stanly & King, for appellee.

BY THE COURT. The claimant in this case obtained on the 21st of October, 1841, a grant from Manuel Jimeno, acting governor of California, for two square leagues of land, as designated on the map which accompanied his petition. Juridical possession was given of the tract as delineated on the map, but the extent of land measured to him largely exceeded the quantity mentioned in the grant. He thereupon petitioned for an augmentation, and on the 6th of July, 1844, he obtained from Governor Micheltorena an additional grant for three and one-half leagues, making in all five leagues and a half. The proofs show that as early as 1839 the land was occupied, and a house built upon it. The grantee also placed there cattle and horses, and cultivated about two hundred acres of the land. He has ever since continued to occupy it. The authenticity of the grant is shown by proof of the genuineness of the signatures, and the production of the expediente from the archives of the former government. The claim was confirmed by the board, and no objections to it are suggested in this court. A decree of confirmation must therefore be entered.

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

Case No. 15,591.

UNITED STATES v. LEFEVRE.

[1 Cranch, C. C. 244.] [1]

Circuit Court, District of Columbia. July Term, 1805.

KEEPING A FARO TABLE.

Under the act of assembly of Maryland, 1797, c. 110, the offence of keeping a faro table can only be committed by a tavern keeper or retailer of spirituous liquors.

Indictment for keeping a faro table, at common law, and on the act of assembly of Maryland, 1797, c. 110.

THE COURT was of opinion, that in order to bring the traverser within the act of assembly, he must be either a tavern keeper, or a retailer of spirituous liquors, by being in the custom of selling liquors by retail, either with or without license.

Whereupon Mr. Jones gave up the count upon the statute.

Case No. 15,591a.

UNITED STATES v. LEMMONS.

[Hempst. 62.] [2]

Superior Court, Territory of Arkansas. Oct., 1828.

INDICTMENT—CONCLUSION.

An indictment must conclude "against the peace and dignity of the United States."

Indictment [against James Lemmons] for setting up and keeping a faro bank.

Before JOHNSON, ESKRIDGE, TRIMBLE, and BATES, JJ.

On motion of the defendant, by his attorney, the indictment was quashed, because it did not conclude "against the peace and dignity of the United States of America."

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Samuel H. Hempstead, Esq.]

Case No. 15,592.

UNITED STATES v. LENOX.

[2 Paine, 180.] [1]

Circuit Court, S. D. New York. Oct. Term, 1827.

ASSIGNMENT—FUTURE ADVANCES—RIGHTS OF THIRD PARTIES.

An assignment of property given to secure advances already made, and which may be made, is valid as to all advances except such as are made after the liens of third persons have intervened.

[This was a suit by the United States against Robert Lenox.]

R. Tillotson, for complainants.

T. L. Ogden, for defendant.

THOMPSON, Circuit Justice. The object of the bill filed in this case, is to call upon the defendant to pay over to the United States a part of the money received by him from the New York Insurance Company, for a loss paid upon a policy of insurance effected by James Woodham upon the brig Yamacran. The bill charges, that the defendant had received $9,670.75, and was entitled to retain only $6,000, and calls upon the defendant to account for the balance. The bill alleges, that the defendant held a bill of sale of the brig, and an assignment of the policy of insurance, as collateral security for the payment of the $6,000 and the interest, solely without reference to any future advances to be made by the defendant to Woodham; and that the United States afterwards recovered a judgment against Woodham for $2,443.80, to secure which he had assigned to the United States the said policy, after deducting the $6,000 and the interest. The bill alleges, that both before and after the assignment of the policy to the United States, the defendant was in the habit of discounting notes and advancing money to Woodham, but expressly charges that such loans and discounts were made upon the security of the paper discounted and the solvency of the parties liable thereon, without any reference or relation to the said brig or the insurance thereon as collateral security for the same; and calls upon the defendant to answer whether the bill of sale of the brig, and the assignment of the policy to him, were not made for the security of the $6,000 only.

The answer of the defendant admits that the bill of sale, although absolute on its face, was given and received as collateral security; but expressly avers, that the bill of sale and the assignment of the policies were made as security for advances made, and to be thereafter made, from time to time; and that they were always held and considered by him as a general security for all advances, and, as he believes, were so understood by Woodham; and denies that any notes were discounted upon the security of the parties thereon, without reference to the collateral security upon the brig, and the assignment of the policy of insurance; but avers, that all the discounts were with reference to and on the faith of such collateral security. The defendant admits the receipt of the money from the New York Insurance Company, as alleged in the bill, and sets out the advances made by him to Woodham, amounting to $9,667, leaving in his hands a balance of $3.75, which he offers to pay over to the United States.

The judgment in favor of the United States against Woodham was entered on the 22d of June, 1825, and the defendant admits notice thereof, and of the claim of the United States on the fund in July thereafter; but alleges, that the last renewal of any note for Woodham, or advance made to him, was in May preceding, and of course before any notice of the claim of the United States.

These allegations in the answer, being responsive to the bill, are not affected by any proofs in the cause. They are in no way contradicted, except by the testimony of Woodham. His understanding of the transaction would seem to be at variance with the statement contained in the answer; but his testimony is much weakened by that of McNeil, who swears that he heard Woodham tell the endorser upon the note last renewed that he had made a bill of sale to the defendant, which was an ample security against his responsibility. This was said to quiet the apprehensions of the endorser, and carries with it strong probability of being a true statement of the transaction. But admitting Woodham's testimony to be true in its fullest extent, it is but the evidence of one witness in direct contradiction to the answer, and is not sufficient to disprove it. The facts are, therefore, left as disclosed by the bill and answer.

The ground upon which the United States rest their claim upon this fund, is that the security given to the defendant by the bill of sale and the assignment of the policy, was for the specific sum of $6,000; and that the defendant had no claim upon the fund for any more. The answer of the defendant, however, expressly denies this allegation, and avers that they were given as security for advances to be made from time to time to Woodham. That this was a valid security, as between the defendant and Woodham, for any advances made by the former to the latter, cannot admit of a doubt. That point has been too often and too well settled, to be drawn in question. 5 Johns. Ch. 320; 6 Johns. Ch. 327, 417; 16 Johns. 165, 169, 417; 2 Johns. Ch. 309; 1 Johns. Ch. 394; [U. S. v. Hooe] 3 Cranch [7 U. S.] 73; [Shirras v. Caig] 7 Cranch [11 U. S.] 34; 15 Mass. 389; 8 Ves. 573. This rule may be subject to some qualifications as it respects the rights of third persons, but

[1] [Reported by Elijah Paine, Jr., Esq.]

none which could affect the present case. All the limitation that could be required would be to protect the lien of third persons which should intervene between the taking of the security and the further advances. In the case now before the court all the advances made by the defendant were before the United States recovered a judgment against Woodham, or would have acquired any legal or equitable claim upon this fund.

The bill must, therefore, be dismissed.

NOTE. A judgment as well as a mortgage may be taken to secure future responsibilities; but it seems that responsibilities, incurred after a subsequent judgment to a third person, will not be covered by the prior judgment. Brinkerhoff v. Marvin, 5 Johns. Ch. 324. Where a creditor has separate judgments against each of two partners, the partnership property is bound to the same extent as if there had been one judgment for the whole against both partners. Id. The lien of a judgment is good for the interest which may accrue on it as well as for the principal debt. Sims v. Campbell, 1 McCord, Eq. 56; Winslow v. Ancrum, Id. 105. Judgments have no lien upon money. Huntingdon v. Spann, Id. 167. A judgment is no lien upon an equitable interest. Jackman v. Hallock, 1 Ham. (Ohio) 320; Manley v. Hunt, Id. 258. Where lands have been omitted out of a contract by mistake, which is afterwards corrected by a court of chancery, whether judgments obtained against the vendor, after the contract was made, but before its correction, have a lien upon it, quære. Pierce v. Brassfield, 9 Ala. 573. A judgment recovered against the devisee of real estate, which estate is charged by the testator with the payment of a joint and several note given by such devisee and the testator, upon which such judgment is obtained, is at law, junior and subordinate, as a lien upon the real estate of the devisee, to a prior judgment against such devisee for his individual indebtedness. Smith v. Wyckoff, 11 Paige, 49. A judicial lien when barred by lapse of time, cannot be revived so as to have a retrospective effect prejudicial to the rights of others. Coombs v. Jordan, 3 Bland, 324; Post v. Mackall, Id. 517; Cape Sable Co.'s Case, Id. 660. Where a judgment has abated, by death, during the continuance of the lien, the plaintiff, or his representatives, may come in under a creditor's suit, and have the benefit of such lien without reviving at law. Coombs v. Jordan, Id. 326. Where the execution of a judgment has been suspended, the lien continues its limited time after such suspension. Id. The bringing of an action of debt upon a judgment, amounts to a virtual abandonment of any then existing lien arising therefrom. Cape Sable Co.'s Case, Id. 660. The general lien of a judgment creditor, upon the lands of his debtor, is subject to all equities which existed against such lands, in favor of third persons, at the time of the recovery of the judgment. And the court of chancery will so control the legal lien of the judgment creditor as to restrict it to the actual interest of the judgment debtor in the property; so as fully to protect the rights of those who have a prior equitable interest in such property, or in the proceeds thereof. Buchan v. Sumner, 2 Barb. Ch. 165. It is a settled principle in the court of chancery that the general lien of judgment, upon the real estate of a debtor, is subject to all the equities which existed against such real estate in favor of third persons, at the time of the recovery of such judgment. And a court of equity will so control the legal lien of the judgment creditor as to protect the rights of those who have prior equitable interests in, or liens on, such property, or the proceeds thereof. Wilkes v. Harper, Id. 338.

Case No. 15,593.

UNITED STATES v. LENT et al.

[1 Paine, 417.] [1]

Circuit Court, S. D. New York. April Term, 1825.

EVIDENCE—AUTHENTICATED COPIES—DISBURSING OFFICER—ACCOUNTING.

1. The provision in the second section of the act of the 3d of March, 1797 [1 Stat. 512], as to the admission in evidence of authenticated copies of bonds, contracts, and other papers, is not restricted to cases where suits are commenced under the authority given by the first section of the act, but applies to all cases where the evidence is required.

[Cited in Bechtel v. U. S., 101 U. S. 600.]

2. Where a battalion quarter-master gave a bond to the United State, conditioned "to expend faithfully all public monies and to account for all public property" it was held, that he was bound to account not with the quarter-master general, but the treasury department, and that this obligation extended to public monies as well as public property, and to monies expended by him while acting as a deputy of the quarter-master general; and a claim for credit which had never been presented at the treasury, was rejected.

3. Utility of the law requiring accounts against the United States to be presented at the treasury, before they can be used in a suit.

Error to the district court of the United States for the Southern district of New York.

The plaintiffs declared in the court below, upon a bond executed by the defendants to the plaintiffs, on the 22d day of August, 1816, in the penal sum of 5,000 dollars, with the following condition. "The condition of this obligation is such, that whereas the above bounden Lieut. James W. Lent, Jr., has been appointed a battalion quarter-master in the corps of artillery, and has accepted said appointment. Now, if the said Lieut. James W. Lent, Jr., shall and doth at all times henceforth and during his holding and remaining in said office, faithfully expend all public monies. and honestly account for all public property which may come into his hands in his said capacity of battalion quarter-master, without fraud or delay, then the above obligation to be void, otherwise to remain in full force and virtue. J. W. Lent, Jr. J. W. Lent." Breaches were assigned by negativing the words of the condition of the bond, and the defendant pleaded the general issue and performance.

On the trial, the plaintiffs gave in evidence a copy of the bond, duly authenticated, under the act of congress, and also an authenticated transcript of the account of J. W. Lent, Jr., as adjusted at the treasury department, stating a balance against him of $5,962.-99. J. W. Lent, Jr., had acted in his capacity of battalion quarter-master, as deputy to Colonel Mullany, who was quarter-master general; and the defendants offered in evidence, an account made by his direction, between Lent and the United States, containing items credited to Lent, which appeared never

[1] [Reported by Elijah Paine, Jr., Esq.]

to have been presented to the accounting officers at the treasury department. This was accompanied with evidence, that Lent had paid monies, receipts for which were taken in the name of Col. Mullany, and by some other circumstances of the same kind. The plaintiffs objected to the admission of this account as evidence, but the objection was overruled, and the jury found a verdict for the defendants. [Case unreported.] The cause was thereupon removed to this court upon a bill of exceptions.

R. Tillotson, for plaintiff.

D. B. Ogden and R. I. Wells, for defendants.

THOMPSON, Circuit Justice. This case comes up on a writ of error to the district court of the United States for the Southern district of New York, and the question presented for the decision of this court, arises upon a bill of exceptions taken at the trial. The action is founded upon a bond given by the defendants below, with a condition, that J. W. Lent, Jr., a battalion quarter-master in the corps of artillery, should at all times during his holding said office, faithfully expend all public monies, and honestly account for all public property that should come into his hands, in his capacity of battalion quarter-master.

Upon the trial, the defendants offered in evidence for the purpose of showing that the battalion quarter-master had duly accounted, an account made out under the direction of Col. Mullany, the quarter-master general, by which the balance against Lent is stated to be eighteen hundred and eight dollars ninety-nine cents; whereas by the treasury statement, it appears to be five thousand nine hundred and sixty-two dollars ninety-nine cents. This was objected to, on the ground that it did not appear that the credits claimed had been presented to the accounting officers of the treasury. This objection was overruled, and the account admitted. And whether properly admitted or not, is the question to be decided.

Upon the argument, however, another question was made on the part of the defendants in error, as to the admissibility in evidence of a certified copy of the bond, upon which the action is founded, which although not properly arising upon the case, may be very shortly disposed of. It would be a sufficient answer, that no objection was made upon the trial to the evidence; but had an objection been made, it would have been unavailable. This copy was duly certified in the manner directed by the act of congress of the 3d of March, 1797 (2 Bior. & D. Laws, 594 [1 Stat. 512]), which declares, that all copies of bonds, contracts, or other papers, relating to, or connected with, the settlement of any accounts between the United States and an individual, when certified by the register to be true copies of the originals on file, and authenticated under the seal of the department, shall have equal validity, and be entitled to the same, degree of credit, which would be due to the original papers, if produced and authenticated in court. With a proviso, as to certain cases where the plea is verified by an oath, which, however, does not apply to the present case. The construction contended for, on the part of the plaintiffs in error, that this provision, as to the admission of authenticated copies, is restricted to certain cases, where suits are commenced under authority given by the first section of the act, cannot be sustained, although it is not perceived why the present is not such a case. But the provision is general, and applies to all cases where the evidence is required; and is founded upon a prudent precaution to guard against the loss of the original.

But the account offered on the part of the defendant, and admitted by the court, was not competent evidence. It cannot be taken out of the prohibition contained in the 4th section of the act already referred to, which declares, that in suits between the United States and individuals, no claim for a credit shall be admitted upon the trial, but such as shall appear to have been presented to the accounting officers of the treasury for their examination, and by them disallowed, in whole or in part, unless it should be proved to the satisfaction of the court, that the defendant is at the time of trial in possession of vouchers, not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury, by absence from the United States, or some unavoidable accident. It was not pretended upon the trial, that this case came within the special exceptions in the act.

But it is said, that the battalion quarter-master was not bound to account to the United States, but only to the quarter-master general, and that this section of the act does not therefore apply to the case. I am unable to discover any ground upon which this position can be sustained. This bond is given to the United States, and it is not pretended but that it was given pursuant to the requirements of law. It is certainly not a bond given to, or for the benefit of, the quarter-master general. The account is to be rendered by the battalion quarter-master to the United States, according to the true interpretation of the provisions of this bond. He might perhaps account through the quarter-master general; but there can be no doubt but the United States have a right to call upon him to account for all public monies received by him for disbursements. And these accounts must be submitted to the accounting officers of the treasury department, and they are to judge in the first instance of their sufficiency. And this is a regulation founded upon the soundest principles of public policy. If officers entrusted with the disbursement of public monies were left to account only in the courts of justice, and upon the trial of suits brought against them, it would leave the state of public accounts in endless confusion and uncertainty.

It was urged on the argument, that by the terms of the bond, J. W. Lent, Jr., is only bound faithfully to expend all public monies, but is not required to account for such expenditure, to the government, but that it is enough for him to account therefor upon the trial; that the obligation to account relates to public property, and not money received for disbursement. This is too narrow a construction of the bond, and cannot comport with the object thereof, or the true intent and understanding of the parties. But admitting the bond as to the disbursement of monies, only requires a faithful expenditure, who is to judge whether there has been such faithful expenditure? The act of congress has answered the question, by requiring this to be submitted in the first instance, to the accounting officers of the treasury, and if disallowed there, the claim may be set up on the trial of the cause against such disbursing officer. This is imposing on the party no hardship, or precluding him from the ultimate decision of the courts of justice upon the merits of such claim. Such is the obvious construction to be given to the act of congress, and it has been so considered by the supreme court of the United States in the case of Walton v. U. S., 9 Wheat. [22 U. S.] 651.

The judgment of the court below, must accordingly be reversed.

UNITED STATES v. The LEVI ROWE. See Cases Nos. 8,293 and 8,294.

Case No. 15,594.

UNITED STATES v. LEVITT et al.

[1 N. Y. Leg. Obs. 92.]

District Court, D. Massachusetts. 1842.

CUSTOMS DUTIES—EVASION OF LAWS—LEADEN BUSTS.

[It seems that busts made of lead are free of duty under the act of 1832 (4 Stat. 583), under the clause providing for "all busts of marble, metal or plaster," although they in fact were imported for use as lead and were put into that form to avoid the duty of 3 cents a pound on "lead in pigs, bars and sheets."]

A. Dunlap, U. S. Dist. Atty., stated that this was an action on a custom house bond given by Messrs. Levitt & Co. for the payment of certain duties claimed by the government upon a large quantity of leaden busts imported per ship Julian, which duties defendants now refused to pay. Messrs. Levitt & Co.., Mr. Dunlap said, were lead manufacturers at Brooklyn, New York, and had imported these articles under the name of metal busts affirming them as such to be free from duty under the act passed by congress in 1832, which provides that "all busts of marble, metal, or plaster shall be imported into the United States free of duty." The custom house authorities however contended, that the busts in this case were but pigs of lead thrown into their present form for the purpose of avoiding the duty. This Mr. Dunlap said was clearly the case, and the defendants had violated the law,—at least its spirit,—by which alone the court ought to be governed. Congress he said, had evidently never intended that lead should be thus imported, they had lately discovered the "leak" in the former act, and had, at the last session passed another act prohibiting the admission of busts unless they could be proved to be double the value of the metal of which they were composed. This Mr. Dunlap designated as "declaratory law" and we understood him as saying that it ought to have its effect on the present occasion.

Daniel Webster, for defendants. The law imposed a duty of three cents per pound upon "lead in pigs, bars and sheets." Now the simple question was, whether the articles before the court (the busts) were, or were not, pigs, bars or sheets of lead. Certainly they were not. He had no desire to see the laws evaded. He had performed his share of duty elsewhere in supplying the defect which existed in relation to the importation of lead. There was, however, a fatal omission in the act of 1832, under which these busts had been imported,—a "leak" as the counsel for the government had termed it,—and such being the case, the defendant in the present case could not be called upon to pay the duty. As to the law passed by congress during the last session, that had nothing to do with the present case. No law could operate retrospectively. All new laws looked to the future, not to the past: and the very fact of congress having amended the law of 1832 proved the existence of the defect and omission which had led to the importation of the articles in question. He (Mr. Webster) repeated that he had no wish to sanction evasion of the law, but he thought it better, now that the leak in the act of 1832 had been stopped,—now that no further evil could accrue,—that the revenue should suffer in this single instance, rather than that a forced construction should be put upon the law in order to procure a conviction.

Mr. Dunlap replied.

DAVIS, District Judge, addressed the jury in a most able and impartial charge, in the course of which he alluded to a former decision in relation to sugar. The duty on loaf sugar, he said had been fixed at a very high rate, but was eluded in many cases by the introduction of an article in a pounded state. The government claimed the duty, but the court notwithstanding the pounded sugar was superior to the best American loaf sugar that could be obtained, decided that it was not loaf sugar, and therefore not subject to duty.

The jury, after some deliberation, gave it as their opinion that the articles in question were leaden busts and consequently free from duty.

The total amount of lead imported by Messrs. Levitt & Co., in the shape of busts during the summer, was stated to be 664,000 pounds.

UNITED STATES (LEWEY v.). See Case No. 8,309.

Case No. 15,595.

UNITED STATES v. LEWIS et al.

[13 N. B. R. 33; 2 Wkly. Notes Cas. 31; 22 Int. Rev. Rec. 39; 32 Leg. Int. 371; 23 Pittsb. Leg. J. 34; 7 Leg. Gaz. 324.] [1]

Circuit Court. E. D. Pennsylvania. Oct. 5, 1875.[2]

UNITED STATES—PRIORITY OF PAYMENT—PARTNERSHIP—JOINT AND SEPARATE ESTATES—FOREIGN PARTNERS—EXHAUSTING SECURITY.

1. The United States need not prove its debt before filing a bill to enforce its right to priority of payment.

2. The United States is entitled to priority of payment out of the separate estates of the partners, although its demand is against the firm.

3. The rule that the joint estate must be applied to pay the joint debts, and the separate estate to pay the separate debts, is only applicable where the joint estate as well as the separate estate is before the court for distribution.

[Cited in Re Lloyd, Case No. 8,429; Re Webb, Id. 17,317; Re Lloyd, 22 Fed. 89.]

4. If the United States holds a demand against a firm, some of the partners of which reside in a foreign country, and the resident partners become bankrupt, it is entitled to priority of payment out of their separate estates.

[Cited in Cottrell v. Pierson, 12 Fed. 807.]

5. The United States may enforce its right to priority without first exhausting the securities it may hold for the claim.

[3] [This was a bill filed by the United States against [Edwin M.] Lewis, the assignee in bankruptcy of Jay Cooke & Co., to subject the assets of the private estates of certain of the bankrupt partners to the payment of the debt due to the United States by the firm of Jay Cooke, McCullough & Co., in which the said bankrupts were partners. The case was heard on bill and answer. A cross bill had also been filed by the trustee. The bill averred that the United States in September, 1873, at the time of the stoppage of Jay Cooke & Co., were creditors to a large amount of Jay Cooke, McCullough & Co., bankers in London. There were ten partners of that house. Three resided in London, seven in the United States. These seven, together with one Garland, composed the firm of Jay Cooke & Co. in Philadelphia. A petition in bankruptcy was filed against the partners of the latter house on the 25th of September, 1873, and on the 26th of November they were adjudicated bankrupts, and the defendant elected as their trustee. The indebtedness, the partnership, the bankruptcy, and the possession of assets were admitted by the answer, which set up, by way of defence: (a) That the three partners in the debtor firm, living abroad, had not been declared bankrupt or insolvent; (b) that they possessed property here and abroad; (c) that the plaintiff held a large amount of merchandise and bonds as collateral for their claim, which was the property of the London house when pledged for the debt; (d) that the United States claimed to apply these collaterals to a debt subsequently contracted by the three foreign partners; (e) that there were separate claims against some of the separate estates of the bankrupts sufficient to absorb the estate. The answer further insisted that the bill could not be maintained because: (1) There was no declared insolvency of the debtor firm. (2) No demand on them or inability to pay was averred. (3) There had been no liquidation of that house or ascertainment of the amounts due by or to the respective partners. (4) It was not averred that there were not sufficient assets of the firm to pay the debt due the United States. (5) By the rule of equity the surplus of the private estates was alone applicable to pay a firm debt. (6) This surplus is divisible in the proportion of joint claims on the two houses in which the partners were common. (7) The United States were subject to the rules of distribution in bankruptcy. (8) The right of the United States being based on bankruptcy, there was no bankruptcy of these debtors until by the bankruptcy the property had vested in trust for the creditors, as provided by the bankrupt law of 1867 (14 Stat. 517). (9) The jurisdiction was in the bankrupt court alone. (10) The remedy was at law. (11) The collaterals should be first applied. The defendant then filed a cross bill to subject the collaterals in the hands of the United States to his right, by way of subrogation, if the United States obtained the satisfaction sought by the bill, and disputing the right to apply the collateral to the subsequent debt. The answer of the United States set up that after the petition, but before the adjudication, a new debt was contracted, for which these securities were also pledged. As the firm was not dissolved till the adjudication, the partners retained the right to pledge. That the bankrupt partners were debtors to the London house far beyond the value of the collaterals, hence, as these must be accounted for to that firm, the non-bankrupt partners could retain them, to cover the balances due by the bankrupt partners, and, therefore, the United States could apply these securities to the debt contracted by them. That the right of the defendant was that of his bankrupt assignor—neither more nor less. And that depended upon the state of the account of that bankrupt, upon final liquidation of the house, to which the securities belonged.

[The case was heard on the original bill and answer only. There being a replication to the answer to the cross bill, the questions discussed were those which arose on the record independently of any matters set up in the answer to the cross bill. On the first argument the court confined the reply to the one

[1] [Reprinted from 13 N. B. R. 33, by permission. 23 Pittsb Leg. J. 34, contains only a partial report.]

[2] [Affirmed in 92 U. S. 618.]

[3] [From 2 Wkly. Notes Cas. 31.]

point, whether the act of congress, supra, gave priority to the separate creditors over a creditor, who, as the United States, had other joint debtors not bankrupt.

[The case was first argued April 22, at Philadelphia, before McKENNAN, Circuit Judge, and CADWALADER, District Judge.

[Wm. McMichael and Richard C. McMurtrie, for plaintiff.

[R. L. Ashurst and W. P. Clough, contra.

[A re-argument having been ordered, it was again argued on the 26th of July, at Erie, before STRONG, Circuit Justice, and McKENNAN, Circuit Judge.

[McMurtrie, for plaintiff. Cooke and Morehead, two of the seven partners in both firms, are admitted by the answer to be debtors to the United States as partners in the debtor firm, and bankrupts. The statute of 1797, c. 74, § 5 [1 Story's Laws, 465; 1 Stat. 515, c. 20], gives a preference in that case. The United States is not obliged to proceed in bankruptcy. Harrison v. Sterry, 5 Cranch [9 U. S.] 289. The priority extends to equitable debts. Howe v. Sheppard [Case No. 6,772]. So that the nature of the debt of one partner to a firm creditor is immaterial. There is then within the very words a statutory right. The only question is whether the United States are excluded for any reason set up by the answer. The onus of showing an exception is on the defendant. U. S. v. Duncan [Id. 15,003]. All the grounds are equitable by which a legal right is to be avoided, and they are found to produce equality which the statute was passed to prevent. It is creditors who set up these defences, not the debtor; his interest is with us, as he is not discharged from the claim of the United States. U. S. v. Herron, 20 Wall. [87 U. S.] 251. As creditors we are equal, and have this statutory privilege. An execution would take this property but for the bankruptcy (Ex parte Ruffin, 6 Ves. 126); and we have a right to proceed immediately in equity against the separate estates (Wilkinson v. Henderson, 1 Mylne & K. 582, cited in 2 Younge & C. 553; Nelson v. Hill, 5 How. [46 U. S.] 133); and the creditor's right to object or defend is only that of his debtor (Way v. Bassett, 5 Hare, 66; Ex parte Ruffin, 6 Ves. 126; 17 Ves. 520). His right, because of the collaterals, is to redeem, and the court is really asked to enjoin execution against general assets because collaterals are held. There is no respectable authority which does not admit that the rights of a creditor are unaffected by collaterals. Shunk's Appeal, 2 Barr [2 Pa. St.] 304; Kyner v. Kyner, 6 Watts, 221; Ebenhardt's Appeal, 8 Watts & S. 327; Neff's Appeal, 9 Watts & S. 36; Lord v. Ocean Bank, 8 Harris [20 Pa. St.] 384. If it were not so, the possession of securities might be ruinous. The rule if it exists must go to the length that the most precariou security must be exhausted before any others could be touched. As to the provision in the bankrupt law it cannot apply to a creditor that does not claim under it, nor to one that is entitled to priority out of any assets. This remedy by subrogation is subject to the rights of other persons. If the application of the general fund leaves the securities untouched, the creditor is not necessarily subrogated. That will depend on the right of his debtor to these collaterals by reasons of the payment of the debt. If, after paying the debt, he is still debtor to the London house, neither he nor his creditors can claim any right to the collaterals which are the property of the London house. If it be true, as is averred in the answer to the cross bill, that the American partners will be debtors on account after they pay all the debts of the United States, it will be an absurd equity to compel the United States to take that fund which belongs to those who ought not to pay, and to leave the one that belongs to those who ought to pay. This rule is well settled. Miller v. Jacobs, 3 Watts, 477; Sterling v. Brightbill, 5 Watts, 229; Ex parte Kendall, 17 Ves. 520. The same reason applies to the objection because of no demand or suit on the foreign partners. If available, it means that till exhaustion of that firm's assets no claim can be made upon a partner of that firm. Yet, if there was judgment, a levy could be made; so that at law no such rule is recognized.

[It is said that under the rule that the separate estate is to be applied to separate creditors, and joint to joint, the United States is excluded. As far as the bankrupt act is concerned, that is disposed of by U. S. v. Herron, 20 Wall. [87 U. S.] 251, ruling that the United States is not affected by the statute further than to obtain a priority. But it is contended that this was a rule of property at the time the act of March 3, 1797, was passed, and must affect its construction. But it never was more than a rule of convenience, and bears no analogy to the bankrupt act. Lindley (page 1096) impliedly admits this, else why disregard it when there is no joint estate, which is the settled rule? Bump. Bankr. 659; Ex parte Clegg, 2 Cox, Ch. 372. It was not the rule in Lord Hardwicke's time. Ex parte Crisp, 1 Atk. 133. It is quite inconsistent with the admitted rule where there are collaterals. It certainly is not the rule at law (Ex parte Kendall), and the practice in case of levies on separate property for a joint debt shows this. Nor does it apply to any case of joint debts, unless they be partnership. Ex parte Buckingham, 1 Mont. D. & D. 235. The reason of the rule was because of the necessary right of the partnership creditors to the joint estate, and the design to give an equal right to separate creditors. But here the bankruptcy created a trust in the first instance for a debt of the United States (Beaston v. Farmers' Bank of Delaware, 12 Pet. [37 U. S.] 102), and the real point is whether a statutory trust giving a legal right is to be disregarded because of the notion of courts of equity that all creditors ought to be upon an equal footing; which notion existed

in full force in 1797, and was certainly not followed or regarded by the legislature when giving the United States their priority.

[R. L. Ashhurst and W. P. Clough, for Lewis, and S. Dickson (Bullitt, with him) for bankrupts, contra.

[As the United States claim as a cestui que trust (Conrad v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 439), the jurisdiction is exclusively in the district court. The general rule as to the effect of collaterals is correctly stated, but there are exceptions which do render it proper that the creditor should be compelled to exhaust his remedy against the collaterals. Bisp. Eq. §§ 337, 339; Hayes v. Ward, 4 Johns, 129; Kent v. Matthews, 12 Leigh, 580. The United States, by permitting the debtors to continue in business undisturbed, have been guilty of such negligence as entitles the creditors here to restrain them from interfering with their assets. Paxton v. Harrier, 1 Jones [11 Pa. St.] 312; Stevens v. Cooper, 1 Johns. Ch. 425; Parkman v. Welch, 19 Pick. 231; Mount v. Potts, 8 C. E. Green [23 N. J. Eq.] 188. There is an equity also from the hopelessness of the right of subrogation at such a distance, while the plaintiffs who made their contract there can readily enforce it. Ex parte Wilson, 7 Ch. App. 493; Selkrig v. Davis v. Davis, 2 Rose, 318; Goldsmid v. Cazenove, 7 H. L. Cas. 785. As to the state of the accounts between the partners in the London house, that is in issue, and cannot be the ground of adjudication. Upon the main point, the vice is in not observing the effect of the bankruptcy, which, like an assignment, converts the claimants from creditors into owners or cestuis que trustent of the estate. Miller's Appeal, 11 Casey [35 Pa. St.] 481. And so equity had always the firm as an entity, and the property as held in trust for its creditors, and it is assumed that credit is given to each estate, joint or separate, according as the creditor deals, and the distribution is made accordingly as a rule of natural equity. U. S. v. Shelton [Case No. 16,272]; Murride v. Neil, 8 How. [49 U. S.] 420; 3 Kent, Comm. 65, 66. That the joint creditors cannot press in bankruptcy against the separate estate till all the separate creditors are paid, will not be disputed. The exceptions as to interest and when there is no joint estate, are rigidly enforced; and the rule without the qualification has been enforced. McCulloch v. Dasheil, 8 How. [49 U. S.] 420; 1 Har. & G. (Md.) 103; Jarvis v. Brooks, 3 Fost. (N. H.) 136, 33 N. H. 542; 3 Kent, Comm. 65, 66; Black's Appeal, 8 Wright [44 Pa. St.] 507. The 36th section of the bankrupt act is copied from the Massachusetts insolvent act of 1836, and the exception has been held not to apply there. Howe v. Lawrence, 9 Cush. 553. And in the administration of a deceased partner's estate, the decree is uniformly that the surplus only, after paying the separate debts, shall go to the joint creditors. Gray v. Chiswell, 9 Ves. 118; Lodge v. Prichard, 1 De Gex, J. & S. 610; Lindl. Partn. 1905; 2 Younge & C. 559; 9 Hare, 297; 13 Beav. 409; 19 Beav. 111; 2 Merw. 117. And in bankruptcy, with the exception of Lord Thurlow's time, the rule has been always the same. See, also, Ex parte Marwick, 8 Law Rep. 169–171; Ex parte Byrne [Case No. 2,270]. As to any surplus, it should go to the several firm creditors, in proportion to their claims. Ex parte Franklyn, Buck, 332; Lindl. Partn. 100. The act of 1797 leaves the state laws to determine what are assets and to whom they belong. U. S. v. Crookshank, 2 Edw. Ch. 233; Brint v. Bank, 10 Pet. [35 U. S.] 59; U. S. v. Amory [Case No. 14,443]. Here the debtor is not bankrupt, for that is the firm, and it is not even insolvent.] [3]

Wm. McMichael and Richard C. McMurtrie, for plaintiffs.

Saml. Dickson, on the same side, for bankrupts.

R. L. Ashurst and W. P. Clough, for Edwin M. Lewis, trustee.

Before STRONG, Circuit Justice, and McKENNAN, Circuit Judge.

STRONG, Circuit Justice. The bill and answer, together with the cross-bill and answer thereto, reveal the following state of facts: On the 25th day of September, 1873, the London firm of Jay Cooke, McCullough & Co. were indebted to the United States in the sum of one hundred and thirty-two thousand six hundred and ten pounds, nine shillings and eight pence sterling, and the debt remains unpaid. Of that firm, there were at the time mentioned ten partners, three of whom are residents in London, England, and the other seven are residents in the United States. The seven resident here, were also partners in the firm of Jay Cooke & Co. On the 25th of September, 1873, a petition in bankruptcy was filed against the firm of Jay Cooke & Co., and on the 26th of November next following, the firm and its members were adjudicated bankrupts. Subsequently, Edwin M. Lewis, the principal defendant, became the trustee under the 43d section of the bankrupt laws. There is in the hands of the trustee a large amount of assets, which belonged to the bankrupt firm, and also a large amount of cash and other property, real and personal, which was the separate property of the several partners of the firm. In view of this state of facts, the bill was originally filed. Its object is to subject the separate property of the bankrupt partners to the payment of the debt due to the United States from Jay Cooke, McCullough & Co., in preference to all other debts due, either by the bankrupt firm, or by the individual partners, and it rests upon the assumption that as members of the London partnership, the bankrupt partners are debtors to the United

[3] [From 2 Wkly. Notes Cas. 31.]

States, each being liable for the amount of the indebtedness.

The facts thus stated are substantially admitted by the answer to the original bill, but it is averred that Jay Cooke, McCullough & Co. are not bankrupts; that they have assets in this country, and in England; that McCullough, one of the partners of the firm, resident in England, has separate property in the United States; that the firm has pledged to the United States a large amount of securities and other property for the protection of the debt now claimed, and that the United States assert a right to apply these securities and other property to the payment of a debt subsequently contracted by the three non-bankrupt partners. The answer does not deny, that generally the United States has a priority of claim against the estates of bankrupt debtors to it, over other creditors, but to evade the application of this acknowledged right to the present case, it presents several considerations, most of which are merely formal, requiring little notice. They are, briefly stated, thus: First. That there is a large debt claimed to be due by Morehead, one of the bankrupts, which, if valid, is sufficient to absorb all the balance of his separate estate in the hands of the trustee. Second. That the bill does not aver Jay Cooke, McCullough & Co. to be insolvent. Third. That the balances due to the firm by the partners respectively are not stated. Fourth. That the bill avers no demand on the three solvent partners, nor refusal, nor inability on their part to pay the debt claimed. Fifth. That by a rule in equity, the private estates must first pay the private debts, and the surplus only can be applied to the firm debts. Sixth. That the surplus of the separate estates should be apportioned among the creditors of the several firms, of which the partners were members, and that the claim of the United States can extend only to so much as the creditors of Jay Cooke, McCullough & Co. would be entitled to out of the private estates of the partners. Seventh. That a declared insolvency of Jay Cooke, McCullough & Co. is necessary to give to the United States a priority over creditors whose rights became vested by the bankruptcy. Eighth. That the United States have not proved their claim, and that there is no jurisdiction in this court. Ninth. That the remedy of the plaintiff is at law. Tenth. That the collaterals held by the plaintiffs should be first applied, or, if not, that the trustee should be subrogated.

Such are the defenses set up. In addition, the defendant Lewis has filed a cross-bill for the administration of the collaterals in the hands of the United States, and for an account of the assets of Jay Cooke, McCullough & Co. In the present stage of the case, however, it is unnecessary to devote much attention to the cross-bill, or to the answer made to it, for they can have no bearing upon the question we are now asked to consider. It is sufficient to say, that in the answer, the United States submits to account for the collaterals when the debt for which they were pledged shall be paid, but denies that there is any obligation to resort to the collaterals before claiming against the separate estates of the bankrupts. The answer also avers, that the securities were pledged to secure a subsequent debt due the United States, for which the bankrupts are not liable, the debt having been incurred, and the pledge made after the petition in bankruptcy was filed, and before the firm was dissolved by the adjudication.

There are other averments in the answer which need not now be noticed. The cross-bill relating solely to the administration of the collaterals, cannot affect in the least the right of the United States to an immediate decree for satisfaction of the debt, out of the private estates of the bankrupts, if the trustee has only a right to subrogation or redemption, on payment of the debt for which the collaterals were pledged. And that he has no greater right is very plain. The administration of the collaterals is a subsequent matter. The present question therefore is, whether in view of the bill and answer, the plaintiffs are entitled to an immediate order for the payment of the debt due them, out of the separate estates of the bankrupts, in preference to the claims of the other creditors. The act of congress of March 3, 1797, re-enacted in the Revised Statutes (section 3466), gives priority of payment to the United States in all cases of the insolvency of the debtor. Its provisions are that "whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied, and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankrupt is committed." Now, that the bankrupts who were partners in the firm of Jay Cooke, McCullough & Co., are not only insolvent, but that they are debtors to the United States in the sum of one hundred and thirty-two thousand six hundred and ten pounds, nine shillings and eight pence sterling is shown by the pleadings and by the admitted facts. True, the debt was incurred by the firm of which they were members, but it is not on that account any the less the debt of each member of the firm. The liability of members of a partnership to its creditors differs in no essential particular from that of other joint debtors. It is true the joint effects of the firm must be applied to pay the joint liabilities, for such is the

legal effect of the partnership agreement. The right of a single partner extends only to an account, and to a share of what remains after the debts have been paid, and his separate creditors can have execution of no more than is his. The inability of separate creditors of a partner to seize partnership property for the payment of his separate debts, has therefore no tendency to show that each member of a firm does not owe the debts due by the firm. And it is well settled by judicial decision affirmatively, that each partner is a debtor to the creditors of the firm. If he be sued at law for a firm debt, without a joinder of his copartners, he must plead the non-joinder in abatement, or the creditor will be entitled to a judgment against him individually. So, if judgment be recovered against a firm, execution may be levied upon the separate estate of any of the partners. Equity also, as well as law, regards each partner as a debtor to creditors of the firm, a joint debtor with each of his copartners; and that the estate of a deceased one of several joint debtors may be proceeded against in equity without regard to the solvency of the surviving debtors is no longer to be doubted. Thorpe v. Jackson, 2 Younge & C. 553. Numerous other decisions have been made to the same effect. Wilkinson v. Henderson, 1 Mylne & K. 582, was a case of partnership where a deceased partner's estate was held liable immediately for the firm debts, without averment of insolvency of the surviving partners; and the court, after pointing out that either the creditor must be required to exhaust his remedies against the survivors, or that the executors of the deceased must be required to demand the balance on settlement of the firm accounts, concluded that the latter is the sound rule. Such is also the doctrine of Nelson v. Hill, 5 How. [46 U. S.] 127, and that asserted in Story, Partn. 362, note 3. And the rule is not different in bankruptcy. Creditors of a firm have been allowed in some cases to prove their claims against the separate estate of a bankrupt partner. Whether such creditors are permitted to share ratably with the separate creditors or only to come upon that portion of the estate which remains after the separate creditors are paid, is immaterial to the present question. It is sufficient that they are allowed to prove their claims. The bankruptcy court acknowledges them to be creditors of the bankrupt partner, though in marshaling the assets it may give priority to the separate creditors.

The case then, as presented, is this: The seven partners of the firm of Jay Cooke, McCullough & Co., who are resident in the United States, and who were also partners in the firm of Jay Cooke & Co., are severally, as well as jointly with others, indebted to the United States, and they are insolvent. The defendant Lewis has in his hands a large amount of money and other property, which was the separate estate of these debtors, which he holds in trust for the payment of these debts. Why then is not the exact case before us which was contemplated by the act of congress, which gives to the United States priority of right over the claims of other creditors? The statute gives that priority without exception. It attaches to all debts due to the United States, whether they be joint or several; whether they be legal or equitable. It postpones all debts due to others, no matter what their character may be. True, the priority of the United States does not override any liens upon the debtor's property which existed before the event occurred which gives the statutory priority, that is, before the insolvency. Conrad v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 438; Brent v. Bank of Washington, 10 Pet. [35 U. S.] 596. The reason for this is obvious. The claim of the government extends only to that which was the property of the debtor when he became insolvent, and his property is only that, in substance, which remains after the satisfaction of liens upon it. His power of disposition extends no farther. The lien is paramount to his right. But there are no liens in this case to interfere with the priority of the United States. None are asserted. The proceeding in bankruptcy transferred the estate of the debtors to the trustee, just as it was when the act of bankruptcy was committed. Conceding that it created a trust in favor of the creditors, it is a trust for the payment of debts, and the trustee holds as well for the United States as for the other creditors. It creates no vested interests in the other creditors superior to those of the government. On the contrary, under the statute, the trust in favor of the latter must be paramount. In Beaston v. Farmers' Bank of Delaware, 12 Pet. [37 U. S.] 102, it was decided to be the operation of the act of 1797, that whenever the debtor is divested of his property, in one of the modes stated in the act, the person who becomes invested with the title is thereby made a trustee for the United States, and is bound to pay the United States first out of the proceeds of the debtor's property. And the bankrupt act has wrought no difference. It has not repealed the act of 1797, and the United States are not subject to its provisions. U. S. v. Herron, 20 Wall. [87 U. S.] 251. Certainly, the bankrupt act has given to the creditors of a bankrupt no lien on the assigned property which can interfere with debts due to the United States. The right to priority of payment is a legal right, not a merely equitable one. It is called into existence by the bankruptcy of the debtors, but it is not created by the bankrupt act. If then there is no lien upon the property in the hands of the trustee, no lien held by or for the other creditors of the individual partners of Jay Cooke, McCullough & Co., who are bankrupts, why must not the debt due to the United States be first paid? This question leads to a consideration of the defenses set up in the de-

fendant's answer. They are all equitable, and, in our judgment, most of them are quite immaterial, needing no discussion. That there are other creditors of one or more of the debtors whose estate is in the trustee's hands; that the bill does not aver the insolvency of Jay Cooke, McCullough & Co.; that it does not state the balances due to the firm by the partners respectively, nor aver any demand on the three solvent partners, or inability on their part to pay the debt due the United States; or that the claim of the United States has not been proved under the bankrupt law; none, or all of these things can possibly affect the right now claimed by the plaintiffs, and they have not been urged in the argument. The defense is vested mainly upon the equity rule that in marshaling the assets of a firm, and those of the members of the firm, in case of insolvency, partnership creditors are entitled to the joint property, to the exclusion of separate creditors of the partners, and separate creditors are entitled to the separate property in preference to creditors of the partnership. It is said the United States is a joint creditor, and, therefore, that the private estates of the separate creditors of the several partners, now in the hands of the trustee, must, under the rule, be applied first to the payment of the individual debts of the partners respectively. The existence of the rule in equity, as well as in bankruptcy, may be conceded; but, for several reasons, it is inapplicable to such a case as we have before us. It was introduced at first, and it is continued professedly to promote equality of distribution. But the statute giving priority to the United States is intended to prevent such equality. How, then, can an equity rule, designed to secure equality, prevail against a statute, the purpose of which is to destroy it? How can a claim preferred by an act of congress absolutely, without exception or qualification, be postponed to the claims of other creditors by force of an equitable maxim never intended to be applicable to the case of a claimant who has a superior right by law? If, therefore, this were a case in which the United States could be regarded as a joint creditor of the bankrupt partners, claiming against the separate creditors of those partners, no court would be at liberty to deny effect to the statute. But the facts exhibited do not present such a condition of things as to enable the defendant to invoke the application of the rule independently of the statutes. The rule is applicable only where the joint estate as well as the private estates of the insolvent partner is before the court for distribution, and where there are joint creditors and also separate creditors of the individual partners. Here the two funds before the court are the joint property of Jay Cooke & Co., and the separate property of the members of the firm. Over the property of Jay Cooke, McCullough & Co., the court has no control. The United States are not creditors of Jay Cooke & Co. They have no claim upon the joint fund within the power of the court, and they cannot be remitted to it. All they can reach of that, is the individual shares of the partners in what may remain after the payment of the joint debts of that firm, if anything shall remain. If they cannot reach the private property, they can obtain nothing. If they were creditors of Jay Cooke & Co., the rule in equity might be invoked were it not for the act of congress, and so also, if the property to be marshaled were the joint property of the London firm, and the private property of the partners. But under the facts of the case, and in view of the unqualified provisions of the statute, we think the equity rule relied upon by the defendant has no applicability to it. Entertaining this opinion, it is unnecessary to discuss this ground of defense more at length.

That the United States are not under obligation to make use of the collaterals, and apply the proceeds thereof to the satisfaction or reduction of the debt claimed, before asserting a right to the fund in the trustee's hands, is very plain. That might be their duty if they were bound by the bankrupt law; but, as we have seen, they are not. They would not be even if they had proved their debt. Harrison v. Sterry, 5 Cranch [9 U. S.] 289. And independent of the provisions of the bankrupt act, no creditor can be compelled to make use of the collaterals he may hold as a security for the debt due him before resorting directly to his debtor. This assertion is abundantly sustained by authority. The answer to the cross-bill avers that the collaterals were pledged for another debt. This, indeed, is not an admitted or established fact, but if it is a fact, clearly the trustee has no right to insist on a resort to the collaterals. And if it be not a fact, the utmost right he has is to subrogation after the debt is paid. Even a surety cannot compel the creditor to resort in the first instance to the estate of his principal. He has no right in equity until he has himself performed equity by paying the debt. The bankrupt partners in this case are not even sureties. They are principal debtors. What a surety cannot do, is certainly beyond their power, and if they cannot require the United States to sell the collaterals before payment of the debts, or to resort primarily to their co-debtors, the solvent partners of Jay Cooke, McCullough & Co., surely their trustee cannot. There is then nothing in any principle of equity, or rule in bankruptcy that affects the right of the United States to priority of payment of the debt due them out of the private estates of the bankrupts in the hands of the trustee, and a decree will be made accordingly.

Let a decree be prepared declaring that the United States are entitled to be paid, out

of the property in the hands of the trustee, belonging to the private estates of those partners of the firm of Jay Cooke, McCullough & Co., who have been adjudicated bankrupts, the amount due by the said firm to the plaintiffs on the day the petition in bankruptcy was filed, in preference to other creditors, and declaring also that the United States are not required to exhaust their rights in the securities pledged to them before they are thus entitled. And the right of the plaintiffs to apply for further relief in accordance with the prayer of their bill, without prejudice by reason of this decree, is reserved. And all questions respecting the right of the defendant to subrogation hereafter, and respecting the administration of the securities in the hands of the United States, as also the right to an account, are likewise reserved for future adjudication.

[Upon an appeal to the supreme court the decree of this court was affirmed. 92 U. S. 618.]

Case No. 15,596.

UNITED STATES v. LIBBY et al.

[1 Hask. 271.] [1]

District Court, D. Maine. May, 1870.

GUARANTY — ACCEPTANCE — COMMENCEMENT OF CRIMINAL PROCEEDINGS.

1. A guarantor of the payment of a specific sum offered the United States in compromise of its claim for taxes, fines and penalties, is not liable upon the guaranty, until the specific offer secured by it has been accepted.

2. It would seem, that criminal proceedings commenced in such case by the United States after the offer had been made and before its acceptance, would operate as a rejection of the offered compromise and destroy the guaranty.

[Action by the United States against Harrison J. Libby and others.]

Debt, upon a guaranty conditioned to secure the payment of a sum offered the United States in compromise of its claim for taxes, fines and penalties.

Plea, performance, in that the offer of compromise had not been accepted, but had been rejected. The cause was submitted upon an agreed statement of facts.

George F. Talbot, U. S. Dist. Atty.

Charles F. Libby and Joseph W. Symonds, for defendants.

FOX, District Judge. It appears that one A. Linn was a woolen manufacturer at Hartland in this state, from July, 1864, to March, 1867, and that during that period, he was in the habit of making false returns of his sales under the internal revenue law. His frauds having been discovered, he made, on the first day of June, 1867, to the commissioner of internal revenue, a written proposal to pay the government by way of compromise of his liabilities, the amount of deficiency of his taxes, viz, $2,786.41, with a penalty of fifty per cent. on that amount, together with a fine of $2,000, these sums in the aggregate amounting to $6,178.61. On the 2d of August, 1867, the commissioner requested that the entire amount offered by way of compromise by Linn be at once deposited with the collector, or that good security be taken therefor, pending the consideration of his offer. On the 20th of August, 1867, the defendants executed the guaranty which is the foundation of the present suit, in which, after reciting Linn's proposal and the request of the commissioner for security, "they acknowledge themselves holden and bound unto the United States for the full amount of said tax, penalty and fine, in case said Linn's proposition for a compromise is accepted, and hereby agree to pay the same on demand after notice of such acceptance."

On the 21st of October, 1867, Linn wrote the commissioner of internal revenue a letter, in which after referring to his proposition for the adjustment of this matter he says: "I have to say that when I made that proposition I was acting under a misapprehension of the facts, and I respectfully request, that action may be suspended on said proposition for a short time. The reason why I request this suspension is, I think I can satisfy you, I ought not in justice to pay the amount there stated. I do hope and pray you will grant my request."

No further action was taken in the matter by the government or Linn, until April 30, 1868. On that day, the commissioner addressed a letter to Mr. Sanborn, the collector in Linn's district, as follows: "Mr. Linn stated in October last, that his offer in compromise was made under a misapprehension. You will please report, whether he now desires to pay the sum offered, and if so, what reasons there are why the offer should be accepted, without instituting proceedings for the recovery of the penalties imposed by law."

May 15, 1868, the commissoner directed an assessment to be made against Linn for the taxes due, without including the penalty. This was done, and the tax, viz, $2,786.41, was paid June 30th. In July, the commissioner of internal revenue directed criminal proceedings to be instituted against Linn for these false returns, and on the 17th of that month, he was brought before Mr. Commissioner Clifford, and held to bail in the sum of $3,000 for his appearance at the September term of the circuit court, when an indictment was found against him for thus violating the provisions of the internal revenue act, which is still pending in that court, the party not having been put upon trial. The defendants became his bail in this proceeding upon their understanding and belief, that they were no longer liable on this guaranty.

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

August 20, 1868, Linn made a new proposition to the department, viz, after stating that he had paid the tax of $2,786.41, he asks the commissioner to compromise his said delinquencies and discharge him from arrest and liability in the case on the payment of a fine of $3,500, being $1,500 more than the amount of fine originally proposed, together with all costs and expenses incurred in the prosecution and management of the case.

June 10, 1869, the commissioner writes the district attorney as follows: "I have duly considered the proposition of Archibald Linn, 3d Dist. Me., to compromise his liabilities for deficient and fraudulent returns as a woolen manufacturer, in May, 1867. I have decided with the advice of * * * to accept the terms offered in compromise, the defendant to pay the sum of $4,179.61 as tax and assessed penalty, together with the further sum of $2,106.80, as specific penalty. You will please notify the party of the acceptance of these terms, and on compliance therewith and the payment of all costs, you will dismiss the case." Notice of this communication was given to Linn, June 14, 1869, and the case finds that was the first and only notice which Linn or the defendants ever received of the acceptance by the government of any offer of compromise, and that defendants were not notified of the acceptance until the day this action was commenced.

All the liability of these defendants to the government, in the present suit, is by virtue of their agreement of August 20th, which is definite and specific in its terms; by it they became bound unto the government for the full amount of the tax, penalty and fine, as stated in Linn's proposition for a compromise, if the same should be accepted, and they promise and agree to pay the same on demand, after notice of said acceptance. This is clearly a guaranty of the payment of the specific offer previously made by him, and can not in any way cover or secure the payment of any other or different propositions.

If the government, in a reasonable time accepted that proposal and notified the parties, the defendants were thereby rendered liable for its payment, and not otherwise. The government must assent to and accept the proposition as made; its acceptance must be exactly equal to its extent and provisions, and must not qualify them by any new matter; and the acceptance if different from the proposition is not sufficient to create a contract, although the difference may not be very important. As stated in 1 Pars. Cont. 477: "A party is at liberty to accept wholly, or to reject wholly, but one of these things he must do, for if he answers, not rejecting, but proposing to accept under some modifications, this is a rejection of the offer."

Without deciding, whether the letter of Linn of October 21, 1867, should be considered as in law a withdrawal of the offer of compromise, or whether the repeal, by act of 1868, of certain sections of the act in force at the time these returns were made, exonerated Linn from all liability, either to a criminal prosecution, or from any civil remedy of the government, I am clearly of opinion, that the government has never, up to the present moment, accepted the proposal of Linn, payment of which was guaranteed by the defendants. On the contrary, instead of accepting it, it appears to have acted upon the idea that it was withdrawn by Linn, and in July it accordingly instituted criminal proceedings against him for this very offence, causing him to be arrested, taken before a commissioner, and by him required to give bail in a heavy sum for his appearance before the circuit court, where he was afterwards indicted and where the prosecution is still pending. It may be, if the ruling of McCandless, J., in U. S. v. Finlay [Case No. 15,099], is correct, that this indictment, by force of the repealing clauses in act of 1868, cannot be maintained, but this result could not affect the present controversy. The government by thus indicting Linn has made its election to prosecute the party as a criminal if possible, rather than exonerate him from liability by a compromise and acceptance of his proposition.

It is claimed by the government, that the commissioner of internal revenue, on the 10th of June, 1869, did accept Linn's proposal for a compromise, and notified him and the defendants of its acceptance. This acceptance was after Linn had been indicted, and while the indictment was pending over him, and by thus resorting to the criminal law, I apprehend the government should be considered as having made its election not to accept the proposal; but without absolutely determining this point, an examination of the letter of the commissioner will at once demonstrate, that the proposition of Linn therein referred to and accepted is one quite different from that secured by the obligation of these defendants. By the latter, the defendants agreed to pay the amounts offered by Linn in his proposal of June, 1867, which were, the deficiency of the tax $2,786.41 with fifty per cent. penalty, viz. $1,393.20, and a fine of $2,000, amounting in the aggregate to $6,178.61. This was all for which the defendants could in any way be held accountable under their guaranty, if that proposition had then been accepted.

It is admitted that the only acceptance of any offer is to be found in the commissioner's letter of June 10, 1869, to the district attorney, in which he says, "I have concluded to accept the terms offered in compromise by defendant, to pay the sum of $4,179.61, as tax and assessed penalty," which is the precise amount of tax, $2,786.41, with fifty per cent. added, $1,393.20, "together with the further sum of $2,106.80 as specific

penalty. And on payment thereof and of the actual costs you will dismiss the case." Those sums without costs amount to $6,286.41, which is $108.80, in excess of $6,178.61, the amount assumed by defendants.

On reference to Linn's letter of August 20th, after the prosecution was instituted against him, it will be found to contain an entirely different offer of compromise from that of June, 1867, viz.: He there proposes to pay the tax of $2,786.41 and a fine of $3,500, with the costs of the prosecution. These sums amount to $6,286.41, which is the amount accepted by the commissioner in his letter of June, 1869. It is therefore quite apparent that the commissioner has never accepted Linn's original offer of compromise of June, 1867, and for the payment of which the defendants proposed to become accountable, but has accepted an entirely different offer, made by Linn, nearly two years subsequently, when he was under the duress of a criminal prosecution, and by which the government was to receive an amount considerably in excess of that for which the defendants could have ever been accountable.

The government must look to other claims against Linn on his new proposal, and as defendants have never guaranteed its payment, in the present case they are under no liability to the government and are entitled to judgment.

Judgment for defendants.

Case No. 15,597.

UNITED STATES v. LIBBY.

[1 Woodb. & M. 221.] [1]

Circuit Court, D. Maine. May Term, 1846.

SLAVE TRADE—ILLEGAL ACTS—AFRICAN TRADE—MANUMITTED SLAVES—CRIMINAL INTENT.

1. If a vessel sail from the United States, owned by a citizen and under instructions to correspondents in Rio, to sell her within a limited price or charter her, the commencement of her voyage is legal on its face. If the consignees charter her to a Brazilian for one year, at the ordinary rate of freight, and not to be employed in carrying merchandise or passengers, which are unlawful, the charter on its face is legal. If under it, goods are put on board, consisting of rum, cotton goods, brass rings, gunpowder, &c., suitable for sale or exchange in Africa for slaves, and these articles with their owner, are carried to the eastern coast thereof, and landed at slave factories, this standing alone is not prohibited by any act of congress.

2. But this and other acts of the captain, such as seeing the purchase of slaves there by the owner of the goods, the shipment of them to Brazil in other vessels, and the bringing him and other free persons hither, who had an interest in the slave trade, are evidence, from which it is competent for the jury to infer, unless satisfactorily rebutted, that the master was himself intentionally coöperating and interested in the slave trade, and taking a part in its gains and criminality.

3. But he would not be liable for a capital offence, committed on board his own vessel, unless he did so coöperate, and decoy, force or receive some African on board there, with intent to make him a slave.

4. If one came on board there with other blacks, the crew of the pilot, and staid but a few hours, and the captain was busily engaged, and did not know him to be a slave, on his way to be sent in another vessel to Brazil, it was not such a receiving of him as the law contemplates.

5. So if he received two other Africans on board there, and brought them to Brazil, without actually supposing them to be free, he would be guilty, either of a misdemeanor or capital offence, as he was merely carrying them for others, or was aiding and acting with others as a participator in the design to make men slaves longer, who were before in bondage, or to reduce those to slavery, who were before free.

6. It was adjudged to be competent evidence against him as to his intent on these points, that his vessel was chartered by persons who turned out to be slave-dealers; remained a year or more in their company and employment in carrying merchandise and free passengers; knew their business in Africa; and returned to Brazil in their company.

7. So, on the other hand, it was ruled to be competent for him to show, that he took no persons on board his vessel, knowing them to be slaves; that he neither bought, nor sold, nor kidnapped any; that the two blacks, whom he knowingly received on board and brought to Brazil, had free papers, as if manumitted, and that he believed them not to be slaves.

[Cited in Emma Silver Min. Co. v. Park, Case No. 4,467.]

8. It was adjudged to be evidence of the genuineness of their manumission papers, that they were attested and sealed by persons, purporting to be Portuguese notaries public on that coast, and who had acted as such in other business; that they were on the kind of paper and under the stamp used there in the public offices, were lodged with the proper authorities in Brazil, and the Portuguese consul there certified to the notaries being regular officers of his government, and that the American consul at Rio obtained and sent to this country all these papers with translations.

[Cited in Wood v. St. Paul City Ry. Co., 42 Minn. 413, 44 N. W. 308.]

9. It was ruled, that they must be presumed to have been executed at their date, if no evidence appeared to the contrary; and, though this and the other matter just referred to, might fail to satisfy the jury, that the papers were in truth genuine, yet if they believed the master supposed them to be genuine, and took the two Africans who had them, on board, supposing them to be in truth free, he was not liable to punishment.

10. To show the intent of the master, any acts by him on the voyage, and so near the time of the offence charged in the indictment as to be connected with it and bear on it, were admitted on the part of the United States; but not what was done in a previous voyage on the western coast of Africa.

11. A passenger is not one of the crew or ship's company, within the meaning of the act of congress.

12. If a principal in a transaction be not liable under our laws, another cannot be charged merely for aiding and abetting him, unless the other do acts himself, which render himself liable as a principal.

13. Intents and acts, tending to make some one a slave, are both necessary under the act

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

of congress of 1820, c. 113 [3 Stat. 600], to convict a person of a capital offence; though under other laws of congress a person may be guilty of a misdemeanor for merely transporting slaves from one place to another abroad.

14. Nothing can be punished under the laws of the United States, which they do not make criminal: and the transportation of any kind of goods to Africa by the owner or a carrier, is not yet made a crime by any act of congress, independent of the intent with which it is done.

[Cited in U. S. v. Plumer, Case No. 16,056.]

15. The constitution and laws have contemplated that slavery is to be safely abolished in this country, by cutting off additions to it of ignorance and paganism from abroad, and elevating its victims, so as in time to be usefully returned to Africa, or made fit for emancipation here. And it is to be abolished in Africa, not only by reframing to purchase slaves there, but by civilizing her people, so as not to make prisoners of war slaves, and producing, by industry and arts, other articles with which to buy foreign merchandise.

[Cited in The Passenger Cases, 7 How. (48 U. S.) 544.]

This was an indictment against the defendant [Cyrus Libby], belonging to Scarborough, in this state, as master of the brig Porpoise, a vessel owned by citizens of the United States. He was charged with having received on board said brig on the 8th of December, 1846, within flow of the tide, at a place called Lorenzo-Marquez, on the eastern coast of Africa, a negro called Luez, not held to service by the laws of the United States or either of them, and with an intent to make him a slave. The defendant was arraigned on this indictment at an adjourned session of the court in August, 1845, when the indictment was found, and pleaded thereto not guilty. The trial came on, July 7, 1846, and after a full hearing was committed to the jury on the 16th of that month, under the following rulings, and also the following charge of the court on the various questions of law arising in the cause.

Most of the facts will be stated in the opinions of the court, that are necessary to understand the grounds of the law upon them. It is sufficient to say here, that the Porpoise was proved to belong to G. Richardson, of Gorham, Maine, and to have sailed from Portland in 1842, on a freighting voyage, under the command of Libby, both being American citizens. He was instructed when reaching Rio Janeiro, as he did in January, 1843, to report to Wright, Maxwell & Co., as consignees, with authority in them to let her for freight, or sell her at a limited price named in the instructions. On the 14th of January, 1843, they entered into a charter party for her with one Franceco, a Brazilian, for one year, and as much longer as was necessary to complete any voyage then begun, at the rate of 900 milreas (about $460) per month, and to carry no persons not free, and no goods illegal in character. She sailed thence for the eastern coast of Africa the next month, with certain merchandise and free passengers on board, as hereafter described, and while on the coast of Africa and on her return was employed in the manner which will be stated in the opinion of the court. On her return she was informed against by Johnson, a free colored man on board, who had been severely punished in Africa for taking a boat ashore without leave, and after examination at Rio before the American minister, consul, and the commander of the American squadron, was sent home by the latter for a breach of the laws of the United States against the slave trade.

Mr. Haines, U. S. Dist. Atty.

Fessenden & Deblois, for the prisoner.

WOODBURY, Circuit Justice, made the following rulings, and gave the following opinions in the progress of the case:

In the course of the trial the counsel for the government offered evidence in order to show Libby's knowledge and intents in this voyage, that while on the eastern coast of Africa he had received on board the Porpoise, not only the boy called Luez, and the sole one named in the indictment, but another boy by the name of Pedro, who was a slave and a brother of Luez, and at another port another boy by the name of Guilheme. And the government proposed to prove, also, some facts which took place on a prior voyage of the defendant in the Porpoise, on the western coast of Africa, under the same general charter party, and urged the admission of all this for the purpose of showing the knowledge of Libby of the illegal objects of the hirers of the vessel, and of the slave character of the black Luez, when he was taken on board.

THE COURT ruled that any thing done by Libby, or those who chartered the vessel during the voyage, and near the time when Luez was taken on board, might be shown in order to prove his knowledge and intents, but nothing of a separate and independent character, transacted at a different place and on a different voyage, and so distant in time as not to bear on this transaction, nor he be likely to come prepared to meet or rebut it on this trial. See People v. Hopson, 1 Denio, 574.

On the same principle, it was ruled that questions could not be asked as to what afterwards became of some of the slaves put on board a vessel called the Kentucky, that sailed to Brazil from that part of the African coast, while Libby was there, unless the government proved first some connection in interest and business between the Kentucky and Libby, or between those slaves and the receiving Luez on board the Porpoise, which is the only charge in the present indictment.

The letters of G. Richardson, the owner, as well as of his consignees, written to Libby before Luez was on board, and giving instructions as to the object and character of the voyage, though objected to by the government as not being competent evidence, were admitted as a part of the res gestæ to

show the design with which the vessel was sent from this country and chartered, and if believed to be written honestly and not as a cover or artifice to conceal illegal objects, the jury were instructed they should tend to rebut any improper views in the outset in this voyage of the Porpoise. But if designed to conceal illegal objects, they were an aggravation of the offence. So letters of freedom or acknowledgments of manumission, to Pedro, at Lorenzo de Marks, and to Guilheme, at Inhambane, made before persons styling themselves to be notaries public of the Portuguese government with their seals annexed, were also allowed to go to the jury, though objected to by the counsel for the United States (Peake, Ev. 73; 9 Mod. 66; [Nicholls v. Webb] 8 Wheat. [21 U. S.] 333; Story, Bills, § 276; [Ventress v. Smith] 10 Pet. [35 U. S.] 170; 1 Greenl. Ev. §§ 4, 5; 1 Denio, 376), and permission was given Libby to offer any evidence in his power as to their being genuine, and as to his having possession of them, believing them to be genuine when these boys were received on board.

THE COURT said it should instruct the jury that, being under the signatures and notarial seals of persons purporting to be notaries public, they might be considered prima facie genuine, without any collateral proof. Notarial seals need not be proved, but must be judicially taken notice of. 1 Greenl. Ev. § 5; 12 Mod. 345; 2 Esp. 700; [Yeaton v. Fry] 5 Cranch [9 U. S.] 335; 6 Serg. & R. 484; 3 Wend. 173; Bayley, Bills, 515. They are also to be presumed to have been executed at the time of their date (1 Best, Pres. 116), which was before the boys came on board.

THE COURT allowed in evidence, to corroborate them and strengthen the probability that they were executed before Libby left the coast, the facts that the paper had the royal water-marks on it, such as is used by the Portuguese public officers there; that it had also the stamps for duties which are affixed there; that it was like other paper in appearance and texture and marks, which is used there for public purposes; that the name of one of the notaries is the name of a person known to have acted as a Portuguese notary public there on other occasions; that the seal, annexed to a passport, connected with one of the documents, is the seal used by the officers of the Portuguese government there; that these papers were lodged with the regular authorities at Rio, when the Porpoise arrived there, and were forwarded here with a certificate on each, by a person purporting to be a Portuguese consul, stating that the notaries, signing and sealing, were legal officers of Portugal on the eastern coast of Africa, and were accompanied with translations of all into English, and were so forwarded under the signature of the American consul at Rio, as having been applied for by Libby, the prisoner.

These facts and circumstances were all permitted to go to the jury for their consideration, but under instructions given upon them in the charge, that the papers purporting to be manumissions, should have no weight, unless in the end they believed, from all the testimony, that the accused had them in his possession, or had seen and believed them to be genuine when he took Pedro and Guilheme on board. And if he so had them, or so saw and believed, that was sufficient, whether the due execution of the papers was technically proved or not. For, if so believing, he of course did not intend to make them slaves, by so receiving and carrying them, since he carried them as free persons, and for aught which appears they still remain free. (Both of them were then in court, nobody claiming them as slaves since they came on board.)

After the evidence was closed, and the counsel on both sides had submitted their views to the jury, the opinion of THE COURT on the general principles of law arising in the case were stated, with extended references to the testimony.

The law as laid down, on the main points, was as follows:

The first question, made as to the voyage by the counsel for the government, is, that it was illegal on the face of it, to carry such merchandise on freight from Rio to Africa, as was taken by the Porpoise. But the jury were instructed, that, for aught which had been proved, the voyage of the Porpoise, as planned by the owner, J. Richardson, was an ordinary one, and, on its face, not in violation of any act of congress. It was under consignment to Wright, Maxwell & Co., for usual employment in carrying freight, or for sale at a limited price.

Next, they were instructed, that the charter party, entered into by the consignees with Franceco for one year for nine hundred milreas, or about $450 per month, to carry any lawful merchandise or free passengers, was, on its face, not a voyage prohibited by any law whatever. Yet all these might be colorable and false.

It was then a further and very important inquiry, whether anything occurred afterwards and in connection with the voyage, which should alter the legality of it, or the appearance of its legality. For, however lawful in part a voyage might be in its inception or external features and purports, circumstances might be developed, and misconduct occur afterwards, which would indicate it to be entirely unjustifiable. The Porpoise in this case, after such instructions and such a charter party, sailed from Rio in February, 1844, for the eastern coast of Africa, with several passengers on board, who were Brazilians, and some of them agents of Franceco, with a cargo consisting of rum, cotton goods, iron bars, gun-powder, brass rings, &c., being articles such as are in demand on that coast, and such as usual-

ly are sold for money, and slaves purchased sometimes with the proceeds, or such as are often exchanged for slaves. The cargo was landed there at different factories, under the direction of Paulo and others, and a launch, which belonged to him. The Porpoise arrived there in April, 1844, and remaining on the coast till December, 1844, landing the cargo at the places described, tended to show Libby's knowledge of their business, and for the same purpose he was proved also to have gone on shore occasionally during the time to get provisions at the factories; sometimes dined there by invitation with Paulo; saw slaves in their yards, and some of the witnesses swear he was present at times with themselves, when some were bought and branded by Paulo.

It was further shown, that he sailed in company from Lorenzo de Marks to Inhambane, with a vessel called the Kentucky, and under the control of Franceco and Paulo, and took on board there some of her crew, who were Americans, as passengers, before the Kentucky loaded with slaves under a Brazilian captain and crew, and sailed with them as she did to Brazil; that the Porpoise and Kentucky hung out lights in the night for each other in going from Lorenzo de Marks to Inhambane, a voyage of sixty or seventy hours; that Libby took on board there one African boy, before named, called Guilheme, and another on his return at Lorenzo de Marks, called Pedro, but both supposed to have the manumission papers before described, and carried no other Africans, unless he knowingly received Luez, as charged in the indictment, and carried him about fifteen miles to Inaak, where he was landed with Paulo and the pilot's crew; that after Libby's return from Inhambane, he waited by direction of those chartering the Porpoise, till a slave vessel, the Galafelia, was loaded and sailed the same day he did for Rio—but he with no cargo on board the Porpoise, and merely provisions and water and some free passengers and the two boys, Guilheme and Pedro. Various other incidents and expressions used by Libby were given in evidence, to prove his knowledge of the business in which Franceco and Paulo were engaged, and in rebuttal showing his disproval of it; and especially, the evidence before referred to, in the rulings of the court as to the manumission of Guilherme and Pedro, before he took them on board.

On all of these, THE COURT instructed the jury that the conduct of Libby, on the whole voyage, must be considered legal or illegal, according to the real intentions with which he entered upon it, and conducted till its close,—accompanied by such acts as congress has made penal. The law requires, to constitute a capital crime, both intentions to make persons slaves, and such acts as either kidnapping them, or receiving them on board a vessel, with such views. For intents without acts, or acts without intents, are insufficient. Where an act is a crime and capitally punished, courts and juries must require very decisive participation in the principal offence by a guilty intent—more than is necessary to avoid a contract, to recover for what is done or furnished in such a case; though even there it must be clear. There they must aid and participate in the principal design, or in the illegal acts themselves. See 8 N. H. 550, and cases there cited. Without any explanations as to such a voyage, and with such companions, and such a cargo, as Libby sailed with from Rio to the suspicious coast of Africa, and returning in such polluted company to Rio, it might be entirely justifiable to infer that he was a copartner in the slave trade itself with Paulo and Franceco, participating in the slave trade itself, by receiving Luez on board, profiting by its gains, blackened by its guilt, intending to assist in the confinement of its victims, and coöperating designedly in depriving them of liberty, or in perpetuating such a wretched condition by transporting them in bondage to a foreign country. And if the jury believed this to be his position, after all the evidence and explanation on his part, then it was competent and proper, however painful, to find him guilty of the capital offence charged in this indictment. It would make him a principal in the trade, and the jury need not trouble themselves about the circumstance that some sections of the act of congress, like that now under consideration, did not, eo nomine, punish aiding and abetting while others did. Libby's conduct in such case would not be like that of one merely an aider, an accessory before or after the fact—or an abettor in it, but would be that of an active participator—one of the principals—and equally guilty and equally punishable with other principals.

Had he been charged in this indictment as aiding or abetting Paulo in conveying slaves on board the Kentucky or Galafelia, or as doing it on board them, as one of the principals, rather than on board the Porpoise, he could not be convicted on such evidence. Because, in these vessels he was not one of the "crew or ship's company," as the offender must be of the vessel on board which the slave is received, and because a Brazilian, doing these acts on board a Brazilian vessel, is not committing a capital offence by our laws, and probably is not by those of Brazil. Nor if Paulo did the act on board the Porpoise, could Libby be convicted of aiding in it like an accessory, unless he knew and participated in Paulo's designs. Even then, some doubts should exist, as Paulo himself, not being one of her "crew or ship's company," is not punishable for it under the act of congress as a principal. For a mere passenger, from the laws of Oleron down to the present day, is not considered one of the "crew or ship's company,"

the latter being the mariners, and having a voice, in times of peril, in consultations, and being under obligations to service, and exposure, and obedience. When a principal cannot be punished for an act under any law, it would be difficult to hold guilty one who was merely an accessory or abettor. As if a parent or master punishing a child, or scholar, or apprentice, or seaman, under certain circumstances was justifiable, but one aiding him to do it was guilty of a crime.

In short, gentlemen, consider it the law for this trial, that if Libby himself was a co-owner in the slaves—if he embarked in the profits and loss of the slaver's voyage—if he had power and control over the slave cargoes—if he united in the kidnapping or confining—the purchase or the sale of them—if he did any thing which is a constituent part of the principal offence (U. S. v. Wilson [Case No. 16,730]), he was a principal with the others in both heart and deed; and as such, he can and ought to be punished capitally under the act of congress, for receiving any of them on board of the Porpoise. But on the contrary, he and his counsel deny all this, and they offer much evidence, and refer to numerous circumstances to rebut it. The jury will examine them with care, as it is a case of life and death; and if reasonable doubts as to guilt remain after examining them, he is entitled to an acquittal under this indictment, however he may be guilty of a different and less crime for carrying slaves for others as a mere carrier, and be liable to conviction under the other indictments now pending against him for such last offence.

Some of the facts relied on by the prisoner are these: From the charter party itself, it is insisted to be clear, that Libby had no idea of entering into the transportation or purchase and sale of slaves—that however he may have seen and known the slave dealing of his employers, he conducted throughout in accordance with the contract; adhering to it in substance, and not using it as a cover; going with the intent to take no slaves on board, no persons whom he supposed to be slaves; buying none; selling none; allowing none to touch his vessel or boats, but only those he believed to be manumitted, like Pedro and Guilheme, or to be the crews of the African pilot, like Luez, and which crew it was necessary to have temporarily on board, and to carry whom, while piloting the vessel, was, of course, not within the spirit or letter of the act of congress. It was further insisted, that his birth, education and principles, all preclude the idea he should attempt to violate so important a law of his country. That he had no motive for it, in receiving any increased wages, no indemnity, no security, nor had his owners any object, to expose their vessel to forfeiture, or he or his crew any inducement to risk their lives and property, as well as character, in such an illegal enterprise, the freight to be paid monthly by the charter, being proved to be only an ordinary rate.

On all the facts, appealed to in support of this view, connected with those urged by the government to sustain a different view, it was for the jury and not the court to decide, what were Libby's real objects; and, if they believed he received Luez on board knowingly, and supposed him to be a slave, and with intent to make or continue him a slave, they should convict; but if otherwise, acquit of the capital offence.

There are four leading propositions which embody what is considered the law on this subject:

1. Whoever, being an American citizen, receives negroes on board as vessel on the coast of Africa, with an intent to continue them in bondage, being interested in them, and in the trade is liable to be punished as for a capital offence.

2. Whoever, being such a citizen, carries only merchandise in his vessel, but coöperating with others, who carry slaves in different vessels of the United States, with the intent to make them slaves, and is transporting the merchandise as a participater in the slave trade and its gains, is exposed to a like capital punishment.

3. Whoever is not interested in the slaves, and has not kidnapped or taken them on board his vessel with intent to make them slaves, but merely carries them from one foreign port to another for others, and for ordinary hire, he is guilty of a misdemeanor under acts of congress, which punish such conduct with heavy fine and imprisonment; but is not doing what is punished by those acts with death and the ignominy of piracy.

4. If such person be neither interested in the slaves themselves, nor engaged, personally, in making others slaves, nor employed in carrying them, knowing them to be slaves, but transports merchandise merely, and that as a carrier of goods for others, to earn freight, rather than coöperate in making or paying for slaves, it is not declared to be an offence of any kind by any of the existing acts of congress.

THE COURT as before remarked, do not consider this one of those cases, where a certain act is made penal, without reference to intent. Because the act of congress itself makes the intent the great essence of the offence, as it is in most cases of crimes. Without the malus animus—the evil mind—the guilt to be punished cannot, in a case like this, exist. It is true, that the legislative power may be broad enough to declare certain acts to be illegal and to punish them, without saying any thing about motives.

But no act of congress has, in terms, made such a charter party as that of the Porpoise, unlawful on its face, though made to slavers and to carry their goods. Nor has any act prohibited the freight to the coast of Africa, whether as an owner, or carrier for others, of rum, or gunpowder, or colored cot-

tons, or brass rings, independent of any design to use them by the carrier himself in the slave trade, or to engage with them himself in its traffic. If we then, without any express law, were to hold, that such a voyage or freight was on its face illegal, we should make the law, rather than expound one already made. It may seem a little singular to this generation, but before 1794, it was not punished as illegal for citizens of the United States to engage even in the slave trade itself, whether foreign or domestic. We had, to be sure, while colonies, been obliged to submit to the importation of slaves by the parent country, though under earnest remonstrances of our fathers against it. We had felt its horrors in our own persons, our sons and daughters taken captives by the savages and held as slaves, and at times so sold in the Montreal market, and again and again redeemed, as was Stark, himself, the subsequent hero of Bennington, by an agent of New Hampshire. We have since seen it worse than repeated as to our gallant seamen by some of the barbarians of Africa, by the semi savages of Algiers and Tripoli, till we became powerful enough to avenge our wrongs and prevent a renewal of them. In short, the whole Union, even before the adoption of the constitution, had gradually become convinced that the only mode effectually to extirpate what the Northern states considered the curse of slavery, was at an early day to stop the addition to the number here from abroad; not only thus cutting off a large and constant reinforcement, but putting an end to the introduction of new ignorance, new superstitions, new Paganism, and allowing the arts of civilization and Christianity gradually to elevate and make more safe the liberation of slaves, long remaining here; and by returning them more civilized, to enlighten and reform slavery at home in Africa; or by releasing them here, when fit subjects for emancipation, thus, in time, to terminate the evil throughout and forever.

Seeing and feeling all this, and that slavery itself might thus in time safely cease, the prudent framers of the constitution secured a right in it to prohibit the slave trade into the United States after 1808, with an implied power to prohibit it at once from being carried on abroad by American citizens, and left slavery itself to be abolished here entirely, and as fast as each state should find it expedient and secure to itself. It is from this apparent, that the foreign slave trade with this country was left to each state to legislate for itself till 1808. Accordingly, most of the states after the Revolution, even at the South, acted promptly for themselves, and prohibited the importation of slaves into their own limits from abroad. But nothing was done by congress under the constitution in respect to the slave trade, till an act, in 1794 [1 Stat. 347], made it penal for Americans to engage in it abroad. No court or jury of the United States could, before that, have inflicted penalties on persons engaged in that trade; nor could they then, by that act, have inflicted them on those engaged in the slave trade to the United States. Only the judges and juries of each state could enforce their own laws against this trade. It is more emphatically the rule under a government of specified powers, such as the constitution of the general government, that its officers cannot regard and punish, as offences, any thing not forbidden by the constitution, or by acts of congress.

The further history of the legislation of the general government on this subject is very instructive on this point, as also on the peculiar character and proper construction of the particular law the prisoner is now tried for violating, as distinguished from other laws of a kindred, but less severe character. Adverting to it, then, for a few minutes; congress having made, by that first act, the fitting out of a vessel here for the foreign slave trade, punishable by a forfeiture of the vessel, and $2,000 fine, proceeded next, in 1800, six years after, and made any citizen of the United States, engaged in that trade, liable to double the amount of his interest therein, and, furthermore, they punished with a fine of $2,000, and imprisonment for not over two years, the serving in any such vessel by a citizen of the United States. Next, in February, 1803 [2 Stat. 205], congress, in aid of those states which had voluntarily prohibited the slave trade into their boundaries from abroad, made it penal to import slaves into them, and forfeited the vessel in addition to imposing a fine for each negro thus introduced. Again, on March 2, 1807 [Id. 426], congress, in its eagerness to exercise the constitutional right to prohibit the slave trade to this country at all after the commencement of 1808, passed a law in advance, expressly forbidding any such importations, under the penalty of forfeiting the vessel, and paying a fine of $20,000, and imposing a further fine of $5,000 on any person aiding or abetting therein, and subjecting those interested in the slaves themselves to imprisonment as well as fine. After this, it was not till the treaty of Ghent stipulated for further measures towards the abolition of the trade, that in 1818 [3 Stat. 450], an act was passed forfeiting any vessel of the United States engaged in that trade, to or from any place whatsoever, and, furthermore, imposed a fine from one to five thousand dollars, and imprisonment from three to five years. It punished, in like manner, the transportation from any place abroad of a negro or mulatto not held to service by any of our own laws. And made some other modifications of former acts on this subject.

But, not content with this moderation for the worst cases, and seeing that there were different degrees of turpitude in the mere carrying of slaves, and being engaged on the African coast or any foreign shore in the

kidnapping of them, or securing them on board, or in decoying or forcing them on board in any way to make them slaves, congress, in A. D. 1820, passed an act declaring the latter offence a piracy, and punishable with death. This is the act, and not that of 1818, or any prior or milder one, under which the prisoner is now on trial for his life. But to hold under this last law, that the mere carrying of cottons or rum to the coast of Africa, without regard to intent, and without meaning to make men slaves, by seizing or carrying them away, is a capital offence, when congress has not said so, would be a great stretch of judicial legislation. Congress has not done all things on this subject, because it has done some. This has been shown fully in the history of its legislation, just sketched to you. So if one state, for instance, prohibits selling spirits without a license, another does not. But the judges by construction cannot punish such sale in the latter state, unless it is prohibited there also. So of the keeping of gunpowder in large quantities in cities. So of carrying deadly weapons. They are punishable only by the courts of a state where they are prohibited, and not by the United States courts, unless expressly made penal by some act of congress or the constitution. If we were to pronounce the carrying such goods as the Porpoise freighted illegal, and a capital offence, without reference to the intent not to be engaged in making negroes slaves, or even carrying them on board, where should we stop?

The whole trade to Africa by such a system of construction might be abolished as illegal, and this too by the judicial tribunals alone. That whole trade is all more or less in articles suitable to be exchanged for slaves, or sold there, and the money invested in slaves. The owners of the cargoes know this, who carry for themselves, as well as the owners of vessels who carry such articles for others. The whole coast, from the Isthmus of Suez to Algiers and Morocco, and the mouth of the Niger, doubling the Cape of Good Hope to Cape Inaak, to Mozambique, Zanzibar, and the Red Sea, the whole is black with slavery, and has been probably since the days of Joseph, sold to the Ishmaelites to be a slave in Egypt. And the great export of Africa now, not the only, but paramount one, is slaves; as much as silver is from Mexico, and coffee from Cuba. Slaves are the chief means of payment from the interior for their wants in foreign merchandise, and are universally made, used, and sold. The pacha of Egypt, one of the most enlightened rulers in Africa, though professing to abolish the slave trade, is believed by travellers to go even beyond this, and to make annual incursions over his Ethiopian borders to fill his armies and household with captive slaves. And till education and Christianity elevate the African mind, elevate their governments above the savage practice of making captives in wars slaves, rather than mere prisoners, to be exchanged,—for this is the great seat and source of the evil, and has been in all ages,—I say, till these great principles, with recolonization and advances in industry and the arts, lead the African people to mitigate the horrors of war as to prisoners, as has been their influence in modern Europe, since our proud British ancestors were sold into bondage in the slave markets of Rome, and induce them to produce articles enough, independent of slaves, to exchange or sell to supply their wants in foreign merchandise, nothing but the extirpation of the foreign slave trade can be at all effective in lessening the evils of slavery in that wretched quarter of the globe.

In regard to the American efforts to break up the foreign slave trade, and to take away the demand and the market, whether by fleets on the coast, or penal severities inflicted here, the courts of the United States can go, and are disposed to go, as far and fast as the laws permit. But they cannot go farther without exercising judicial legislation, without usurpation, and infidelity to their oaths. We are mere agents of the law, to execute, and not enlarge or add to them. If they reach only to punish carrying slaves, we cannot extend them to punish carrying merchandise. Whenever congress may choose to go further, and punish as illegal the transportation of any merchandise to Africa, whether by its owners or for owners, and those owners mere merchants or slave dealers, if that merchandise be such as is usually exchanged for slaves, then such a voyage can be treated as illegal, but not till then, unless undertaken with the intent to participate in that trade, and accompanied before its close, by acts of seizing or receiving on board slaves, knowing them to be such. So if congress should please to go further still, and can do it constitutionally, and pronounce it illegal to carry articles to any slaveholding country, Brazil or elsewhere, suitable to be used by slaves, and to thus help sustain the institution or condition of slavery, whether shoes, ploughs, or clothes, of domestic or foreign manufacture, or make it penal to bring hither, or consume the productions of slave labor, whether cotton, or sugar, or tobacco, the courts of the United States can then, but not till then, punish such acts. These acts are, in the views of some, sinful, and should be denounced as illegal. And England has, of late years, actually imposed a higher and discriminating duty against slave grown sugar, though allowing it to be imported and used. But recently she has abolished that discrimination, seeing, that if it was immoral or inexpedient to consume sugar unless under a higher duty, it was immoral, if not inexpedient, to consume it at all, on account of its vicious origin, and not probably being yet prepared, with some, to hold the

use of all articles produced by slave labor as a culpable participation in its guilt. But let the United States government prohibit the consumption or purchase or sale of articles produced by slave labor, black or white, or the sale of any thing likely to be used in the slave trade, it will then behoove courts and juries to enforce such prohibitions, if they can do it constitutionally. But, till then, we possess no authority, acting on common law principles, or any subtle distinctions in the metaphysics of moral science, to set up our private opinions and attempt to enforce them without any legislative warrant from congress.

A single illustration more on these distinctions, and I have done with them. It is drawn from a practice common elsewhere, but which, it may well be a cause of gratitude, is less known among ourselves. Two duellists proceed to the field of honor with their weapons and seconds. The seconds aid and abet, by arranging the terms of the fight, by loading the pistols, and giving orders to fire, and hence are punishable like the principals. But who ever heard that the coachman or hack driver, or conductor of the railroad cars, who aided to carry them or their pistols and balls, were ever indicted as principals or punished as such? The carriers may have known the intention of the parties to fight, but they had no object beyond their own fare, or common wages, in their customary business of carrying persons and things for hire. If this was merely the design of Libby, and nothing more, it is clear that he cannot be punished for a capital offence. Something has been said of former decisions bearing on this question, as more or less stringent. The principle involved in U. S. v. Battiste [Case No. 14,545], decided by my eminent predecessor, was the same as that adopted here. The facts there differed from this, as to the commencement of the voyage being more disconnected with the trade itself; but the conduct there afterwards, in taking known and shackled slaves on board, and carrying them from one foreign port to another, was open, reiterated, and far stronger than in the present instance. Nor am I aware of any decided case connected with these questions, where the courts of the United States have held doctrines concerning them different from those just laid down.

Take up then, gentlemen, all the circumstances in the present case, differing as well as similar to that of Battiste, and any former decisions. Look at the whole real object and character and conduct of the voyage, and then decide whether the three points are satisfactorily made out or not, which are necessary to convict under this indictment, viz.: (1) That Libby was a part of the crew or ship's company of a vessel of the United States. (2) That he received Luez on board the Porpoise about 8th of December, 1844. (3) That he did it with intent to make him a slave. The first point seems fully proved, if the captain of a vessel be a part of the crew or ship's company. And we give you in charge that he is. The second point is made out, if you believe Libby saw Luez come on board, and assented to his being and remaining there as one of Paulo's slaves for the few hours he was on board. But if, on the contrary, in the pressure of business, and crowd of people, he did not know or notice that any black came on board in the pilot's boat, except his colored oarsmen, he did not receive him designedly. A person brought into a vessel surreptitiously, or without the knowledge or assent of the master, of course cannot be said to be received by him on board within the meaning of the law, so as to make the master punishable with death, as receiving him with a view to make him a slave. You have heard the evidence on both sides: that Luez in fact came on board in the same boat with the pilot as well as with Paulo; how the master was then busily engaged—the short time that Luez remained there—the short distance he was carried, and the want of motive Libby would have to carry Luez, and refuse to carry any others not supposed to be free, or not the crew of the pilot, such as Guilheme and Pedro, till they had, as is claimed, free papers, before he received them. You will look to all which operates both for and against him on this point, and decide as your duty seems to you to require. But the third and last point is the most important in order to constitute the capital offence. Did he intend to make Luez a slave? In order to find this against him, it is not necessary that Luez should have been free, and that Libby thus attempted to make him a slave for the first time. It is enough, if he meant to coöperate as a party in interest and power, and design, to perpetuate his condition as a slave, and received him on board for that purpose.

In conclusion, gentlemen, while on the one hand, you cannot be too anxious to vindicate your country from any imputation of connivance at the illegal traffic in slaves from the African coast, and to punish every offence, satisfactorily proved, against its laws on this subject, (this nation being first and foremost in the world to hold up such offences to condign severity of punishment,) and solicitous, as we all are, to show every people that no reasonable effort will be spared to sustain the policy of most of the present governments of Christendom to suppress that inhuman traffic; yet you will of course abide by your oaths in doing this, and convict the prisoner, only if guilty, under the laws and the evidence. And you will be happy to find in any case, if these laws and the evidence justify the conclusion, that one of your own countrymen charged with this crime, has been so true to the biddings of duty and so faithful to the laws, so observant of the honor and character of the place

of his birth and education, as not to pollute his hands with participating in the gain or the turpitude of what. in the present age, is generally regarded so ignominious no less than cruel as the trade in human blood.

Case No. 15,598.

UNITED STATES v. LIDDLE.

[2 Wash. C. C. 205.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

ASSAULT AND BATTERY—MEMBER OF FOREIGN LEGATION—EVIDENCE OF DIPLOMATIC CHARACTER.

1. Indictment for an assault and battery, on a member of the legation from Spain. The certificate of the secretary of state, dated subsequently to the assault and battery, is the best evidence to prove the diplomatic character of a person, accredited as a minister by the government of the United States.

[Cited in U. S. v. Ortega, Case No. 15,971; U. S. v. Benner, Id. 14,568. Cited in brief in Re Baiz, 135 U. S. 421, 10 Sup. Ct. 854.]

2. Parol evidence was admitted, to prove the period when a person was considered by the government of the United States as a minister.

3. The law is the same in the case of a defendant charged with an assault of a minister, as when charged with the same offence against a citizen; and if the minister gave the first assault, the defendant will be excused for the subsequent battery, though he was a minister.

The defendant [William Liddle] is charged in the indictment, with an assault and battery committed on Don Ignatius Peror De Lima, attached to the legation of Spain, and executing the duties of secretary of legation. The first count states him to be a public minister of Spain, viz., a gentleman attached to the legation of Spain, and executing the duties of secretary of legation: the other counts are general, and state him to be a public minister. The evidence of one of the witnesses for the prosecution, stated that the defendant, a constable, had taken a domestic of De Lima, and was carrying her before a magistrate, when De Lima came up, put his hand gently on Liddle's shoulder, and inquired what was the matter; that Liddle inquired if he meant to rescue his prisoner; and immediately gave him two very severe blows with a stick, which De Lima returned. A witness for the defendant, stated that De Lima ran to the constable, seized him violently by the breast; insisted upon his releasing the prisoner; continued his hold, though two or three times desired by Liddle to desist, who stated that the prisoner would have justice done to her, before the magistrate, where De Lima might appear; that De Lima still continued his hold, and jostled him into the gutter, when the defendant, with a stick in his hand, gave De Lima a blow, which De Lima returned. To prove the public character of De Lima, a certificate from the secretary of state, dated April, 1808, was read, stating that when Mr. Feronda produced to the president his credentials, as charge des affaires of Spain, he also introduced De Lima as a gentleman attached to the legation, and performing the duties of secretary of legation.

Mr. Hopkinson objected, that as the assault laid and proved, was in October, 1807, this certificate did not show, that, at that time, De Lima was accredited as secretary of legation; and that parol evidence was inadmissible to supply this defect.

(Mr. Dallas had offered himself to prove, that long before October, 1807, the official character of Feronda was notorious, and that he was treated and considered by the government as minister of Spain.)

Mr. Dallas read 4 Burrows, 2016, to prove that the attorney of the United States, prosecuting, was evidence of the official character of the minister, and that he was received as such by the government.

Mr. Hopkinson, contra. The introduction and acceptance of a minister, is either mentioned on the records of the secretary of state's office, and if so, a defect in the certificate can only be supplied by the secretary himself; or is a matter in the private recollection of the secretary, in which case his certificate is no more evidence than a certificate from the clerk of a court, not given under his official seal, and in a matter where he is authorized to certify.

BY THE COURT. The certificate of the secretary is good evidence, and the best to prove the essential point, that he was received by our government, and accredited as the charge des affaires of Spain; and it also proves, that at the same time De Lima was presented and received as secretary attached to the legation. This is not like the case of a certificate from the clerk of a court; for he certifies as to things respecting third persons. Here, the certificate of the secretary, the proper organ of the government, is an acknowledgment by the government that De Lima is received and considered as entitled to the character attributed to him; and, of course, there can be no better evidence of that fact. After this acknowledgment, parol proof of the time since which Feronda has been considered a minister by the government, and has acted in his official character, is proper; and this latter, in connexion with the certificate, will fix the time when the privileges of De Lima commenced.

Mr. Dallas proved, that prior to October, 1807, Feronda was treated by our government as minister, and that he was notoriously considered as entitled to that character. To prove that De Lima was to be considered as a public minister, Mr. Dallas read Vatt. Law Nat. 664, bk. 4, c. 5, § 55; Id. c. 6, §§ 69, 75, 76; Id. c. 9, § 122; 3 Burrows, 1478; 4 Burrows, 2017, 3 Term R. 79; Mart. Law

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

Nat. 250, bk. 7, § 3; [Respublica v. De Longchamps] 1 Dall. [1 U. S.] 111. The 122d section, cited from Vattel, states, that the secretary to the embassy is a kind of public minister, and is under the protection of the laws. Second; it is not necessary to lay in the indictment, or to prove, that the defendant knew the public character of the secretary: the act of congress does not require it, and such a principle would be absurd.

Barnes & Hopkinson, for defendant, contended: First, that if a foreign minister offend a citizen, the latter may oppose him without infracting the law of nations. Vatt. bk. 4, § 80. Secondly, that it is no violation of the law of nations, to assault a minister, unless the aggressor knew that he was a minister. Mart. Law Nat. 226, 267; Vatt. Law Nat. bk. 4, c. 7, § 82, 107. The act of congress does not punish an assault upon a minister, except where it is in violation of the law of nations: therefore, if the first assault be committed by the minister, or the battery be committed by one not knowing that the person is a minister, these authorities prove that it is not against the law of nations. Upon the evidence, it was contended, that the first assault was committed by De Lima, and that the defendant did not know his public character. Third, that even if it appeared that De Lima was appointed by his sovereign, still a secretary of legation is not a public minister. He may be entitled to the protection of the law of nations, and yet not be a minister. Mart. Law Nat. 201. The protection is not claimed by the secretary, but by the minister for him. 3 Term R. 79; Ward, Law Nat. 316; [Respublica v. De Longchamps] 1 Dall. [1 U. S.] 117; 2 Ld. Raym. 1524. Mart. Law Nat. 213. But, to entitle him to the character of secretary of legation, he must be appointed by his sovereign: if appointed by the minister, he is only a private secretary, and comes under the character of one of his domestics. In this case the certificate of Mr. Madison, so far from stating that he produced credentials from his master, implies the contrary, by stating that fact as to the minister, and not as to the secretary. Fourth, that the indictment does state him affirmatively to be secretary of legation, so as to be traversed; but merely that he is a gentleman attached to the legation, and performing the duties of a secretary of legation; this is too uncertain. 2 Hawk. P. C. bk. 2, c. 25, §§ 62, 72, 59. The second and third counts state him to be a public minister; which is an equivocal term. 4 Burrows, 2016.

Mr. Dallas admitted, that if the first assault was committed by De Lima, there was no ground for the prosecution; but, on the evidence, denied the fact.

WASHINGTON, Circuit Justice. The assault and battery is fully proved, and the question is, whether the defendant has justified it, in law or fact. The attorney has very candidly admitted, what the court intended to have stated to the jury; viz. that as to the law arising on the facts, the case stands upon the same ground as if the assault and battery had been committed on a citizen: that is, the prior assault of De Lima, if the jury should think he committed it, would excuse the battery by the defendant, whether De Lima were a public minister, or not entitled to that character. The whole cause, then, upon the merits, depends upon the credibility of two of the witnesses. If the one examined, on the part of the prosecution, be believed, then De Lima was guilty of no assault, and the battery cannot be justified. If, on the other hand, the witness for the defendant is believed, then the first assault was by De Lima, and your verdict should be in favour of the defendant. As to the points of law raised and discussed, it is unnecessary to give any opinion upon them to the jury. The objections, if good, appear on the indictment; and may be taken advantage of, on a motion to arrest the judgment, should the verdict find the defendant guilty.

The jury found a special verdict, that the defendant is guilty of the assault and battery as laid; that previous thereto, De Lima had been introduced to the president, (pro ut, Mr Madison's certificate,) but at the time of the assault and battery laid, the defendant did not know of such introduction.

The court afterwards gave the following opinion upon the special verdict found by the jury:

WASHINGTON, Circuit Justice. The question reserved for the opinion of the court, is, in effect, whether this case be within the operation of the twenty-eighth section of the act of congress [1 Stat. 119S], for the punishment of crimes against the United States; from the circumstance that Liddle did not know, at the time of the assault and battery, of which he was found guilty, that Don Ignatius De Lima was a public minister? This must depend upon the true construction of that section of the law; which, it must be admitted, is by no means free from ambiguity. It is contended by the counsel for the defendant, that assault, battery, &c. mentioned in this section, must be so coupled with the descriptive words which immediately follow, as to qualify and restrain their meaning, to those acts when done in violation of the law of nations; and if this position be right, the conclusion also is right; since it is not to be denied, that if the aggressor be ignorant of the character of the minister, the assault is not considered as an offence against the law of nations. The court was at first strongly inclined to adopt this construction; considering the words, "or in any other manner infract the law of nations," as implying, that the acts before mentioned were meant to be such as

did infract the law of nations. But, upon a more deliberate examination of the whole subject, we are satisfied, that the intention of the legislature corresponds with what we consider to be the liberal interpretation of the expressions used. Let it be recollected, that the constitution vests in the courts of the United States jurisdiction in all cases affecting ambassadors, other public ministers, and consuls. This delegation of jurisdiction to the tribunals of that government which is charged with all the foreign relations of the nation, and with the consequent duties to preserve its peace and honour, seems to have been proper and necessary; and in respect to those, at least, who represent the persons of their sovereigns. It follows, that the national judiciary, a branch of the general government, was peculiarly marked out for the decision of national questions. Hence, it is probable, that congress would perceive the propriety of occupying so much, at least, of the ground of jurisdiction granted by the constitution, as might be necessary for the general peace, and would leave no part of the subject of the cognisance of state tribunals, which might possibly involve the responsibility of the government.

Thus far as to the probable intention of the legislature. It is agreed, that a battery committed upon the person of a public minister, though his character be unknown to the aggressor, is a trespass for which the latter may be criminally or civilly punished. The trespass equally affects the minister, as if it had been committed scienter; and the commission of it might equally involve the peace of the nation; as, in general, the plea of ignorance would seldom be deemed a satisfactory excuse by the sovereign, offended in the person of his minister. As to cases which might produce such consequences, it is highly improbable, that congress could intend to make the degree of offence the criterion of jurisdiction, between the national and state tribunals. The words of the law, literally interpreted, seem to express, what we consider to have been the intention of the legislature. "If any person shall assault, strike, wound, or imprison the person of an ambassador, or other public minister," he commits an offence at common law, whether the character of the minister be known or not; and it is an offence, within this section of the law, for the purpose of giving jurisdiction to the federal courts. These acts of violence, on account of their enormity, and being principally in the view of the legislature, are of course specifically enumerated. But, as minor acts of violence might be committed against a foreign minister, which could not be so easily foreseen or described; and it was not intended, on the one hand, to punish every possible injury to the person of a foreign minister, nor, on the other hand, to leave every other than the specified acts unpunished; the legislature, as to those not specified, seems to have thought it proper to require, that they should be such only as infracted the law of nations. But the degree of punishment to be inflicted, upon conviction, resting in the breast of the court, the circumstances relied upon, to exclude this case from the jurisdiction of the court, would, nevertheless, form a proper subject of consideration, in deciding what the punishment shall be. It has, in this instance, had its influence upon us.

Case No. 15,599.

UNITED STATES v. LILIENTHAL.

Circuit Court, S. D. New York. 1873.

[Affirming Case No. 16,105. Affirmed by supreme court. Lilienthal v. U. S., 97 U. S. 237. Cited in Hawloetz v. Kass, 25 Fed. 765. Nowhere reported; opinion not now accessible.]

UNITED STATES (LILIENTHAL'S TOBACCO v.). See Case No. 16,106a.

Case No. 15,600.

UNITED STATES v. The LILLA et al.

[2 Cliff. 169.] [1]

Circuit Court, D. Massachusetts. May Term, 1863.[2]

APPEAL—PRIZE CASE—FURTHER PROOF—NEUTRAL OWNERS—BONA FIDES.

1. In a prize court, where the motion for further proof was filed in the court below, and was there overruled, and the appeal taken, as well from the action of the court in that behalf as from the decree upon the merits, *held*, that the appellate tribunal would not grant a separate hearing, upon the motion, because the appeal is an entirety, and the several questions involved in it can be most conveniently heard at the same time.

2. Where such motion was made and overruled in the court below, it cannot be determined whether the action of the court was correct or incorrect, without recurring to the evidence then before the court.

3. If the neutral owner claims a portion of the cargo, which belongs to an enemy, for the purpose of deceiving the court, the rule is that the part belonging to the neutral will be condemned, as a penalty for the fraudulent conduct; but this rule, perhaps, should only be applied in extreme cases, and where the evidence leaves no doubt of the truth of the charge, and the circumstances afford no ground of justification, palliation, or excuse.

4. The universal rule is, that, before a claimant can expect an order for further proof to be made, he must be able to render it probable, that if the motion is granted, he will be able to overcome the probative force of the suspicious circumstances.

5. A purchase of an enemy's vessel in a neutral port, during war, is itself a suspicious cir-

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[2] [Affirming Case No. 8,348.]

cumstance; and whenever such a purchase is drawn in question, the evidence of an absolute and bona fide transfer ought to be clearly established.

6. Neutrals may purchase an enemy's ship, but such purchases are liable to great suspicion; and if full proof be not given of their validity, by bill of sale and payment of a valuable consideration, it will materially impair the validity of the neutral claim.

7. Evidence to acquit or condemn must come, in the first instance, from the papers of the officers and crew of a captured ship, and leave for further proof is granted in cases of honest mistake or ignorance, or to clear doubts or remedy defects, but the application must be supported by evidence of probable cause and good faith, or it will be rejected

8. Prize courts will not, in general, grant an order for further proof, where it clearly appears that the party moving for the order has knowingly attempted to cover and claim an enemy's interest in the captured property, whether the purpose of the claimant was to protect his own interest, or to benefit the enemy owner.

9. Persons claiming to be the owners of property captured as prize, and wishing to procure the restitution of the same, must file their claim before the proper court. The master or agent may make the claim, but it must be made in behalf of the proper party; and if no claim at all be made, the presumption is that it is enemy's property, and the same must finally be condemned.

10. Claims presented after the proofs have been opened and examined, and after hearing the reasons assigned for the condemnation, are never favored.

[Appeal from the district court of the United States for the district of Massachusetts.]

This was a case of prize, and the case came before the court upon an appeal from a decree of the district court [Case No. 8,348]. Capture was made on the 3d of July, 1862, by the United States gunboat Quaker City; and the vessel and her cargo were sent into this district for adjudication. The property captured was the brig Lilla and her cargo; and the material allegation of the libel was that the vessel and her cargo were lawful prize to the United States and to her captors. Claim for the vessel was filed July 30, 1862, by Barak Maxwell, of Wells, in the state of Maine. He intervened for his interest, and that of Richard C. Bartlett, and the Mercantile Mutual Insurance Company. His claim was for the vessel, her tackle, apparel, and furniture, and he alleged that he and the parties for whom he intervened were the true and lawful owners of the vessel. A part of her cargo was sold by agreement. On the 2d of August, 1862, Charles Applebee appeared and also filed a claim to the brig, her tackle, apparel, and furniture, as the property of Richard G. Bushby, a British subject. According to his statement, he also was a British subject; and the allegation was that he filed the claim as the master who was in command of the vessel during the voyage. Among other things, he alleged, that she was a British merchant brig, duly registered as such, and that she was wholly owned by British subjects. Allegation was also made upon information and belief, that all of the cargo, except thirty-seven packages of medicine, was owned by British subjects, residing and being in England at the time of the capture and the filing of the claim. Said packages of medicine, as alleged, belonged to a passenger, but the name of the passenger was not specified, nor did the intervenor in direct terms make any claim for that part of the cargo. Three days later, the name of the passenger was given in a test affidavit filed by the claimant, as B. D. Hewetson, and it was then represented that he was also a British subject, and that he was the owner of the thirty-seven packages of medicine. The claimant intervened as master; and the allegation was that all of the cargo, except the packages of medicine, was owned by Bushby & Co. of Liverpool; and he averred "that the parties aforesaid were the bona fide owners of said brig and cargo," and denied that the same were lawful prize. Proofs in preparatorio were duly taken, and filed in the cause, consisting of the depositions of all who were on board at the time of the capture. On the 1st of October, 1862, the proctor for the claimants of the vessel and cargo, moved the court for an order for further proof in the cause, to enable him to establish the truth of the alleged fact that R. G. Bushby was the true and lawful owner of the vessel; and that the cargo was shipped from the port of departure to be transported to Nassau, and nowhere else, and that the shippers, John Senior & Co., Bushby & Co., R. G. Bushby, I. Perrin & Co., and Henry Lafone were and always had been the bona fide shippers and owners of the cargo in the proportion standing in their names on the freight-lists on file; that they, the claimants, were British subjects; and that Barry D. Hewetson, also a British subject, was the owner of the several packages of medicine, and that no part of the cargo was intended to be transported to any Southern port, in violation of any blockade or belligerent right of the United States.

Full hearing was had in the district court, and the motion for further proof was denied and overruled. Final decree was accordingly entered on the 14th of October, 1862, to the effect, that the claim of R. G. Bushby to the vessel should be dismissed, and that the claim of Barak Maxwell and others to the same should be allowed; but, inasmuch as it appeared, that the vessel had previously been taken from their possession, by the officers and crew of an armed vessel acting as a privateer, under the direction and control of the enemies of the United States, and was captured from the possession of persons claiming title under such pretence of authority, the restoration of the vessel to them was ordered, on the condition that they should pay to the captors a certain sum as

salvage, and the costs and expenses of the captors incurred on account of the vessel. A part of the cargo was found to be the property of Barry D. Hewetson, although not formally claimed by him; and in respect to that part of the claim the decree was, that it be condemned as lawful prize, upon the ground that the owner had for a long time been a resident in Charleston, S. C., which was a part of the territory of the enemies of the United States, and the property must, therefore, be deemed the property of an enemy. The residue of the cargo was claimed in behalf of R. G. Bushby and others, and was condemned by this decree. The ground of the decree was that the claimants were not the real owners of the property, but that the apparent title thereto was for the benefit of persons permanently residing in the territory of the enemies of the United States, and was simulated for the purpose of deceiving the cruisers of the United States; and also because it appeared, that the property so claimed was the property of persons permanently residing in the territory of such enemies, and consequently must be deemed to be enemies' property. Appeal was duly claimed by R. G. Bushby as owner of the vessel, and by Bushby & Co., as part-owners of the cargo.

The application for the order for further proof contains an allegation, that portions of the cargo were owned by John Senior & Co., R. G. Bushby, I. Perrin & Co., Henry Lafone, and Barry D. Hewetson; and they were also joined in the petition for an appeal. It was in evidence that the vessel was built in Wells, in the state of Maine, and that she was owned by the American claimants; her permanent enrolment showed that she was built at that port in the year 1855, and that she was called the Betsey Ames, of Wells, and that Richard P. Bartlett, one of the American claimants, was at that time her master. The enrolment was dated on the 31st of October in that year, but on the 30th of March following, the same was surrendered at the custom-house in Boston, and cancelled, and a temporary register was taken out, in which it was certified that the vessel was bound on a foreign voyage; the owners' oath was duly taken on both these occasions, and the corresponding certificates were issued that the American claimants were the only owners of the vessel. Barak Maxwell's test affidavit affirmed the same thing, and also stated, that about the 1st of October, 1862, the vessel sailed from New York for Cuba with a lawful cargo. The evidence also tended to show that during the voyage, somewhere about the 12th of October, she was captured by an armed vessel commanded by one Henry L. Libby, acting or claiming to act under the assumed authority of the so-called Confederate States; that she was carried into Charleston, S. C., and while lying there, by proceedings in a tribunal of some kind, she was condemned and sold. John Frazer & Co., a commercial house doing business in the city of Charleston, were the purchasers. Immediately after the proceedings for condemnation, the name was changed to the Mary Wright; and under this new name, November 2, 1862, she successfully run the blockade established by the United States, still commanded by the same Henry L. Libby, and she arrived at Liverpool under the same commander, some time in the following month, where she was soon after registered as the British brig Lilla, in the name of the claimant Bushby. On the 15th of May following she sailed from Liverpool on a voyage, which was the subject of investigation in this cause.

R. H. Dana, Jr., U. S. Dist. Atty.

The title of Bushby is not shown to be bona fide. The onus is on him to show his title and neutrality. 1 Wheat. [14 U. S.] 506 (Append.); The Walsingham Packet, 2 C. Rob. Adm. 77; The Rosalie & Betty, Id. 343; The Countess of Lauderdale, 4 C. Rob. Adm. 283. The vessel may be condemned, notwithstanding the owners have a neutral as well as an enemy domicile. The San Jose Indiano [Case No. 12,322]; The Antonio Johanna, 1 Wheat. [14 U. S.] 159; The Friendship, 4 Wheat. [17 U. S.] 105. The fraud as to the master is attempted to be imposed upon the prize court. This is not merely a fraud as to the master, but it shows that there was reason to conceal that Libby was master. There were false bills of lading of the medicine; they were made out in Bushby's name, but Hewetson was the owner of them. This fact alone would warrant the dismissal of the claim of R. G. Bushby to the vessel. The St. Nicholas, 1 Wheat. [14 U. S.] 431; The Betsey [Case No. 1,364]; The Graaf Bernstorf, 3 C. Rob. Adm. 109; The Eenrom, 2 C. Rob. Adm. 1; Dos Hermanos, 2 Wheat. [15 U. S.] 76.

The purchase of an enemy's vessel in a neutral port during war is suspicious. 2 Wheat. [15 U. S.] 30 (Append.); Hall, Law War, 483; 3 Phillim. Int. Law, § 486; The Dree Gebroeder, 4 C. Rob. Adm. 233; The Argo, 1 C. Rob. Adm. 159; The Bernon, Id. 102; The Welvaart, Id. 122. When such a purchase is so made, the evidence of absolute and bona fide transfer of all interest must be clear. Retaining the former master, an enemy, in command, taking an enemy passenger, with a cargo belonging to him, and bound to an enemy's blockaded port, and making no change in the vessel or her employment, are all circumstances of grave suspicion relied on by the courts.

The claim of Bushby & Co. ought to be dismissed. The cargo must be presumed to be enemies' property, from the fact that it was in an enemy's vessel. The London Packet, 5 Wheat. [18 U. S.] 132; The Flying Fish [Case No. 4,892]; The Primus, 29 Eng. Law & Eq. 590. A fortiori, where there is an attempt to conceal the character of the vessel, where

the enemy master is continued in command, his true character concealed, and where the vessel is bound on just such a voyage as an enemy charterer would have prosecuted. The London Packet [Case No. 8,474]. As part of this cargo was certainly enemies' property, and bound to an enemy's port, the maxim noscitur a sociis applies. One of the claimants has concealed the character of the vessel. The Eenrom, 2 C. Rob. Adm. 1; The Graaf Bernstorf, 3 C. Rob. Adm. 109; The Betsey [supra]. If this cargo, neutral when shipped, was to become enemy's property in the event of safe arrival, it should be condemned. The Ann Green [Case No. 414]; The Francis [Id. 5,032].

The motion for further proof should be refused, because it offers no proof of facts essential to be shown, or to explain the difficulties. The Vrouw Hermina, 1 C. Rob. Adm. 163; The St. Lawrence, 8 Cranch [12 U. S.] 442; The Mars, 6 C. Rob. Adm. 86. It was filed after seeing the proof, and hearing the reasons for condemnation. 3 Phillim. Int. Law, § 467, and cases cited supra.

S. Bartlett and C. G. Thomas, for British claimants.

The vital question as to the vessel is, whether the evidence in preparatorio is such as ought to induce the court, to refuse the claimant all right, to establish as against the captors, by further proof, the existence and fairness of his title, and that such title is not held in trust for enemies, on the ground of which suspected trust alone, the condemnation in the court below rested. It is fit, at the outset, to find on what grounds the supreme court place the doctrine of admission or rejection of further proof, since its rules of decision have been less austere than those of some of the earlier cases in the circuit courts. It is well settled, if an application for further proof be rejected in the district court, this court can administer the proper relief. The Pizarro, 2 Wheat. [15 U S.] 240.

The doctrine of the supreme court, in relation to further proof is best stated in the following cases: The Dos Hermanos, 2 Wheat. [15 U. S.] 80 where it is stated thus: "If from the whole evidence the property clearly appeared to be hostile or neutral, condemnation or acquittal immediately follows. If, on the other hand, the property appear doubtful, or the case be clouded with suspicions or inconsistencies, it then becomes a case of further proof. It is granted in cases of honest mistake or ignorance, or to clear away any doubts or defects consistent with good faith. But if the parties had been guilty of gross fraud, or misconduct, or illegality, further proof is not allowed." In the case of The Fortuna, Id. 161; where papers were concealed in a tin box in an old piece of timber, and where it was insisted that such fraudulent concealment was a substantial ground for condemnation, the court sustained an application for further proof. In the case of The Pizarro, Id. 228; where papers were thrown overboard, and where it was insisted that such spoliation of papers excluded the benefit of further proof, the court held it to be a circumstance open to explanation, and not a ground for denial of further proof. In the case of The Friendschaft, 3 Wheat. [16 U. S.] 47; where it was contended that, in a case of cargo accompanied by mere bills of lading, but not with letter of advices or invoices, claimants ought not to be let into further proof, the court refused so to regard it, stating (page 48) "that it is unquestionably extraordinary that the same vessel which carries the goods should not also carry invoices and letters of advice, but the inference which the counsel for the captors would draw from this fact does not seem to be warranted by it. It might induce a suspicion that papers had been thrown overboard, but in the total absence of evidence that the fact had occurred, the court would not be justified in coming positively to such a conclusion. Between London and Lisbon, where the voyage is short and the packets regular, the bills of lading and invoices might be sent by the regular conveyances." The case of The Atalanta, Id. 409, was a case where property clearly neutral was shipped on board an armed enemies' vessel, which it was contended was conclusive ground of condemnation; but the court held that the claimant should be entitled to make further proof, although there were other facts that weighed against him, stating thus (pages 415, 416): "In addition to the extraordinary fact of employing a belligerent carrier, while a neutral vessel belonging to the alleged owner of the cargo lay in port, there are circumstances in this case calculated to awaken suspicion, which the claimant ought to clear up so far as may be in his power."

Was this case when heard by the district judge, and before the application for further proof, one where the property "clearly appeared to be hostile," or was it a case where "since the property appeared doubtful, and the case clouded by suspicions or inconsistencies, it then became a case of further proof"; and if it fell within the latter category, had the claimant "been guilty of gross fraud or misconduct," which upon settled principles shut him off from further proof? If parties, through misapprehension, have not been represented in the case, they may file their case even after it has reached the supreme court. The Harrison, 1 Wheat. [14 U. S.] 298. Barak Maxwell, in presenting only a register of enrolment of the vessel, does not show even prima facie evidence of title. The title of Maxwell must be proved in the ordinary way in which title is established. The rules of proof in prize cases do not permit property to be delivered to any party who shall make a claim to it supported by his test affidavit or oath; even in uncontested cases, no court of admiralty would deliver up a vessel to a party under such slender proof of title. The London Packet, 2 Wheat. [15 U. S.] 371.

F. C. Loring, for Maxwell and American claimants.

By the decree of the district court, this vessel was ordered to be restored to these claimants, its former owners, on payment of a certain sum as salvage to the officers and crew of the Quaker City, and costs. From this decree neither the libellants nor these claimants have appealed; consequently, so far as the libellants are concerned, they cannot now contest the right of these claimants to restitution, nor ask a larger amount of salvage than that awarded by the district court. The claimants ar equally concluded by its decree, and cannot now insist that no salvage or a smaller amount should be awarded. The Mary Ford, 3 Dall. [3 U. S.] 188; Stratton v. Javis, 8 Pet. [33 U. S.] 4. The American claimants are bound to show their original title and ownership; it is proved by the test affidavit of Barak Maxwell, and the shown identity of the Lilla with the Mary Wright and the Betsey Ames.

The Confederate cruiser had no right by the law of nations to make captures. She was a private-armed vessel. Chit. Law Nat. 73; The Estrella, 4 Wheat. [17 U. S.] 298. Until the government of the United States shall recognize the Confederate States as an independent power, its courts cannot do so. That is a political, and not a judicial question, over which courts of law have no jurisdiction. Rose v. Himely, 4 Cranch [8 U. S.] 241; U. S. v. Palmer, 3 Wheat. [16 U. S.] 610; The Nueva Anna, 6 Wheat. [19 U. S.] 193; Judge Sprague's Charge, 24 Law Rep. 17. The British claimants' title depends not only upon the legality of the capture, but of the proceedings and sentence of condemnation. There were no such judicial proceedings for condemnation of the vessel as this court could recognize. Rose v. Himely, 4 Cranch [8 U. S.] 241. Consequently, the ownership of the American claimants was not disturbed by the alleged capture or condemnation. The facts of the case tend to show that Bushby was a colorable, and not a real purchaser of the vessel. There is necessity of condemnation to change title. The Flad Oyen, 1 C. Rob. Adm. 135; The Kierlighett, 3 C. Rob. Adm. 97; Goss v. Withers, 2 Burrows, 683; Assievedo v. Cambridge, 10 Mod. 77; Chit. Law Nat. 99, 100; Hall. Law Nat. 728.

CLIFFORD, Circuit Justice. The petition or motion for appeal is signed by the proctor of the claimants, and the only entry under it in the transcript is, that "the court allowed an appeal accordingly," which is, to say the least of it, exceedingly indefinite, and not very satisfactory.

Strong doubts are entertained whether any of the parties named, except R. G. Bushby and Bushby & Co., had any right to appeal; but as no motion to dismiss is presented, the court will briefly examine the whole case.

The parties appealed from the refusal of the court to grant the motion for an order for further proof, as well as from the decree dismissing the claim to the vessel, and condemning the cargo as lawful prize. The appellants hardly contend that the decree of the district court was incorrect upon the proofs there exhibited, but they insist that the court plainly erred in overruling the motion for an order for further proof.

Prize courts of original jurisdiction usually, and almost necessarily, hear the cause in the first instance upon the proofs taken in preparatorio, and then decide upon that evidence, whether or not it is proper to allow such a motion if one be filed. Where the motion was filed in the court below and was there overruled, and the appeal is taken, as well from the action of the court in that behalf, as from the decree upon the merits, the appellate tribunal will seldom or never grant a separate hearing upon the motion, because the appeal is an entirety, and the several questions involved in it can be most conveniently and appropriately heard at the same time.

Such motions may also be originally made in the appellate court, and where they are so made, the hearing upon the question of granting the same may in the same manner be deferred, and the motion heard with the merits; or in special cases, where, upon opening the record, it appears that the application for leave may conveniently and safely be heard and determined, without a full examination of the entire merits; or where it clearly appears that delay will be prevented and justice promoted, the court will hear the application as a preliminary motion in the cause, and grant or refuse it as the circumstances of the case may require. The present case is one where the motion was filed and overruled in the court below, and of course it is one where it cannot be determined whether the action of the court was correct or incorrect, without recurring to the evidence then before the court. The original owners of the vessel insist, in the first place, that the British claimant is a mere nominal purchaser; that the beneficial interest, if any was acquired under the pretended condemnation and sale, is still in the purchasers at that sale, and that if the claimant took or now holds the legal title, it was and is, only as trustee for the equitable owners, who in truth and fact were and continue to be enemies of the United States. Secondly, they contend that even if the British claimant was an actual purchaser for value, still that their claim as original owners of the vessel must prevail, because the evidence shows that the primary title held by them has never been diverted. The last proposition is chiefly one of law, but the first presents a mixed question of law and fact, and of course must depend in a great measure upon the evidence. The theory of the British claimant is that he is the bona fide owner of the vessel, under a purchase for value, in an open market,

from one holding the legal title; and that the voyage was in fact, as described in the ship's papers, a voyage from Liverpool to Nassau and back, and nowhere else; and that the cargo was neutral property, destined unconditionally and without any reserve, for the Nassau market, as a lawful traffic between two neutral ports. Assuming the facts to be so, then it is clear that the owners of the cargo had nothing to conceal, and it may be, that in the proper application of those liberal principles which ought always to prevail in favor of neutral rights, that the claim to the vessel, if the purchaser had no knowledge or notice actual or constructive, of the infirmity of the title, is one which a prize court ought to respect and protect; but in the view taken of the case, it will not be necessary to decide or even to examine that question at the present time, for the reason, that it is obvious that unless all the conditions, mentioned as applicable to the claim for the vessel, substantially concur, the view of the claimant upon that branch of the controversy cannot be sustained. The ship's papers represent that Charles Applebee was the master for the voyage, and he appeared in the case as such, and preferred the claim both to the vessel and to the cargo, and the only one that has been filed, except that presented by the original owners of the vessel. When interrogated as a witness in the preparatory examination, he testified that R. G. Bushby owned the vessel as he supposed, and that the supposed owner appointed him master. The evidence shows that he acted as master in loading the vessel, in shipping the crew, in signing the ship's papers, and in navigating the vessel out of the harbor of the port of departure. The sixteenth answer of the witness was to the effect that he had no acquaintance with any of the shippers, and knew nothing as to the ownership of the cargo. Subsequently, however, he stated that the medicines belonged to a passenger, and that Mr. Libby was a passenger, but that he (Libby) had no interest in the vessel or cargo.

Hearing was had upon the evidence taken in preparatorio before the motion for an order for further proof was filed. Accompanying that motion is an affidavit signed by the witness, which was filed at the same time with the motion. He there states that before he sailed he knew nothing of Henry Libby, except that he was introduced to him by the claimant of the brig, to go as a passenger in the vessel to Nassau, but he admits that after the vessel got to sea, he learned by his conversation that the supposed passenger commanded the vessel on the outward passage. Captors insisted at the hearing that Henry S. Libby was in point of fact the master of the vessel for the voyage. Witnesses examined in preparatorio so testified, and their depositions were duly filed in the cause. Special reference is made to the deposition of the acting mate as establishing that fact. He testified that Henry S. Libby acted as master, working the ship and giving the courses from the time they left Liverpool, until they sighted the Quaker City; and he also stated that he heard the affiant say, that he was to act as mate until they got to Nassau, and that Libby was then to leave, and that he was to take the vessel back to the port of departure. Libby, as the witness states, was really "my skipper on the voyage, and Applebee and I stood watches like first and second mates." An attempt was made by the affiant, when he gave his affidavit in support of the motion for an order for further proof, to break the force of that testimony, but the attempted explanation is not satisfactory. He admits that he stood watch on the voyage, but alleges that he had done so for many years, when he had no second mate, and was in the command of a small vessel. The interference of Libby in the command of the vessel is admitted, but he alleges that it was the controversy growing out of that interference that induced him to make the entry on the log-slate. The presumption from the whole evidence is irresistible that Henry S. Libby, who had first captured the vessel, and then successfully employed her in running the blockade, and finally navigated her to the port of Liverpool, was in point of fact the actual master on the return voyage. The clearance was doubtless facilitated, and perhaps inquiry silenced, by putting forward the mate as the ostensible master; and it is equally probable that the arrangement contemplated that he was to resume the position as master, whenever it should become necessary for him to do so, as a means of deceiving the cruisers of the United States, in case any attempt should be made to board the vessel. The claimant of the vessel knew Henry S Libby, and the clear inference from all the evidence is that he was connusant of the whole arrangement. All of the cargo as represented in the claim was the property of Bushby & Co., except thirty-seven packages of medicines, and those it was stated belonged to a passenger. The preparatory proofs showed that the name of that passenger was Barry D. Hewetson; and the bills of lading show, that all the medicines and other goods constituting his adventure, were shipped in the name of the claimant of the vessel. The bill of lading is made to order or to assigns, but it is not indorsed, nor was the shipment accompanied by any instructions. The owner of that part of the cargo, although a British subject, is shown beyond peradventure to have been a permanent resident in the city of Charleston, and to have been in the vessel during the outward voyage, both when she ran the blockade, and when she arrived at the port of destination. His own testimony shows that he owned the merchandise, and that he shipped the same for the shop of his son-in-law, also a permanent resident in Charleston, and doing business there as a druggist;

and he expressly stated that he was "interested with him" in the trade or business. The application for the order for further proof alleges, that the party named was the bona fide owner of the goods, and that no part of the cargo was intended for a Southern port; but the proctor presenting it offers no evidence to prove the allegations, except the affidavit of the owner and shipper of the merchandise. Studied effort is made by him to qualify the testimony he gave before the commissioners, but the explanations are not of a character to obviate the force and effect of his former statements. Insufficient and unsatisfactory as they are, however, still they deserve, and should receive, a brief notice. Respecting the relations between him and his son-in-law in regard to the packages of medicines, he says that he did not mean to testify that he was interested with him in the profits of his store, but only that he was interested with him as being his son-in-law, which is a distinction, as it seems to the court, more ingenious than credible. The witness stated before the commissioners that he had his own bills of lading in his trunk, but he did not produce anything of the kind. Failing to exhibit them, the commissioners showed him the one found on board the vessel, and he admitted that the two sets of initials appearing in the margin of the paper were his own, and those of the firm of his son-in-law, but he stated that he did not know the claimant of the vessel, or how the bills of lading came to be made in his name, or to his order. The explanation upon that subject, if such it may be called, is, that he received his bills of lading from the ostensible master, and he repeats in his affidavit that he has them in his possession, and is ready to exhibit them to the court; but they have never been produced.

Taken as a whole, the evidence on this branch of the case shows that the party owning the medicines was domiciliated in the enemy's country; that he had a permanent residence there, and that he purchased and shipped the property intending to transmit it there, and that he was in the act of so doing when the capture was made. The conclusion, therefore, is inevitable, that the name of the claimant of the vessel was used to cover enemies' property, and, unlike the owner of the thirty-seven packages of medicine, he does not even offer the excuse that he was ignorant of the transaction. Where the neutral owner claims another part of the cargo which belongs to an enemy, for the purpose of deceiving the court, the rule is as laid down by the supreme court, in the case of The St. Nicholas, 1 Wheat. [14 U. S.] 417, that the part belonging to the neutral will be condemned as a penalty for the fraudulent conduct. Doubts are entertained whether that rule ought to be applied except in extreme cases, where the evidence leaves no doubt of the truth of the charge, and the circumstances afford no ground of justification, palliation, or excuse. But the case under consideration presents no necessity for the decision of that question, as the evidence upon that subject must be taken in connection with the undeniable proof of deception practised as to the master, and the whole list of subterfuges, cropping out in every part of the transaction, from the date of the register of the vessel, to the time of her capture. Freight was not paid to the claimant of the vessel by the owner of the medicines, and he carefully omits to state to whom he paid it. If he is to be believed, he paid it in advance, but to whom he paid it he does not state. His language is, "the freight was paid in advance, they would not take it on any other terms," but the names of the persons to whom the payment was made do not appear. The evidence shows that he applied to Frazer, Trenholme & Co. for his passage and for transportation of the medicines, and they finally directed him to send the same to the Lilla, and he obeyed their instructions. They had to inquire, however, of another "gentleman" before they could decide to take the freight, but the case is silent as to the name of the person of whom the inquiries were made. What relation Frazer, Trenholme & Co. bear to John Frazer & Co. does not directly appear, and the claimants offer no explanation upon the subject. The outward cargo was consigned by the one of those parties to the other; and the witness Henry S. Libby states that the former were the agents of the Charleston house, and they still appeared as the managing owners of the vessel after the pretended sale to the present claimant.

Subterfuge and fraud, as to the bills of lading, and as to the master, are not the only imputations of the kind which are justified by the evidence. On the contrary, the deception as to the master is carried out in all the official papers, connected with the manning, victualling, loading, clearing, and sailing of the vessel, and the same subterfuges and misrepresentation are adopted in the claim and attempted to be imposed upon the court. Many other circumstances might also be adverted to, as tending to establish the same conclusion. The ostensible master was directed to report himself to a certain commercial house at Nassau, and to confer with them as to the disposition of the cargo, but the same brief letter also states that instructions were to follow by mail, showing conclusively that the letter was not regarded as the letter of instructions. Just enough was written to apprize the persons to whom the communication was addressed, that secret instructions were forthcoming, and to make it useful to the ostensible master, in case he found it necessary to use it as a means to elude capture in the course of the voyage. The Flying Fish [Case No. 4,892].

The motion for the order requested and refused, is supported by the affidavit of the proctor, and by the affidavits of the osten-

sible master, and the owner and shipper of the medicines, and of George D. Harris, one of the firm to whom the before-mentioned letter was addressed. The vessel on her voyage from Charleston to Liverpool was consigned to Frazer, Trenholme & Co., and that commercial house, or one of the partners, acted as the agents of John Frazer & Co. in the pretended sale to the claimant. The shipping articles also show that the Liverpool house are still the managing owners of the vessel, and the evidence also shows, that they paid the advance wages of the seamen, and that the return list of the crew was without date and directed to their firm. None of these matters are explained or proposed to be explained, in any other way than by the suggestion that they are not necessarily conclusive. The answer to that suggestion is, that the burden is upon the claimant to explain the suspicious parts of the transaction The universal rule is that before a claimant can expect an order for further proof to be made, he must be able to render it probable that if the motion is granted, he will be able to overcome the probative force of the suspicious circumstances. The affidavits accompanying the motion do not constitute a compliance with that rule. As a whole, they are sufficient in form, but they are wanting in substance. They affirm that the vessel was regularly documented to the claimant, and that she was really bound to Nassau, and not to any Southern port, but they do not show that the claimant paid value for the vessel, or that he held the title as his own absolutely, and not in trust for enemies of the United States.

No attempt is made to explain why two masters were on board nor the deception, as to the one who in fact had the command, and no effort is made to explain the suspicions arising out of the character of the official papers. Direct testimony is also exhibited in the record which requires explanation. The deponent, Gleason, testifies, that Frazer, Trenholme & Co., of Liverpool and Charleston, owned the vessel and her cargo when she was taken by the Quaker City, and that the two houses have the same name in each of those places, and that they owned her before she sailed on the outward voyage. The same witness also testifies, that he heard Henry S. Libby say that the cargo was to have been carried from Nassau to Charleston in the steamer Scotia, which was to follow the Lilla to Nassau, and there to take the cargo, and the informant of the witness, on board for Charleston. The argument is that the witness is not entitled to credit, but where there is such a cloud of suspicion hanging over a transaction, such suggestions are not alone sufficient answer to the imputations.

The purchase of an enemy's vessel in a neutral port during war, and while active hostilities are waging, is itself a suspicious circumstance, and whenever such a purchase is drawn in question, the evidence of an absolute and bona fide transfer ought to be clearly established. Neutrals may purchase an enemy ship, but such purchases are liable to great suspicion, and if good proof be not given of their validity, by bill of sale and payment of a valuable consideration, it will materially impair the validity of the neutral claim. 2 Wheat. [15 U. S.] 30 (Append.); Wheat. Int. Law (by Lawrence) 972; The Bernon, 1 C. Rob. Adm. 102; The Dree Gebroeders, 4 C. Rob. Adm. 232.

Further proof, says Mr. Phillimore, is never allowed to the claimants where fraudulent papers have been used, where there has been a spoliation of papers, where there has been a fraudulent covering or suppression of an enemies' interest, where there is a false destination and false papers, nor, in general, where the case appears incapable of fair explanation, or where there has been gross prevarication, or an attempt to impose spurious claims upon the court, or such want of good faith as shows that the parties cannot safely be trusted with such an order. The Welvaart, 1 C. Rob. Adm. 122; The Rising Sun, 2 C. Rob. Adm. 104; The Graaf Bernstorf, 3 C. Rob. Adm. 109; The Nancy, Id., 122; The Vrouw Hermina, 1 C. Rob. Adm. 163.

Evidence to acquit or condemn, must come in the first instance from the papers and officers and crew of the captured ship. The captors are to bring the ship's papers into the registry of the district court, in order that the principal officers and seamen of the captured ship may be examined, and their examinations reduced to writing under the rules of the court. The cause is to be heard, in the first instance, upon those papers and the depositions so taken; and if it clearly appear that the property is that of an enemy, or neutral, condemnation or restitution immediately follows; or if it appear that the character of the property is doubtful or the case suspicious, the order for further proof may be granted, according to the rules which govern the legal discretion of the court, but further proof will not be allowed if it appear that the claimants have been guilty of gross fraud or misconduct or illegality. Leave for further proof is granted in cases of honest mistake or ignorance, or to clear away doubts or defects, but the application for it must be supported by evidence of probable cause and good faith, or it will be rejected. The Dos Hermanos, 2 Wheat. [15 U. S.] 76.

Such is the substance of certain general rules laid down by the supreme court, to which it may be added, that prize courts will not in general grant an order for further proof where it clearly appears that the party moving the order has knowingly attempted to cover and claim an enemy's interest in the captured property, whether the purpose of the claim was to promote his own interest or to benefit the enemy owner. The Betsy [Case No. 1,364].

Applying these rules to the present case, I

am of the opinion that the motion for the order for further proof was properly overruled, and that the decree of the district court directing the vessel to be restored to the American claimants was correct.

Neither the libellants nor the American claimants appealed, and of course the allowance for salvage must remain unchanged. An appeal was also regularly taken by R. G. Bushby & Co., as claimants of all the cargo, except the thirty-seven packages of medicine. The documents found on board the vessel, tending to show the ownership of the cargo, are the bills of lading and freight-list.

Two parcels of saltpetre, one of seven hundred and two bags, and the other of six hundred and thirty-four bags, were shipped in the name of the claimant, and the bills of lading purport to have been consigned to order. The bills of lading were found for each of the two parcels of saltpetre, and they contain the firm name of Bushby & Co. as the shippers of that part of the cargo, and it appears that at some time they had been indorsed, but the indorsement is erased by a line drawn through it. The freight-lists and bills of lading also show that John Senior and Co., R. G. Bushby, J. Perrin & Co., and Henry Lafone were shippers of certain portions of the cargo, and there is no evidence whatever which in any manner tends to show that the claimants owned, or pretended to own, those portions of the cargo, except the unsupported statement of the claim.

The affidavit of the proctor states that the other shippers, naming them, have ever been and still are the bona fide shippers and owners of the several portions of the cargo standing in the freight-list on file. Gross error or wilful falsity is stamped upon all that part of the claim. Even the proctor does not pretend that any of the other shippers, except Barry D. Hewetson, have ever filed any claim, or attempted to furnish any evidence to show that the merchandise ought to be returned. Persons claiming to be owners of property captured as prize, and wishing to procure the restitution of the same, must file their claim for such property before the proper court. The master or agent may make the claim, but it must be made in the name of the proper party; and if no claim at all be made, the presumption is that it is enemy property, and the same must finally be condemned. 3 Phillim. Int. Law, § 466, p. 442; 1 Wheat. [14 U. S.] 499, note.

The enemy proprietor is necessarily absent by operation of law, and yet the sentence is completely valid, as well against him as against all the world. The Falcon, 6 C. Rob. Adm. 199.

Nine of the bills of lading are in favor of the shippers, who, it is conceded, have made no claim, and there yet is as much reason to suppose that they were owners, as that the claimants owned the goods shipped in their name. Some of the bills of lading were indorsed in blank and others were not, but it does not appear to whom any of them were consigned. The other shippers make no claim, and no attempt is made to procure their testimony or to furnish any explanation upon the subject. Four of the bills of lading were in favor of R. G. Bushby, the claimant of the vessel, and yet he says he owned no part of the cargo, and that he acted only as ship-owner. He it is who wrote the only letter that accompanied the cargo, and now he disclaims all interest in the adventure, except as ship-owner. The claimants, or one of their firm introduced Henry S. Libby to the ostensible master, and must have had full knowledge of all the principal circumstances attending the manning, loading, victualling, and sailing of the vessel. All of these circumstances have been very carefully considered in determining upon the validity of the claim to the vessel, and the remarks there made upon the evidence need not be repeated. An order for further proof in respect to the cargo was also moved by these claimants, but it is very clear that it was properly overruled. The proposition in effect now is, to show that the claim as originally made is not true; that large portions of the cargo were owned, not by the claimants, but by other persons, who have never made any claim or taken any steps to show that the capture was unlawful. The suspicious circumstances tending to implicate the owners of the cargo are not explained or attempted to be explained, and without such explanation there is no pretence that the motion ought to be granted. The examination of the case thus far has been confined to the questions involved in the appeal, and the result is that there is no error in the record. Since the appeal, however, a new claim has been presented in this court, and the motion is, to allow the petitioners to take further testimony to support the claim. The new claim is in behalf of Fraser, Trenholme & Co., and it is presented by her Britannic majesty's consul. Through him, the parties named move for the order, for further proof in the cause to enable them, among other things, to show that the goods and merchandise described in the prior claim to the cargo belonged to them, and that the same were shipped by the prior claimants as their agents. Nothing of the kind was suggested in the prior claim, although it is signed by the ostensible master, who must have been well known to the managing owners of the vessel. They do not sign the claim, and it is not accompanied by any test affidavit signed by them. The libel was filed on the 14th of July, 1862, but the new claim was not presented until the 5th of June of the present year. In the mean time the cause had been heard, determined, appealed, and the opinion of the district judge delivered, published, and circulated.

The cause was heard, not only upon its merits, but also upon motions for an order for further proof, both in respect to the vessel and the cargo. The parties preferring this

claim were silent throughout all that period, and they admit that the prior claimants were their agents in shipping the goods and merchandise, and they do not in terms deny that they were their agents in presenting and prosecuting the claim. Unless it can be held that the new claim is one in aid of the prior claim, and consistent with it, the general rule is that it must be rejected as an attempt after the decree of the prize court to contradict the claim upon which the decision was founded. On the other hand, if it be regarded as a claim in aid of the prior one, and consistent with it, then it is wholly unnecessary, and should be rejected as an unusual proceeding.

Agents may present a claim as well as principals, and as the prior claimants were the agents of the petitioners in shipping the goods and merchandise, it is no more than a reasonable presumption, considering the long delay and the facilities for obtaining information, that they were also their agents in prosecuting the claim in the lower court, and in taking the appeal. The rights of all parties would have been concluded if no appeal had been taken, and that was taken by the prior claimants, and of course the petitioners must approve their action in that behalf, else they could have no standing in court. Full proof is exhibited in the cause that the petitioners had knowledge of this enterprise from its commencement. They were the consignees of the vessel on her voyage from Charleston to Liverpool, and they were the agents of John Frazer & Co. in the pretended sale of the vessel. Had the matter stopped there, the present application might have had some foundation, but it does not stop there, because the proof is undeniable that they were the managing owners of the vessel for the voyage, and at the time she was captured. Claims presented after the proofs have been opened and examined, and after hearing the reasons assigned for the condemnation, are never to be favored, and under the circumstances of this case the claim cannot be allowed.

The motion for an order for further proof is overruled, and the decree of the district court condemning the cargo as lawful prize, is affirmed with costs.

Case No. 15,601.

UNITED STATES v. LIMANTOUR (two cases).

[Hoff. Land. Cas. 389.] [1]

District Court, N. D. California. June Term, 1858.

MEXICAN LAND GRANTS — FRAUDULENT CLAIMS.

These claims rejected on the ground that the alleged grants are fraudulent and antedated.

These claims were both confirmed by the board, appealed by the United States, and tried together before the district court.

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

[These were claims by José Y. Limantour for four square leagues in San Francisco county, supposed to extend south of California street. Grant claimed from Manuel Micheltorena to Limantour February 27, 1843. Also, claim by same for the islands of Los Farallones, Alcatraz, and Yerba Buena, and a tract of one square league in Marin county, opposite the island of Los Angeles, known as "Punta del Tiburon." Grant claimed from same to same December 16, 1843. These grants were confirmed by commission on January 22 and February 12, 1856.]

P. Della Torre, U. S. Atty., and Edwin M. Stanton, for the United States.

James Wilson and Whitcomb, Pringle & Felton, for appellees.

HOFFMAN, District Judge. The claimant in these cases asks a confirmation of his titles, alleged to be derived from two grants made to him by Governor Micheltorena in 1843. The first is for four square leagues of land situated in San Francisco county. The second is for the islands of Los Farallones, Alcatraz and Yerba Buena, and for one square league of land, a little more or less, at Point Tiburon, in the strait of the island of Los Angeles. The two cases have been heard together, and the evidence taken has, by agreement, been made applicable to both.

In support of the claim for the four leagues, the following documentary evidence has been produced: (1) A grant of four leagues in the present county of San Francisco, made by Manuel Micheltorena, and dated February 27, 1843. On the margin of this grant is an approval or confirmation, signed Bocanegra, and dated April 18, 1843. (2) A letter, signed by Micheltorena, and dated at Los Angeles, January 8, 1843, addressed to José Y. Limantour, stating the governor's want of resources, soliciting assistance, and offering to compensate him by grants of land. (3) A certificate, signed by Micheltorena and by Jimeno, secretary, dated December 25, 1843, in which is recited a letter received by Micheltorena from Bocanegra, minister of exterior relations and government of Mexico, and dated Mexico, October 7, 1843. In this communication Bocanegra acknowledges the receipt of an official note by Micheltorena, dated February 24, 1843, enclosing the memorial of Limantour, and he announces to the governor that the supreme government has "been pleased to grant to Limantour sufficient leave to acquire, besides the property which he has already acquired, and which has been recognized by the supreme government, further country, town, or any other kind of property." (4) A copy of an expediente, the original of which was found by Vicente P. Gomez, in the office of the recorder of Monterey county. This expediente contains a petition of Limantour, dated January 10, 1843, a marginal order of reference, signed

by Micheltorena, dated January 11, 1843, and a decree of concession, dated February 25, 1843, two days before the date of the grant produced in evidence. (5) An official communication from Manuel Jimeno, written, as it recites, by order of the governor, and addressed to William A. Richardson, captain of the port of San Francisco, and dated January 14, 1843. In this communication the boundaries of the land solicited by Limantour are described, and information relative to those lands is required of Richardson, who is also directed to furnish a map. (6) A letter from M. G. Vallejo to Wm. A. Richardson, and dated November 7, 1843. This letter is produced by Richardson, and will hereafter be noticed.

In support of the Islands grant, the claimant has produced the following documents: (1) A grant signed by Micheltorena, and dated December 16, 1843. On the margin of this grant is an approval or confirmation, signed by Bocanegra, and dated Mexico, March 1, 1844. (2) An expediente from the archives, containing the petition of Limantour, dated December 12, 1843, with a marginal decree by Governor Micheltorena, dated December 14, 1843, granting the land asked for, and which is described on the diseño. There has also been produced by Manuel Castañares, a witness examined in this court, a copy of a document purporting to be on file in the archives of the ministry of protection, colonization and industry of the Mexican republic. This document purports to be a minute or direction in obedience to which the communication to Governor Micheltorena, recited by him in the certificate already alluded to, was written. To this minute is attached the rubric of Bocanegra. Appended to it is a memorandum, or advertencia, also rubricated by Bocanegra, which will hereafter be adverted to. There have also been produced two letters from Mariano Arista, president of Mexico, addressed respectively to the governor of this state, and to the land commissioners, in which the claims of Limantour are commended to their favorable consideration. These letters are dated October 2, 1852.

It is contended on the part of the United States, that all the documents on which the claimant relies are false and forged, and that they were fraudulently fabricated long after their pretended dates, and after the acquisition of California by the United States. The charge is grave. It requires and has received the most careful consideration. The first of the claims now presented for adjudication is for four square leagues of land in the present county of San Francisco. It embraces the greater part of the northern extremity of the peninsula on which this city is situated, and it includes about three-fourths of the city, of an assessed value of about $15,000,000, with its wharves, streets, markets, etc. The Islands claim comprises: That island of Yerba Buena, which lies opposite to and commands the city and port of San Francisco; the island of Alcatraz, a small and barren rock which commands the entrance to the Golden Gate, and which is the site of important defensive works erected by the United States; the island of the Farallones, which lies opposite the Golden Gate, and at some distance from the mouth of the harbor, and on which the United States have erected one of the most important light houses on the coast; and, finally, the point of Tiburon, which commands the strait between the island of Los Angeles and the main land, by which vessels avoiding the city of San Francisco are enabled to reach the northern waters of the bay and its tributaries.

In addition to the claims under consideration, José Y. Limantour presented to the board of commissioners six other claims, of which he asked confirmation. These claims were: One for eleven square leagues, called "Laguna de Tache." One for eleven square leagues, called "Lup Yomi." One for eighty square leagues, near Cape Mendocino. One for the vineyard of San Francisco Solano. One for six square leagues, called "Cahuenga." One for eleven square leagues, called "Cienaga de Gabilan," alleged to have been granted to one Chaves, and assigned to Limantour. All these last claims were rejected by the board. No appeals have been prosecuted in this court, and they appear to have been abandoned by the claimant.

All these claims, and the two now submitted, are in form separate, but they are in many respects so closely connected, that those before this court cannot be considered without reference to them. The six claims referred to embrace one hundred and thirty-four square leagues of land, or nine hundred and twenty-four and thirty-four one hundredths square miles, or five hundred and ninety-four thousand seven hundred and eigthy-three and thirty-eight one hundredths square acres. They all purport to have been made within a period of about sixteen months, and are, with the exception of the grant for the vineyard of San Francisco Solano, founded on the same consideration, viz., the great services of the grantee to the department in money and goods. If these immense and extraordinary concessions were in fact made by Governor Micheltorena, and if the advances in money and goods, on which they were founded had in fact been furnished by Limantour, it would naturally be expected that the records of the government, and the correspondence of its officers, would furnish abundant allusions to the transactions. How far that expectation is realized in this case will subsequently appear.

By the decree of March 11, 1842, the jealous and exclusive policy which had prohibited the acquisition of lands by foreigners within the Mexican territory was in some degree relaxed, and they were authorized to

acquire such property within the central department of the republic. This privilege, however, did not extend to the frontier departments, in which they could acquire lands only by express permission of the supreme government. The singular advantages presented by the bay and harbor of San Francisco for commercial purposes, had, long before the date of the grants to Limantour, attracted the attention not only of foreigners, but of the more intelligent of the native population. So early as 1837, General Vallejo had, in a memoir or exposition addressed to the departmental authorities, brought to their attention the great commercial advantages of the bay and its tributaries, and had particularly remarked the importance of the point of Tiburon and the islands of Alcatraz and Yerba Buena for the military defense of the harbor. The record in this case discloses that just previous to the date of these grants, a plan had been proposed to transfer the custom house from Monterey to this port, and to establish at the latter naval arsenals and schools. The islands solicited by Limantour, particularly those of Alcatraz and the Farallones, were almost without value to a private individual, if retained for his own use. When, therefore, he solicited and the governor granted them, it must have been contemplated by both that they would subsequently be repurchased by the government, as indispensable to the fortifications of the harbor; for in that way alone could the grantee have hoped to derive any advantage from their acquisition. The lands embraced in the four-league grant were also in great part unfit for agricultural purposes, and they could only have been desired by Limantour from their prospective value as the site of an important town.

The case, then, as stated by the claimant, is extraordinary and surprising. That a governor of California should not only have so widely departed from the ancient and traditional policy of his country with regard to foreigners as to make the enormous concessions which have been offered for confirmation by the claimant, but that he should have granted to him the site of a future town, upon the most important bay of the coast, and added thereto a grant of all the islands and military positions which command the approach or the entrance to the harbor, strikes us at the outset as a circumstance astonishing if not incredible. Among the accusations brought against General Micheltorena after his overthrow and expulsion from the country, it is strange that so just and so popular a ground of animadversion as such grants as these to a foreigner would have afforded, should have been wholly omitted. And it is still more strange that the archives should fail to show the slightest trace of his action on the subject, either in his official correspondence with the supreme government, or with his own subordinates. These considerations are at least sufficient to justify us in approaching the examination of the evidence in support of these claims with surprise if not with suspicion. The documentary evidence in support of the four-league grant, on which the chief reliance is placed, consists of the grant itself and the expedientes.

1. As to the grant. The handwriting of the grant is stated by Arce, Prudon and Abrego, three of the claimant's witnesses, to be that of one Maciel, a captain in Micheltorena's command, who was sometimes employed by him to write in the office. On the other hand, it is testified by A. Jouan and F. Jacomet, witnesses on the part of the United States, that the writing is that of E. Letanneur, a clerk in the employment of Limantour about the year 1852. Letanneur himself is proved to have confessed the fact, when interrogated before the grand jury of this county; but his subsequent denial of it, when examined as a witness for the claimant, and the circumstances under which the confession was made, deprive it of any great weight as evidence in the case. But the testimony of Jouan and Jacomet is confirmed by other proofs. In the archives at Monterey is found the record of a criminal proceeding, in which a document purporting to be written by Maciel is found. The handwriting of this document in no respect resembles that of the grants in these cases. Francisco Sanchez testifies that he knew Maciel, and has seen him write. With a scrupulousness that adds force to his testimony, he declines to say that he remembers his handwriting well enough to say that he knows it. He states, however, that "it appears to him that Maciel did not write the document; that he was an educated man, and that no Spaniard would use the word 'estacado' as it is written in that paper." Benito Diaz testifies that he has seen Maciel's handwriting on several occasions, but is not particularly acquainted with it; that he cannot compare the writing of the document with that of Maciel, because he does not remember the latter sufficiently, but from its tenor and style, he does not believe it to be his; that it contains errors such as Maciel would not have made, and he particularizes the circumflex over the word "linea," the use of the words "fundadero" instead of "fondeadero," "estacado" for "estacada," and "podro" for "podra." But the most significant circumstance connected with the writing of these grants is the fact that the Yerba Buena grant and the Islands grant are in the same handwriting, and this, although one is dated at Los Angeles, and the other at Monterey ten months afterwards, and that among all the archives found in the surveyor general's office, no writing similar to this is found. If Maciel, who it is admitted was only employed occasionally in the governor's office, wrote these two grants at different places, after

so long an interval, with the mistakes which have been mentioned, and then abruptly desisted from his labors, it was surely a most singular coincidence.

The expediente produced in the four-league grant is stated by Vicente Gomez to have been found by him accidentally in the office of the recorder of Monterey, in the year 1853. This witness testifies that, at the request of José Castro, he went to the office of the recorder to examine the papers in reference to some property of the former; that while so engaged he discovered the expediente now produced; that after finding it he consulted José Abrego, who advised him to take a copy of it, which he did. W. I. Johnson testifies that he held the offices of recorder and deputy county clerk in Monterey from April, 1850, until June, 1853, and had charge of all the archives or records relating to lands; that pursuant to an act of the legislature of this state, he examined all the archives under his charge, but that he found no such paper as that discovered by Gomez; that if there had been any such he thinks he would have found it, and would certainly have remembered it. He further states that he first heard that Limantour claimed a tract of land in San Francisco from Gomez, who said to him that he believed José Abrego was concerned in it, and that to his (Gomez's) knowledge, it was a fraudulent claim; that immediately after this conversation he again carefully examined the archives relating to land titles, but found no document of the kind now produced. Philip A. Roach testifies that in 1850 he, together with Mr. Ripley, who was elected recorder, were appointed a committee to examine the papers in the recorder's office, and to separate those which would belong to the county from those relating to the city, and that in the discharge of those duties he examined all the papers in the office; that subsequently he examined them all a second time when searching for an expediente relating to a rancho in Monterey, but that on neither occasion did he discover the document now produced, and that he does not think such a paper could have escaped his attention.

It is admitted by Gomez, and the fact is unquestionable, that the proper and regular place of custody of such documents as that found by him, was the office of the secretary of state, and not that of the alcalde, the records of which were transferred to the recorder's office. Mr. Hartnell, who, during the existence of the military government in this country, held the situation of government translator, and who made an index of all the California land grants he could find, testifies that he only heard of the existence of the grant to Limantour, by public rumor, in the year 1853; and, finally, Mr. Selim E. Woodworth states that he made a general examination of all the archives in 1850; that being desirous to ascertain the limits of the pueblo of Monterey, he examined every paper and book in the office of the alcalde, and that he did not see among them the expediente subsequently found by Gomez.

To corroborate Gomez, the claimant has taken the testimony of Florencio Serrano. This witness describes accurately the expediente as now produced, and states that he saw it in the archives of his office when he was judge, in 1848 or 1849. On his cross-examination he states that he never saw the document or a copy of it from that time until it was exhibited to him in court, December 8, 1855. The falsehood of this declaration is proved by the testimony of the county recorder, Mr. Williams. This officer states that on the 5th of December Serrano called at his office and asked for the petition of Limantour; that he handed him the expediente, which he read attentively; that a few days afterwards he read in a newspaper the testimony given by Serrano, and at once remembered that he had been in the recorder's office, but he could not recollect when. On retiring for the night, he remembered that he had made a charge in his books for searching for the paper, and the next morning, on referring to his books, he found the entry under date of December 5, 1855, "Search for Limantour grant, fifty cents." The exposure of this gross falsehood on the part of Serrano, not only destroys his credibilty as to the more material fact to which he testifies, but the attempted deception confirms our suspicions as to the truth of the statement of Gomez. If to the testimony of Johnson, Roach, Woodworth and Hartnell, be added the circumstance that Gomez, immediately on discovering the expediente, suspended his search for Castro's papers, which he never afterwards resumed, and that his statement with regard to his consultation with Abrego is unconfirmed if not absolutely contradicted by the latter, we are justified in asserting that this claim can derive little support from documents discovered and produced under circumstances so suspicious. How far any statement of Gomez is entitled to credit will hereafter more fully appear.

The expediente thus presented for consideration consists, as has been stated, of a petition in the writing of Limantour, and a marginal order and a decree of concession in the writing of Micheltorena. The marginal order directs, in the usual form, a reference "to the proper judge," and the decree of concession recites that "the proper judge having taken all the steps and investigations," etc., there is granted to José Y. Limantour the tract mentioned in his petition. The judges in the jurisdiction of Yerba Buena, in the years 1842 and 1843, were Francisco Sanchez, first alcalde, and José de Jesus Noé, second alcalde. If, then, as the marginal order directs, and the decree of concession asserts, the petition of Limantour was referred to the respective judges, the reference should have been to one of these

officers. But no trace of any report by them exists, either in the expediente, where such informes are usually found, or in any document whatever in the archives. Noé himself testifies that neither during the year 1843, nor at any other time, was he called upon for an informe in relation to land near the pueblo of Yerba Buena solicited by Limantour, and that he never had heard of any claim by Limantour to such lands until 1852. Francisco Sanchez makes the same statement, and adds that in 1844 Limantour petitioned for lands near the Mission Dolores, at a place called "Los Canutales," and was refused because he was a foreigner; that he heard of Limantour's claiming lands in California in 1852 for the first time. The testimony of these witnesses is confirmed by the records of their official action.

On the 13th of May, 1846, Enrique Fitch and Francisco Guerrero petitioned for two and one-half square leagues of land in the point of the presidio of San Francisco. This land is within the limits of the tract alleged to have been granted to Limantour. The petition was referred to the prefect, Manuel Castro, who appears to have referred it to the first justice of the peace, José Jesus Noé. The expediente contains the report of the latter, stating that the land is vacant; and also the informe of Castro, advising the governor that the land may be granted. It is also shown by the expediente in the case of Benito Diaz, that on the 24th of May, 1845, he petitioned for two square leagues of land called "Punta de Lobos," a great part of which is included within the limits of the Limantour grant. The usual reference having been made to the respective judge and the military commandant, both of those officers report that the land is vacant, and can be granted. The judge who signs the informe is José de la Cruz Sanchez, and the military commandant is Francisco Sanchez. It thus appears that not only no reference was made of Limantour's petition to the respective judge, as is recited in the decree of concession, but that the statement of the two alcaldes that they have never heard of any grant to him is corroborated by their official reports as found in the archives.

But the claimant contends that the informes on which the govenor acted were obtained from Wm. A. Richardson and Francisco de Haro. To establish this, Richardson has been examined. This witness states that about the latter part of January, 1843, he received by the hands of the former magistrate of San Francisco, Don Francisco de Haro, a communication from Manuel Jimeno, which he produces; that at the same time De Haro showed him a communication on the same subject addressed to himself; that he answered the communication sent to himself, and prepared a map which he transmitted with his reply to the governor. At the time of this transaction Richardson was captain of the port of San Francisco, but resided on the northern side of the bay, at Saucelito. The duties of that office are detailed by Escriche (ap. verb. 415). They relate chiefly to the visiting and inspection of vessels and the prevention of smuggling. They appear to have had no reference to the granting of lands. A reference therefore to Richardson for the information required, was a departure from the invariable practice of the governor in similar cases, and the fact of such a reference in this case, is on other grounds extremely improbable. The archives show that on the very day on which this letter of Jimeno purports to have been written, Manuel Castañares, the administrator of the custom house, addressed a letter to Micheltorena complaining of Richardson's official misconduct, and charging him with smuggling, and that in about a month thereafter Richardson was removed from office. There is also produced by Richardson a letter signed by M. G. Vallejo, and dated November 7, 1843.

The proof of the authenticity of these letters rests on the testimony of Richardson and Arce. General Vallejo, though a resident of this country, has not been called to establish the genuineness of the letter attributed to him, or to explain the circumstances under which it was written. Admitting it, however, to be genuine, its language seems to indicate that the writer was at its date ignorant that Limantour had obtained any grants from the government. After alluding to the fact that "our friend, the notorious Limantour," had furnished large sums to Gen. Micheltorena, it adds, "if he does not intrigue, at least he endeavors to obtain some grants in that (Punta de Reyes) and other places, taking advantage," etc. Such language would surely not have been used had the writer been aware that a grant of four leagues in the port of San Francisco had already been made to Limantour, and approved by the supreme government. But Manuel Jimeno himself has been examined as a witness. It is a significant circumstance that neither the letter produced by Richardson, nor the certificate of Micheltorena reciting the communication of Bocanegra, and which purports to be attested by Jimeno, were exhibited to the latter.

In reply to a question whether, on Gov. Micheltorena's arrival in Monterey, (in August, 1843) he understood from him (Gov. Micheltorena) that he had made a grant of lands to Limantour, he replies: "I did not so understand from Gov. Micheltorena." He further states that he never heard Gov. Micheltorena say that he had granted lands to Limantour adjoining the pueblo of San Francisco, and that he does not know that such grant was made. He adds, however, that he recollects that as secretary he asked for information respecting lands petitioned for by Limantour. Of what authority he asked this information he does not recollect. Two of the grants presented by Limantour

to the board, and which were rejected, and have been abandoned by him, bear the signature of Jimeno as secretary. They are dated December 4, 1843, and December 20, 1844; one is for eleven square leagues, the other for eighty square leagues. The certificate of Micheltorena, attested by Jimeno, before referred to, is dated December 25, 1843. The reasons for considering all these documents antedated and fabricated will hereafter appear. It is sufficient for the present to observe, that if they are genuine and were signed by Jimeno, it is impossible that he should not have known and remembered that such extensive and extraordinary grants had been made.

The testimony of Jimeno exposes the falsehood of the statement made by Gonzales, another of the claimant's witnesses. Gonzales swears that soon after Micheltorena's arrival, he offered to grant to him land at Yerba Buena; that he had received a report on the subject from Prefect Guerrero, from whom, as from other prefects, he had required a statement of the condition of their lands; that the witness did not see the informe, but saw on several petitions the order for an informe, directed to Guerrero; that a short time before Micheltorena went out of office, he (witness) presented a petition for the land, which was, by a marginal order, referred to Jimeno; that Jimeno reported in writing, and that the next day he received back his petition from the hand of Jimeno, with a decree of the governor, stating in substance that the lands could not be granted, as they had already been granted to Limantour. It is unnecessary now to dwell on the various falsehoods contained in the deposition of this witness. His statement that he was administrator of the custom house from 1832 to 1834; that he received an order to remove the custom house to Yerba Buena; that Guerrero was prefect; that Micheltorena removed to Monterey about a month after taking his oath of office, are all disproved by the records now existing of the transactions of the former government. Not only was Guerrero never prefect, but the records have been searched in vain for any petition on which a marginal order of reference to him is found. Had several such existed as asserted by the witness, it is nearly impossible that all could have been lost.

The negative evidence against this grant, afforded by the fact that Jimeno did not know of its existence, is most important. The records of proceedings under Micheltorena's administration, with reference to grants of land, show his uniform and almost invariable habit of referring every application to Jimeno for information and advice. The intelligence, the experience, and the evidently cautious and circumspect disposition of that officer, appear to have given to his recommendations great weight with the governor, and in every instance his advice seems to have been relied on and implicitly followed by that officer. To suppose, then, that Micheltorena, without consulting Jimeno, would have made to a foreigner a grant which Vicente Gomez says was much "spoken of, because it was a grant of a famous port;" that after doing so he never even mentioned the circumstance to Jimeno, and that up to 1853 Jimeno remained in ignorance of the fact, is to suppose what is almost impossible. That Jimeno could not have forgotten it is I think, obvious. The dilemma is therefore presented: either he swore truly that he did not know it—in which case Gonzales' testimony must be rejected as false, and Jimeno's signature to Micheltorena's certificate be regarded as forged—or else, if Gonzales' testimony be true, and Jimeno's signature genuine, the latter has sworn falsely, when he stated that he did not know that the grant was made. Which of these alternatives is to be adopted by this court will subsequently appear.

But an indirect confirmation of Jimeno's testimony is, however, afforded from another source. Victor Prudon, a witness for the claimant, states that he delivered and read to Limantour the letter from Governor Micheltorena, dated January 8, 1843, in which he solicits assistance from Limantour. The witness then details a conversation with Limantour, in which the latter expressed his intention to ask for lands near Yerba Buena, to which the witness objected that Governor Micheltorena had no power to grant lands to a foreigner. He adds that he and Limantour made a bet on the subject, and when the case was submitted to Micheltorena, the latter convinced him by showing him Santa Anna's decree of 1842, allowing foreigners to hold lands in the Mexican republic; that the petition was then drawn, and he saw it afterwards with Micheltorena's decree of concession, in the secretary's office. If this statement be true the official action of both Micheltorena and Jimeno, in the case of Sparks, is not easily accounted for. By the expediente in that case, produced from the archives, it appears that on the 6th of June, 1843, Sparks, a naturalized Mexican citizen, petitioned for land which he had for some time been allowed to occupy provisionally. The prefect, to whom his petition was referred, reports that, "as the law, in speaking of strangers, prohibits them from acquiring real estate in the republic, if they have not been naturalized therein and married with a Mexican, your excellency will order that which may be proper." On the 5th of July, 1843, Micheltorena orders all the proceedings to be returned to the interested party to await the very shortly expected arrival of the new constitution of the republic; "and when he may know that it has arrived, he will make his application anew."

On the 1st of December, 1843, Sparks renewed his application; on which Jimeno reports, December 5, 1843, as follows: "The

party interested has not acquired the property of the land he petitions for, on account of not being married to a Mexican, as required by the constitution of 1836, and although, by a subsequent decree, foreigners were allowed to acquire real estate in the republic, exceptions are made in the frontier departments, which have been subjected to regulations which have not been received. I believe it would be an act of justice to grant the land to the petitioner, because he is an honorable man" etc. The land was, accordingly, on the 5th of December, ordered to be granted, on the condition that the grantee should have no power to sell it. The evidence afforded by this expediente is important, not only as contradicting or at least discrediting the statement of Prudon, but as indicating the caution and circumspection of both Micheltorena and Jimeno with reference to grants to foreigners. If the grants presented by Limantour be genuine, Micheltorena must have signed and Jimeno attested on the 4th of December, 1843, (the day preceding the date of the latter's report and the order of the governor) a grant to Limantour for eleven square leagues —Laguna de Tache—and on the 16th of December. Micheltorena must have granted to him the islands of the Bay of San Francisco, the paramount military importance of which to the government has already been noticed; and this, though Limantour was neither naturalized nor married to a Mexican.

Had Micheltorena, ten months before, granted to a foreigner the port of Yerba Buena, and had he, on the preceding day, granted to the same foreigner eleven leagues of land under the authority of the law of 1842, the doubts of Jimeno, his ignorance of the regulations prescribed by law, and the condition imposed by Micheltorena in the grant to Sparks, are inexplicable. That Jimeno considered naturalization as an indispensable requisite to a petitioner soliciting a grant, is further evident from the expediente in the case of Sainsevain. The application of this person was, by Micheltorena, referred as usual to Jimeno, on the 20th of November, 1843. That officer on the same day reports: "Don Pedro Sainsevain is not naturalized, an indispensable requisite in order to secure property in this territory." Sainsevain's application was accordingly denied, until, having become naturalized, he obtained a title from Pio Pico in 1846.

But there are other parts of Prudon's deposition which are worthy of notice. He states, as we have seen, that he saw the petition of Limantour, with the decree of concession, "in the secretary's office." On his cross-examination, he testifies that Governor Micheltorena "had no civil secretary until he arrived in Monterey." This statement, made evidently with the object of accounting for the absence of the attestation of the secretary to either of the grants now presented, is shown to be untrue. A list of grants purporting to have been made by Micheltorena at Los Angeles in the year 1843, has been prepared from the records on file in the surveyor general's office. Two of these, dated January 27, 1843, are attested by Jimeno as secretary; the remainder, twenty-two in number and of various dates, from January 27 to May 20, 1843, are attested by Francisco Arce. Arce himself states that in January, 1843, Jimeno was secretary of the departmental government of California, and that he himself acted as secretary ad interim under Micheltorena at Los Angeles; and on the 24th of February, 1843, three days previous to the date of the first grant to Limantour, a grant is found in the archives bearing his attestation. The same facts are also testified to by Rafael Sanchez, who was clerk in the office of the military secretary in January, February, March and April, of 1843. This witness states that Jimeno was appointed secretary in January, 1843; that after acting as such a short time, he went to Monterey, and that Arce, his first clerk, acted as secretary during his absence.

With regard to Richardson, to whom, as he says, the letter of Jimeno was addressed, it will hereafter appear that at the time when these documents are supposed by the United States to have been forged, viz. in June, 1852, he was in Mexico, and in frequent communication with Limantour. One statement, however, contained in his deposition may here be noticed. In reply to the seventeenth question, Richardson testifies that when he was in Mexico in 1852, Limantour inquired of him as to the condition of his "lands at Yerba Buena." That upon his (witness') advising him that he ought to send on his documents at once, as the commissioners were in session, Limantour replied that he could present them at any time; that "they were all substantiated by the proof of signatures by the United States consul in the city of Mexico, or the United States minister." In a subsequent part of his deposition, Richardson states that he left San Francisco on the 1st day of June, 1852, and returned to that city on the 29th of July, of the same year, having spent eleven days in the city of Mexico. The conversation with Limantour must, therefore, have occurred some weeks prior to the 29th of July.

It is true that the documents produced by Limantour do bear the certificates of the United States consul at Mexico, attesting the genuineness of the signature of J. Miguel Arroyo, who himself certifies to the genuineness of the signatures of Bocanegra and Micheltorena. But unfortunately the certificates of the consul are dated on the 2d of November, 1852, more than three months after the date of the alleged conversation, in which, according to Richardson, Limantour stated that they had already been obtained.

It is therefore evident that the statement by Richardson of that conversation is untrue. Whether this falsehood was intentional, or is the result of an inaccurate recollection, we will be enabled to judge when the evidence to prove the fraud attempted in these cases has been more fully considered.

It is stated by Prudon that the fact that the lands had been granted to Limantour near Yerba Buena and the Presidio was known, as he believes, to all the principal persons in the country; and he asserts positively that it was known to Alvarado, José Castro, Manuel Castro, Jimeno, Guadalupe and Salvador Vallejo, Arce, Sanchez, and some others. With respect to Jimeno, we have already seen that this statement is contradicted by himself. We have also seen by the expedientes in the case of Fitch and Guerrero, and in that in the case of Benito Diaz, that Manuel Castro, as prefect, in June, 1846, reported a part of the tract embraced within the grant to Limantour as vacant, and that José de la Cruz Sanchez as judge, and Francisco Sanchez as military commandant, made a similar report, on the application of Benito Diaz for a part of the same tract. Rafael Sanchez, who was examined as a witness, states that he does not remember whether or not Micheltorena made any grants of land at Los Angeles.

Alvarado testifies that neither Micheltorena nor Limantour ever told him that any land near Yerba Buena had been granted to the latter. He says, however, that he heard that there had been granted or sold lands to Limantour, and that he had solicited lands at the north, but where he did not hear. Francisco Arce, though examined by the claimant, says nothing on the subject. Guadalupe and Salvador Vallejo have not been examined as witnesses. The only witness who corroborates the statement of Prudon is José Castro, and he merely states that Limantour told him in 1845 that he had no money, having expended it all in purchasing lands near the port of San Francisco. It will hereafter be seen that in 1854, and long subsequently to the date of the alleged grant of lands near Yerba Buena, Limantour received from the Mexican government, in payment of goods furnished to Micheltorena, more than $56,000.

We have thus far directed our attention to various circumstances connected with the grant and expediente in the Yerba Buena case, which suggest suspicions as to their genuineness. We are now to consider the evidence upon which the United States rely as demonstrating, beyond all doubt, the forgery of the titles and the perjury of the witnesses who have testified in support of them. The most imposing, and in many respects most important witness produced by the claimant is Manuel Castañares. The testimony of this witness was taken in this court after the case was appealed. He came, as he states, from Mexico to this country for the purpose of giving his evidence in this cause, and by permission of the president of Mexico, obtained through the intervention of the French minister. The official position and the intelligence of this witness, the clearness and precision of his answers, and the circumstances under which his testimony was given, are such as would naturally commend him to the respectful consideration of the court. It is the discharge of a painful duty to declare that his evidence, in almost every important particular, has been shown to be false, by proofs which amount to demonstration. In reply to the thirty-second question, Castañares states that the paper on which the grants in these cases were written was printed in Monterey, towards the end of the year 1842. That by the laws of Mexico, paper was habilitated for a "bienio," or period of two years; that paper had accordingly been printed for the bienio of 1842 and 1843, but inasmuch as by a new law the prices and uses of stamped paper were changed, it became necessary to have a new impression in conformity with that law for the remaining year of the bienio; that the law making this change was received by him in the latter part of November, or quite early in December, 1842, and that he immediately took measures to have the new form of stamped paper printed in conformity with it; that he sent down to Micheltorena, by express, in December, all the paper that was printed, that it might be rubricated by him; that all the paper ordered for the use of 1843 was printed in the latter part of 1842, and that the impression was made at one time; that he affixed his own rubric to it, and sent it all to the governor at one time. There were about two reams, of five hundred sheets each. In reply to the one hundred and forty-ninth question, the witness repeats that all the acts necessary for habilitation, viz. the printing, the applying the seal of the custom house, and affixing his own rubric, were performed by him on the paper for use in 1843 in the year 1842, previously to his sending it to Micheltorena, at Los Angeles. He adds that the paper was returned back from Los Angeles early in the month of March. Henry Cambuston, by whom, as stated by both Castañares and himself, the paper was printed, swears that the paper on which the grants in these cases are written was printed by him in November or December, 1842; that he "knows for a certainty that it was printed either in November or December of that year;" that all the paper for 1843 was then printed—a form was set up, and as soon as all the paper was printed, it was taken down. The witness, in reply to the eleventh question, states that he knows positively that the two sheets exhibited to him, (the grants in these cases) are two of the sheets printed by him in November or December, 1842, for habilitation and use in the year 1843.

The importance of this testimony, if true, to the claimant is evident. The grant for four leagues, near Yerba Buena, is on habil-

itated paper. It is dated Los Angeles, February 27, 1843. But the proofs of its entire falsity are irresistible. So early as the year 1837, the necessities of the Mexican government had suggested the policy of obtaining a revenue from a tax upon sealed or stamped paper. The law on this subject, which was modified and in part repealed by the decree of April 30, 1842, is found in the archives, and it has been printed among the exhibits filed in these cases. By the eighteenth article of that law, all sealed paper for use in the departments was to be transmitted from the capital by the director general de rentas, who was, by the forty-first article, required to furnish, with the greatest promptitude, the necessary supplies to the governors of the various departments for distribution and consumption. It was, however, provided by that article that in cases of absolute necessity, and in the absence of sealed paper from Mexico, paper might be "habilitated" by the administrator general and the commissary, with the previous approbation of the governor. The habilitation was to be made by placing on the paper the stamp of the office, and expressing therein the class of the seal, its value, the bienio to which it belonged, the place and date, together with the signatures of the administrator and commissary, or political authority in the absence of the commissary. No sealed paper from Mexico seems to have been furnished to the department of the Californias. The paper was accordingly habilitated by the signatures of the administrator of the custom house and of the governor. But this habilitation required, as we have seen, the previous approbation of the governor. Micheltorena assumed the duties of that office on the 31st of December, 1842. It is therefore evident that he could not have given directions for the habilitation of paper in time to permit it all to be prepared, as stated by Castañares, in November or December of that year.

When it was in fact ordered, and at what time the habilitation was effected, is conclusively shown by the archives of the former government. In those archives is found the official correspondence of Micheltorena and Castañares with reference to the habilitation of paper for the year 1843. The first letter is from Micheltorena, and is dated Los Angeles, January 9, 1843. It is as follows: "The sealed paper provided by the last law upon the subject not having reached this department, you will proceed to habilitate as much as may be necessary, and distribute the same to the proper parties for the sale thereof. Michelt'a."

This letter is addressed to the administrator of the custom house at Monterey. On the margin of this order of Micheltorena is a note signed with the rubric of Castañares, and dated January 22, 1843. It is as follows: "Let the paper be sealed as required."

On the 15th of March, Governor Micheltorena again writes to Castañares, referring to his previous order of the 9th of January, and stating that up to that time (viz. March 15, 1843) no paper had reached Los Angeles. He thereupon reiterates his order to Castañares to "proceed immediately to its habilitation, and to distribute it to the various officers, together with a copy of the law on the subject, for publication, advising them that the only copy of the law is that which was transmitted to the custom house."

On the 5th of May, 1843, Castañares writes to the governor as follows: "Excellent Señor: I have the honor to transmit herewith to your excellency twenty-five sheets of the first class, forty of the second, fifty of the third, one hundred of the fourth, and one hundred and fifty of the fifth, in order that you may place your rubric thereon, and order the same to be forwarded to the prefect of the Second district, that they may be distributed to the courts under his jurisdiction," etc.

On the 6th of June, 1843, Governor Micheltorena acknowledged the receipt of the paper transmitted by Castañares on the 8th of May. His letter is as follows: "With your official communication of the 8th ultimo, I have received twenty-five sheets of the first seal, forty of the second, fifty of the third, one hundred of the fourth, and one hundred and fifty of the fifth, the distribution, collection and account of which I have committed to the charge of the prefecture of the Second district, for the reason that the office of the military paymaster has to be removed. Man'l Michelt'a. God and Liberty. Los Angeles, June 6, 1843. To the Administrator of the Maritime Custom House of Monterey."

In the exhibit in which these letters are contained is a large number of official communications relating to the distribution of the sealed paper among the various officers. On the 30th of May, Castañares transmits a number of sheets to the justice of the peace of San Juan Bautista. On the 29th of June, he transmits sealed paper to the subprefect of San José, and on the 20th of December he informs the governor that he had forwarded sealed paper to those officers, in obedience to his order of the 15th of March. The distribution of the sealed paper transmitted to Los Angeles by Castañares on the 8th of May, and the receipt which the governor acknowledges on the 6th of June, are also shown by the official correspondence of the governor with the prefect, and of the latter with subordinate local authorities. On the 3d of June the governor transmits to the prefect of the Second district all the paper he had received from Castañares. On the 5th of June the prefect acknowledges its receipt. On the 6th of June the prefect transmits a portion of it to the justice of the peace for distribution. On the 7th the justice acknowledges its receipt. The transmission of sealed paper to, and the receipt of it by other justices, are shown by their official letters contained in the same exhibit.

The genuineness of all this correspondence is unimpeached. The signatures and rubrics of Castañares and Micheltorena are proved. The correspondence is found in the archives among the records of the government, where the official letters of Micheltorena's administration are preserved. But the facts disclosed by these letters do not rest upon the evidence afforded by them alone. All the grants issued by Micheltorena at Los Angeles from the beginning of his administration up to May 20, 1843, have been exhibited in evidence. All of them are upon unhabilitated paper. The only documents dated previously to June 6, 1843, which are on habilitated paper, are the petition and the grant in this case. On the 22d of February, J. J. Sparks presented his petition for a title on unhabilitated paper. On the margin of this petition is an order by Micheltorena, dated March 16, 1843, in which he directs the petition to be returned to the interested party in order that he may renew his application "as soon as it is known that new sealed paper has arrived at Santa Barbara, (which will be issued soon) to avoid the necessity of duplicating all the documents." The petition seems to have been accordingly returned, and on the 6th of June, the very day on which Micheltorena acknowledges the receipt of sealed paper from Castañares, Sparks renews his application on habilitated paper, and the title was subsequently issued to him. If further proof on this point could be deemed necessary, it is found in the testimony of Pablo de la Guerra, a witness of unimpeachable character, who swears that when he reached Monterey in January, 1843, no sealed paper had yet been printed.

No attempt has been made by the claimant to rebut the proofs on the part of the United States which have been referred to, or to reconcile the existence of the facts shown by them with the possible genuineness of the four-league grant.

They establish beyond all doubt, not only the falsehood of the statements of Castañares and Cambuston with respect to the habilitation of paper for 1843, but they show that at the date of the petition for the four-league grant, viz. January 10, 1843, and at the date of the grant itself, viz. February 27, 1843, the very paper on which they are written was not in existence.

But the statements of Castañares and Cambuston with regard to this paper are shown to be untrue in another respect. They both swear positively, as we have seen, that the paper for 1843 was all printed at the same time; that one impression was made and the form was then taken down. Castañares swears that all the paper so printed was sent by him to Micheltorena and received back in March, at one time. The habilitated paper for 1843 has been subjected to a minute examination. It is proved beyond all doubt by the testimony of Truesdell and Tennent, that the paper on which these grants are written could not have been printed on the same form as that on which other habilitated paper for that year was printed. It would be tedious to recapitulate the numerous differences in the shape of the letters, in the length of the words, in the distances between the words, between the letters, and between the lines, on which this conclusion is founded. It is enough to say that it is clearly established, and is visible on inspection. It serves to confirm the statement of Pablo de la Guerra that the paper was printed during the year 1843, at different times, and as it was wanted.

With regard to the transmission of all the sealed paper to Los Angeles, and its return in March, 1843, at one time, Castañares' statement is also disproved None of it was, as we have seen, transmitted by him until May 8th, and the precise number of sheets sent is mentioned in his letter of that date, in the reply of Micheltorena acknowledging its receipt, June 6, 1843, and in the letter of the governor to the prefect to whom he transmitted it for distribution. But that Castañares did not send it all to Los Angeles is evident from the receipt of Salvador Munras for more than two hundred sheets from the custom house at Monterey, dated May 22, 1843, and from Castañares' letter of May 30th to the justice of the peace of Monterey, transmitting to that officer a portion of the paper. The evidence is further confirmed by the fact that a majority of the documents for the year 1843, found in Monterey, are on paper habilitated by Castañares alone, which is inconsistent with the supposition that all the paper, after being rubricated and sealed by Castañares, was transmitted to the governor for his rubric, and by the latter returned, after being rubricated, to Monterey. The falsehood of Castañares' statements on other points in these cases will hereafter be shown, in connection with other branches of their investigation.

It is to be observed that the evidence of fraud afforded by the proofs with regard to the habilitation of the paper can only be applied to the first grant to Limantour; his second or Islands grant being dated in December, 1843, at a time when habilitated paper for that year was undoubtedly extant.

We proceed to consider the evidence more particularly applicable to the Islands grant. This grant bears date on the 16th of December, 1843. Among the claims presented by Limantour to the board is that for Laguna de Tache, dated December 4, 1843. This grant purports to be made in consideration of his valuable services and loans in money and effects. The Islands grant purports to be made in payment of duties advanced by Limantour on the cargo of the Ayacucho, which was shipwrecked; and also in consideration of services rendered by him on divers occasions to the department. The petition found in the expediente in this case is signed by Limantour, and dated De-

cember 12, 1843. It is shown beyond controversy that neither at the date of this petition, nor for three months previously, had Limantour been in California, and that he did not arrive here until July, 1844. It appears in proof that, in the fall of 1841, the Ayacucho, a vessel belonging to Limantour, was wrecked off the Punta de Reyes. The goods saved from the wreck were stored in the house of Captain Richardson, and the greater part of them were subsequently sold by Limantour. In the fall of 1842, or beginning of 1843, he undoubtedly made considerable advances to Micheltorena, who had been furnished by the government, in addition to the ordinary resources of the department, with a credit on the custom house at Mazatlan for $8,000 per month. Drafts in favor of Limantour for $10,221 were accordingly drawn by Micheltorena on that custom house, which were, on the 24th of May, 1843, ordered by the supreme government to be paid, as appears by the official letter of the minister of war and the navy, communicated by the minister of the treasury to the treasurer general of Mexico, and by the latter department transmitted to the treasurer of the department of the Californias, among the records of whose office it is found.

It may here be remarked, that so far as it appears from the archives, the payment of this draft was a complete settlement of all accounts between Micheltorena and Limantour for the advances which had been furnished by the latter. It is probable that on the receipt of these drafts, Limantour immediately proceeded to Mexico to obtain the order for its payment, which we have seen was issued on the 24th of May, 1843. It is at all events clear, if the testimony adduced by himself is to be relied on, that in the months of April, June, and December of 1843, he was in Mexico.

The ratification or approval in the margin of the grant for two leagues at Yerba Buena, signed by Bocanegra, is dated April 18, 1843. This instrument states that, in consideration of the services rendered by José Y. Limantour, the supreme government approves the grant made, and it confirms the property granted, of which this document (that is, the grant) makes mention, which is returned to the party interested. In the "advertencia" or note appended to the "acuerdo" or ratification produced by Castañares, it is stated that "the supreme government has heretofore ratified and approved the grant made to the foreigner Limantour, setting down upon the original titles themselves said ratification and approbation, and returning them to the party interested, in the months of April, June, and December of 1843, and June of 1844."

It cannot, I think, be doubted that in these documents it was intended to be stated that the titles, with the ratifications appended, were delivered to the interested party in person at the time mentioned. No proofs have been offered to show that the titles were sent to Mexico by Limantour, while he remained in California. If such had been the case, his messenger would no doubt have been produced; or, at least, the fact that the documents were sent to Mexico would have been somewhere suggested in the evidence. But the testimony of Castañares and Keenan, the claimant's own witnesses, places this matter beyond doubt. Castañares states that from the middle of September, 1842, when he entered upon his office as administrator of the custom house at Monterey, he remained in that city until the beginning of December, 1843, with the exception of a trip to Los Angeles, in the early part of November, 1842. He further states that he sailed in the bark Clarita for the port of San Pedro, in Upper California, and that he there embarked on the Trinidad for San Blas. The records of the custom house show that the Clarita sailed from Monterey with Don Manuel Castañares and family on board as passengers, on the 13th of December, 1843. In reply to the one hundred and thirty-ninth question, he says that at the time he left Monterey in the Clarita, Limantour was not in Monterey, nor had he seen him there within the three or four months preceding. James Keenan, a witness produced by the claimant to prove that in 1843 Limantour spoke of his having "lands and property in California," states that the conversation to which he refers occurred on the road between the city of Mexico and San Juan de los Lagos, in the latter days of November, 1843. To this testimony may be added that of Jacob P. Leese, who states that Limantour sailed from this country for Mexico early in 1843, in a schooner which he had purchased, and which was laden with aguardiente, and that he did not return until 1844.

But the precise date of Limantour's return to California is shown by his own memorial to the administrator of the custom house, on the subject of the seizure of the cargo of the Joven Fanita for want of a register. In that memorial he states that on the 20th of April, 1844, he sailed from Mazatlan in the Joven Fanita for San Pedro and Santa Barbara, in Upper California; that on the 16th of May he discovered that his register had been eaten by rats; that on arriving at San Diego he presented to the captain of the port the fragments of the register, and other documents. He therefore asks the administrator of the custom house to consider the embarrassment in which he is, and to do what may be proper in the premises. The various documents by which this petition was accompanied, the order of the administrator of the custom house, the certificate of the packages contained in the cargo, the very fragments of the document alluded to by Limantour, and, finally, the order of Micheltorena, by which he took

possession of the goods, under an engagement to account to the custom house for their estimated value, in case they should prove to have been liable to confiscation, are all found in the archives, having every mark of genuineness.

In the "carpeta" or bundle of documents presented by Limantour, with his memorial to the custom house, are the "guias" or certificates from one custom house to another, stating that the proper duties have been paid on the cargo therein referred to. By these documents it is shown that on the 24th of January, 1844, Limantour was at Colima, bound for San Pedro, with goods. On the 8th of March, 1844, he was at Guadalajara with goods, shipped on the Joven Fanita for the ports of San Pedro, Santa Barbara and Monterey. This fact is shown by an invoice dated at Guadalajara on the 8th of March, and signed by himself. On the 24th of March, 1844, he was at Tepic with goods, bound for Monterey. On the 26th of March, 1844, he was at San Blas. On the 17th of April he was at Mazatlan, bound for San Pedro, in the Fanita. On the 16th of May, 1844, he was in latitude 22° 27′ N., and longitude 119° 44′ W., on the Joven Fanita, bound for San Pedro. On the 29th of July, 1844, he was in Monterey, soliciting the release of his cargo. These last two positions appear from Limantour's memorial to the custom house, already referred to.

The importance of establishing the position of Limantour at these dates will hereafter appear, when we revert to the testimony of Castañares on the other branch of the case. It is sufficient here to observe, that it is evident from the statement of Castañares himself, that neither the petition of Limantour for the Islands grant, dated at Monterey on the 12th of December, 1843, and which is signed by himself, nor the grant for Laguna de Tache, dated December 4, 1843 (a copy of which was presented to the board for confirmation, but which was abandoned without proof), could have been written at the time they bear date

We now approach the consideration of a part of the evidence applicable to both the grants under investigation by which it is urged by the United States the forgery of those documents is conclusively established. The testimony referred to is that which relates to the seals. It is proved by the testimony of Pablo de la Guerra, and Castañares admits the fact, that there was but one seal in the custom house of Monterey, which was used on official documents. The impressions of this seal on documents of undoubted authenticity from the archives have been compared with those found on the grants and petitions produced by the claimant in the cases under consideration. It is shown beyond all doubt that the two classes of impressions could not have been made with the same seal. It would be tedious to detail the numerous differences pointed out by the witnesses between the genuine seal and that found on the grants in question. They are readily detected on attentive examination, and are distinctly discernible in the photographic fac similes which have been exhibited in the cause. Among all the impressions, amounting to upwards of a thousand, of the custom house seals found on various documents in the archives for the years 1843 and 1844, impressions similar to those on the papers in these cases are found on but eight other documents.

An examination of these documents will, however, show that the existence of these seals upon them strengthens the proof of the fraud alleged in this case. The first is the expediente in the case of the alleged grant to Limantour of eighty square leagues at Cape Mendocino. In this case the original grant was not produced, and the claim was rejected by the board, and has been abandoned by Limantour. The petition which is produced is dated Monterey, December 16, 1844. It is in the handwriting of Limantour. The paper on which it is written is habilitated by the rubrics of Micheltorena and of Pablo de la Guerra, who was then administrator of the custom house. Pablo de la Guerra testifies that the rubric attached to his name is not his genuine rubric, nor was it placed there by him. We shall hereafter see that this document is not the only one produced in this case which bears the forged rubric of Pablo de la Guerra.

The next is the grant to Antonio Chaves. The claim in this case was presented by Limantour as assignee of Chaves. No proof of any kind was adduced in support of it. It was accordingly rejected by the board. The assignment under which Limantour claimed is dated at Monterey on the 1st of February, 1844, and is signed by him as well as Chaves. The latter, in his deposition, states that the consideration for the assignment, viz. five hundred dollars, was paid by Limantour to him on that day. We have already seen that Castañares swears positively that Limantour was in the city of Mexico in the month of February, 1844, and that in fact he was, on the 1st of February, neither there nor at Monterey, but on the road between Colima and Guadalajara. It is therefore impossible that the assignment could have been made on the day it bears date; or that Chaves' statement with regard to the payment of the money by Limantour can be true. The subscribing witnesses to this assignment are Manuel Castro, Francisco Pico and Francisco Arce.

The third is the petition of Castañares for La Estrella. It is in the handwriting of Limantour. Castañares himself, though his name is attached to the petition, was, at the time of his examination, ignorant of its existence. He states that he applied to and obtained from Micheltorena two grants—one for lands near the beach of Juana Briones, the

other for a place called "Las Mariposas." In answer to the one hundred and eighty-eighth question he states positively that he never applied for any other grants in California than the two above mentioned.

The fourth document which bears the same seal as that on the Limantour papers, is the grant to Francisco Pico and José A. Castro. It purports to be signed by Micheltorena and M. Jimeno, secretary. In the index of land grants made by the latter officer, no mention of this grant is to be found, although a grant made on the very day (December 29, 1843) on which this grant purports to have been made is duly indexed. No expediente was produced in this case. The court, though entertaining and expressing much doubt as to its genuineness, confirmed the claim, not conceiving itself at liberty to substitute its suspicions for the positive testimony of the witnesses who testified to its genuineness. Those witnesses were Francisco Arce, Vicente P. Gomez and José Y. Limantour. It is proper to add that at the time the discrepancy in the seals had not been discovered.

The fifth document is the grant to Ramon and Francisco de Haro. In this case, which has not yet been submitted for decision, the deposition of Vicente Gomez has been taken. This witness confessed on the stand that the original grant produced by the claimants had been written by himself in 1850. That at that time it had neither the rubrics of Micheltorena nor of Castañares at the top, nor the signature of Jimeno at the bottom. That the signature of Micheltorena was then very lightly traced. He adds that he did this at the request of a Mr. Gliddon, but that he had no idea "so ridiculous a thing would be presented in court." In order to test the truth of the witness' statement, and to ascertain whether he had, in confessing a forgery, committed a perjury, he, at the request of claimants' counsel, wrote out in the presence of the court what was dictated to him. The writing was found to be in all respects the same as that of the grant in question. As the proofs in this case are not yet closed, any further observations upon it would perhaps be inexpedient.

The sixth document on which the Limantour seal appears is the grant to Modesta de Castro. This case was rejected by the board of commissioners. In their opinion, the board say: "A paper purporting to be the original grant is filed in the case, and the genuineness of the signatures of the governor and secretary appearing on it are proven by the deposition of José Y. Limantour. This constitutes the whole testimony in the case. The grant refers to the original petition and map mentioned in the expediente in explanation of the boundaries. These documents are not produced, and from the index of the records of the former government, now in the custody of the surveyor general, it appears that none such exist in the archives." After alluding to the imperfect description of the land contained in the grant, and the absence of any evidence of occupation or possession of the premises, the board add: "But independently of these considerations, there are a number of suspicious circumstances connected with the grant itself, which we should not feel justified in passing over in silence. The grant purports to be made on stamped paper for the years 1844 and 1845. Upon comparing it with a number of grants of undoubted genuineness, made upon stamped paper for those years, it is found to differ in so many important particulars as to suggest strong doubts of its authenticity." These differences are then enumerated, and the board observe: "The rubrics annexed to the certificate of habilitation by Don Pablo de la Guerra are so different from those on the genuine paper, as to leave but little doubt of their being simulated." The opinion concludes as follows: "If, therefore, the claim were unexceptionable in other respects, we should not feel justified in entering a decree of confirmation on such a paper as this, without very strong testimony in explanation of the suspicious circumstances connected with it. The claim is accordingly rejected."

The seventh document on which this seal appears is the petition of Manuel Castro for a sobrante. This petition states that "in the location which was granted to Don José Limantour, called 'Laguna de Tache,' there results considerable surplus," etc. This reference to the grant to Limantour of Laguna de Tache might seem to afford some proof of the genuineness of the latter. This grant is dated on the 4th of December, 1843. The petition of Castro purports to be dated on the 7th of December, and the marginal order of Micheltorena on the 12th of December of the same year. Unfortunately, however, for the genuineness of either document, it appears that the dates of both the marginal order and the petition have been altered from October, as they were originally written, to December. The alteration is obvious on inspection. It is plainly exhibited in the photograph of the original, which has been filed. It has been so clumsily effected that the last syllables of the word Octubre still remain, and the word is spelled Decietubre instead of Deciembre. The allusion, therefore, in the petition of October 7th, to a grant made on the 4th of December, must have been prophetic. It ought to be added that the genuineness of the grant to Manuel Castro is testified to by William A. Richardson. The claim was rejected by the board.

The last document to be noticed is the petition of Ma. Antonia Pico de Castro. This petition, though in the name of M. A. Pico de Castro, is signed by her son, Manuel Castro, whose petition with altered dates, referring to the grant of Laguna de Tache, has just been noticed. No original grants or expedientes were produced by Limantour in any of the claims presented by him for confirmation, with the exception of the documents in the

cases now before this court, and the expediente in the Mendocino case for eighty leagues. As none of these documents, copies of which were presented to the board, have been exhibited in this court, it may be presumed that they bear the same seal as the other documents presented by Limantour, and that their production would not tend to establish the genuineness of the latter.

We have thus examined in detail each of the only documents on file in the office of the surveyor general which have the same seal as that on the papers in the cases under consideration. It is apparent that, so far from affording proof of the genuineness of the latter, the circumstances surrounding them are so suspicious as to corroborate rather than to weaken our convictions of the fraud imputed to the claimant. We have seen that all the grants presented by Limantour to the board for confirmation purport, with one exception, to have been made in consideration of his services to the department and of supplies furnished by him.

The evidence relating to the consideration on which the two grants submitted to this court are alleged to have been made, will now be adverted to. The principal witnesses relied on by the claimant to prove that the supplies, in payment of which the grants are said to have been made, were in fact furnished to Micheltorena, are Manuel Castañares and José Abrego. Manuel Castañares testifies that in the month of February, 1843, he received at Monterey a letter from Governor Micheltorena, informing him that he had made a contract with Limantour, from whom he had received certain amounts in money and clothing for his troops, and that in payment thereof he had given to Limantour drafts upon Mazatlan and upon the general treasury of Mexico, "having made to him some grants of land." Governor Micheltorena therefore requested the witness to write to Santa Anna, and to those ministers with whom he was on terms of friendship, representing the destitute condition of the departmental government, and recommending the payment of the drafts and the approval of the grants. He accordingly wrote to Santa Anna, Tornel, and Bocanegra as requested, —Santa Anna being at the time president; Tornel, minister of war; and Bocanegra, minister of external and internal relations and of government. Replies were received from these persons by the witness in December, 1843, stating that his recommendation had been complied with, and in that of Santa Anna it was added that Mr. Limantour had been authorized to make new loans to Micheltorena. Castañares further states that a few days after his arrival in Mexico, on his return from California, and in the month of February, 1844, Limantour visited him at his house and handed him a letter from Micheltorena, in which he (Micheltorena) informed the witness that he had received new supplies from Limantour, and recommended anew Mr. Limantour to him (Castañares) in order that he should procure the payment of the drafts given to Mr. Limantour in consideration of those supplies—Micheltorena having made to him (Limantour) new concessions of land by virtue of the authorization he had received from the Mexican government. The witness further states that in the year 1844, and some three or four months after his meeting with Limantour in February, the latter showed him two titles for land in California, which he recognizes as those produced in these cases.

Such is in substance the statement of this witness with regard to the consideration on which these grants were founded. The flagrant falsehood of his evidence with regard to the habilitation of paper for the year 1843, which has already been exposed, might well relieve us of the task of examining this portion of his evidence, resting as it does on his own unsupported assertion. Some observations upon it, however, may not be inappropriate. Neither the letter which he testifies he received from Micheltorena at Monterey, nor that handed to him by Limantour in February, at Mexico, are produced, nor is Castañares able to state with certainty whether or not they are still among his papers in Mexico, although he thinks it probable they are. (Answer to the nineteenth interrogatory.) We have already seen that the sole object of the visit of this witness to California was to give his evidence in these cases. If, then, he had really received letters from Micheltorena, it is incredible that he should not have searched for, and if possible, brought them with him. He could not have been ignorant that they would have afforded the most decisive evidence of the genuineness of the claims he came to establish, and would have corroborated his own statements by the most unquestionable and satisfactory proofs. The failure to produce these letters, and the inability of the witness even to state with certainty that they still exist, indicating that he has never searched for them among his papers, is a circumstance of itself sufficient to make us doubt the truth of his entire statement. We have seen that Castañares testifies positively that the letter of Micheltorena, informing him of further concessions of land to Limantour, was handed to him by the latter in Mexico, a few days after his (Castañares') arrival from California, and that Limantour showed him his titles some three or four months afterwards, in the same city. But the documents presented by Limantour himself to the custom house at Monterey, and found in the carpeta attached to his memorial, conclusively establish that at neither of the dates mentioned by Castañares could Limantour have been in the city of Mexico. On the 24th of January he was, as we have seen, at Colima; on the 8th of March, at Guadalajara; on the 24th of March, at Tepic; on the 26th of March, at San Blas; on the 15th and 17th of April, at Mazatlan; on the

16th of May, he was at sea, and on the 29th of July, 1844, he was at Monterey. I have been unable to conjecture any answer that can be suggested to the proofs thus afforded of the falsehood of Castañares' statements.

The second witness on whom reliance is chiefly placed by the claimant to prove the consideration on which these grants were made, is José Abrego. This witness states that all the accounts between Micheltorena and Limantour passed through his hands as commissary of the department; that the form in which the accounts were kept was substantially as follows: In one column were charged against Micheltorena all the moneys which came into his hands to be used as public funds. In an opposite column were credited to him all the disbursements he made. The whole amount received by him from Limantour, at various times, was $70,000 or $80,000, with which Micheltorena stood charged in the accounts, and he stood credited in the accounts with $56,000 or $66,000. These credits were of drafts on Mazatlan, and perhaps other places, and there was also a charge against Limantour, which stood as a credit to Micheltorena, of a certificate for lands in Upper and Lower California, for upwards of $6,000. In this certificate, which was to be sent to Mexico, it was stated that according to the accounts of General Micheltorena, he appears to have received from Señor Limantour upwards of $6,000 for certain lands granted to him by the departmental government, according to titles which have been given him. This certificate the witness swears was signed by himself, by Micheltorena's order, and given to Limantour about a year before Micheltorena left the country. It was required by Limantour, the witness states, in order that he might obtain the approval of the supreme government of Micheltorena's acts in the premises.

It is proved beyond all doubt that nearly all the foregoing statements of José Abrego are false. Since his deposition was taken, the accounts of Micheltorena's administration, with the books of the treasurer, Abrego, have been found in the archives. They consist of (1) a book of entries for 1841; (2) a book of entries, cortes de caja for 1843; (3) corte de caja for 1845; (4) a book of entries for 1844; (5) a book of entries for 1845; also, two books of entries by José Abrego for 1841 and 1842. These books have been produced in court by Mr. R. C. Hopkins, the keeper of the archives. He testifies that he has carefully examined them, and he states the form in which they were kept. It appears from his testimony and from inspection of the books themselves, that they were prepared in Mexico, the first and last pages being signed by the "director general of rentas," and the intermediate ones by the "contador." There were kept (1) a book of entries of amounts paid out; (2) a book in which were entered the amounts received each month, and also the amounts paid out each month, showing the balance on hand at the end of every month. The items or entries are in every case authenticated by the signature of José Abrego, and sometimes by that of the party receiving the payment. There were also monthly and yearly balance sheets made out and examined and audited by the governor, or in his absence by some other officer.

Mr. Hopkins proceeds to state that he has carefully examined these books of the commissary department for the years 1842, 1843, 1844, and 1845, and that they contain no entry whatever of any transactions between Limantour and Governor Micheltorena. That this statement is accurate, is evident from the books themselves, printed copies of which have been filed as exhibits in the cause. An inspection of the books also discloses the fact that the description given by Abrego of the mode of keeping the accounts is untrue. It is stated by him, as we have seen, that there were two columns of items, the one containing charges against Micheltorena of moneys received by him; the other, credits to him of disbursements made by him. The books show that the accounts were kept in the form of receipts for disbursements, which were entered in the book and numbered. All the receipts from the same party being placed in a carpeta or bundle, on the outside of which was an abstract of its contents.

All the accounts of Micheltorena's administration appear to have been handed to Abrego at one time, and by him entered in a book on the 2d of April, 1845. In this book the aggregate amount of the receipts or "partidas" is stated, and attested by the signatures of Micheltorena and Abrego. The number of partidas or separate entries is one hundred and eight, each of which is attested by the signature of José Abrego, and refers to the numbered receipts or vouchers contained in the corresponding "carpeta," or bundle of vouchers. These last have also been examined. They have been found to correspond in numbers and amounts with the entries or partidas which refer to them.

Of the authenticity of these books there can be no doubt. They are found among the archives of the former government. They contain intrinsic proofs of their own genuineness. They are attested by the frequent signatures of Abrego and Micheltorena. The statement of accounts in them precisely corresponds with the statement of Micheltorena's accounts made by Abrego himself to the departmental assembly, on the 15th of April, 1845, after the expulsion of Gen. Micheltorena, and which is found among the archives. And the account as stated in these books is carried into the "corte de caja," or balance sheet, made out on the 1st of January, 1846, also found in the archives. It is evident from inspection that there are no entries of charges and credits in opposite

columns, as stated by Abrego; that there is no charge in the books against Micheltorena of $70,000 or $80,000, or of any sum whatever, received by him from Limantour; that there is no credit in favor of Micheltorena of $56,000 or $60,000 for drafts on Mazatlan or other places, or an entry of or allusion to any such drafts; that there is no charge to Limantour and credit to Micheltorena of a certificate for lands in Upper and Lower California, for upwards of $6,000, nor any allusion to any such credit, charge or certificate; that the books contain no charge whatever against Limantour. And finally, that no certificate such as that mentioned by Abrego in his answer to the eighth question is any where contained in his books. It further appears by the testimony of Mr. Hopkins, that no written order from Micheltorena to Abrego, directing him to make out the certificate to Limantour, can be found in the archives, nor any mention or allusion to it; that neither in the books of Abrego, nor in any book, paper or account in the archives, can be found any "item crediting Limantour," or any item crediting Micheltorena, as stated by Abrego. And finally, that there is found in the archives an official letter of Garcia Condé, minister of war and marine, addressed to the departmental treasurer, in which he acknowledges the receipt from the latter of the "balance sheet made in the treasurer's office on the 1st of April, 1845, showing the amount which Gen. Don Manuel Micheltorena distributed in that department while he was governor and commandante general."

The demonstration of the falsehood of Abrego's testimony is thus complete. It cannot be pretended that there were other books and accounts, which have disappeared. That the departmental treasury over which Abrego presided possessed no information of the amounts received by Micheltorena, is evident from Abrego's letter of the 15th of April, 1845, to the departmental assembly.

After the expulsion of Micheltorena, an inquiry into the accounts of his administration appears to have been instituted by that body. A statement was therefore demanded of Abrego, which he accordingly transmits on the 15th of April, 1845. This statement or balance sheet precisely corresponds, as has been mentioned, in the items and amounts, with the archives; and in the communication to the assembly which accompanies it, Abrego says: "In compliance with the wishes of the most excellent departmental assembly, I inclose the balance sheet formed by this office, showing the amounts that his excellency Don Manuel Micheltorena distributed during the time he held the administration of this department, and also a copy of one of the entries of the return which is found in the books of this treasury —not having any other class of documents or information that can be given relative to the administration of his excellency before mentioned. José Abrego. God and Liberty. Monterey, April 15, 1845."

If any explanation of the evidence, apparently conclusive of the falsehood of Abrego's testimony, were possible, it would surely have been offered by that witness himself. Since the discovery and production of his books he has not been recalled to the stand. Nor has any attempt been made to show that there were other books or accounts in this office, which in any respect corresponded to the description given by him of the mode in which they were kept, or of their contents. If the audacity and hardihood requisite to permit Abrego to make statements susceptible of a refutation so complete and apparently so easy should appear incredible, it is to be remembered that at the time his deposition was taken his books had not been discovered. They have since been found among a mass of other documents at the barracks of the United States troops at Benicia, where they have remained since the conquest of the country—four boxes of public papers, among which these books were found, having been recently removed from Benicia and placed among the archives by the United States district attorney, as detailed by that officer in his deposition. The same observations are applicable to the testimony of Castañares; for it was not until that witness' deposition was taken that the documentary evidence with regard to the habilitation of the paper was produced.

With such proofs of the falsehood of the more material parts of Abrego's testimony, comment on other portions of it might seem superfluous. It may however be observed, that his statement that the certificate given by him to Limantour was required by the latter in order to obtain the approval by the supreme government of Micheltorena's acts, is inconsistent with the facts alleged by the claimant to exist. Abrego states that this certificate was given in Monterey "about a year before Micheltorena left"—that is, in 1844. But if the facts are as contended for by the claimant, that approval had long since been obtained. The grant of four leagues at Yerba Buena had been approved on the 18th of April, 1843, and the grant returned to Limantour. The Islands grant had been approved on the 1st of March, 1844; and on the 25th of December, 1843, Micheltorena had, at Limantour's request, given him a certified copy of a dispatch from Bocanegra, dated October 7, 1843, in which the grants already made to Limantour were confirmed, and leave given to him to acquire further country, town or other property. In the advertencia or note appended to the "acuerdo" produced by Castañares, and bearing the rubric of Bocanegra, it is stated that "the supreme government has heretofore ratified and approved the grant made to the foreigner Limantour, setting down upon the original titles themselves said ratification and approbation, and returning them to the

party interested, in the months of April, June, and December, 1843, and June, 1844." It is evident, therefore, that on the claimant's own showing, the motive assigned for delivering the certificate to Limantour is absurd.

The examination of Abrego's testimony has not only exposed the perjuries of which that witness has been guilty, but it has incidentally disclosed the fact that no trace whatever of the alleged concessions to Limantour is anywhere to be found in the voluminous records and documents now remaining in the archives of the transactions of the former government of this country. The pregnant and almost conclusive negative evidence afforded by these archives will hereafter be adverted to. Before dismissing, however, the subject of the alleged consideration of these grants, a brief statement of the facts as they appear in official documents found in the archives may be necessary.

It is evident that in the early part of 1843, Limantour furnished to Micheltorena advances of money, perhaps derived from the sale of the cargo of the Ayacucho, which had been wrecked. In the correspondence of Governor Micheltorena with Manuel Castañares, the first letter is an order to the latter "to proceed to negotiate in the commercial market a loan in money for $10,000 or $12,000, hypothecating a certain percentage of the duties that may accrue from the vessels entering the port" of Monterey. This letter is dated January 9th. It is marked by the clearness, decision, and military brevity so conspicuous in all Micheltorena's dispatches, and which so strikingly contrast with the suppliant and almost abject tone of the letter addressed to Limantour, and produced by the latter, dated on the preceding day. It is difficult to believe that the governor, who on the 9th transmitted the brief and peremptory order to Castañares to negotiate a loan, could, on the preceding day, have written the imploring and almost piteous letter to Limantour, so lavish of promises to give him "drafts on Mazatlan," "contracts with the department," and "to enable his vessel to carry on a profitable trade," as well as grants of any vacant lands he might select, and begging him to "do him the favor to call and see him, that he might have the honor of conversing with him."

Whether the advances made by Limantour were obtained by Castañares, in compliance with Micheltorena's letter of the 9th of January, we cannot now ascertain. It is certain, however, that for his advances made about that time he received a draft on Mazatlan for $10,221. This draft was, as we have seen, ordered by the supreme government to be paid on the 24th of May, 1843. On Limantour's return to California in July, 1844, the cargo of the Joven Fanita was seized for want of proper documents. This cargo was not restored to him, but was taken by Micheltorena on the 18th of August, 1844, to supply his necessities. For these goods he received, on the 16th of May, 1845, from the general treasury of Mexico, a draft on the custom house at Mazatlan for the sum of $56,184.12½, as appears by the official communication on the subject, signed by A. Batres and Antonio Maria Esnaurrizar, and addressed to Abrego. On the receipt of this communication, an investigation was instituted by Abrego to ascertain what amount of goods from the Joven Fanita had in fact been received by Micheltorena. For this purpose the declaration of Larkin was taken, with whom the goods had been deposited, and by whom they had been distributed on the orders of Micheltorena. By Larkin's declaration, it appeared that the total value of the goods of Limantour received by him was $36,104.06½, according to an invoice in the handwriting of the former; but according to another invoice delivered to Micheltorena, their value was 29,052.4 reals. The investigation seems at this point to have been dropped.

It thus appears that for his advances in money Limantour was, in 1843, paid the sum of $10,221, and for the cargo of the Joven Fanita he was, in 1845, paid the sum of $56,184.12½, being, it would seem, an overpayment of about $20,000 above their value, as shown by his own invoice. Whether this over-payment was the result of a fraud upon the Mexican government, contrived by himself and Micheltorena, it is unnecessary to inquire. These two distinct transactions of Limantour with Governor Micheltorena, which are so clearly explained by the archives, seem to have been either by accident or design confused and blended together by his witnesses. The fact of their occurrence has no doubt suggested the plausible idea of founding the pretended concessions of land upon the consideration of supplies and advances furnished to the governor.

We will now direct our attention to the confirmations of those concessions said to have been obtained from the supreme government. The evidence of these confirmations originally submitted to the board consisted of the marginal memoranda on the grants themselves, and signed Bocanegra, and the certificate signed by Micheltorena and Jimeno, in which the dispatch of Bocanegra of the 7th of October, 1843, is recited. There has since been produced by Castañares a certified copy of the order in pursuance of which the dispatch is alleged to have been written, with the advertencia or note appended to it already referred to. With reference to the marginal memoranda or certificates, it is to be observed that they do not on their face purport to be the official act of any Mexican functionary. They do not profess to come from any minister or department of that government. They are authenticated by no seal; nor are they signed by Bocanegra as minister of any department of the Mexican administration. The fact of

the approval of the grants is stated in the certificates, and to those certificates the signature of Bocanegra is appended. It is only from other testimony, which shows that at the date of the certificates Bocanegra held a certain office in the Mexican government, that we are asked to presume these certificates to have been signed by him officially, and in the exercise of the duties pertaining to his office. Whether or not it properly belonged to the department of which he was minister to furnish such evidence as this of the action of the supreme government, and whether the mode in which they are signed in any respect corresponds with the provisions of the Mexican law, which provides for the manner in which the ministers are to perform official acts, is perhaps doubtful; but it is not now necessary to inquire. For the more important question is, did the Mexican government in fact approve these grants? whatever may be the informality or insufficiency of the mode in which that approval has been manifested.

With regard to the certificate purporting to have been given by Micheltorena to Limantour, in which the communication of Bocanegra is recited, it might be sufficient to say that it bears the spurious or forged seal found on the other papers exhibited in these causes. It may be observed, in addition, that it purports to be signed by Jimeno as secretary. But the document was not exhibited to Jimeno when he was examined as a witness, and we have already seen that Jimeno at the time his deposition was taken was ignorant that any grants whatever had been made to Limantour by Micheltorena. The pretended communication of Bocanegra, set forth in the certificate, refers to an official note of Micheltorena of the 24th of February, inclosing the memorial of Limantour, in which the latter asked of the supreme government permission to acquire property, etc. If Micheltorena had in fact written such a note, and if Bocanegra had answered it as set forth in the certificate, those communications would have been found in the archives.

An exhibit has been filed in these causes, in which all the circulars, decrees and dispatches of the supreme government with the department of Californias, from January, 1842, to December, 1844, are digested. The dates of the various papers are given, and a short statement of the contents. The very great number of these dispatches—the continuous and apparently unbroken order of their dates—afford the strongest presumption that all the official communications received by this department are preserved. It is almost needless to say that no communication from Bocanegra, such as that mentioned in Micheltorena's certificate, can be found amongst the numerous official dispatches of that officer. The communication set forth in the certificate is dated, as we have seen, on the 7th of October, 1843. Among the dispatches found in the archives is one from the treasury general of the Mexican republic, dated on that day, and two from the ministry of exterior relations and government, the department over which Bocanegra presided, and dated respectively on the 9th and 11th of October. It is to be presumed that the communication from the treasury general of Mexico was carried by the same mail or courier as that which brought the communication from Bocanegra of the same date, had the letter then been written. It appears, however, that the dispatches from the minister of exterior relations, of the 9th and 11th of October, were not received until the beginning of 1844. But the certificate of Micheltorena is dated December 25, 1843, and states that the communication recited had been received by the last mail. If there were no other circumstances in the case to prove the spuriousness of this document, I cannot but consider the negative testimony of the archives as almost sufficient of itself to lead us to that conclusion.

The document produced by Castañares, and alleged to have been copied from the archives of Mexico, remains to be considered. The convincing and unanswerable proofs of the falsehood of this witness' testimony, which have already been adduced, might well justify us in dismissing without further comment any document produced by him, and authenticated by his testimony. But there is intrinsic evidence of spuriousness in the document itself. In the note or advertencia appended to the acuerdo or order for the dispatch of the 7th of October, it is stated that the supreme government "had approved the grant made to the foreigner Limantour, setting down upon the original titles themselves said ratification and approval, and returning them to the party interested, in the months of April, June and December of 1843, and June, 1844." See the decisions (acuerdos) set down in the titles themselves, which were returned to him as decreed. It is evident that the person who prepared this document, in his zeal to furnish evidence of the ratification and confirmation of every grant which Limantour might pretend to have, has lost sight of the fact that the confirmations referred to as "set down on the titles themselves," could not by possibility have been given. Of all the titles presented by Limantour to the board, only one is dated prior to December, 1843, viz. the Four-League or Yerba Buena grant; and only two, viz. those presented in these cases, purport to have been confirmed by the supreme government. The confirmation of the Yerba Buena grant purports to have been "set down on the title," in April, 1843. But the confirmations stated to have been set down in June and December of that year, not only do not appear, but there were not at those dates, on the claimant's own showing, any grants in existence on which such confirmations could have been

inscribed. With regard to the confirmation stated to have been set down in June of 1844, it is sufficient to say that none such appears; the pretended confirmation of the Islands grant being dated on the 1st of March of that year.

It has already been mentioned that the archives of the former government, now in the office of the United States surveyor general, have been subjected to a thorough and minute examination. The voluminous documents which had remained in that office confused, in great part unknown, and practically inaccessible, have recently been collected, classified and arranged by Mr. Hopkins, the keeper of the archives, to whose intelligent and conscientious industry we are largely indebted for the information we have obtained respecting the administration of Gov. Micheltorena. The results of that examination are stated by Mr. Hopkins as follows:

"I have made a special search to discover, among the archives, handwriting similar to that in which the grants in these cases are written. I never found any grant or other paper in the archives in that handwriting. I have made a special search to discover any entry, memorandum or allusion to these grants among the archives. I find no mention or allusion to them, except in the expediente in the Islands case on file in the archives. In the Yerba Buena case there is an expediente found in Monterey by Vicente Gomez, which was not in the original archives. I have searched in the journals of the assembly for some allusion to these grants, but find none. I have also searched for the same purpose in the correspondence and miscellaneous documents of the former government, but find nothing. I find nothing whatever in the archives relating to these grants except the document that I have mentioned. I find nowhere any reference for an 'informe' of the Yerba Buena grant to any judicial officer. I find no report or any allusion to any report made in that case to the governor. I have made a similar seach for reports, references or 'informes' in the Islands case. I find nothing except what is shown by the expediente. I have searched for the original confirmation of these grants, but I have found none, nor any mention of or allusion to it. I found no original communication from any department of the supreme government of Mexico referring or alluding to these grants. Among the original documents transferred to the surveyor general's office, on the dissolution of the board of land commissioners, are several petitions of Limantour for other lands in California. No original cases in those grants were filed. I find no original grants to him anywhere in the archives, except those produced in those two cases. I have searched especially to ascertain the earliest dates at which sealed paper for the year 1843, habilitated by Micheltorena and Castañares, was used at Los Angeles. It was first used on the 6th of June, 1843. I have also searched to ascertain whether any land titles were issued by Micheltorena at Los Angeles in 1843 on paper purporting to be sealed paper for 1843, habilitated by Micheltorena and Castañares. I find only one,—the grant to Limantour in the Yerba Buena case, now before the court."

It is, of course, impossible justly to appreciate the force of the negative testimony furnished by the entire absence of any mention or allusion to the grants in the archives, unless the number, the character and the apparent completeness of those records, as they now exist, be considered. A slight examination of the documents contained in the printed volume of archive exhibits filed in these cases will show how full, voluminous, and it would seem complete, are the records of every important event during Micheltorena's administration. It would be tedious now to describe the large mass of orders, dispatches, decrees, circulars, official correspondence, reports, accounts, etc., which are printed at length, or a digest of which is given in the volume referred to.

Two records, more particularly relating to grants of land, may be noticed. Among the archives is a list headed as follows: "Index of lands adjudicated and persons to whom they have been conceded." At the foot of the list is a note in the handwriting of Manuel Jimeno, secretary of dispatch, and signed by him. In this list or index, which has long been known under the name of "Jimeno's Index," are mentioned the numbers of the expedientes, the names of the lands conceded, and of the persons to whom concessions are made. On comparing it with the expedientes found in the archives, it is found to correspond with them in all these particulars, with some exceptions, which are noted on the index itself. This list embraces land concessions from the year 1830 up to the 24th of December, 1844. No one of the alleged concessions to Limantour appears in this list. There is also found in the archives a book in which notes or "razones" of land grants during the years 1844 and 1845 are entered. No one of the grants to Limantour, purporting to have been made in those years and which were presented by him to the board, is noted in this book, although to four of them is attached the usual memorandum of the secretary, that "a register of the grant has been made in the proper book."

The total absence in the archives of all record, allusion to or trace of grants so numerous, extensive and extraordinary as the alleged concessions to Limantour, would, of itself, be sufficient to suggest vehement suspicions of their genuineness; but when taken in connection with the other proofs in these cases, it places their true character beyond any reasonable doubt. An examination, however, of the archives at Monterey has disclos-

ed some facts relating to these grants which deserve mention. By the testimony of Mr. E. L. Williams, the very intelligent recorder of Monterey, it appears that there are in his office about thirty documents purporting to be dated at Los Angeles. On all of these dated 1838 the name of that town is written Ciudad de Los Angeles, Angeles abbreviated, or Los Angeles. On none is the town styled as in the Limantour papers, "Pueblo de Los Angeles." It also appears that of all the papers and documents found at Monterey, no one bears the water marks which appear on the Limantour papers. It may also here be observed that the grant to Chaves, alleged to have been assigned to Limantour and presented as we have seen by the latter to the board, bears the same water mark as the certificate of Micheltorena already noticed. It also appears that on comparing the paper habilitated for the year 1843, found at Monterey, with that on which the Limantour and Castañares petitions are written, important differences exist. (1) The impression of the type on the topmost lines on the latter is smaller than that on the former. (2) On the Limantour and Castañares petitions the impression of the type is not shown upon the last page of the paper. On all the other papers this impression is visible on all the pages of each sheet, indicating that the sheet must have been folded when placed under the press.

These coincidences, though affording of themselves no conclusive evidence of the spuriousness of these titles, are yet significant as corroborating and confirming our conclusions drawn from other testimony, and as showing that every circumstance connected with them, even the most minute, points unmistakably in the same direction. Such is the result of the vigorous and thorough examination which has been made of the archives of this department. It is shown that the archives at the city of Mexico are equally silent as to the alleged concessions or confirmations in these cases. It appears that on the 4th of March, 1854, Mr. Cripps, the American chargé d'affaires at that city, addressed an official note to Bonilla, the Mexican minister of exterior relations, requesting to be informed whether any record or evidence of titles granted to José Y. Limantour existed in the archives of Mexico. To this note, Bonilla replies by enclosing to Mr. Cripps communications received by himself from the heads of the departments, to whom he had applied for the information required.

In the communication received from the minister of fomento it is said: "I have searched with the greatest care the documents to which the note of the señor chargé d'affaires ad interim of the United States refers, and I have not found any evidence whatever of the grant which might have been made to Mr. J. Yves Limantour by General Micheltorena, of four square leagues of land to the west of the bay of San Francisco, Upper California. Nor is there any minute or evidence whatever of the approval of said grant by the supreme government, which, as it is said, has been authorized by Señor Bocanegra. Nor are there any titles of any other land which might have been granted to said Limantour in Upper California, and it is remarkable that there is not a single communication of Señor Micheltorena in which notice is given of grants of lands which he had made, whereby knowledge might be obtained in relation to those of the said Limantour." The communication from the ministry of war and marine, and from that of the general and public archives of the nation, are to the same effect, and in the communication of the minister of foreign affairs to Mr. Cripps, of the 6th of December, 1855, he informs the latter that the three offices of fomento, of war, and of the general archives, are the only ones where the evidences of the alleged grants could be found in the city of Mexico. He therefore refers Mr. Cripps to the archives of the public offices of California. How unproductive the search in these latter has been we have already seen.

It is worthy of note that the acuerdo and advertencia produced by Castañares purport to be among the archives of the ministry of fomento, the department from which the full and explicit communication just cited was received by Bonilla, and that they bear the certificate of the Manuel Orosco who, in 1854, as minister of the general and public archives, officially informed Bonilla that no documents relating to these titles could be found among the archives of his office. The evidence which has thus far been considered has established, it is conceived, beyond all question, that the titles of the claimant could not have been made at the time, in the manner, and under the circumstances alleged by him.

We will now briefly consider the direct and positive testimony, which discloses the time and place at which and the persons by whom they were fabricated. The witnesses who testify on this point are François Jacomet and Auguste Jouan, of whom the former was a clerk in the house of Robin & Co., Mexico, of which Limantour was a partner, and the latter was an agent of Limantour in California. Jacomet testifies that in the fall of the year 1852 he saw W. A. Richardson, who was then in the city of Mexico, in frequent consultation with Limantour; that he does not know the nature of their business, but that on one occasion he saw them making a plan, for which they borrowed from himself a box of instruments; that Micheltorena frequently came to the house, and after being closeted with Limantour, came out with an order of Limantour on the witness for money; that he saw Micheltorena writing at a table, on which were some sheets of Mexican paper having stamps upon them not of the year in which he was writing; that he saw Emile Letanneur writing on this paper after Micheltorena had written upon it; that he also paid on the order of Limantour four hundred dollars to Mr.

Bocanegra, and that he knew of no business transactions between them up to that time. The witness adds, that a quarrel having arisen between Limantour and Robin, his partner, the former exhibited to the witness a letter of Robin, in which he threatened "to denounce Limantour as a maker of false instruments, and that he would denounce not only him, but his accomplice, Mr. Bocanegra; that Limantour was exasperated at the charge, and said that if he continued to abuse him in that way, he would, through the influence of Mr. Bocanegra and others, have him put into prison."

Auguste Jouan testifies that in March, 1852, at the city of Mexico, Limantour exhibited to him some four or five titles for land in California signed by Micheltorena, one of which was in the name of Limantour, the others in those of various persons; that Limantour proposed to him to go to California, find out where the lands were, (on which point Limantour could give him no indication) and make a survey of them; that he accordingly went to California, where Limantour also arrived towards the end of 1852; that on the arrival of Limantour, they had frequent conversations in regard to his titles; that he (the witness) expressed surprise at seeing titles of land shown to him by Limantour which he had never seen before, and that he conversed "freely with him without dissimulation" as to their being fraudulent; that when Limantour gave him the titles for translation, he noticed that on the Islands grant the ratification by Bocanegra was dated in 1843, while the grant itself was dated in 1844; that on calling Limantour's attention to this discrepancy, he was told by the latter to erase the figure "3" in the date of the ratification and substitute the figure "4." This he accordingly did, in the presence of Victor Prudon, but intentionally in so rough a manner that a hole was left in the paper, and that he had not seen the paper from that day until it was exhibited to him at his examination, after he had made the foregoing statement with regard to it. The witness also states that Limantour gave him for translation fourteen titles, none of which were identical with any of those he had previously seen in Mexico. The witness further states the substance of various conversations between himself and E. Letanneur, in which the latter gave an account of the place and time at which these titles were fabricated and signed by Micheltorena and Bocanegra, but as the admissibility of these conversations is questionable, it is unnecessary to dwell upon them. The witness further states that on Limantour's arrival, he saw in his possession a bundle of papers covered with black glazed cloth, with the official seal of the French legation stamped upon it, directed to M. Dillon, consul of France in San Francisco; that Limantour at the time said it contained papers; that he again saw this bundle at the St. Francis Hotel, when Letanneur opened one of Limantour's trunks; that Letanneur then told him it contained about eighty blank titles and petitions, all signed by Micheltorena, and which were the same as those used by Limantour for his California land titles. About two days after he was in company with Limantour and Letanneur at the hotel, when Limantour informed them he was going to dine with M. Dillon, and both Letanneur and Jouan remarked that he carried under his overcoat the bundle directed to M. Dillon which he had seen on board the steamer and again at the hotel. He adds that Letanneur assured him that M. Levasseur, the French minister, had no knowledge that the official seal had been used in this manner, and that Limantour had obtained it fraudulently, etc. He also states that in his (witness') conversations with Limantour, the latter "never denied, but on the contrary, always admitted" that his titles were fraudulent; and finally, that Letanneur gave him, before he embarked for Mexico, four of the blank titles which, as he said, he had taken from the bundle before described, being induced to do so by Limantour's statement that each one was worth in California $10,000. That Limantour subsequently offered him $1,000 if he would surrender them, which he refused.

I have not thought it necessary to detail at length the positive, frequent and circumstantial statements contained in this deposition relative to the admissions by Limantour of the fraudulent character of the titles. If his testimony is believed, there is an end of the case. But as he, by his own showing, was an agent and accomplice of Limantour, his unsupported declarations are entitled to but little weight. We will therefore consider how far they are corroborated by other proofs. We have seen that Jacomet testifies that the grants are in the handwriting of Letanneur, and Jouan states that Letanneur admitted to him he had written them. These statements are strongly corroborated by circumstances heretofore adverted to: The fact that nowhere in the archives can be found any writing similar to that of these grants; that the writing of Captain Maciel, who is said by the claimant's witnesses to have written them, is found on comparison to be essentially different; that these grants are both in the same handwriting, although purporting to be made, the one at Los Angeles, and the other, after an interval of ten months, at Monterey, and though Maciel, according to the claimant's own witnesses, was only occasionally employed in the secretary's office; the spelling of the words "fundadero" and "estacado"; and finally, the fact that Letanneur himself admitted the writing to be his, before a grand jury, though he subsequently denied it on the stand.

All these circumstances tend strongly to corroborate the testimony we are considering. The statement of Jouan with regard to Limantour's arrival with the forged titles in his possession, is corroborated by the fact

that not only all the petitions of Limantour to the board of commissioners, but all the petitions in the cases, the titles in which bear the spurious seal found on the Limantour documents, were filed in the months of February and March, 1853, with one exception—the petition of Josefa de Haro—which was filed on the 16th of March, 1852. But the title fabricated by Gomez, and bearing the Limantour seal, was not exhibited until 1854, having been then, as was alleged, recently discovered. Again, the Islands grant mentioned by Jouan as having been altered by him, exhibits the erasure and the hole in the paper described by the witness. No attempt has been made by the claimants to explain or account for this circumstance. The witness had given his testimony with regard to it before the grant was exhibited to him. The paper had been for several years in the custody of the surveyor general. It was not attempted to be shown that the witness had seen the document before giving his testimony.

But the strongest and most conclusive corroboration of the testimony of this witness is the fact that he produces one of the blank titles which, as he says, were taken by Letanneur from the bundle of documents in Limantour's possession. This title consists of a paper habilitated by the rubrics of Micheltorena and Pablo de la Guerra. On the margin is an order of concession signed by Micheltorena, the space where the petition is usually written being left blank. Attached to it is another paper habilitated in the same manner, the first, second and third pages of which are blank, except that on the latter is the signature of Micheltorena. The genuineness of Micheltorena's signatures and rubrics to these documents is established. The rubric of Pablo de la Guerra he pronounces a forgery.

I have been unable to conjecture any mode by which the existence of such documents can be reconciled with the possible integrity of the governor. If they were obtained by Letanneur, as stated by Jouan, from a bundle in Limantour's possession,—and Letanneur, though subsequently examined by the claimant, does not deny the fact, nor was he interrogated with respect to it,—they show that Limantour had in his possession the means and instruments for effecting the fraud charged upon him. And even if we regard the statement that they were obtained from Limantour as doubtful, they nevertheless remain in court, the mute but undeniable evidence of the fact that Gov. Micheltorena has been willing to lend himself to the fabrication of false titles, and to affix his name to documents which could only have been intended to be used for some fraudulent purpose. If all other proofs in these cases were wanting, the fact that documents are produced bearing the genuine signature of Micheltorena, and the forged rubric of Pablo de la Guerra, coupled with the fact that no trace of any of the alleged grants to Limantour is found in the archives, would be sufficient to suggest vehement suspicions as to their genuineness. But our suspicions become certainties when these documents are shown to have been in the possession of the claimant himself about the time at which he first presented his numerous claims to the board for confirmation, and that among the papers so presented is found one (the petition in the Mendocino case) bearing the genuine signature of Micheltorena, and the forged rubric of Pablo de la Guerra, precisely resembling the blank documents produced by Jouan; when we find, also, on the petition of the Islands, that the marginal concession speaks of the "land solicited," while the "Islands" constitute the chief objects of the petition,—a form of expression which would hardly have been used had the marginal concession been written after, and with a knowledge on the part of the grantor of the contents of the petition.

We have, at length, reached the end of our protracted and laborious examination of the evidence in these cases. We have not thought it necessary to notice in detail much of the testimony which has been taken. In view of the conclusive evidence by which it is shown that these titles cannot be genuine, we have considered the testimony of the witnesses who state that at various times Limantour spoke of or exhibited these grants, as deserving of but little weight. In some instances these witnesses have, no doubt, intended to testify truly. But the date or the import of the conversations may have been inaccurately remembered, or Limantour may have then been contemplating the frauds he subsequently consummated. But no declarations of Limantour that he had titles for lands in California, no matter when, to whom, or how often made, can overthrow or even affect the force of the demonstration which has shown these titles to be spurious, and especially when to the evidence of those declarations is opposed testimony of his admissions of their fraudulent character, and the undoubted fact that from the conquest of the country until 1852, he neglected to assert or even give notice of his claims; and that on one of them he suffered a city to be founded, lots to be sold at extravagant prices, and buildings to be erected at great expense upon the land, for four years, during which he neither in person, by an agent, or by letter, or a public notice, apprised the inhabitants of his rights.

A brief recapitulation of the more important facts established by the proofs will conclude our labors. We have seen that the claims in these cases are but two out of eight presented by the claimant to the board for confirmation. The alleged concessions are found to be in all respects extraordinary and unprecedented, whether we consider the enormous extent of the land granted and its situation and importance to the government, the character of the grantee, or the considera-

tion on which the grants are alleged to have been made. To make any grant of land to a foreigner was a departure from an ancient and settled policy of the Spanish and Mexican governments; but to grant him the most important port on the Pacific, with every military position about it or commanding an entrance to it, was an act which, if committed, we may safely affirm was without parallel in the history of Mexico, or perhaps in that of any civilized nation.

The grants presented in the cases before the court are in their form as singular as in their object. They are unattested by the secretary, although every other grant made during Micheltorena's administration bears the signature of the secretary, as required both by custom and by positive law. They are in the same handwriting, though made at different places and with an interval of ten months between them, although the person who is alleged to have written them is admitted to have been employed only occasionally in the office. Among all the records of the former government, this handwriting nowhere else appears—a fact which increases the improbability that Maciel could have written these two grants only. His handwriting is found in the records, but it in no respect resembles the writing in these grants. And finally, two witnesses swear that the writing is that of Emile Letanneur, a clerk of the claimant. The grants are made without informes from any judicial officers. In the Islands case, none appears to have been asked. In the Yerba Buena case, it is recited that they were asked and obtained. No such reports or references to obtain them can be found in the archives. And it is shown by the testimony, and by the subsequent official acts of the officers themselves, that none could have been asked for or given. The only reference pretended to have been made, was by Jimeno to Richardson, an officer whose duties had no connection with the granting of lands, who at the time did not possess the confidence of the government, and who was shortly afterwards removed for misconduct in office. The letter purporting to be written by Jimeno, the secretary, is not presented to that officer, although examined as a witness, and he declares his ignorance that any grant whatever was made to Limantour, although he was secretary of the department, and although several of the grants presented by the claimant to the board bear his attestation,—a statement which is corroborated by the records of his official action on subsequent petitions for a part of the land embraced within these grants.

The expediente in the Yerba Buena case is found in 1852, in an office which was not its proper place of custody, by a person whose own confession in another case shows him to have been engaged in fabricating titles, and whose character to this court, which has so often been called on to pass upon his credibility, no attempt has been made to vindicate. This expediente is shown to have escaped the notice of several persons whose duty or whose interest it was to examine thoroughly the records of the office where it is said to have been found, and a material part of the testimony of the only witness (Serrano) who pretends to have seen it in the office before its discovery by Gomez, is conclusively shown to be a deliberate falsehood. The expediente in the Islands case is found among the archives, but by whom, and when placed there, we know not. It is not numbered nor noted in Jimeno's index, nor referred to in any other document whatever. The expedientes in all the other cases which the claimant presented to the board for confirmation, and which were rejected, have disappeared, nor is any trace of such grants, or even of any application for them, to be found, with the single exception of the petition for eighty leagues in Mendocino county, for which the original grant was not produced, nor was any proof offered to establish it.

We find that all the documents presented by the claimant bear a similar seal; and that seal differs from the genuine seal elsewhere found on public documents. It is proved by the records themselves, by the testimony of an unimpeachable witness, and by the admission of Castañares himself, who as administrator of the custom house was its legal custodian, that there was but one seal during the years in which these grants purport to have been made; and the fact that this seal appears on eight other documents which are produced, corroborates, when those documents are examined, our convictions of its spuriousness.

With respect to the Yerba Buena grant, it is shown that the habilitated paper on which the petition and grant are written could not have been in existence at the time those documents are dated. This fact is established, not only by the official correspondence, which shows when the order for the habilitation was first given, and when it was executed and the paper transmitted to and received by the governor, but by the fact that no habilitated paper was used at Los Angeles until after the date when the correspondence shows it to have been transmitted, and that long subsequently to the date of the documents now produced, proceedings on an application for lands were suspended to await the arrival of sealed paper which had not yet been received. With respect to the Islands grant, it is shown that at the date of that grant, and also of the grant for Laguna de Tache, presented by Limantour to the board, but abandoned without proof of any kind, the alleged grantee was not in the country, nor had he been for several months previously, nor did he arrive until more than six months afterwards. The evidence by which this fact is

established is the testimony of the claimant's chief witness, Manuel Castañares, and documents presented and signed by Limantour and found among the archives.

With regard to the alleged consideration on which the grants are founded, it is shown that for any advances made prior to the first grant, Limantour received a draft on Mazatlan, which may justly be presumed to have been in full of all demands against the government up to that time; that he shortly after left the country, and did not return until above eighteen months afterwards, and therefore could not have made the advances or furnished the goods on which the two subsequent grants, made in 1843, purport to be founded, that no letter of Micheltorena, referring to such further advances, and stating that further concessions had been made, could have been delivered by Limantour to Castañares in February, 1844, in Mexico, because Limantour had not been in California to make the advances, nor was he in the city of Mexico in February, 1844, to deliver the letter. It is also shown that for his goods, which were taken in August, 1844, by Micheltorena, he was paid $56,184.12½, being an overpayment of about $20,000. And, finally, that the statement made by Abrego as to the contents of his books, and the mode of keeping the accounts of the government, is conclusively disproved by the production of the books themselves.

With respect to the alleged confirmations, it appears that those inscribed upon the titles themselves are unattested by any seal; that they are not signed by Bocanegra, as minister, nor do they purport to be the official act of any Mexican functionary. It also appears that the certificate of Micheltorena, in which the dispatch of Bocanegra is recited, bears the spurious seal found on the other documents presented by Limantour. That, although it purports to be attested by Jimeno as secretary it was not exhibited to him when examined as a witness by the claimant, and he denies all knowledge of any grants whatever to Limantour. That neither the alleged letter of Micheltorena, to which Bocanegra's dispatch purports to be a reply, nor the dispatch of Bocanegra is found in the archives, nor any mention of or allusion to it, although a dispatch from the treasury general of the same date, and two dispatches from Bocanegra's own department, dated a few days subsequently, are found in the archives among the official letters of Micheltorena's administration. It also appears that these last communications, although relating to a most important subject, were not received until long after the time when, according to Micheltorena's certificate, the dispatches approving of the concessions to Limantour had reached California; and the custom house record of arrivals during the months of November and December, 1843, renders it almost certain that no dispatch dated in Mexico on the 7th of October, 1843, could have reached California on the 23d of December of the same year.

With regard to the "acuerdo" or order from the archives of Mexico, with the "advertencia" or note attached to it, produced by Castañares, it is evident that the statements made in the latter are untrue. For no ratification could have been "set down on the original titles themselves in the months of June and December, 1843," for the reason that no titles were in existence in the month of June but the Yerba Buena grant, of which the approval is dated April 18th; and the two grants dated respectively December 4 and December 16, 1843, could not have been presented to the supreme government of Mexico in the same month as that in which they are dated. Nor do these grants, nor any others presented by Limantour, purport to bear "confirmations set down upon them" as stated in the "advertencia," for the grant of the 4th of December, 1843, (Laguna de Tache) has no approval whatever inscribed upon it, and that of the 16th of December (the Islands grant) has an approval dated March 1, 1844. It also appears from the communications addressed by the minister of exterior relations of Mexico to Mr. Cripps, the United States chargé d'affaires, that search has been made in the only three public offices of that republic in which evidence relating to the titles of Limantour would be found if it existed, and that those archives are as barren of all record or trace of those letters or confirmations as are those of California.

And, finally, we have the positive testimony of two witnesses, the one a clerk and the other an agent of Limantour, who identify the handwriting of the grants; and one of whom describes the private interviews of Bocanegra, Micheltorena and Limantour, and states the amount of money paid to the former on the order of the latter; while the other, in addition to his evidence of the frequent admissions by Limantour of the fraudulent character of these titles, produces in court a blank petition and grant bearing the genuine signatures of Micheltorena and the forged rubric of Pablo de la Guerra, demonstrating that Limantour had in his possession papers which not only afforded the means of committing the frauds charged upon him, but which could not have been prepared for any honest purpose. If to all this be added the fact that the testimony of Prudon, Serrano, Cambuston, Abrego and Castañares, the chief witnesses of the claimant, has been shown in almost every important particular to be false, we are justified in asserting that the proofs in these cases have the force and certainty of a demonstration.

On reviewing the whole case, it is not easy to confine within the limits of judicial moderation the expression of our indignation at the fraud which has been attempted

to be perpetrated. Whether we consider the enormous extent or the extraordinary character of the alleged concessions to Limantour; the official positions and the distinguished antecedents of the principal witnesses who have testified in support of them, or the conclusive and unanswerable proofs by which their falsehood has been exposed; whether we consider the unscrupulous and pertinacious obstinacy with which the claims now before the court have been persisted in—although six others presented to the board have long since been abandoned—or the large sums extorted from property owners in this city as the price of the relinquishment of these fraudulent pretensions; or, finally, the conclusive and irresistible proofs by which the perjuries by which they have been attempted to be maintained have been exposed, and their true character demonstrated—it may safely be affirmed that these cases are without parallel in the judicial history of the country. It would have been more agreeable to the court, and would have lessened its labors, had any argument been addressed to it in behalf of the claimant. But the counsel who had principally conducted the case for Limantour, shortly before the hearing announced that they had retired from the case. No reason for this step was assigned; but the court was not at liberty to treat it as an abandonment of the cause from any conviction on the part of those gentlemen of its fraudulent character.

The remaining counsel, though he attended at the hearing, and was invited by the court to submit a brief on behalf of the claimant, declined to do so. The court has therefore felt it to be its duty to give to the evidence a more elaborate examination, and to set forth the grounds of its decision at greater length than would otherwise have been necessary. It is no slight satisfaction to feel that the evidence has been such as to leave nothing to inference, suspicion or conjecture, but that the proofs of fraud are as conclusive and irresistible as the attempted fraud itself has been flagrant and audacious.

[José Y. Limantour was indicted for presenting a fraudulent land grant. See Case No. 16,138.]

UNITED STATES v. LINCOLN COUNTY. See Case No. 15,503.

Case No. 15,602.

UNITED STATES v. LINDSAY.

[1 Cranch, C. C. 245.] [1]

Circuit Court, District of Columbia. July Term, 1805.

DISORDERLY HOUSE—SELLING LIQUOR TO SLAVES—SUNDAY SELLING.

The practice of selling spirituous liquors, in a public manner to negroes assembled in considerable numbers, and suffering them to drink the same in or about the house on a Sabbath day, constitutes the offence of keeping a disorderly house.

[Cited in State v. Crawford, 28 Kan. 733.]

Indictment [against Adam Lindsay] for selling spirituous liquor to slaves on Sunday, contra formam statuti. The defendant, being a shopkeeper, sold liquors to slaves on Sundays, and kept a disorderly house.

Mr. Jones, for the United States.

Mr. Key, for defendant.

THE COURT was of opinion, that the indictment does not sufficiently set forth any offence under either of the acts of Maryland, cited 1723, c. 16, § 11, and 1784, c. 7, § 12, and the traverser cannot be convicted thereon, or made liable to the penalties contained therein. But the indictment also states an offence at common law, and although the defendant may not be brought within the statute or statutes against the form of which the indictment concludes, the prosecutor may resort to the offence at common law; and, on this point, THE COURT was of opinion, that the practice of selling spirituous liquors in a public manner to negroes assembled in considerable numbers, and suffering them to drink the same in or about the house on a Sabbath day, constitutes the offence of keeping a disorderly house. See, also, the case of U. S. v. Coulter [Case No. 14,875], and U. S. v. Prout [Id. 16,093].

Case No. 15,603.

UNITED STATES v. LINDSEY et al.

[1 Gall. 365.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1812.

CUSTOMS DUTIES—WHEN ACCRUING.

Duties accrue upon the arrival in a port with an intent to unlade the cargo there, and not upon the entry of the goods at the custom-house. The importation is complete on such arrival.

[See The Boston, Case No. 1,670.]

[Cited in U. S. v. Dodge, Case No. 14,973; Waring v. Mobile, 8 Wall. (75 U. S.) 120; U. S. v. Thomas, Case No. 16,473; U. S. v. Merriam, Id. 15,759.]

This was an action of debt [against Jonathan W. Lindsey and others] on a custom-house bond, to secure the amount of duties on goods imported into the port of Bristol. The bond was dated on the 2d of July, 1812, and was in the usual form. It appeared in evidence, that the vessel arrived at Bristol on the evening of the 30th of June; that on the 2d of July, the vessel was duly entered at the custom-house, and began to discharge her cargo.

Mr. Howell, for the United States.

Mr. Burrill, for defendants.

[1] [Reported by Hon. William Cranch, Chief Judge.]

[1] [Reported by John Gallison, Esq.]

THE COURT ordered the damages to be assessed to the amount of single duties and interest, and not of the double duties under the act of July 1, 1812, c. 112 [2 Stat. 768]. By the arrival of the vessel at the port of Bristol, on the 30th of June, with an intent there to unlade her cargo, the importation was complete. The duties accrue on the importation, and not on the entry at the custom-house.

Case No. 15,604.

UNITED STATES v. LINENS.

[16 Leg. Int. 388;[1] 3 Phila. 523.]

District Court, E. D. Pennsylvania. Dec. 9, 1859.

CUSTOMS DUTIES—FORFEITURE—EXACTING PENAL DUTIES.

The goods in this case had been delivered to the claimant on his execution of a bond with surety, approved conformably to the provisions of the eighty-ninth section of the act of 1799 [1 Stat. 695]. Judgment of condemnation having been afterwards rendered, the amount of the bond was paid into court. A commissioner was appointed to distribute the fund thus in court. The commissioner's report showed that in the course of the proceedings for the delivery of the goods to the claimant, the penal duty of 20 per cent. had been exacted from him by the collector, in addition to the regular duties. The claimant paid the amount of the penal duties, protesting against its exaction, and, before the commissioner, claimed its return to him out of the money in court. The commissioner reported that it should be returned accordingly. The United States excepted to the report.

Mr. Van Dyke, Dist. Atty., in support of the exception.

Mr. Loughead, for claimant.

CADWALADER, District Judge. The subject of this exception has been, in part, considered in the opinion of the court delivered to-day in the case of U. S. v. Segars [Case No. 16,249], Mayoz, claimant. According to the opinion of the supreme court expressed in [U. S. v. Sixty-Seven Packages of Dry Goods] 17 How. [58 U. S.] 93, 94, the exaction of the penal duty, after the prosecution to forfeit the goods had been instituted, was illegal. It has been said, however, that, in the present case, the appraisers, before the return of their valuation, deducted from it the amount of the regular duty, and that, consequently, the whole amount, which, if the exception should be sustained, will be received by the United States, will not exceed the sum rightly receivable. The question whether the amount of the regular duties was, in fact, thus deducted by the appraisers from the valuation, cannot be judicially investigated. According to the decision in [Hoyt v. U. S.] 10 How. [51 U. S.] 137, the court must assume that the goods were properly appraised at their market value. The case is, therefore, simply that of an exaction, by the collector, of an excess above the amount of duties properly receivable. The district attorney objects to the reimbursement of this excess out of the fund in court. He contends that it is only recoverable in an action against the collector, and insists that the present demand of this claimant against the United States should, no more than any distinct independent demand of the same party, be deducted from the fund in court.

In his argument, the difference between the exaction of such a payment by the collector, before information filed at the suit of the United States, and its exaction afterwards, has been overlooked. When the information is filed the goods are taken out of the hands of the collector, and pass into those of the marshal, whose custody from thenceforth is that of the court. [Ex parte Hoyt] 13 Pet. [38 U. S.] 279. In the present case, if payment of the penal duty had been exacted before information filed, the goods, according to the above cited opinion in 17 How. [58 U. S.] would have been exempted from liability to forfeiture. They have nevertheless been condemned as forfeited. The collector's act after the information filed, could not affect the result of the prosecution. The present is a converse question. The claimant became entitled to a delivery of the goods to him upon payment of the duties assessed, as if they had been legally entered. When the collector exacted the payment of a greater amount, the proceeding was under the direction and control of the court. The claimant was entitled to the court's protection against the demand of the excess. Its payment was, however, exacted, the collector and naval officer having refused to give a receipt for the duties until it was paid. Such an exaction, after information filed, should be redressed on a principle similar to that which would apply if the exaction had been made by the marshal or other officer of the court. The excess which passed into the hands of the collector has been accounted for by him to the United States, who now demand, in effect, the double forfeiture of this penal amount. The act of the court would therefore sanction a wrong, if the commissioner's report should not be confirmed. The wrong would result from a proceeding which has been, or ought to have been, from its commencement, under the direction and control of the court. This cannot be permitted. The case is not within the statutes and rules of decision applicable to ordinary cases of duties paid under protest. The commissioner's report is consequently confirmed.

[1] [Reprinted from 16 Leg. Int. 388, by permission.]

UNITED STATES v. LINENS. See Case No. 16,249.

Case No. 15,605.

UNITED STATES v. LINN.

[Crabbe, 307.] [3]

District Court, E. D. Pennsylvania. Dec. 12, 1839.

CUSTOMS DUTIES—BOND—SURETY.

Under the fifth section of the act of July 14, 1832 (4 Story's Laws, 2323 [4 Stat. 591]), a surety is liable on a bond given for duties under $200.

This was a suit on a bond given by John C. Swain for duties under two hundred dollars, and on which the defendant [John H. Linn] had become surety.

On the 12th of December, 1839, the case came on for trial, before HOPKINSON, District Judge, and a verdict was taken for the plaintiffs, for the full amount demanded, subject to the opinion of the court on the question, whether the surety was liable, the bond having been given for duties under two hundred dollars, which the act of July 14, 1832, § 5 (4 Story's Laws, 2323 [4 Stat. 591]), directed to be paid in cash.

On the 1st of September, 1843, judgment was given for the plaintiffs on the verdict.

Case No. 15,606.

UNITED STATES v. LINN et al.

[2 McLean, 501.] [1]

Circuit Court, D. Illinois. June Term, 1841.[2]

PAYMENT—APPLICATION—SURETIES—ACTION ON OFFICIAL BOND—PREVIOUS DEFALCATION.

1. The general doctrine as to the application of payments, is, that if the debtor fail to apply them, the government may do so. If both fail, the law will make the application, as the principles of justice shall require.

[Cited in U. S. v. Bicket, Case No. 14,590.]

[Cited in State v. Sooy, 39 N. J. Law, 547.]

2. Where different sets of sureties are concerned, this rule does not govern.

[Cited in brief in McCune v. Belt, 45 Mo. 176.]

3. Sureties are only bound, on a receiver of public moneys' bond, that he shall pay over all moneys received, after the execution of the bond.

4. They are not bound for any previous defalcation.

5. And the government can not bind them, by the exercise of any supposed power, to make application of the payments made.

6. If the sureties are at all responsible, they must be made so by strict law.

7. As between different sureties, the court will apply the payments so as to avoid injustice. And this they can do from the face of the transcript.

8. Where the payments exceed the receipts in any one quarter, the excess shall be applied to the payment of the previous quarter, though such quarter be prior to the date of the bond.

9. Where a general payment has been made some years after expiration of the bond, the payment must be applied, as stated on the transcript, to discharge, pro tanto, the general balance.

At law.

Mr. Baker and Mr. Butterfield, U. S. Dist. Atty., for the United States.

Logan, Brown & Davis, for defendants.

OPINION OF THE COURT. This action is brought on an official bond, given by [William] Linn, as receiver of public moneys, and signed by the other defendants, as sureties. The defendants pleaded that Linn had paid over all moneys which had come to his possession, as receiver. The bond, dated the 2d of May, 1831, was given in evidence, and, also, a transcript from the books of the treasury, showing the accounts of Linn, from the 12th of January, 1831, to the 12th of February, 1835. From the face of this transcript, it appeared that Linn was charged with various sums of money, received prior to the date of the bond; and, from some of the quarterly payments, it appeared that he had paid over more money than he received within the quarter. The credits, as they were received, were entered on the books, and the balance against the receiver was carried, as a debit, to the accounts of the succeeding quarter; and, in that form, the general balance was made up against him. On this state of facts, it was contended that the government had a right to apply the money received, subsequently to the date of the bond, to the discharge of any balance which the receiver owed at the date of the bond; and, that the payment had been so applied, appeared from the transcript.

The doctrine, as to the application of payments, is, at all times, important; but it becomes peculiarly so when the rights of sureties are affected. This question was somewhat examined in the case of U. S. v. January and Patterson, 7 Cranch [11 U. S.] 373. In that case the supervisor of the revenue for the district of Kentucky (not Ohio), in due form of law, appointed John Arthur, collector of the revenue. On the 25th of August, 1797, he and his sureties executed a bond, for the faithful performance of his duties, in the penalty of $4,000. On the 23d of March, 1799, the collector gave another bond, with Patterson, surety, in the penalty of $6,000. The duties of the collector were commenced, and, from that time up to the 30th of June, 1802, he was charged with having collected $30,584.99½. On the settlement of his account, in 1803, he was in arrear $16,181.15½, and suits were instituted on each of the bonds. Performance was pleaded, to which the plaintiffs replied, that he had not collected and paid over, &c. Pending the suit, Arthur died. The supervisor kept one general account, only, against the collector. On the trial the general account was exhibited, showing the above balance. They also showed the balance appearing to be due, when the second bond was

[3] [Reported by William H. Crabbe, Esq.]

[1] [Reported by Hon. John McLean, Circuit Justice.]

[2] [Reversed in 1 How. (42 U. S.) 104.]

given, amounting to the sum of $6,183.59½. The defendants proved, by a witness, that James Morrison, the late supervisor, informed him that Arthur had paid a sufficient sum to discharge the bond first given. This fact was proved by the supervisor, and he admits that he may have told January that the whole of the bond would be paid off, if the payments made by Arthur should be so applied, and that it was his opinion that was the proper application of them. On this state of facts, the plaintiffs moved the court to instruct the jury, that the promise of the supervisor was not, of itself, an appropriation of the payments, unless it was followed by some act of appropriation. The court overruled the motion, and instructed the jury, if they believed the supervisor had made the election and promise, as proved, it was a declaration of his election how the payments should be applied, and that an entry on the books to that effect was unnecessary. To this opinion an exception was taken. The court say the debtor may make the application of a payment at the time of making it; and, if he fail to do so, the creditor may make it. That, if neither exercise this right, the law will make the application. And, the court further say, that a majority of the judges are of opinion, that the rule, adopted in ordinary cases, is not applicable to a case circumstanced as this is, where the receiver is a public officer, not interested in the event of the suit, and who receives on account of the United States, where the payments are indiscriminately made, and where different sureties, under distinct obligations, are interested. It will be generally admitted that moneys arising due, and collected subsequently to the execution of the second bond, can not be applied to the first bond, without manifest injury to the surety in the second bond, and vice versa; justice between different sureties can only be done by reference to the collector's books. The judgment of the circuit court was reversed.

In U. S. v. Kirkpatrick [9 Wheat. (22 U. S.) 720], the court say "the general doctrine is, that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notions of justice. It is certainly too late for either party to claim a right to make an appropriation, after the controversy has arisen, and, a fortiori, at the time of the trial. In cases like the present, of long and running accounts, where debits and credits are perpetually occurring, and no balances are otherwise adjusted, than for the mere purpose of making rests, we are of opinion that payments ought to be applied to extinguish the debts, according to the priority of time, so that the credits are to be deemed payments, pro tanto, of the debts antecedently due." This view was given on an instruction of the circuit court, to which exception was taken, "that the payments made by the collector, for whom Kirkpatrick was surety, might, under the circumstances, be applied to the discharge of the balance due from collections made under the acts, which were in force when the bond was given." Now, what were the circumstances referred to? Reed was appointed collector the 11th of November, 1813, by the president, which appointment continued until the end of the succeeding session of the senate. The 24th of January, 1814, he was reappointed to the same office, by the president and senate. And the question was, whether the responsibility of the sureties extended beyond the duration of the first commission, and the court held, very properly, that it did not.

It will be observed that, in this case, there was no question between the liabilities of different sets of sureties. The general rule as to the application of the payments, under such circumstances, was unquestionably correct. But the doctrine here laid down does, in no respect, conflict with the previous decisions in U. S. v. January and Patterson [supra]. In that case the court say, the ordinary rule which governs the application of payments does not apply. And the reason was, that distinct interests arose under different surety bonds, which took the case out of the general rule. And that this is the true principle, will be shown by subsequently adjudicated cases. It may be proper here to remark that, in the case of Miller v. Stewart, 9 Wheat. [22 U. S.] 680, the case preceding that against Kirkpatrick, the court held that the contract of a surety is to be construed strictly, and is not to be extended beyond the fair scope of its terms.

In U. S. v. Nicholl, 12 Wheat. [25 U. S.] 505, the court say: "The case of U. S. v. January and Patterson, 7 Cranch [11 U. S.] 572, is, in point, to show that, as to any disbursements of money, after the 30th of November, 1822, for which Swartwout was entitled to credit, it was at the election of the government to apply them to either account. But there is no necessity for the application of the principle to this case." The court well remarked, that there was no necessity for the application of the above principle in that case. What was meant by the power of the government to apply the payments, as decided in U. S. v. January and Patterson [supra], is not easily apprehended. For it is manifest that, in that case, the court decided no such principle, but directly the contrary. They lay down the general principle as above stated, and then say that the rule does not apply where there are different sets of sureties. That, to do justice to them, a reference must be had to the books, and, consequently, to the dates of the entries. Mr. Justice Tremble, who wrote the opinion in the Case of Nicholl, must have used this language without referring to the case of U. S. v. January and Patterson, or

he must have referred to the general principle there laid down, and not to the exception on which the decision of the case turned.

There is no question that has ever come before the supreme court, better settled, than that a surety can only be bound from the date of his bond. No matter if the officer, at the time the surety is given, be a defaulter, unless the bond shall specially stipulate for past performances, or the money previously received shall be in the hands of the officer, the surety is not bound. This question has frequently arisen on bonds given by receivers of public moneys. A case of this kind was decided at the last term, between U. S. v. Boyd, 15 Pet. [40 U. S.] 187. Boyd's duties, as receiver, commenced the 27th of December, 1836; the bond, on which the suit was brought, was dated the 15th of June, 1837; and the condition was, "that Boyd should faithfully discharge the duties of his office of receiver of public moneys, for four years, from the 27th of December, 1836;" and the court held that the sureties were not bound for any defalcation, prior to the date of the bond. And they refer to the case of U. S. v. Giles, 9 Cranch [13 U. S.] 212, where it was held, "if the marshal, before the date of his official bond, receive money upon an execution due to the United States, with orders from the comptroller to pay it into the Bank of the United States, which he neglects to do, the sureties in his official bond, executed afterwards, are not liable therefor, upon the bond, although the money remained in the marshal's hands after the execution of the bond." That was a very strong case. For we should have supposed that a liability might arise on the bond for a failure to pay over the money, in the hands of the officer, at the time the bond was executed. The bond is, for the faithful performance of his duties, generally; and it is supposed to be a continuing duty to pay over money in his hands, as well after as before the execution of the bond. And this view is sustained in Farrar v. U. S., 5 Pet. [30 U. S.] 373. The court there say, that "for any sum paid to Rector (surveyor general) prior to the execution of the bond, there is but one ground on which the sureties could be held bound, and that is, on the assumption that he still held the money in bank, or otherwise. If still in his hands, he was, up to that time, bailee to the government."

Now, the question arises, whether the government, in the case of a receiver of public moneys, can apply the moneys received by him, and paid over subsequently to the execution of his bond, in discharge of a sum due by him prior to the date of the bond. If it can not do this, in the language of the court, in the case against January and Patterson, the ordinary rule in regard to the application of payments, does not apply where the interests of sureties are involved. And this we take to be sound law. The general principle is a sound one, but it can not apply to the prejudice of third parties. The contract of the surety is, that the officer shall pay over all moneys that shall come into his hands, after the execution of the bond. Where money is thus received and paid over, to apply it to any other purpose than a discharge of the liability arising subsequently to the bond, and hold the sureties responsible, would be an essential alteration in the contract. Not an alteration in form, but in substance; and this, it is clear, the government has no power to make.

That such a power should be assumed to be exercised, under any supposed right in the government to make an application of the payments, is extraordinary. Such an act is not only in direct opposition to the contract, but it is a fraud upon the sureties—such a fraud as no court, the facts being undeniable, could sanction. It will be recollected that the application is the act of the government. And, if it have not power to make it under the above circumstances, no such power exists, where the rights of third parties are involved. The doctrine well applies between the principal, his sureties, and the government. The sureties are bound, not for the performance of certain duties, but, positively, to pay so much money. Now, we will suppose that the principal is indebted to the government in a sum for which no security has been given, and, under such circumstances, a general payment is made, no one can doubt that the government may apply the payment to the discharge of either debt. And the sureties can not complain of this application; for the bond is without a condition, or, at least, it does not bind the principal to pay over moneys received from a particular source. It is this condition in the bond, to pay over moneys received, for instance, in payment of public lands, that takes the case out of the ordinary doctrine on this subject. And, unless the rights of sureties are totally disregarded, this exception must exist. It was made by the court, in the case of January and Patterson; it is sanctioned by the immutable principles of justice, and can not, in good faith, be departed from.

We are, then, clearly of the opinion that the government could not apply the moneys received, and paid over by Linn, since the execution of the bond on which this suit is brought, in discharge of any balance due before the bond was given. And the court and jury can judge, from the face of the transcript, of the applications to be made, so as to avoid injustice to the sureties, which, at various times, were given by the receiver. Where the payments of any quarter exceed the receipts for such quarter, the excess shall be applied to the balance against the receiver at the beginning of the quarter. And this upon the ground, that it is not presumable the receiver made payments in advance, of anticipated receipts. The surplus

will be presumed to have been paid out of moneys in his hands, prior to the execution of the bond, provided previous quarters, from the date of the bond, have been fully paid. It appears that a payment of $23,000 was made, in 1838, by the receiver. This was after his resignation, and several years after the four years had expired, for which the bond was given. The court, in regard to this payment, can make no other application of it than has been made in the transcript. It will go to discharge, pro tanto, the general balance against the receiver and his sureties.

On the above principles, the case was submitted to the jury, who found a large balance in favor of the United States, for which a judgment was rendered.

[NOTE. For the opinion of the supreme court in this case upon certificate of division of opinion, 15 Pet. (40 U. S.) 290. Upon a writ of error in the supreme court, the judgment of the circuit court was reversed. 1 How. (42 U. S.) 104.]

Case No. 15,607.

UNITED STATES v. The LION. SAME v. The MAHALA. SAME v. The METEOR.

[1 Spr. 399.] [1]

District Court, D. Massachusetts. April, 1858.

PRACTICE IN ADMIRALTY—FORFEITURE—OWNERS—SECURITY FOR COSTS.

1. In a libel in rem for a forfeiture, after a default, there must be some hearing; before a decree of forfeiture.

[Distinguished in Miller v. U. S., 11 Wall. (78 U. S.) 302. Approved in dissenting opinion in Miller v. U. S., 11 Wall. (78 U. S.) 327, and in dissenting opinion in Tyler v. Defrees, 11 Wall. (78 U. S.) 354. Cited in U. S. v. Clarke, 20 Wall. (87 U. S.) 112; U. S. v. The Mollie, Case No. 15,795.]

2. This may be by merely examining the libel and the return of the marshal, and evidence that the owners had actual notice, and had wilfully made default, having knowledge of material facts.

[Cited in Miller v. U. S., 11 Wall. (78 U. S.) 302, and in dissenting opinion in Miller v. U. S., 11 Wall. (78 U. S.) 327; U. S. v. Clarke, 20 Wall. (87 U. S.) 112; U. S. v. The Mollie, Case No. 15,795.]

3. Upon suggestion that the owners were unable to give security for costs, the court required an affidavit of ownership, inability and merits, before it would require the government to make further proof of the allegations of the libel.

4. The libel having been dismissed, the owner was allowed to intervene as claimant, without giving security.

5. In such case, the vessel, or if it is sold, the proceeds, will be delivered to the claimant free of cost.

These were three libels of information against fishing vessels, alleging that they became forfeited by violations of law in obtaining the fishing bounty. The owners did not put in a claim and give stipulations for costs, as required by the admiralty rule, to entitle them to be recognized as parties, and there was, consequently, no appearance by any claimant. Mr. Hallett and Mr. Scudder, as amici curiæ, suggested that the owners, from poverty, were unable to give security for costs, and requested the court to require the government to produce full proof of the allegations in the libel. This was resisted by Mr. Woodbury, district attorney, who contended that as there was no appearance, there must be a default, and a decree of forfeiture, if the libel set forth a prima facie case.

SPRAGUE, District Judge, said, in substance, that the owners could not be recognized as parties, without putting in a claim, and giving security for costs. A default, therefore, had been properly entered. It is contended, by the district attorney, that condemnation follows of necessity upon default, without a hearing, and such was the requirement of Collection Act 1790, c. 35, § 67 [1 Stat. 176], as to the forfeitures therein referred to. But these prosecutions are founded upon St. 1813, c. 35, § 6 [3 Stat. 51], which expressly refers to St. 1799, c. 22 [1 Stat. 695], for the mode of prosecution, the eighty-ninth section of which provides that after a default, "the court shall proceed to hear and determine the cause according to law." This makes it imperative that there shall be some hearing before a decree of forfeiture, but to what extent must depend upon the circumstances of the case. The court will at least examine the allegations of the libel, to see if they are sufficient in law, and the return of the marshal, and such affidavit or affidavits as the district attorney shall submit. Where it appears that the owners have had full notice of the proceedings, and ample opportunity to intervene, and have voluntarily declined to do so, slight additional evidence will be sufficient. Indeed a wilful omission by the owners to answer, and thereby make disclosure as to material facts within their knowledge, might, of itself, satisfy the court that a forfeiture should be decreed. But the court will require the prosecutor to introduce full proof of the allegations in the libel, whenever the circumstances shall make it reasonable.

In the present case, it is suggested that the owners have a good defence, but are unable to give the security which, by the rules of the court, is necessary to entitle them to be recognized as parties. I am disposed to listen to this suggestion, and to require the district attorney to produce further evidence, if the owners shall file an affidavit of ownership, inability, and merits. The affidavit must be equivalent to a claim and answer, and must fully set forth the grounds of defence. If such affidavit were not required, an owner who had given no security for costs and entered no appearance, might have an undue advantage, by requiring the govern-

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

ment, upon a mere suggestion to the court, to prove allegations which, if an answer were put in, the party would be compelled to admit. Further proceedings were then postponed, to give time to the owners to file such affidavit. Afterwards, upon motion of the district attorney, pursuant to an arrangement made out of court, a default and decree of forfeiture was entered against the Mahala and the Meteor, and the libel against the Lion was dismissed, with a certificate of reasonable cause.

Some time before this decree, the Lion had been sold under an order of court, upon an application made by the district attorney, on the ground that the expenses of holding her in custody were greatly disproportionate to her value, and the marshal had paid the net proceeds into court, having previously deducted $101 for his expenses and fees. After the decree dismissing the libel, Hallett and Scudder moved the court that John L. Lombard, the owner of the Lion, might be permitted to intervene and claim the proceeds, without giving a stipulation with surety, which motion was allowed, there being no other claimant of the proceeds, and no contestation upon which costs could arise. The proctors for the claimant then made a motion, that the marshal be ordered to pay into the registry the residue of the gross proceeds of the sale, that is, the $101 which he had deducted for expenses and fees. The court held, that it appearing by the discontinuance of the libel that the vessel was innocent, the expenses created by the government in the prosecution against her should be borne by the government. That were she now in the custody of the marshal, the court would order her to be delivered to the owner, without charge. Having been sold, the proceeds were substituted for the vessel. The sale was not made for the benefit of the owner, he had not intervened, and could not have been liable for the expenses of custody. The sale was merely to relieve the government from the burden of keeping, and the expense of the sale should not be deducted from the proceeds, which belonged to the owner. The motion was granted, and an order made on the marshal to pay the residue of the gross proceeds into the registry, and then the whole was ordered to be paid to the claimant.

Case No. 15,608.

UNITED STATES ex rel. RITCHIE v. LITTLE.

[3 Cranch, C. C. 251.] [1]

Circuit Court, District of Columbia. Dec. Term, 1827.

PLEADING AT LAW—NUL TIEL RECORD—APPOINTMENT OF GUARDIAN.

1. When the record set forth in the declaration is not the foundation of the action, but only matter of conveyance or inducement, nul tiel record is not a good plea, for it is no answer to the whole count.

2. When the record is shown forth in the declaration, the defendant may deny the operation thereof.

3. An order of the orphans' court, that J. T. R. enter into bond as guardian to J. W. O., is not an appointment of J. T. R. to the office of guardian.

This was an action of debt [against John Litle] for $18,000, the penalty of Mrs. Ann Ott's administration bond, in which this defendant, John Litle, was surety. It was brought in the name of the United States, for the use of John T. Ritchie, guardian of John W. Ott, the infant son of Doctor John Ott, upon whose estate Mrs. Ann Ott, his widow, was administratrix. The condition of the bond was in the usual form, that she should "well and truly perform the office of administratrix, according to law, and should, in all respects, discharge the duties required by law of her as administratrix, without any injury or damage to any person interested in the faithful performance of said office."

The declaration recites the bond with its conditions; and avers, that "the said Ritchie was appointed guardian of the said John W. Ott, infant, by order of the orphans' court of the county aforesaid, passed, made, and entered on the ninth day of August, 1825, as will more fully appear by the record of the said orphans' court, which for greater certainty, is here referred to, and an official transcript from which is to the court now here shown, and is in these words: "Tuesday, the 9th August, 1825. The court met, &c. John T. Ritchie files in court a written application from John W. Ott, that John T. Ritchie may be made his guardian. Whereupon it is ordered, that said John T. Ritchie enter into bond, as guardian of John W. Ott, in the penalty of $10,000, with Doctor Charles A. Beatty, and Mary C. Ott, as securities. Copy from the record of the proceedings of the orphans' court of Washington county, District of Columbia. Test: Henry C. Neale, Reg. Wills."

The breach assigned is, that Mrs. Ott did not pay over to the said J. T. Ritchie, $1,000, according to an order made by the orphans' court, on the 10th of August, 1825.[2]

The defendant pleaded "that the said John T. Ritchie is not, nor ever hath been guardian of the said John W. Ott, in manner and form, as the plaintiffs have above, in the said declaration, in that behalf alleged; and this, he the said defendant prays may be inquired of by the country, &c."

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] The declaration concludes thus: "And therefore they bring suit, &c., and the said plaintiffs by their said attorney, bring here into court, the letters of appointment of the said John T. Ritchie, as guardian aforesaid, whereby it appears to the court here, that the said John T. Ritchie is the guardian of John W. Ott, aforesaid, and has the care of his person and estate."

To this plea there was a general demurrer and joinder.

Mr. C. C. Lee and Mr. Jones, in support of the demurrer, contended that the defendant could not deny the guardianship without denying the record, by plea of nul tiel record.

Mr. Marbury, contra. It is not necessary that the plaintiff should show himself to be guardian by matter of record. He might have been guardian by other means; and the record does not show an appointment by the orphans' court. It is only where the cause of action, or matter of defence, is matter of record, that it is necessary to refer to the record, or to plead nul tiel record. It is like the plea of never administrator.

Mr. Redin, on the same side, cited 1 Chit. 481, and 2 Chit. 450, that the plea of nul tiel record only denies the existence of the record. If J. T. Ritchie might have been guardian, although there might have been no such record, nul tiel record would have been a bad plea. This court has decided, in the case of Mauro v. Ritchie [Case No. 9,312], that the appointment was absolutely void, because the judge of the orphans' court had not jurisdiction. It is therefore no record.

THE COURT (THRUSTON, Circuit Judge, absent) gave judgment for the defendant upon the demurrer:

1. Because, as the record set forth in the declaration, was not the foundation of the action, but was only matter of conveyance or inducement, the plea of nul tiel record was not an answer to the whole count; for the count avers letters of guardianship, and makes a profert of them; and non constat, that Ritchie was not guardian, although not appointed by the orphans' court, as is supposed to have been stated in the record set forth in the declaration; and notwithstanding the issue on the plea of nul tiel record, if it had been pleaded, might have been found for the defendant, the plaintiffs would not have been precluded from showing that Mr. Ritchie was guardian by other means.

2. Because nul tiel record is not a good plea where the record is "showed forth;" but the defendant may deny the operation thereof; namely, that the record does not show the appointment. Com. Dig. "Pleader" (2 W. 13); Young v. Pennington, Hardr. 158; System of Pleading, 368, 369; Eden's Case, 6 Coke, 15b, and Co. Litt. 260a, says, "If a grant, by letters patent under the great seal be pleaded and showed forth, the adverse party cannot plead nul tiel record; for that it appears to the court that there is such a record; but inasmuch as it is in the nature of a conveyance, the party may deny the operation thereof; therefore he may plead non concessit, and prove in evidence that the king had nothing in the thing granted, or the like; and so it was adjudged."

3. Because nul tiel record is not a necessary plea where the record is not the foundation of the action.

4. Because the record recited in the declaration does not purport to be an appointment of Mr. Ritchie, as guardian, and therefore the plea that he never was guardian, does not conflict with that record. The record only seems to take it for granted that he had been before appointed in some way not stated; perhaps by the infant himself. It is only an order that an existing guardian should give bond and security.

Case No. 15,609.

UNITED STATES v. LITTLE.

[1 Cranch, C. C. 411.] [1]

Circuit Court, District of Columbia. June Term, 1807.

CONSTABLE—FEES.

The constable is not entitled to any fee on an execution not served.

Indictment [against Israel Little] for taking illegal fees. The question was whether the constables are entitled to fifty cents for every execution returned, but not served. The act of congress says for every execution served and returned.

THE COURT (nem. con.) decided that the constables were not entitled to any fee upon an execution unless it be served and returned.

Case No. 15,610.

UNITED STATES v. LITTLE.

[2 Wash. C. C. 159.] [2]

Circuit Court, D. Pennsylvania. April Term, 1808.

WITNESS—PROCESS AGAINST—CONTINUANCE.

The court continued the cause, on the application of the defendant, a witness being absent in New Jersey; on the ground, that a state magistrate cannot issue process, for defendant's witnesses, into another state.

Indictment for a misdemeanour. The defendant was bound over by a state magistrate, and the recognizance, being returned into court, a bill was found this term. The defendant moved for a continuance, on the ground that his material witness left Philadelphia, before he was bound over, and went to New Jersey; and that, notwithstanding all his inquiries, he has not been able to hear of, or find him. The question was, whether the defendant had not been negligent, in not obtaining compulsory process, for the witness, from the magistrate who took the recognizance.

Mr. Hopkinson, for defendant, contended that the magistrate who binds over, cannot

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

issue process for the defendant's witnesses; but still less can he bind over the defendant's witnesses to appear at court. But, even if a judge of this court could have done this, which he denied, and stated this to be the practice of the state; still it is clear, that a state judge could not send process into Jersey. The defendant could not get process from the clerk of this court, until the bill is filed; or at any rate, until the recognizance is returned to it.

Mr. Dallas, contra. The right of the defendant to compulsory process is under the constitution; and if he cannot procure it from the examining magistrate, he may entirely lose the benefit of his testimony. He stated the practice differently from Mr. Hopkinson.

BY THE COURT. The objections to a state magistrate issuing process into New Jersey, are conclusive.

The cause was continued.

UNITED STATES (LITTLE v.). See Case No. 8,396.

Case No. 15,611.

UNITED STATES v. The LITTLE ANN.

[2 Hall, Law J. 457.]

District Court, D. New York. Aug. Term, 1809.[1]

UNLAWFUL EXPORTATION—FORFEITURE OF VESSEL AND CARGO.

[A vessel, having the president's permission to proceed to the West Indies for American property, condemned, with her cargo, for having on board other merchandise besides that permitted.]

[This was a libel of forfeiture filed against the brig Little Ann and cargo on the ground of attempting an unlawful exportation of merchandise from the United States.]

The brig, having the president's permission to proceed to the West Indies for American property, sailed from Bristol in the state of Rhode Island, and when at sea off the east end of Long Island was captured by the United States frigate Chesapeake and sent into this port for trial. Besides the articles of permitted stores there were found on board other goods, and the libel charged her with lading on board merchandise in the nighttime without the permit of the collector or the inspection of a customhouse officer and of exporting the same.

The judge condemned the vessel and cargo on the ground of an unlawful exportation from the United States, and decreed restitution of the articles which were permitted by the collector as necessary stores for the voyage, and laden under proper inspection.

[The decree in this case was reversed, upon appeal, by the circuit court. Case No. 8,397.]

[1] [Reversed in Case No. 8,397.]

Case No. 15,612.

UNITED STATES v. The LITTLE CHARLES.

[1 Brock. 347.][1]

Circuit Court, D. Virginia. May 27, 1818.

EMBARGO—REPORT OF MASTER—LIBEL—CHARACTER OF VESSEL—EXCEPTIONS IN STATUTE.

1. A libel against a vessel for violating the embargo laws, must contain a substantial statement of the offence, and it must be made with reasonable precision. But, inasmuch as the embargo act of December, 1807 [2 Stat. 457], prohibits all vessels, whether foreign or domestic, registered, or coasting vessels, from sailing to any foreign port or place, and the supplemental act of January, 1808, annexes the penalty of forfeiture to any vessel which violates either act, it is not necessary that the libel should set forth the particular character of the vessel.

2. The exception in the act exempting foreign vessels from its penalties, in certain cases, need not be noticed. The libel is good, though it does not charge that the vessel libelled, was not embraced within the exception.

3. A vessel is charged with having violated the embargo acts, in departing from a port of the United States, and proceeding to Antigua. The proof is, that she was at Camden, in North Carolina, in December, 1807, and January, 1808, and was in the port of Norfolk, in April, 1808. *Held*, that the report and manifest of her cargo, with the affidavit made by the captain, before the collector at Norfolk, which are adduced as proof, that she took in her cargo at Antigua, is admissible evidence.

4. These documents constitute one entire transaction; they need not the entry of the ship to make it complete.

5. In a prosecution against the ship itself, a forfeiture is incurred by her violation of the act, whether with, or without the authority of the owner. The vessel is put in action by the crew, who are guided by the master; she acts, and speaks by the master, and reports herself by the master; she is, therefore, affected by his report, whether the owners be so affected or not. But the owner is properly affected by it. The master is selected by the owner as his agent, amongst other things, for reporting the vessel. The report is prescribed by law. It must state, truly, the voyage, and the place from which she last sailed. The owner then has authorized the master to make the report, and though he may controvert it, yet it is prima facie evidence.

[Cited in U. S. v. Hall, Case No. 15,281; U. S. v. The Malek Adhel, 2 How. (43 U. S.) 234; Jecker v. Montgomery, 18 How. (59 U. S.) 116. Applied in Dobbins v. U. S., 96 U. S. 401. Cited in U. S. v. Hutchinson, Case No. 15,431.]

[Cited in Boggs v. Com., 76 Va. 994.]

6. After a vessel has been seized and libelled, and a forfeiture claimed, the court of admiralty does not lose its jurisdiction to condemn the vessel, by losing possession of it.

[Followed in Otis v. The Rio Grande, Case No. 10,613.]

[Cited in U. S. v. Mackoy, Case No. 15,696.]

[Appeal from the district court of the United States for the district of Virginia.]

The schooner Little Charles, with her tackle, apparel, and furniture, was seized in the port of Norfolk, in 1808, as forfeited to the United States, by reason of an alleged violation of the embargo laws. The attorney for the United States, filed his libel

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

in the district court of the United States at Norfolk, charging, "that the said schooner Little Charles, on or about the 19th day of January, 1808, did depart from the port of Camden, in the district of Camden, in the state of North Carolina, which said port is a port of the United States, and proceed to a foreign place, to wit, to the island of Antigua, with a cargo on board, contrary to the provisions of the act of the congress of the United States, entitled, 'An act laying an embargo on all ships and vessels in the ports and harbours of the United States,' and of the act, &c., entitled, 'An act supplementary thereto,' &c., by which actings and doings, the said schooner Little Charles hath become forfeited to the United States, and hath been seized within the jurisdiction of this court, as forfeited, &c. Wherefore, the United States pray, that the proper and legal process may be issued in this case, that the said schooner, her rigging, tackle, apparel, and furniture, may be decreed by this court, to be sold as forfeited to the United States; that the proceeds of such sale may be appropriated as the law directs," &c.

The embargo law, referred to in the libel, was passed on the 22d day of December, 1807, and the supplementary law, also referred to, annexing the penalty of forfeiture for a violation thereof, was passed on the 9th day of January, 1808. The deposition of Anthony Butler proved, that the schooner Little Charles, sailed from Elizabeth City, in North Carolina, on the 19th of January, 1808, with a cargo of corn and staves, bound, as he was informed by Charles Grice, the owner, for the port of Charleston, in South Carolina, but in reality, the deponent believed, having so heard from several sources, for the West Indies. The report and manifest of the Little Charles, signed and sworn to by the master, James Corrmatt, at the port of Norfolk, on the 31st day of March, 1808, proved, that the schooner had taken in her cargo, which consisted wholly of West India products, at the island of Antigua. After the seizure of the Little Charles, and before the trial of the cause, viz. on the 12th of April, 1808, the judge of the district court of Norfolk, directed the marshal, in whose custody she was, to release the vessel, on the owner's giving bond, with good and sufficient security to the full amount of her value, in ready money, to be ascertained by three disinterested merchants, or shipwrights, and of one hundred dollars in addition thereto, "conditioned to abide and fulfil the further proceedings and final decree of the court, to be had hereafter, upon the subject matter of the seizure and release of the said schooner." The vessel was valued at $1,800, and a bond for $1,900, condition as required, was executed by Charles Grice the owner, and Warren Ashley, and the vessel was forthwith released.

At the trial of the cause, in the district court of Norfolk, in December, 1809, the court rejected the report and manifest of the cargo of the Little Charles, signed by the master as aforesaid, as incompetent testimony, "inasmuch as the ex parte affidavit of James Corrmatt, could not be read as evidence in this cause, to which he is no party, to prove the truth of the facts therein stated, and this being the only evidence to prove this fact, the court doth order and decree, that the libel be dismissed." [Case unreported.] From this decree, the United States appealed to this court.

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

MARSHALL, Circuit Justice. The first point made in this case, respects the pleadings. It is contended, on the part of the claimants, that the libel is insufficient to support a sentence confiscating the vessel. The libel is supposed to be defective, because it does not state the character of the vessel. The court is not informed whether the Little Charles was a foreign vessel, an American registered, or a coasting vessel. If the embargo acts omitted in their prohibitions any vessels of either description, the failure to aver the character of the vessel would certainly be fatal to the libel. The evidence in the cause, showing, that in point of fact, the Little Charles had incurred the penalty of the law, would not supply the want of a case stated in the libel. Nor would the averment, that the vessel had departed contrary to the provisions of the acts of congress, aid the libellants. This libel must contain a substantial statement of the offence, or it will not sustain a sentence of confiscation. These principles were, after mature deliberation, settled in the supreme court, in the case of The Hoppet, 7 Cranch [11 U. S.] 389, 2 Pet. Cond. R. 542. But in the same case it is laid down, "that all those technical niceties which are unimportant in themselves, and which stand only on precedents, of which the reason cannot be discerned, are not to be transplanted from the courts of common law into the courts of admiralty." All, then, that is required is, that the offence created by the law should be stated substantially, and with reasonable precision.

The libel charges, that the schooner Little Charles, did on or about the 19th day of January, in the year 1808, depart from the port of Camden, in the state of North Carolina, a port of the United States, and proceed to a foreign place, to wit, to the island of Antigua, with a cargo on board. The act of December, 1807, declares, "that an embargo be, and hereby is, laid on all ships and vessels in the ports and places, within the limits or jurisdiction of the United States, cleared or not cleared, bound to any foreign port or place." This prohibitory clause extends to vessels of every description. Foreign and domestic, registered and coasting vessels, are equally included in it.

No vessel of either character could proceed from an American to a foreign port, without violating this part of the law. Suppose it pleaded, that this was a coaster, would this excuse? It cannot, therefore, be necessary, in reason, or under the decision in the case of The Hoppet, so far as respects this part of the law, to aver the particular character of the vessel. The defence does not depend on her character.

The only part of the description found in the law, and not in the libel, is, "bound to any foreign port or place." These words are supplied by the charge that she did proceed to a foreign port. The fact charged in the libel, then, is a violation of the prohibitory part of the act of 1807. It remains to inquire whether the law contains any other provision which requires a more particular description of the vessel, or of the offence. The section provides "that nothing herein contained, shall be construed to prevent the departure of any foreign ship, or vessel, either in ballast, or with goods, wares, and merchandize, on board of such foreign ship or vessel when notified of this act." The whole section amounts to this. A general clause forbidding the departure of all vessels, from a port in the United States, to a foreign port, or place, is followed by an exception in favour of a foreign ship, departing in ballast, or with the cargo she had on board, when notified of the prohibition. If it be necessary in the libel to assert, that the Little Charles is not within the exception, then this libel is defective, otherwise it is sufficient. This point, also, has been considered in the supreme court. In the case of The Aurora, 7 Cranch [11 U. S.] 382, 2 Pet. Cond. R. 540, it is said by the court, "that in no case can it be necessary to state, in a libel, any fact which constitutes the defence of the claimant, or a ground of exception to the operation of the law on which the libel is founded."

The third section of the supplemental act declares that, "if any ship or vessel shall, during the continuance of the act to which this act is a supplement, depart from any port of the United States without a clearance or permit, or if any ship, or vessel, shall, contrary to the provisions of this act, or of the act to which this act is a supplement, proceed to a foreign port or place, such ship, &c., shall be wholly forfeited." This act expressly annexes the penalty of forfeiture to any ship or vessel which shall violate either the original or the supplemental act. It is, therefore, unimportant, so far as respects the sufficiency of the libel, which act is violated. If, as has been argued, different penalties were imposed by the act, on different descriptions of vessels, the court would certainly require that the libel should describe the vessel. But so far as the court can understand the law, forfeiture is inflicted on every vessel, of every description, which shall commit the offence charged in the libel. Consequently, it is not necessary, for the instruction of the court, that the vessel should be described. The court is fully satisfied that the libel, in this case, is sufficient to sustain a sentence of condemnation, should the testimony prove the offence charged in it to have been committed.

2. The court will next proceed to examine that testimony. In doing so, the caption which the clerk has prefixed to the documents in the record, will certainly be disregarded, and only the documents themselves be considered as testimony. The offence is, departing from a port in the United States, after the passage of the first and second embargo acts, and proceeding to Antigua, which is a foreign port, or place. That the Little Charles was in the port of Camden, in North Carolina, in December, 1807, and January, 1808, when both those acts passed, is not controverted. That she was in the port of Norfolk, on the 8th of April, 1808, while they were in force, is equally clear, because she was then seized in that port. The inquiry is, had she, in the mean time, proceeded to a foreign port? The report and manifest, with the affidavit, made by the captain, before the collector of the port, at Norfolk, if admissible, in the form in which they appear in the record, are certainly, in the absence of all exculpatory testimony, sufficient to satisfy the mind that the Little Charles took on board, at Antigua, the cargo which was imported into Norfolk, and, consequently, that she had violated the embargo laws.

The objections to the admissibility of this document, are (1) that it is only part of a transaction; (2) that, in a criminal case, the declarations of the captain cannot affect the owner. It will be unnecessary to inquire whether, in any case, part of a transaction may be received as testimony. The general principle, that it may not, is certainly correct; but it might be improper to say, that this general rule admits of no possible exception. The inquiry is, at present, unnecessary, because the court is clear in its opinion, that this is not a part of, but is an entire transaction. The document is a report and manifest, as required by law, with the affidavit annexed, which is also required. Had the report and manifest been offered without the affidavit, or the affidavit without the report and manifest, it would have been part of a transaction But offered together, they form one entire transaction, requiring nothing for its completion. It has been argued, that the entry ought to be produced. But the entry is a distinct and independent act, which must be preceded by, but may not follow the report and manifest. It is to be made by a different person, and if made, may be deferred fifteen days after the report. In the meantime, a seizure, as in this case, may prevent an entry. The validity of this objection cannot be admitted.

The court will next inquire, whether this document can affect the vessel. The argument, that in criminal cases no authority can

be given, that the character of principal and agent disappears, and the parties become accomplices, will not be controverted. If this was a prosecution against the owner personally, and the confession of the master was adduced, to prove that he acted under the authority of the owner, the argument would be entitled to great consideration. But this is not a proceeding against the owner; it is a proceeding against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner. It is true, that inanimate matter can commit no offence. The mere wood, iron, and sails of the ship, cannot, of themselves, violate the law. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is, therefore, not unreasonable, that the vessel should be affected by this report.

But this vessel is the property of another; and his property, it is said, ought not to be wrested from him by evidence, which would be inadmissible in an ordinary question, concerning property. The court thinks otherwise. The master is selected by the owner, as his agent, for the purpose, among others, of reporting the vessel on her coming into port. The report is not a criminal act, but one prescribed by law. It must state, truly, the voyage, and however criminal that voyage may be, in reporting it, the master is in the precise line of his duty, and in the execution of an authority, inseparable from his character as master. This report, then, which is in the very terms prescribed by law, contains, according to the mandate of the law, an averment of the place from which the vessel last sailed. This averment, then, the owner has authorized the master to make for him; and although he may certainly be permitted to controvert it, the court deems it prima facie evidence of the fact. Such evidence has often been considered, in the supreme court, sufficient to warrant a forfeiture in the absence of that testimony, which would be in the power of the claimant, if innocent, and was so considered in the case of The Aurora, already cited.

But admitting the sufficiency of the libel, and the proof, it is contended, that the court has lost its jurisdiction, by losing possession of the thing to be condemned. The stipulation which is substituted for the vessel was, it is said, irregularly taken, and, consequently, cannot be considered as a substitute. That possession of the thing is necessary, as a foundation for the jurisdiction of the court, is, in general, true. There must be seizure to vest the jurisdiction. But it is not believed that the continuance of possession, is necessary to continue the jurisdiction. It is a general principle, that jurisdiction, once vested, is not divested, although a state of things should arrive in which original jurisdiction could not be exercised. No authority has been found, nor is any reason perceived, for making this case an exception to the general rule. If, in proceedings in rem, the vested jurisdiction of the court could be divested by the loss of the thing, the reason must be, that as the thing could neither be delivered to the libellants, nor restored to the claimants, the sentence would be useless, and courts will not render judgments which can operate on nothing But this reason will not apply to any case where the judgment will have any effect whatever: if, for example, the liability of the officer for making the seizure, to damages, be dependent on it, or if the parties have, by consent, substituted other property to abide the fate of the suit. However this may be, the court is not satisfied that its jurisdiction is lost by the circumstance that has occurred, and is of opinion, that the sentence of the district court be reversed, and the Little Charles be condemned and forfeited.

[Subsequently there was a motion for an execution against one Warren Ashley, who had signed a bond with the owner of the Little Charles, then libeled for a breach of the embargo laws. This execution was awarded. See Case No. 15,613.]

Case No. 15,613.

UNITED STATES v. The LITTLE CHARLES.

[1 Brock. 380.] [1]

Circuit Court, D. Virginia. Nov. Term, 1819.

PRACTICE IN ADMIRALTY—FORFEITURE—EMBARGO—BOND.

1. An order, made by a district judge of the United States, for the release of a vessel libelled for a breach of the embargo laws, is as valid, if made by the judge, at his chambers, as if it were made in open court.

[Cited in Cunningham v. Neagle, 10 Sup. Ct. 665, 135 U. S. 56.]

2. Where the condition of a bond is, that the parties will perform the decree of the court, the term "the court," means, the court which shall ultimately decide the cause.

3. The admiralty courts of the United States may proceed, under their general powers, in every case in which they are not restrained from the exercise of those powers by statute.

4. A defendant will not be permitted to avail himself of an irregularity to which he is himself a party.

[Cited in Todd v. The Tulchen, 2 Fed. 603.]

See the proceedings against the Little Charles, Case No. 15,612.

This court, at the May term, 1818, having reversed the decree of the district court, dismissing the libel against the Little Charles, and rendered a decree of forfeiture against the vessel, a monition, issued against Charles Grice, owner, and Warren Ashley, requiring them to appear at the next term thereafter, and show cause why a decree should not be rendered against them, for the sum of mon-

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

ey expressed in the obligation. The bond was executed by these parties, pending the proceedings in the district court, for the appraised value of the vessel and one hundred dollars in addition thereto, according to law, conditioned to perform the decree of the court. Upon the execution of this bond, the marshal released her under an order of the district judge.

Warren Ashley appeared at this term of the court and the attorney for the United States moved for an execution against him. This motion was opposed by Ashley, upon the grounds stated in the following opinion.

MARSHALL, Circuit Justice. This is a motion for an execution against Warren Ashley, who signed a bond with Charles Grice, the owner of the Little Charles, then libelled for a breach of the embargo laws, on receiving which the vessel was restored to the owner. In the district court, the vessel was acquitted; that sentence was, on appeal, reversed, and the vessel was condemned by the sentence of this court. On the return of the monition, which has been issued to the party who signed the bond, Mr. Ashley contends that the proceedings in the case have been so singular, informal, and defective, that no execution can be issued on the bond against him. The objections are:

1. That the order for release, is a nullity, and all the consequent proceedings void, because the order was made by the judge, at his chambers, and not in court. The judicial act appoints certain stated terms of the district court, and gives the judge power to hold special courts at his discretion, either at the place appointed by law, "or at such other place in the district, as the nature of the business, and his discretion shall direct." No power, it is contended, is given to the judge, except when sitting as a court, and, therefore, the form of declaring himself to be a court, is indispensable to the validity of his acts.

This objection seems rather technical than substantial. By law, the district judge alone composes the court. He is a court wherever, and whenever he pleases. No notice to parties is required; no previous order is necessary. The various ex parte orders which admiralty proceedings require, renders this informal mode of acting essential to justice and expedition. The judge will take care that neither party be injured by the orders which he makes ex parte, and where they are of course, it is convenient that they should be made without the formality of summoning the parties to attend. It does not seem to be a violent construction of such an act, to consider the judge as constituting a court whenever he proceeds on judicial business. Such seems to have been the practice in this, and in other districts of the United States. Had the judge prefixed to his order such words as these, "At a special court, held at ——, on this —— day of ——, it is ordered, &c.," the proceedings would have been regular, for the law does not, in terms at least, require that the order for a special court should be made in court, or made any given time previous to its session. To every purpose of justice, the order of the judge, made in his character as a judge, is made by him as a court, whether he declares himself, in words, to be a court, or not. This order is, in its nature, judicial. It is such an order as may be made ex parte; it is signed by the judge, in his official character, and is directed to the officer of the court. Under such circumstances, I cannot overturn a practice which is convenient, which is not liable to abuse, on a mere technical objection.

2. The second objection is, that the condition of the bond has not been broken. It is to perform the decree of the court, which must mean the district court; and by that decree, the libel was dismissed.

This objection, too, must search for other support than is furnished by the merits of the cause. The bond was intended to be substituted for the vessel, and to be acted upon as the vessel would have been acted upon, had it remained in the power of the court. I think myself justified, then, by authority and by reason, in construing the general term, "the court," which is used in the condition, as meaning the court which shall ultimately decide the cause.

3. An objection which I felt most difficulty in removing, was, that the bond was executed to the marshal, and that the valuation ought to have been made by commissioners appointed by the court.

I believe there is no special act of congress prescribing the form of the bond, or the mode of valuing the property. The act for regulating process in the courts of the United States, directs, that in causes in equity, and in those of admiralty and maritime jurisdiction, the proceedings shall be "according to the principles, rules and usages, which belong to courts of equity and courts of admiralty, respectively, as contra-distinguished from courts of common law." The courts of the United States have never doubted their right to proceed under their general powers, as courts of admiralty, where they were not restrained from the use of those powers by statute. It may be, that the proceedings in this case have not conformed strictly to the usages of admiralty. But I do not think the defendant can be permitted to avail himself of an irregularity to which he is himself a party, and which could only affect the libellants. The bond is executed voluntarily to the marshal, for the purpose of being substituted for the vessel, and with full knowledge of the valuation. The libellants might have objected, that the valuation was informal and insufficient. But they have not objected. The stipulation, as it is, was filed in court, and has remained there in place of the vessel. I

do not think, that those who, with full knowledge, have made this stipulation, have placed it in the stead of the vessel, and thereby obtained restitution thereof, can be permitted to allege any unimportant informality in their own act.

The execution is to be awarded.

Case No. 15,614.

UNITED STATES v. LLOYD.

[4 Blatchf. 427.] [1]

Circuit Court, S. D. New York. April 13, 1860.

WITNESS — IMPRISONMENT FOR WANT OF BAIL — APPLICATION FOR DISCHARGE.

1. A person arrested on a warrant issued under section 7 of the act of August 8, 1846 (9 Stat. 73, 74), as a witness on the part of the United States, in a criminal case, and imprisoned for want of bail, was, under the peculiar circumstances of the case, discharged on his own recognizance.

2. The hardships attending the administration of that statute, commented on.

This was an application by one Samuel Marlor, founded on a petition and affidavits, showing that he was imprisoned as a witness in behalf of the United States, and praying that he might be discharged from such imprisonment on his own recognizance or on reduced bail. He was arrested at the instance of the district attorney, in the latter part of March, upon a warrant issued pursuant to the seventh section of the act of August 8, 1846 (9 Stat. 73, 74), and required to give bail to appear as a witness in criminal prosecutions pending in this court against John Lloyd. Failing to furnish the bail required, he was committed to the custody of the marshal.

Charles H. Hunt, Asst. U. S. Dist. Atty.
John O'Rourke, for Marlor.

BETTS, District Judge. The petitioner is a non-resident of this district, and had, when he was arrested, just returned from a voyage to England, after an absence of several months. The indictments against Lloyd charge a series of frauds committed by him against the revenue laws, by the falsification of invoices, and by other criminal acts accompanying the importation of goods to this port from foreign countries, to a large amount, and continued for a considerable period of time. Marlor was, during a portion, if not the whole of the time, a confidential clerk of Lloyd, and it was upon his disclosures that the prosecutions were chiefly founded. He was employed by the United States attorney and the officers of the customs, in collecting and arranging original invoices and letters of Lloyd's, and having them prepared to be used, with his own testimony, as evidence on the trial of Lloyd. Whilst in that confidential relation to the public officers, he was entrusted with some of those documents, and had free access to many other highly important ones. Under these circumstances, he suddenly left the country and went abroad. On his departure, many of those papers and vouchers were found to be missing from the places where they were deposited whilst he had the means of access to them at his pleasure. The district attorney imputed this surreptitious abstraction to Marlor, and prayed that he might be put under stringent securities, so as to assure his personal appearance in court, and also the production of the lost vouchers. Marlor admitted that some of the papers had been entrusted to him, but asserted that he delivered back to the district attorney's office all which he ever had in his charge. On those facts, the judge ordered the witness to give securities for his appearance in court, in the sum of $5,000, and, neither that nor any other sum being offered by him, he was committed to the custody of the marshal, the judge remarking, that if the witness produced the missing vouchers, the amount of the surety, which was designed also to ensure his presence in obedience to a subpœna duces tecum, should the government elect to issue one, would be materially diminished.

On the present application, the representation of facts made when the witness was first arrested, is substantially repeated by the assistants having charge of the district attorney's office, with the farther statement, that the witness has never returned to that office the papers and vouchers before alleged to have been clandestinely withdrawn therefrom. The witness now also files his own deposition, asserting positively that he never abstracted any papers, and has none of them in his possession or control now; that he did not leave the country clandestinely, but went abroad publicly, on family and private business, with the intention of returning here speedily; that he has a family, and is a permanent resident and householder in Providence, Rhode Island, and has been so for thirteen years; that he is engaged there in business as a jeweller, and in a manufacturing establishment, and likewise in constructing a patented discovery, in which he has a personal interest; and that he has returned from his visit abroad, to abide in Providence permanently. He likewise asserts that he is in a very critical state of health, and is confined in jail under circumstances of great bodily exposure and suffering from bad accommodations, and from the want of indispensable medical attendance, and of the care of his family, in his debility and sickness. No testimony is offered, on either side, showing the pecuniary condition or responsibility of the witness.

This case illustrates some of the manifold hardships and inequities to which witnesses are liable, under the authority and administration of the laws which subject them, in criminal cases, to be imprisoned in close confinement, at the discretion, in a good measure, of public prosecutors, to await a summons into

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

court to testify on behalf of the United States. These laws afford no exemption for the aged, or the feeble, or those who, from infirmities of body or mind, are dependent on the attention and the services of others, or who must be separated by such arrest or detention, from the most stringent calls of their own business, or from supplying help or solace to their families or friends, in the extremest exigencies of sickness or destitution. None but those who can furnish competent bail, that is, who have the command of money or credit, can exonerate themselves from instantaneous incarceration for an indeterminate period of time, and, from being imprisoned no less absolutely, with every privation of exercise, wholesome food and personal comforts, than if abandoned culprits. This cruel exaction not only falls upon and overpowers the citizen at home, amidst acquaintances and friends with whom he may retain such degree of intercommunication as may not be inconsistent with his safe custody, thereby mitigating, in some degree, the severity of the injustice to him individually, but, in practice, a stranger on a journey, or pursuing his occupations away from his residence or family, is equally subject to instant arrest and imprisonment, if he knows, or is supposed to know, facts connected with a criminal transaction by an accused party, with whom he may have no connection other than perhaps accidental knowledge of some particular which may tend to convict the suspected party of having committed a criminal offence. It is to be apprehended, moreover, that this oppressive power is not always exercised with the most prudent precaution, or kept in force only during the shortest period possible to secure to the government the benefit of testimony thus sought for; but prosecutions are allowed to be procrastinated, under trivial excuses, so as to cause deeper wrongs and injuries to witnesses than is reasonably necessary.

The case in hand brings to notice some of the bitter privations which the enforcement of this power of imprisoning witnesses may naturally inflict upon them, when they are helpless of all relief. The petitioner had just landed in this city from a foreign voyage, and was here united with his wife and only child, who had come, according to his deposition, from their home in Providence, to meet him on his arrival, and was, when arrested as a witness, about to depart with them to their home. He is evidently painfully enfeebled in health, from a severe and dangerous malady, and requires medical attendance and careful attention and diet. He has been, for many years, a resident and householder in Providence, but possesses no means, and has no friends to give such security for his personal appearance in court as the government is entitled to demand, upon its prima facie evidence of the materiality of his testimony in support of the indictment pending in its behalf. The court is now in session before which the indictment must be tried; and there is, moreover, a strong color for the claim on the part of the government for extraordinary aid to be supplied to it, to compel his attendance as a witness. This naturally led to his being called upon for extraordinary security, and to his bodily detention for want of such bail, and, consequently, to the imprisonment which followed, although that imprisonment must be in a place imminently hazardous to his health, and even to his life. The witness, by his affidavit, now produced, swears positively that he has not in his possession, or under his control, any of the papers or vouchers referred to, and that all of those papers which were ever in his possession were returned by him to the office of the district attorney, before he went abroad; that he is ready to attend court and testify in the cause, and has never been absent for the purpose of avoiding doing so; and that, on the contrary, he immediately returned here, for the purpose of being present as such witness, on learning from his wife that there was a report here that he designed keeping away from being a witness on the trial. He further avers, that his business and family relations are all in this country and that he intends to remain here, subject to any subpœna in the cause. The government furnishes no testimony directly contradicting any of these statements, and does not prove that the petitioner is able to give bail for his appearance, or that there is any fact justifying a presumption that he will not be amenable to a subpœna, whenever he may be required as a witness, or that such a personal recognizance in the case as would be ordinarily required of a householder and resident here, would not be ample security to secure his personal attendance at court.

Under these circumstances, I shall order the petitioner to be discharged from imprisonment on his executing his own recognizance in $1,000 penalty, to appear and testify in court on the trial of the indictments, when notified to do so on the part of the United States, at any time during the term.

Case No. 15,615.

UNITED STATES v. LLOYD.

[4 Cranch, C. C. 464.] [1]

Circuit Court, District of Columbia. May Term, 1834.

ARREST OF JUDGMENT — WANT OF PROSECUTOR'S NAME ON INDICTMENT.

The want of a prosecutor's name upon the indictment is no ground for arresting the judgment.

[This was an indictment against Henry Lloyd.]

Assault and battery. Verdict for United States.

Mr. Hewitt, for the defendant, moved in arrest of judgment, that no prosecutor's

[1] [Reported by Hon. William Cranch, Chief Judge.]

name had been written upon the indictment before it was sent to the grand jury, as required by the act of assembly of Virginia of November 13, 1792, p. 105, §§ 23, 24; and contended that the court would have quashed the indictment upon motion before trial. That there was no difference in principle between a motion to quash, and a motion to arrest the judgment. If there was good ground to quash, there was, a fortiori, good ground to arrest. 4 Bl. Comm. 375; 1 Chit. Cr. Law, 661, 663, 664. The new statute of jeofails of Virginia of 1819 was passed before the case of Com. v. Chalmers, 2 Va. Cas. 76, 77. See Leigh, Comp. St. Va. p. 611.

Mr. Key, contra. Nothing appears upon the face of the indictment to arrest the judgment. The case of Com. v. Chalmers, 2 Va. Cas. 76, 77, is decisive. See, also, Wortham's Case, 5 Rand. (Va.) 669.

THE COURT overruled the motion; THRUSTON, Circuit Judge, not giving any opinion. THE COURT did not state the reasons for their decision, but the grounds were, that the provision of the statutes requiring the name of a prosecutor to be written on the indictment, was for the benefit of the defendant, that he might have security for costs, and to prevent unnecessary expense to the United States. If the defendant goes to trial without such security, he must be considered as having waived the benefit; and the United States have already incurred the expense.

[See Case No. 15,616.]

Case No. 15,616.

UNITED STATES v. LLOYD.

[4 Cranch, C. C. 467.] [1]

Circuit Court, District of Columbia. May Term, 1834.

INDICTMENT — MOTION TO QUASH — PROSECUTOR'S NAME ON INDICTMENT.

1. A motion to quash an indictment for want of the name of a prosecutor, is too late after verdict.

2. The court will not quash the indictment for want of the name of a prosecutor if the witnesses were called for by the grand jury; but will quash an indictment where the name of a prosecutor was not indorsed, and no order of court to send the witnesses to the grand jury, and it does not appear that the witnesses were called for by the grand jury.

Assault and battery.

In U. S. v. Turley [Case No. 16,546], in this court, at November term, 1833, the court was of opinion that the objection, for want of a prosecutor, was too late after verdict; but agreed to hear Mr. Hewitt again in [Henry] Lloyd's cases, on that point. [See Case No. 15,615.] It does not appear, however, that in these causes any thing further has been said upon it. The doctrine in Turley's Case, may, therefore, be considered as conceded.

Mr. Hewitt moved to quash this indictment.

The proceedings respecting the witnesses appeared to be as follows: On the second day of the term the witnesses were called upon by the grand jury and sworn. It appeared by the defendant's recognizance, returned by the justice, that certain persons were witnesses. Their names were indorsed on the indictment by the grand jury, who certify by their foreman, that they were called on by the grand jury. See Va. Law, pp. 105, 346.

Mr. Hewitt contended, that the act of 1795, p. 346, § 2, applies only to cases where the fact is known to some of the grand jurors of their own knowledge, and not of the information of others.

THE COURT (THRUSTON, Circuit Judge, contrà) refused to quash the indictment, where the witnesses appeared to have been called upon by the grand jury. But (nem. con.) quashed another, where there was no prosecutor indorsed, and no order of the court to send the witnesses to the grand jury; and it did not appear that the grand jury had called for them.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,617.

UNITED STATES v. LLOYD.

[4 Cranch, C. C. 468.] [1]

Circuit Court, District of Columbia. Oct. 18, 1834.

ASSAULT AND BATTERY—UPON SLAVE.

1. A simple assault and battery on a slave is not an indictable offence. A simple assault upon a slave, even with intent to murder him, is not an offence at common law.

2. There must be a battery, as well as an assault with an intent to kill, to bring the case within the penitentiary act [4 Stat. 448]. The court refused to quash the indictment without prejudice to a motion in arrest of judgment.

[This was an indictment against Henry Lloyd.]

Assault and battery The first count was for a simple assault and battery upon a slave. The second count was for assault (not assault and battery) with intent to kill and murder, a negro slave, Harry.

Mr. Brent, in arguing to the jury, contended that the second count is not a good count under the penitentiary act, which requires that there should be a battery as well as an assault with an intent to kill.

Mr. Key, contra, that it is a good count at common law.

Verdict, guilty on both counts, and amerced by the jury $20 on the first count.

THE COURT (nem. con.) was of opinion, that a simple assault and battery on a slave, is not an indictable offence; that a simple assault upon a slave, even with an intent to murder him, is not an offence at law; that

[1] [Reported by Hon. William Cranch, Chief Judge.]

the second count was bad under the penitentiary act, because it did not charge a battery.

CRANCH, Chief Judge, doubted of this, because the murder of a slave is a felony, and an assault with intent to commit a felony is a misdemeanor, at common law.

October 18, 1834. A new indictment was this day found by the grand jury against the defendant. The first count was for publicly and cruelly beating Harry, a slave. Second count for assault and battery with intent to murder the slave, Harry.

Mr. Brent, for the defendant, moved to quash the indictment, because, he contended, it was not an offence to assault and beat a slave, even with intent to murder him.

THE COURT (nem. con.) refused to quash the indictment, without prejudice to a motion in arrest of judgment, if the verdict should be against the defendant.

Case No. 15,618.

UNITED STATES v. LLOYD.

[4 Cranch, C. C. 470.] [1]

Circuit Court, District of Columbia. Oct. Term, 1834.

BEATING SLAVE—COMMON-LAW OFFENCE.

The owner of a slave who beats him cruelly, and exposes him, so beaten, to public view is guilty of a misdemeanor at common law.

Indictment [against Richard B. Lloyd] for beating his own slave Henry, cruelly, and exposing him, so beaten, to public view.

Verdict guilty, and amerced by the jury $100.

Mr. Brent, for the defendant, moved in arrest of judgment, because the indictment, as he contended, did not state an indictable offence, and cited Turner's Case (1827) 5 Rand. (Va.) 678, and U. S. v. Brockett [Case No. 14,651], in this court, some years ago, for cruelly beating his own slave. He also moved for a new trial, on the ground of misdirection by the court to the jury; and because the verdict was against evidence.

THE COURT overruled both motions, and rendered judgment for the amount assessed by the jury.

Case No. 15,619.

UNITED STATES v. LLOYD.

[4 Cranch, C. C. 472.] [1]

Circuit Court, District of Columbia. Oct. Term, 1834.

ASSAULT AND BATTERY—INDICTMENT—VERDICT—WITNESS.

1. Upon an indictment for assault and battery on M. H. with intent to kill him, a verdict, "Guilty of an assault by shooting M. H. with intent to kill," is substantially a general verdict of guilty.

2. An indictment under the penitentiary act for assault and battery with intent to kill, need not aver it to be done with malice aforethought, nor with any other evil intent than the intent to kill.

3. Upon a suggestion that a witness, whose affidavit had been taken in support of a motion for a new trial, was an idiot, the court required the witness to be brought in and examined in court, but refused to order another witness whose affidavit had also been taken for the same purpose, to be brought in and examined, his affidavit not being impeached.

Indictment [against Richard B. Lloyd] for assault and battery on Moses Hepburn, with intent to kill him. Verdict, "guilty of an assault by shooting Moses Hepburn with intent to kill, but not with malice aforethought."

The second count charged that the defendant, &c., at &c., "with force and arms in and upon one Moses Hepburn, in the peace of God and the said United States, did make an assault, and him the said Moses Hepburn, did then and there beat, shoot, and ill treat, with intent him the said Moses, then and there to kill, and other wrongs and injuries then and there did, to the great damage of the said Moses, against the peace and government of the United States, and against the form of the statute in such case provided."

Upon a motion in arrest of judgment, W. L. Brent, for defendant, objected that the verdict did not find a battery; and that the indictment does not charge the manner of shooting, kind of weapon, kind of shot, &c.; and does not state that the defendant unlawfully assaulted the said Hepburn; and cited 1 Russ. 585. It might have been done in his own defence.

THE COURT (THRUSTON, Circuit Judge, contra) was of opinion that the second count, and the verdict thereupon, were sufficient.

THRUSTON, Circuit Judge, thought that the indictment should have charged that the assault and battery was wilful, unlawful, or malicious, and should have set forth the manner of the beating and the weapon, &c.

Upon a subsequent argument (on the 11th of October, 1834), Mr. Brent and Mr. Fauntleroy, for defendant, cited 1 Chit. Cr. Law, 227, 228, 233, 242, 245, 276, 286, 643; and Mr. Key, for the United States, cited Chit. 644.

PER CURIAM. This is substantially a verdict of guilty; for the shooting of a man is, in law, a battery upon that man, and the assault and the intent to kill are expressly found. The statute does not require that the act should be done with malice aforethought. The finding, therefore, that it was not done with malice aforethought is an immaterial finding, and is surplusage. The jury, therefore, have found every thing necessary to constitute the statute offence. We do not think it can be necessary, in an indictment upon this clause of the statute, to aver any other evil intent than the intent to kill, which is expressly averred; for it would be tautology to say that the defendant, with evil intent made an assault and battery on the man with intent to kill him.

[1] [Reported by Hon. William Cranch, Chief Judge.]

In support of a motion by the defendant's counsel, at the last term, he produced the affidavit of a woman named Frances Tattersall. Upon a suggestion that she was an idiot, THE COURT (CRANCH, Chief Judge, absent) required that she should be brought into court and examined by the judges.

The defendant now offered the affidavit of Francis Lloyd for the same purpose.

Mr. Key, for the United States, requested that this witness also should be brought in and examined in court. Mr. Brent, for the defendant, objected and said, it was not usual to examine witnesses in court upon a motion for a new trial.

THE COURT (MORSELL, Circuit Judge, contra) refused to cause the witness to be brought in and examined in court, and granted a new trial upon newly-discovered evidence; and the cause was afterwards transferred to Washington for trial.

UNITED STATES (LOCKE v.). See Case No. 8,442.

Case No. 15,620.

UNITED STATES v. LOCKMAN.

[Brunner, Col. Cas. 554;[1] 11 Law Rep. 151.]

Circuit Court, D. Massachusetts. 1848.

CRIMINAL LAW—SETTING FIRE TO VESSEL—MINOR.

1. A minor who ships on board a vessel without the knowledge of his parents may be convicted of the offense of burning a vessel on the high seas.

2. On an indictment for setting fire to a vessel on the high seas, the mere possibility that the fire might be occasioned by spontaneous combustion, or by accident, is no answer to strong probable evidence against the prisoner; in criminal cases a jury must act on strong probabilities.

This indictment charged that Lyman Lockman, on the 20th of April, 1848, "on the high seas, did wilfully and corruptly burn the ship William Thompson, of New Bedford, he, the said Lockman, then and there being a mariner on board thereof, and belonging to said ship William Thompson. And the said ship William Thompson being the property of citizens of the United States, and said Lockman not being an owner of said ship." It was founded on St. 1804, c. 40, § 1, which provides that "any person not being an owner who shall, on the high seas, wilfully and corruptly cast away, burn, or otherwise destroy any ship or other vessel unto which he belongeth, being the property of any citizen or citizens of the United States, or procure the same to be done, and being thereof lawfully convicted, shall suffer death." The fire took place at the Sandwich Islands. It appeared that the vessel, which was a whaler, in April, 1847, a few hours after she set sail for the northwest coast, at about nine or ten o'clock in the evening, was found to be on fire in the forehold. She was taken back into port and found to be considerably damaged by fire. In a few weeks she was repaired and went on her voyage. Several of the crew were seized and charged with the offense, but on examination before the consul, Lockman was sent home to be tried, with two witnesses against him. The vessel arrived at New Bedford the 1st of April, 1848.

It was testified on the part of the government that a grating which separated the forecastle from the forehold, where the fire was, had been broken; that the forehold had in it a great deal of old junk, rigging, tar, etc.; that the prisoner was seen working at the bulkhead, and creeping out of the forehold through the hole; that the prisoner had said "that he had been in the forehold; that he had got some tar and rope-yarn in a sack, and would burn the ship before he would go to the northwest coast in her; that he had tried to fire the ship before, but he had only two matches, and they would not go"; that after the fire he had said that "he wished he had a spade, and he would cut off the captain's head"; that after the fire, the prisoner having been flogged to make him tell what he knew about it, he said, in reply to the question if he knew who did it, "that he did not know anything else." It also, appeared that the vessel had been previously on fire, and that at that time the prisoner was confined, and two others of the crew were sent home charged with that offense; that the conduct of the captain was harsh; that the crew were also dissatisfied with their grub, and said they wished the vessel sunk or burned before they had to go in her. It was further shown that the owners acted as citizens of the United States. On the part of the prisoner it was testified that there were great complaints among the crew of the William Thompson; that they were generally dissatisfied; that several had been heard to say they would throw the captain overboard or sink the ship before they would go on to the northwest in her; that Lockman was under age, not twenty; that he shipped without the knowledge or consent of his father; and that he was quiet and orderly on board ship.

Charles L. Woodbury, for the United States.

Charles M. Ellis, for the prisoner.

THE COURT desiring the question of law in the case to be stated, the counsel for the prisoner contended that the evidence did not support the indictment, the evidence being that the prisoner was brought into the United States prior to the time alleged in the indictment; that there was no legal contract binding the prisoner to service in the ship, and therefore he did not belong to the ship under the statute, which did not apply to passengers, persons from other ships, or the

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

owner, but only to those holding a certain relation, that of the ship's crew; that the property of the ship could not be shown without the bill of sale, the vessel having been built by persons not then owners of her; and that the citizenship of the owners could not be shown, except by proving their birth or legal naturalization; and that the only burning punishable under the act must amount to a substantial destruction of the ship, such being the force of the words "otherwise" and "or" in the act, and its necessary grammatical construction; that the act was the same as if it read "shall destroy by casting away, burning, or any other means"; that this appeared also from the statutes from which this act is framed, and because the statutes, when intended to apply to cases of mere setting on fire, used appropriate language; and that the Case of De Londo, 2 East, P. C. p. 1098; and U. S. v. Johns [Case No. 15,481], being upon the same words, should be held to apply to this point. On the part of the government it was argued that the time was immaterial; that no proof of ownership or citizenship was required if the ship carried the American flag; that the law applied to any one on board the ship; and that the statute was only the enactment of an admiralty offense, and applied to any burning, however slight.

Upon the question of the partial burning WOODBURY, Circuit Justice, stated that if the case arose under second section of the act, the court should consider the law settled on the grounds urged by the prisoner's counsel; that his learned associate was more strongly inclined than he to the opinion that a case of partial burning would not be within the statute, which could apply only to cases of destruction of the ship; but that he could not consent, without precedent, and considering that there was some difference in the objects of the two sections, in case of a crime of so grave a character, and one which could not be reached unless by this law, to let the prisoner go free, without first having the opinion of the supreme court of the United States. He accordingly proposed to certify a division of opinion and have the cause carried up. But the prisoner, desiring to have the jury pass upon the case, the court consented, reserving for the prisoner the question of law.

The cause was then argued to the jury upon the facts. For the prisoner it was contended that there was no proof that the prisoner was guilty; that if the evidence were all taken as true, still the hemp, sails, etc., stored in the forehold might have taken fire by spontaneous combustion, and several cases were cited of like sort; or that the fire might have taken accidentally from lights in the forecastle; and that the evidence was suspicious, and if the ship was set on fire it was quite as probable, if not more so, from the evidence that the fire was set by some one besides the prisoner. The government urged that the threats, the preparation, and the fire following showed conclusively that the prisoner was guilty.

WOODBURY, Circuit Justice, urged upon the jury the performance of their duty. The courts and juries are to administer the laws as they exist, not to make or unmake them. The jury must remember their oaths, and march up to their duty. The rule is not, as is sometimes laid down, that the jury is to be satisfied beyond doubt. The jury will not stop because it is possible that some other hypothesis than the prisoner's guilt may be true, or is consistent with the evidence. The only rule is this: The jury must be reasonably satisfied. In civil cases they must act from the mere preponderance of evidence. In criminal and capital cases they must act on strong probabilities. The jury must act in this way as they would act in any matter of their own concerns. The mere possibility that this fire might have been occasioned by spontaneous combustion, or might have been set by accident, is no answer to strong evidence, making it probable that a particular person did it. There is no doubt this was on the high seas, and the act was done to an American vessel owned by our own citizens. It is enough that the prisoner wanted employment, and went on board the ship as one of her crew, so that he belongs to her. The supreme court has just held the owners of the Lexington liable for the neglect of some of the men in a large amount. To burn "wilfully" is designedly, intentionally; "corruptly" is from a bad motive. It is not necessarily for gain or hire. For this trial any burning of the ship is sufficient to bring this case within the act. The jury will consider whether it is not likely that this fire was set by some of the crew. They will consider the testimony of the two witnesses, the fellow-shipmates of the prisoner, whose apparent fairness approves itself. They will consider who would be likely, from threats, preparation, and previous character, to have been guilty of this offense. Who had come from the house of refuge? The captain and consul were men of sense, and the jury would consider who was charged and sent home for trial, and if it was not likely that he was the guilty one. If the jury were satisfied, from the strong probabilities of the case, that all pointed to but one person, they should make an example of him. It might be painful to discharge their duty. But if the jury found the prisoner guilty, it was doubtful whether the law could reach this horrid case. This case was infinitely worse than any crime on land. There were no alarm bells, no engines, no neighbors to help. The jury, whilst they thought of the prisoner, must think of the thirty souls on board ship on that awful night. His honor dwelt on the case of the Caroline, the ill-fated Lexington, and others. There could be little doubt that the prisoner would never suffer the extreme penalty of

the law, for the executive would undoubtedly pardon.

The jury in a few moments, on the second ballot, agreed upon a verdict of not guilty.

Case No. 15,621.

UNITED STATES v. LOCOMOTIVE BOILER.

[Cited in U. S. v. Sixteen Barrels of Distilled Spirits, Case No. 16,300. Nowhere reported; opinion not now accessible.]

Case No. 15,622.

UNITED STATES v. LODGE.

[4 Cranch, C. C. 673.] [1]

Circuit Court, District of Columbia. March Term, 1836.

CRIMINAL LAW—TRIAL—PRODUCTION OF STOLEN NOTES.

Upon an indictment for stealing bank-notes against the act of congress of the 2d of March, 1831, § 9 [4 Stat. 449], it is not necessary to produce them upon the trial; and if they have been recovered by the owner and passed away, their contents and purport may be proved by parol.

Indictment [against William Lodge] for stealing "one promissory note of the Bank of Washington for the payment of five dollars, of the value of five dollars; one other bank-note of the Bank of New Lisbon, Ohio, for the amount of five dollars, of the value of five dollars; one note of the corporation of Georgetown for the payment of two dollars, of the value of two dollars; three silver coins of the goods and chattels of one Edward Simms, then and there being," &c., against the form of the statute; that is, Act Cong. March 2, 1831, § 9 (4 Stat. 449), "for the punishment of crimes in the District of Columbia," which enacts "that every person convicted of feloniously stealing, taking, and carrying away, any goods or chattels, or other personal property, of the value of five dollars or upwards, or any bank-note, promissory note, or any other instrument of writing, for the payment or delivery of money, or other valuable thing, to the amount of five dollars or upwards, shall be sentenced to suffer imprisonment and labor," &c.

There was no evidence as to the coins; and Mr. Giberson, for the prisoner, objected to parol evidence as to the bank-notes, because they were not produced, the witness, the owner, having passed them away.

THE COURT said they were inclined to think that parol evidence may be given of the contents and purport of the notes, but would reserve the question upon a motion for a new trial, if the prisoner should be convicted.

The witness found the notes upon the prisoner before he left the shop; and knew the Bank of Washington note by an indorsement upon it of the name Cloakey.

Verdict, guilty of stealing the notes only.

Mr. Giberson and Mr. Dandridge, for the prisoner, moved, in arrest of judgment, and for a new trial; and contended that the judgment ought to be arrested (1) because the indictment does not pursue the words of the statute upon which it is based; (2) because it does not state that the notes and coin, therein described, were the property of the prosecutor, at the time the larceny is said to have been committed.

And that a new trial ought to be granted, because (1) it was not competent or proper for the United States to give parol evidence, as to the contents of the notes, without having first proved that the notes were lost, destroyed, or mislaid, and, if the latter, that due diligence had been used to find the same; (2) that the court ought not to have admitted evidence of the contents of the notes, and that they should have been produced at the trial—First, because they are the best evidence; second, because, if produced, it would have been competent for the accused to show that they were counterfeit; or, third, that they were notes of broken banks, and therefore of no value; or, fourth, that they were not such as the banks could be compelled to pay or redeem.

THE COURT, however, overruled both motions, and sentenced the prisoner to the penitentiary.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,623.

UNITED STATES v. LOGAN.

[2 Cranch, C. C. 259.] [1]

Circuit Court, District of Columbia. Oct. Term, 1821.

CRUELTY TO ANIMALS.

Public cruelty to a horse is in indictable offence.

Indictment for cruelty to a horse in a public street in Washington.

Verdict, guilty. Sentence $10 fine, and twenty days' imprisonment.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,624.

UNITED STATES v. LOGAN.

[12 Int. Rev. Rec. 146.]

Circuit Court, E. D. Tennessee. 1867.

INTERNAL REVENUE ACT—FAILURE TO PAY DISTILLERS' TAX—PERSONS CRIMINALLY LIABLE.

[1. One employed by another as a laborer in a distillery is not carrying on the business of a distiller, so as to be criminally liable for not having paid the tax.]

[2. To convict one under the act for retailing liquor without payment of the tax, the defendant must be proven to have held himself out publicly as following the business as one of his means of gaining a livelihood.]

The defendant [Lea Logan] was indicted for distilling and retailing, under section 44 of the act of July 20, 1868 [15 Stat. 142], without having paid the special tax as a distiller or retail liquor dealer.

O'Connell Russell, the first witness, testified that he had contracted with defendant to deliver to a certain mill near the distillery for the defendant, some corn, for which defendant was to give him one gallon of whiskey for each bushel of corn so left at the mill. This was in the summer of 1869. Witness had taken one bushel and a half of corn to the mill under this arrangement. Had been at the distillery on two or more occasions when defendant was doubling, and had received from defendant three quarts of whiskey there at the still house, on two different occasions, and that before he received all he was entitled to, the distillery was broken up. On cross-examination witness stated he had seen John Wimberly at the still at one or more times, but that his dealings were all with defendant. Witness knew of other parties who had also bought whiskey from defendant in a similar way he had, and that defendant kept whiskey there, as he supposed, for sale. Bartley Russell, next witness, testified to having furnished defendant corn in exchange for whiskey; that on two or more occasions he had been at the distillery; saw defendant engaged in doubling and got whiskey from him in small quantities under said contract of exchange. Witness had seen John Wimberly there at some of the times he had been there, but did not know whether Logan or Wimberly was the owner and proprietor of the distillery. G. M. Green, next witness, testified that he was the revenue officer who seized the still about November last. That defendant was with six or eight others at the still, and the still was running; and that defendant at his (witness's) request helped him take the still out of the furnace. On cross-examination, defendant's counsel asked witness what defendant said at the time about his being only employed by Wimberly to carry on the work, to which the district attorney objected, as being immaterial; but THE COURT overruled the objection, when witness stated that the defendant said at the time he was working for Wimberly who had employed him. John Norwood, next witness, testified that he had delivered corn in exchange for whiskey also; that he had made his contract with John Wimberly, but had got the whiskey from defendant, and had been at the still-house a good many times; had seen both Logan and Wimberly there at work. On cross-examination this witness was also asked as to the statements he had heard from either Logan or Wimberly while at the distillery, and engaged in distilling as to who was the proprietor. To this, district attorney also objected; first, because it was an immaterial matter as to who was the principal in the transaction, except it was for the purpose of assisting the court in determining the proper punishment that should be inflicted in case of conviction; and, secondly, that Wimberly being a competent witness himself, any statements he may have made were incompetent to be proven in this case. THE COURT overruled the objection and permitted witness to state anything he may have heard either defendant or Wimberly say while at the distillery, and engaged in carrying it on, relative to this matter. Witness then stated he had heard both of them say that Wimberly was the proprietor and defendant was working for him.

This being the substance of the testimony given by witnesses for the government, the defendant introduced no proof.

In the argument of the case, defendant's counsel insisted that under the proof, the defendant was shown to have been an employee merely, and therefore could not be said to be "carrying on the business of a distiller," as only persons who were principals in the transactions are contemplated by and embraced within the forty-fourth section of the act of July 20, 1868; therefore the defendant should be acquitted on this count. Under the second count, for retailing, defendant's counsel insisted that proof showing the defendant guilty of selling whiskey on one, two, or a half dozen different occasions, of a pint or quart each time, did not constitute the offence of "carrying on the business of a retail liquor dealer" under said forty-fourth section; but that to be brought within the offence here charged, the proof must show not only that the party selling was acting for himself and not as a clerk or employee of another, but also that he held himelf out publicly as being engaged in the business of retailing, prepared and willing to accommodate all who may reasonably be expected to call upon him.

The district attorney controverted these propositions as being very novel in their nature and manifestly unsound, and insisted the rule "that in misdemeanors, all who in any wise aid, encourage, or abet in the transaction, are guilty as principals, and may be so charged," applies to both counts in the indictment; that it was a matter of no moment to the government who was principal in the transaction; that the government must deal with the party caught engaged in the unlawful transaction; and if there was another who had furnished the pecuniary aid, and who was the inducing party to this unlawful transaction, while this latter would also be equally guilty, or even might deserve a more severe punishment, yet this defendant is none the less guilty in law; that under the law under which this indictment is found and the definition given in the statute to the term "distiller," not only the party who has the business carried on or is interested in the carrying on of the business, but those who actually perform the labor or otherwise aid or assist in carrying on the business, are guilty, and may be convicted under the first

count of this indictment. In support of this position, the district attorney referred to the decision of Judge Benedict in the case of U. S. v. Mulrany [see note at end of case], and of Judge Krekel in the case of U. S. v. Howard [Case No. 15,401]. The district attorney insisted that the doctrine here contended for by defendant's counsel was at variance with the decisions of courts, and, if accepted as law, will be ruinous in its tendency to defeat the very purposes of the law, and to shield from punishment the very parties the law intended should be held responsible for their guilty acts. That while it might be true that only those who were really interested in the business as principals were alone responsible to the government for the special tax imposed for the carrying on of the business, and only their property could be distrained upon to collect the same, except as the statute has specially otherwise provided for, yet that in a criminal prosecution, a different rule applies; and if a party knowing what the law requires to have been done by his employer (as all parties are presumed to) sees fit to undertake for another to carry on the labor or otherwise aid in the matter without first ascertaining that the employer has complied with the law, such person takes upon himself the risk of being punished under that law, if the same has been violated.

As to the second count, the district attorney insisted that the argument contended for by defendant's counsel, "that proof of occasional acts of retailing did not constitute a violation of the law, but that a party must hold himself out publicly as engaged in the business," was strange indeed, and if recognized as the law of the case would require of the government to show either that the party had set himself up publicly as a violator of law, the punishment for which is so severe, or else, by bringing the people of whole neighborhoods into court as witnesses, that by the number of times the matter may be shown to be something more than a mere occasional act, but in fact at least one of the matters of business which the party is engaged in carrying on, and from which he gains at least a portion of his livelihood. To require either will, in effect, defeat in most cases the law itself. The experience of all men teaches that it is in secret, so far as possible, that violators of law carry on their business, and especially is this true with regard to dealers in spirits.

The district attorney referred to ruling of Mr. Rollins, commissioner of internal revenue, contained in series 3, No. 4, of regulations, and published in Internal Revenue Record of April 6, 1867, and to the uniform rulings of Commissioner Delano subsequent to this, to show the construction which had been placed upon the statutes, and that it had uniformly been the holding of the revenue department that even occasional acts of retailing spirits would make a person guilty; and they had acted upon such construction of the law in assessing and collecting taxes under the revenue laws, both under the acts of June 30, 1864 [13 Stat. 223], July 13, 1866 [14 Stat. 98], and July 20, 1868 [15 Stat. 142]. The district attorney further insisted that, however the court might charge upon these legal propositions, the jury would find the defendant guilty as principal in the transaction; at least that defendant had not shown by the best proof available that he was not the principal, which he should have done if the fact be so.

E. C. Camp, U. S. Dist. Atty.
George Brown, for defendant.

CHARGE OF COURT. The court charged the jury that the simple question for them to determine was "whether the defendant carried on the business of a distiller or retail liquor dealer." That, as to the first count, if the defendant was found engaged in the act of distilling, the jury would, without further proof, presume that he was the person engaged in carrying on the business of a distiller; but if the proof shall also show that the defendant was not the proprietor and had no interest in the distillery, and was only employed by some other person as a laborer in carrying on the work of distilling, then in law he cannot be said to be carrying on the business of a distiller. It is the party or parties having an interest in as proprietors of the distillery that can in law be said to be carrying on the business. Any different construction which would hold a clerk or employee liable to a criminal prosecution because of a failure of a principal or proprietor to comply with the law, would have no sense, no justice or law, on which to base it, no matter what court or judge has or shall so decide. If this is so, then not only the employer, but the clerk and the hired laborer, will be required to pay the special tax, and in this way more than one special tax will be required for the same business. This the government does not require, and therefore only the party or parties in interest as proprietors or owners does the government look to for payment of the special tax; or if that be not paid and the business carried on, against him only does it inflict its punishment. He alone can be said to be "carrying on the business." If it be proven that defendant was found engaged in distilling, and from the proof the jury shall be in doubt as to whether he was interested as owner or principal in the business or not, and shall believe that defendant had it in his power to produce evidence which would clear up that doubt and fails to do it, the jury should resolve that doubt against the defendant, and find a verdict of guilty against him on the first count.

As to the second count, all I have said to you relative to the distinction to be drawn between the principal and his employer, and the presumptions arising from proof of the doing

of the act and the necessity of proof by defendant showing his capacity of clerk or hired servant in the doing of the act, applies also to this count. But more than this it must be shown by the government, before they can obtain a conviction on this count, that not only defendant was acting for himself and not as employee of another, but the defendant must be proven to have held himself out publicly in some way as following the business as at least one of his means of gaining a livelihood. It must be a business which the party engages in in such a manner and to such extent as shows a readiness to supply whoever may reasonably be expected to call on him. Occasional acts or a few instances of selling spirits do not constitute the offence, if the matter is not done in such manner as shows that it is a business regularly carried on, not secretly and to the few, but publicly and to all who desire to purchase upon the same terms.

Notwithstanding this charge, the jury returned a verdict of guilty as charged in the indictment, and no motion for a new trial being made, the defendant was sentenced to six months' imprisonment, and to pay a fine of $1,000 and costs.

NOTE [from 6 Int. Rev. Rec. 20.] The sentence of Judge Benedict in the Case of Mulraney, referred to in the text, and also in the Case of Freel, is as follows:

In the United States circuit court for the Eastern district of New York, Judge Benedict passed sentence on James Freel, who had been indicted and convicted for distilling whiskey without paying the special tax, and distilling in a dwelling-house, since September 1, 1866. Judge Benedict opened by saying that the law under which Freel had been convicted was an important one, and continued:

"It is and must be, a stringent law, and it must be enforced But two ways are open to the government to enforce that law. One is to take the property of the persons that offend, and the other is to imprison. The object of all actions is to punish the offender. Another object is to deter others by the punishment which is so inflicted. Now, in your case, it seems that for some months you carried on the business without any attention to the law. Argument has been made that there is a change in the law, but I cannot ignore the fact that it was notorious that the change went into effect on the 1st of Septembe., and that all persons legally in the business conformed substantially to that change, and they do so now. It likewise appears that, first, the milder remedy of the law was resorted to, and the property was taken and forfeited. You bought it back, as you had a perfect right to do, but then did not comply with the law. You kept the still in the place, and it was seized a second time. You are therefore now brought to the second branch of this law, which endeavors to enforce itself by imprisonment; and, I must believe, under all the evidence, that you deserve that punishment for your own participation in that matter. I also must notice that this law is widely disobeyed. I must also take notice that it seems to be understood that violations of the revenue law can be perpetrated with impunity. And nothing is more important in this community than that the people should understand that the violation of the revenue law is attended with hazard; that it is not the violation of a mere contract, o failure to keep a promise; that the laws of the United States in this regard must be obeyed. You are the first man that has been convicted and brought to sentence in this county, —I do not know, but the first man in both cities together. I am inclined to the opinion that the government has delayed imprisoning citizens in the hopes that they will obey this law; and you were the first person convicted either in New York or in Brooklyn. I therefore must regard, in passing sentence upon you, the effect upon the public. I must make you an example of all person. in this community, that they may know what it is to violate the law of the United States with regard to the revenue. The section under which you have been convicted would impose a fine, and also imprisonment for a term not exceeding two years. I shall, in your case, in view of all the circumstances, impose upon you the extremity of the statute, and sentence you to imprisonment for a space not exceeding two years, the sentence to be executed in the Albany penitentiary."

Hugh Mulraney, convicted for a similar offence was also arraigned for sentence, and the judge said:

"The remarks which I made to the prisoner before you will be applicable to your case in the same degree. You are a man of intelligence,—a man who was before, and perhaps now, of some property. In your dwelling house, in which you lived, under the floor of your parlor, was erected a still, in full operation. It was known to your family, and was known to you; and the excuse—the only excuse which has been presented here, is that you leased the basement to another party, who was the guilty party; not yourself. There is reason to suppose, in your case,—to surmise, in your case as in the case of the previous prisoner,—that there are persons, perhaps more able, who are the inducing parties to these violations of the law; and that persons in moderate circumstances are put forward, and receive the punishment, while they who furnish the capital can go with impunity. This is one of the misfortunes attending all human affairs, and the only way the government can do is to convict and punish those that are caught. I confess to surmise in your case that there are parties who have not appeared here as prisoners, that may know more about this than has been disclosed. It appears that you were away most of the time. I have read your affidavit. You have a wife and six children, and I take that into consideration; I take somewhat into consideration the fact that your case, perhaps, has not been presented so strongly as it might have been. If I followed up the verdict of the jury, I should impose upon you the same penalty that I imposed upon the former prisoner; but, in view of the circumstances and your family, I shall reduce imprisonment and shall sentence you to be imprisoned for the space of twelve months. I impose no fine.

Case No. 15,625.

UNITED STATES v. LONG.

[1 Cranch, C. C. 373.] [1]

Circuit Court, District of Columbia. Dec. Term, 1806.

PAROL EVIDENCE—WARRANT.

Upon an indictment for assault and battery of a constable, in the execution of his duty in serving a warrant, parol evidence of its contents cannot be given, unless it be lost or destroyed, &c.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Indictment [against Dennis Long] for assault upon a constable, in the execution of his duty. The United States proved that the warrant had been given by the constable to one John Palmer, who was not summoned as a witness.

THE COURT refused to suffer parol evidence to go to the jury, of the contents of the warrant, as there was not sufficient evidence to raise a presumption that it was lost, or could not be had.

See U. S. v. Pignel [Case No. 16,049]; U. S. v. Lambell [Id. 15,553]; U. S. v. Wary [Id. 16,645].

Case No. 15,626.

UNITED STATES v. LOT OF JEWELRY.

[13 Blatchf. 60.] [1]

Circuit Court, S. D. New York. June 25, 1875.

VIOLATION OF CUSTOMS LAWS—FORFEITURE—STATEMENTS BY AGENT—POSSESSION.

1. S. delivered at New York, to the purser of a steamer about to sail from there to France, a package of jewelry, corded and sealed, and addressed to L. at Paris, France. An officer of the customs obtained the package from the hands of the purser, on board of the vessel, at New York, and made seizure of its contents as forfeited, for having been landed at New York, from a vessel which brought them from Havana, without a permit from the collector. Suit was brought against the diamonds, as forfeited. L. put in a claim to the goods, by S. as his agent, the claim being verified by S. At the trial, evidence was offered, on the part of the United States, of admissions made by S., after the seizure, to the effect that the goods had been left with him by L. their owner, for sale, that L. had brought them from Havana, and that S. had been unable to sell them, and was now returning them to their owner in France, but the evidence was excluded. *Held*, that the evidence was properly excluded.

2. While S. had the goods in his possession, such declarations respecting their ownership and his authority to dispose of them, were competent evidence.

3. Statements made by S. after he gave the goods to the purser, were narrative or historical.

4. Declarations by S., while in possession of the goods, in derogation of the title of L., were not competent evidence.

5. Under section 3082 of the Revised Statutes, possession of goods is not sufficient evidence to authorize conviction, until it is otherwise proved that the goods were imported contrary to law.

[Disapproved in U. S. v. A Lot of Jewelry, 59 Fed. 684.]

[Error to the district court of the United States for the Southern district of New York.]

At law.

Henry E. Tremain, Asst. U. S. Dist. Atty.

William Stanley and George S. Sedgwick, for defendant in error.

HUNT, Circuit Justice. This is a writ of error to the district court for the Southern district of New York. The information alleges, that, on the 8th of August, 1874, the collector of the port of New York seized a package of diamonds addressed to Leon Labbe, and imported by the steamship City of Merida, as forfeited to the United States, for the reason that they were unladen from the ship within that district, without a permit from the collector. A monition was served upon Labbe as the claimant of the goods. Labbe intervened through Jules Sazerac, as his agent, who averred that Labbe was the true and lawful owner of the goods, and that Sazerac was the bailee thereof, as his agent. In his answer and plea Labbe denied that the goods had become forfeited as alleged in the information. The cause came to trial before the court and a jury. [Case unreported.] To maintain his case, the district attorney called as a witness James S. Chalker, a special agent of the treasury department, who testified, that, on the 8th of August, 1874, he saw Sazerac go into the purser's room of the steamer La Fayette, then lying in the port of New York, with a package, and soon come out without it; and that the witness, with others, then went into the purser's room and got the package from the purser, which he produced on the trial. It was a wooden box, corded and sealed, addressed "J. M. Leon Labbe, Paris, per steamer La Fayette." The witness seized the package, opened it, and found it to contain rings, brooches, lockets, &c., set with diamonds. Immediately afterwards, and on the dock, he saw Sazerac, who told him he had left the package with the purser. It was in evidence, that the La Fayette was not a recently arrived vessel, but had been some time in port, was preparing to sail for France, and on the same day did sail for France. The district attorney then put this question to the witness Chalker: "What else did Sazerac at that time say to you, in regard to the goods in suit?" This question was objected to by the claimant, was excluded by the court, and the district attorney excepted to such ruling. The district attorney further offered to prove, that, after Chalker had seized the goods, and before they had reached the seizing department of the custom house, Sazerac made admissions, to the effect that the goods had been left with him for sale by Labbe, their owner, that Labbe brought them from Havana on the City of Merida, in June, 1874, and that he, Sazerac, had been unable to sell the goods, and was now returning them to their owner in France. This offer was rejected, and the district attorney excepted. Certain other evidence was then offered, which would have tended to prove that the goods in question had been smuggled, if the evidence before excluded had been given in the case, but which without that evidence was of no value. This

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

evidence was excluded by the court, and the district attorney excepted.

Upon the principles of law applicable to that subject, the declarations of the agent Sazerac are not admissible to charge his principal or to affect his property. The evidence, aside from declarations or admissions, was simply this: Sazerac had the goods in his possession, and delivered them, boxed and corded, to the purser of the steamer La Fayette, then about to sail for France, directed to Leon Labbe, at Paris. While he had the goods in his possession, his declarations respecting their ownership, and his authority to dispose of them, were competent evidence. Bradley v. Spofford, 23 N. H. 444. Even then, the declarations must be limited to such matters as relate in some measure, and more or less directly, to the right of sale or the agency. If I place my horse in the hands of an agent, with directions to sell him for a sum not less than $100, his statement that he sells on my behalf, and that the price named was fixed by me, is competent evidence, and whatever inferences may be justly drawn from these facts must rest upon me. But, he would not be authorized by such agency and possession, to state that I had obtained the horse by a trespass or a theft of the property of A. B., and thereby destroy my title, and show A. B. to be the real owner of the property. Such matter has no connection with his agency. If he knows the fact of a trespass or a theft to exist, he must prove it as a witness, but he cannot, as an agent, interject it into the case, as an admission, to the injury of his principal. The general rule is, that the declarations of an agent, to be evidence, must constitute a part of the res gestæ. They must be made in the transaction of the business, and must constitute a part of it. Historical statements are not evidence. Narratives by an agent are not evidence. The declarations are evidence only upon the theory, that when and as an agent acts for his principal, he does and must speak for him. His acts would not ordinarily be intelligible if separated from his statements. But, when the business is done, and the transaction is actually closed, there is necessity neither for statements nor for acts. If the agent then chooses to talk about the matter, he talks for himself, and can properly charge no one but himself. This subject has been recently examined in the supreme court of the United States by Mr. Justice Strong, in the case of Packet Co. v. Clough, 20 Wall. [87 U. S.] 528, where the authorities are cited, and the principles I have referred to are laid down.

In the case before us, the declarations of Sazerac were all made after he had parted with the control and possession of the goods. He had delivered them to the purser to be transported to Labbe, the owner. This ended all right or claim on his part. They had, also, been seized by the custom house authorities, and were in their possession. The duties and the powers of Sazerac as an agent were at an end. Any statements thereafter made by him were narrative or historical in their nature. This was necessarily so. His agency was to sell. That was ended, first, by his own act of delivery to the purser; and, second, by the action of the revenue officers in seizing the goods. If he spoke at all, it could only be of a past transaction.

Again, if the statements had been made while he was in possession of the goods, his declarations in derogation of the title of his principal were not competent, unless there is something in the position of the parties or the goods, as affected by the revenue laws, that alters the general law on this subject. The district attorney argues that such is the fact, and that this peculiarity is to be found in the provisions of section 3082 of the Revised Statutes. It is there provided, that, "if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment or sale of such merchandise, after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited, and the offender shall be fined" or imprisoned, as specified. "Whenever, on trial for a violation of this section, the defendant is shown to have or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury." To have a benefit from this statute, the district attorney must establish two facts, which have not been proved in this case. First, he must show that the goods have been "imported contrary to law;" second, that the party proceeded against had knowledge of that fact. There was no evidence of either of these facts, nor any offer of proof of them, except by the admissions of the agent. Possession of such goods (it is declared by the statute) shall be deemed evidence sufficient to authorize conviction. "Such goods" are goods which shall be proved to be smuggled. When the smuggling is proved, the possession will authorize a conviction, but not until the smuggling is proved. The possession is not to be used to establish, nor does it tend to prove, the smuggling. This section is intended to apply to a case where a party is proceeded against, and a fine of $5,000, or an imprisonment not exceeding two years, or both, is sought to be imposed upon him, for fraudulently importing merchandise, or receiving and concealing the same, knowing it to be so imported. The object and intent of the proceeding is the imposition of the fine and the

imprisonment, not the recovery of the goods. The statement that goods so imported shall be forfeited, is incidental to the main point —the imposition of the fine and imprisonment. It is by virtue of sections 3059, 3061, 3072, and other sections, that goods are seized when imported in violation of law, and the authority of section 3082 is not needed for that purpose. It is for a violation of sections 2872 and 2874, requiring a permit to land and the payment of duties, that this action is brought, and to hold the goods as forfeited to the United States. The information further alleges, that the proceeding was in violation of section 3082, and that Labbe (not Sazerac) received, concealed and held the goods. There is, however, no suggestion in the pleadings, or on the trial, that a fine could be imposed, or that imprisonment could be inflicted, and Labbe is not before the court except as a defendant in a civil suit, seeking to protect his goods. U. S. v. Sixty-Seven Packages, 17 How. [58 U. S.] 85; Stockwell v. U. S., 13 Wall. [80 U. S.] 531. In my opinion, the rules of evidence, as applicable to this suit, are not altered by the provisions of section 3082, but the case stands like other cases, and to be disposed of upon the general principles of law.

The district attorney further insists, that the evidence was admissible, for the reason that Sazerac is the agent to claim these goods, and is proved to have been their custodian, and the only custodian they are shown to have had in this country; that it does not appear that there was any limit or scope to his agency; and that all his acts and sayings must go to the jury. The court can hardly be asked to assume the agency to be more extensive than the counsel offered to prove it to be. The offer was as follows—to "prove admissions by Sazerac, that the goods had been left with him for sale by Leon Labbe, their owner, who lived in France; that Labbe brought the goods with him * * on the 17th of June, from Havana; * * that the day after he sailed for France; and that he (Sazerac) had been unable to sell the goods, and was now returning them to their owner in France." If admitted, this evidence would have tended to prove: (1) That Labbe was the owner of the goods; (2) that he brought the diamonds from Havana; (3) that he left them with Sazerac to sell for him (Labbe); (4) that Sazerac was unable to sell, and attempted to return the goods to their owner. If admitted, this evidence would have proved an agency, limited to power to sell the diamonds, and with no other power. I cannot see that the verification, by Sazerac, of Labbe's claim to the goods, by way of answer, can throw light upon the extent of his original agency, or authorize the admission of his previous declarations.

Upon the whole case, I am of the opinion that there was no error on the trial, and that the judgment must be affirmed.

Case No. 15,627.

UNITED STATES v. LOT OF LEAF TOBACCO.

[2 Ben. 76;[1] 6 Int. Rev. Rec. 222.]

District Court, E. D. New York. Dec., 1867.

INTERNAL REVENUE — BONDING PROPERTY — PAYMENT INTO COURT.

1. Where property was seized as forfeited for an alleged violation of the internal revenue law, and the claimant applied for a delivery to him of the same upon a bond, *held* that, as the application was one for a favor, terms might be imposed.

2. The property might be delivered to the claimant, on his giving stipulations in the appraised value of the property, less the amount of tax due on it, paying this latter amount in money into the registry of the court.

B. F. Tracy, U. S. Dist. Atty.
W. H. Hollis, for claimant.

BENEDICT, District Judge. This is an application on the part of the claimant of certain tobacco, machinery, tools, &c., seized as forfeited to the United States, for an order to release the same upon a stipulation for value. An appraisement of the property has been made in accordance with the rules of the court, and the value of the tobacco in the market, as tobacco on which the tax had been paid, has been reported by the appraisers. The questions raised are, whether the stipulation should be for the value of the tobacco, including or excluding the tax, and what provision, if any, should be made in regard to the tax. The proposition of the claimant is to include the tax in the value of the property, and, upon his incorporating into the ordinary stipulation for value a provision which would enable the government to enter a decree upon it for the amount of the tax, notwithstanding the acquittal of the property, if that should be decreed, upon the charges in the information, to receive the property as free from tax. What should be the proper order to make in regard to the tax upon this property, in the event of a verdict in favor of the claimants, and upon the entering of a decree of restitution, it is not necessary now to decide. The application of the claimant here is for leave to take the property into his own possession and control, pending the determination by the court of the question of its forfeiture or restitution. This property, it should be noticed, is now in the absolute custody of the marshal, and, if now surrendered by him, will not be delivered into the custody of a collector, who can hold it until the payment of the tax, but to the claimant, without any security for the payment of the tax, except such as may be exacted by the court. Upon such an application, being, as it is, an application for a favor, terms may be imposed; and I think it not unreasonable, if indeed it be not nec-

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

essary in order properly to protect the government, to require, as a condition of the delivery, that the portion of the appraised value of the tobacco, which represents the tax, shall be paid, in money, into the registry, to insure the liquidation of the tax in case of an acquittal of the property upon the charge in the information. The possession of this property must, in the ordinary course of law, remain in the government until that possession be changed by a decree of restitution. The government, being thus now in possession of the tax, in the property which represents it, cannot, certainly, in the absence of a decree of restitution, be asked to surrender that possession.

A further question has been raised in this case, since the submission of the motion, by the application of the district attorney for leave to withdraw his consent to a delivery of the property, upon which consent the motion had been originally based; and in support of this application, as well as to show that the public interest requires that none of the property seized shall be delivered upon bail, affidavits have been received. The affidavits produced in reply, on the part of the claimant, are, however, very full, and satisfactorily explain the circumstances relied on by the government, and make out a case where the favor asked may well be granted, provided the security be such as to be satisfactory to the district attorney. An order may, therefore, be entered, allowing the claimant to receive the property, upon giving stipulations in the appraised value of the property, less the amount of the tax, which last amount must be paid in lawful money. The stipulations to be executed by two sureties, residents and freeholders in the city of Brooklyn, and satisfactory to the district attorney.

Case No. 15,628.

UNITED STATES v. LOTRIDGE et al.

[1 McLean, 246.] [1]

Circuit Court, D. Ohio. Dec. Term, 1834.

FRAUDULENT CONVEYANCES—LEVY OF EXECUTION.

1. On a bill to set aside a fraudulent conveyance of land levied on by execution, under a judgment, the court will not enquire whether there was not personal property on which the marshal should have first levied.

[Cited in brief in Stewart v. Stringer, 41 Mo. 402.]

2. Where such sale has been fraudulent, the court will set the conveyance aside, and order the land to be sold, subject to the lien of the original vendor.

At law.

Mr. Swayne, for the United States.
Mr. Hunter, for defendants.

LEAVITT, District Judge. The material allegations in the bill are, that on the 26th of December, 1831, the United States obtained a judgment, in the district court [case unreported], against the defendant Sherman; on the 6th of May, 1832, a writ of fieri facias, et levari facias, issued upon the judgment, on which the marshal returned, "No goods," and that he had levied on the tract of land described in the bill, as the property of the defendant, Sherman; that in March, 1831, the said Sherman mortgaged the land to the defendant, Barker; and on the 21st of December, in the same year, he conveyed it to the defendant, Lotridge, for the consideration expressed in the deed, of $225. The bill charges the conveyance to Lotridge to have been fraudulent and void; and prays that it may be set aside, and the land sold to satisfy the judgment, recovered by the United States. The defendants, Sherman and Lotridge have filed their answers, denying the allegations of fraud, and asserting, that said sale and conveyance were made in good faith, and for a valuable consideration. Sherman also asserts, that he had personal property on which the marshal should have levied. The defendant, Barker, has also answered, alleging that he sold the land to Sherman, who executed a mortgage therefor, to secure the payment of the purchase money; of which there is still due the sum of $188. To these answers there is a general replication.

The first point made by counsel for the defendants is, that the proceedings of the marshal, under the fi. fa. et lev. fa. are void, for the reason, that he did not first levy upon the personal property of the defendant in execution. To support this position the statute of Ohio is referred to, by which the sheriff, or other officer having an execution, is required to seize the goods of the defendant, if he has any, before he can levy upon land. There is proof that Sherman was in possession of some personal property, upon which the deputy marshal refused to levy, unless Sherman would agree to deliver it at Columbus. The question arising on this state of facts is, whether the court, in this form of action, can go back of the marshal's return, and set it aside, as false, so far as it declares, that the defendant had "no goods." The court has no hesitation in saying, that the defendant cannot, in this way, impeach the return of the marshal, and that it must be taken as true. If the marshal or his deputy has made a false return, the remedy must be by an action at law.

The next inquiry is, whether the allegations in the bill, as to the fraudulent character of the sale and conveyance, from Sherman to Lotridge, are sustained by the evidence. In the opinion of the court the charge of fraud is clearly made out. It is established, first, presumptively, by the facts, that the sale was made during the pendency of a suit against Sherman and in anticipation of a judgment; that no purchase money was paid, and no note or obligation taken there-

[1] [Reported by Hon. John McLean, Circuit Justice.]

for; and that no change of possession followed the conveyance. And the allegation of fraud is established positively, by the evidence. The witness Cole, says he applied to Sherman to purchase the land, who told him, at first, he had sold it to Lotridge for $500; and that he would see Lotridge and ascertain if he would sell it. The witness called on Sherman soon after, who told him he had not seen Lotridge, but that the land was as much his as ever, and he would sell it to witness for $500. He also said, he had conveyed the land to Lotridge till his son should arrive at full age, when Lotridge was to reconvey. Witness procured a deed to be drawn, and offered it to Lotridge for execution, who objected on the ground that the deed contained a covenant of warranty, and he did not know but the judgment of the United States would operate as a lien from the time of bringing the suit. Witness also states, that when he informed Sherman that Lotridge declined executing the deed, he would go and see if the old rascal meant to cheat him. The testimony of Cole is strongly corroborated by the witnesses, Wreather and Fuller, who testify to other declarations of Sherman, clearly establishing the fraudulent character of the sale and conveyance to Lotridge.

The principle insisted on by the counsel for defendant is, that the defendants having denied under oath, in their answers, the allegations of fraud, must be contradicted by the testimony of more than one witness, is admitted. But its application to this case is not perceived. The fact of the fraud is made out by the testimony of three witnesses, and by strong corroborating circumstances. The court therefore set aside the sale and conveyance as fraudulent, and decree, that the land be sold to satisfy the judgment of the United States, subject to the claim of Barker, for the purchase money due him. And as to Barker the bill is dismissed without costs.

Case No. 15,629.

UNITED STATES v. LOTS AND STORES NOS. 50 & 52 PEARL ST., CINCINNATI.

[Nowhere reported; no opinion filed. The decree is given in Jenkins v. Collard, 12 Sup. Ct. 868, 145 U. S. 546.]

Case No. 15,630.

UNITED STATES v. LOUDER.

[1 Cranch, C. C. 103.] [1]

Circuit Court, District of Columbia. Dec. Term, 1802.

COURTS—JURISDICTION—SLAVE—CONSENT.

This court has no jurisdiction to try a slave for larceny, but will quash the indictment and send him to a justice of the peace to be tried. By consent of parties the court will try the issue, whether slave or not.

Indictment for stealing. The prisoner pleaded ore tenus that he is a slave of S. B. Balch, and concluded to the jurisdiction of this court. 2 Hawk. P. C. 227. The United States joined issue upon that plea.

The attorney for the United States, and the counsel for the prisoner agreed that the court should try the issue, fact as well as law. Whereupon the court examined witnesses, and being satisfied that the prisoner was a slave, ordered him to be delivered to a constable to be carried before a justice of the peace and tried; and the indictment to be quashed, this court not having jurisdiction.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,631.

UNITED STATES v. LOUGHERY et al.

[13 Blatchf. 267.] [1]

Circuit Court, E. D. New York. March 8, 1876.

TRIAL — TERM OF COURT — JURY—BYSTANDERS — CHALLENGE TO ARRAY—ESCAPE OF DEFENDANT DURING TRIAL.

1. Section 746 of the Revised Statutes provides, that, when a trial has been commenced and is in progress before a jury or the court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of the court. On the trial of an indictment, after several jurors had been called and challenged, and three had been found competent and sworn, the court, on the last day of the term, directed that the trial proceed on the following day, which was the first day of the succeeding term. It so proceeded, and, after a conviction, it was, on a motion in arrest of judgment, *held*, that the trial had been commenced and was in progress, although a full jury was not empanelled before the term ended.

2. Section 804 of the Revised Statutes provides, that, when the panel is exhausted, the marshal, by the order of the court, shall return jurymen from the bystanders, sufficient to complete the panel. Under such an order, the marshal summoned as jurymen persons who were not in the court room, or about the court house, when such order was made, or when they were summoned, but they were present in court when they were returned by the marshal as present, and when their names were placed on the panel and their ballots placed in the wheel. *Held*, that they became bystanders, within the meaning of the statute, when they attended.

[Cited in Patterson v. State, 48 N. J. Law, 386, 4 Atl. 452.]

3. Such objection should have been taken as a ground of challenge to the array, before the polls were drawn, and that it was too late to challenge the array after challenging the polls.

4. If, after the trial of an indictment is commenced, the accused escapes from custody, and, for that reason, his further attendance cannot be had, the trial may proceed in his absence.

[This was an indictment against John S. Loughery and Thomas Loughery.]

Hubert G. Hull, Asst. U. S. Dist. Atty.

Isaac S. Catlin, for defendants.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

BENEDICT, District Judge. The defendants were jointly indicted with one Lewinski for coining. All three were put upon trial together, at the November term. After several jurors had been called and challenged, and three had been found competent and sworn, the panel was found to be exhausted by reason of challenges. The hour being late, on the last day of the term, the court, in pursuance of section 746 of the Revised Statutes, directed that the trial of the cause be continued on the following day, notwithstanding that such following day was the commencement of the December term. The court also directed the marshal to summon talesmen to fill the panel. On the day following, the marshal returned the names of twenty-four persons as in court ready to serve as talesmen. The names of those persons were then placed in the box, and from those ballots names were drawn to complete the jury. Those persons so drawn, as they were called to be sworn in the cause, were each challenged by the prisoners. Upon the trial of such challenge, it was proved, by the oath of each juryman, that he was not in the court room, or about the court-house, on the previous day, when the order for talesmen was made, but had been summoned by the marshal to attend, and when so summoned, was not in the court room or about the court house. These challenges were overruled. Thereupon, after the full number of jurors had been sworn, the defendants claimed the right to challenge the array, and to prove by the marshal that the persons summoned by him, in pursuance of the order for talesmen, were not bystanders when so summoned. The challenge to the array was rejected, and the trial proceeded. After the evidence on the part of the government was for the most part completed, and during the night, these two defendants broke jail and escaped from custody. Thereupon, their counsel objected to further proceedings upon the indictment, in the absence of the prisoners. The objection being overruled, the counsel for these defendants withdrew, and the trial proceeded. The jury thereafter found a verdict of guilty against all three accused, and the one still in custody was thereupon sentenced. Subsequently, the prisoners who had escaped were caught and brought into court for sentence, whereupon this motion in arrest of judgment is made, upon the following grounds: First, that there was a mistrial, because the trial was not commenced before a jury or the court at the November term, within the meaning of section 746 of the Revised Statutes, since but three jurymen had been sworn when the term ended, and there was, therefore, no power to continue the trial upon the subsequent day. A jury, it is said, consists of twelve men, and section 746 has no application to a case where a full jury is not impanelled before the term ends. The statute provides, that, when a trial has been commenced, and is in progress, before a jury or the court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of the court; and I am of the opinion that the trial of this cause was commenced and in progress at the November term, within the meaning of the statute. When a juryman is sworn in a cause, a trial is commenced—perhaps, when one juryman is drawn from the box. Here, several jurymen had been drawn, challenges had been taken and tried, and three jurymen had been accepted and sworn. Upon these challenges, questions of law had been raised, and objections taken, which formed part of the record. This trial was, therefore, in progress before either the court or the jury, and, as I consider, was in progress before a jury, within the meaning and intent of the act. It was, therefore, lawfully proceeded with, as if another stated term had not intervened.

The next ground upon which an arrest of judgment is asked, arises out of the challenges taken on the second day of the trial. The statute of the United States, section 804 of the Revised Statutes, directs, that, when the panel is exhausted, the marshal, by the order of the court, shall return jurymen from the bystanders, sufficient to complete the panel. In this case, the point taken is, that the persons summoned by the marshal, in pursuance of the order of the court, were not bystanders, because not in court when summoned by the marshal. But, these persons were present in court when they were returned by the marshal as present, and when their names were placed upon the panel, and their ballots placed in the wheel; and the statute is complied with, if the persons returned by the marshal are present in court when so returned. How long they had been present, or how they happened to be present, is of no consequence, provided no fraud or collusion or improper action is suggested. At common law, the duty of selecting jurors belongs to the sheriff, and it would seriously embarrass trials if it were held that, when a panel fails by reason of challenges, and talesmen are ordered, the marshal is bound to return the talesmen from those who happen, at the instant of making the order, to be present in court. There may be no bystanders then present, or all present may be unfit persons, or they may be persons whose presence has been secured by the accused in anticipation of a failure of the panel. "Persons, who are not bystanders in the court, may be summoned as talesmen, for, when they come in, they are bystanders." 5 Bac. Abr. "Juries," p. 337. The statutes of 6 Geo. IV. c. 50, § 37, provided that tales be named by the sheriff of the "able men of the county then present." Under that statute it was held not to be necessary that the tales should be selected out of persons accidentally present, but that they might be selected out of persons whose presence the sheriff had taken previous measures to obtain. Bac. Abr. "Juries." See, also, State v. Lamon, 3 Hawks, 179. I

am, therefore, of the opinion, that it formed no valid ground of objection to the persons placed upon the panel on the second day of the trial, they being present in court when returned by the marshal, and when their names were placed in the box, that, at the time they were notified by the marshal to be present in court on that day, they were elsewhere than in the court room or the court house. Whether they could be compelled to attend is another question, but, when they did attend, they became bystanders, within the meaning of the statute. It would seem further, that this objection was taken too late. The fact relied on, if of any effect, constituted a ground of challenge to the array, and the point should have been raised by challenging the array before any of the tales were drawn. 5 Bac. Abr. "Juries," pp. 345, 352. Here, the point was first taken as a ground of principal challenge to the polls. After a challenge to the polls it was too late to challenge the array.

The next ground relied upon is, that the accused were not present during the whole of the trial and when the verdict was rendered. But, the absence of the accused does not affect the proceedings, when it arises from the fact that, after the trial commenced, the accused escaped from custody, and his attendance cannot, for that reason, be had. The right of these defendants to be present during their trial was lost when they broke jail and escaped. Certainly, great inducements to escape during trial would be held out were it the law that, by an escape, further proceedings in a trial will be prevented. I see no reason for giving that effect to an escape, and I am furnished with no authority for the proposition.

The grounds for an arrest of judgment, which have been relied on, cannot, in my opinion, be upheld, and the motion is, accordingly, denied.

Case No. 15,632.

UNITED STATES v. The LOUISA BARBARA.

[Gilp. 332.] [1]

District Court, E. D. Pennsylvania. Jan. 21, 1833.

SHIPPING—PUBLIC REGULATIONS—EXCESS OF PASSENGERS.

1. To subject a vessel to forfeiture according to the provisions of the act of March 2, 1819 [3 Stat. 488], there must be an excess of twenty passengers beyond the proportion of two to every five tons of the vessel.

2. In estimating the number of passengers in a vessel, no deduction is to be made for children or persons not paying, but those employed in navigating the vessel are not to be included.

3. In estimating the tonnage of a vessel, bringing passengers from a foreign country, the measurement of the custom house, in the port of the United States at which the vessel arrives, is to be taken.

[1] [Reported by Henry D. Gilpin, Esq.]

This was a suit arising on an information filed by the attorney of the United States, against the Dutch ship Louisa Barbara, as liable to forfeiture, for having on board more passengers than are allowed by the act of congress. The law of March 2, 1819, declares, that if more than two passengers for every five tons of any vessel, according to custom house measurement, shall be brought into the United States, except the men employed in navigating the vessel, the master and owner shall each forfeit one hundred and fifty dollars for every passenger above that number; and if such excess amounts to twenty passengers in the whole, the vessel shall be forfeited.

It appeared in evidence, on the part of the United States, that the Louisa Barbara arrived in the port of Philadelphia on the 8th of August, 1832; that the captain presented at the custom house a report or manifest of all his passengers, amounting, exclusive of the men employed in navigating the vessel, to one hundred and seventy-eight; and that on a measurement of the vessel by the custom house officers, she was found to measure three hundred and ninety-three tons and eighty-two ninety-fifths of a ton, which would allow her to bring one hundred and fifty-seven passengers, twenty-one less than the number actually on board. On these facts the district attorney contended that the vessel ought to be condemned. It was proved by the claimants, that of the one hundred and seventy-eight passengers reported, twelve were in the cabin, nine only of whom paid, and that of the remainder, upwards of forty were children under twelve years of age. and not paying passage money, and that they were well accommodated, and arrived in good health, that the measurement of the vessel by the Dutch mode was two hundred and eighteen lasts, and that the last was to be taken as two tons, thus making the tonnage by the Dutch rule four hundred and thirty-six tons, and allowing one hundred and seventy-four passengers. On these facts the counsel of the claimants contended that the passengers, such as the act of congress meant, were not in a greater proportion than it allowed; that the spirit of the law was not violated, as they suffered no inconvenience; and that in fact, according to the foreign measurement, which ought to be adopted, the tonnage of the vessel was so great as not to render her liable to forfeiture.

Mr. Gilpin, U. S. Dist. Atty.
J. S. Smith, for claimants.

HOPKINSON, District Judge. The information in this case is founded on an act of congress passed on the 2d of March, 1819, for "regulating passenger ships and vessels." The first section of this law enacts that if the master, or other person on board of any ship or vessel, shall take on board of such

ship or vessel, at any foreign port or place, or shall bring or convey into the United States from any foreign port or place, a greater number of passengers than two for every five tons of such ship or vessel, according to the custom house measurement, the master and owner of such vessel shall severally forfeit and pay to the United States the sum of one hundred and fifty dollars for each and every passenger so taken on board, over and above the said number of two to every five tons: "Provided, that nothing in this act shall be taken to apply to the complement of men usually and ordinarily employed in navigating such ship or vessel." The second section of the act enacts "that if the number of passengers, so taken on board of such ship or vessel, or conveyed or brought into the United States, shall exceed the said proportion of two to every five tons of such vessel, by the number of twenty passengers, in the whole, every such vessel shall be deemed and taken to be forfeited to the United States." The information on trial is founded on this second section of the act, and claims a forfeiture of the ship on an alleged violation of its provisions.

There is no contrariety of evidence about the facts of this case. The ship Louisa Barbara arrived at the port of Philadelphia on the 8th August last, having on board one hundred and seventy-eight persons, taken on board at Amsterdam and brought to the United States, not being any part of the complement of men employed in navigating the ship. On a measurement of the ship by the proper officers of the custom house, she was found to contain three hundred and ninety-three tons and eighty-two ninety-fifths of a ton, custom house measurement of the United States, according to the sixty-fourth section of the act of congress of March 2, 1799 [1 Stat. 676], directing the mode of measuring a ship or vessel to ascertain her tonnage. This tonnage would allow the ship to bring to the United States but one hundred and fifty-seven passengers, at the rate or proportion of two to every five tons; and of course, if the one hundred and seventy-eight persons on board are to be deemed passengers within the meaning of the law, there was an excess of twenty-one; and as an excess of twenty is sufficient to incur the penalty of forfeiture of the ship, she has become liable to it. The defence has been mainly rested on the fact, that a large proportion of the one hundred and seventy-eight persons taken on board, were children, who paid nothing for their passage, and cannot, therefore, be considered or taken to be passengers within the intention of the law. The captain has testified that there were twelve persons in the cabin, of whom but nine paid their passage; that there were in the steerage, or between decks, one hundred and sixty-six, of whom but one hundred and twenty-seven paid their passage: that of the children on board, twenty-five were under five years of age; twenty-one from five to ten; fourteen from ten to fifteen; and seventeen from fifteen to twenty: that no passage was paid for those under twelve years of age, nor for those of twelve.

An argument, not wanting in plausibility, was urged to show that children, especially those of a very tender age, are not within the object or evil to be prevented by the law, and therefore cannot be taken to be a part of the number of passengers allowed by the law. It was indeed contended that a passenger, commercially and philologically speaking, is only one who pays for his passage, and therefore that none of the persons in this ship who did not pay for their carrying, ought to be taken into the count of the number of passengers on board of this ship, within the meaning of the law. If we were to make these deductions of children and unpaid persons on board of a vessel from the number of her passengers, we should find no warrant for it, in the law, and throw the construction of the act into such uncertainty as would render it little better than a nugatory attempt at legislation. In regard to children, we should be obliged to fix the age at which they may not be considered as passengers within the act, and the question of payment would often be as difficult to settle. The inconvenience and danger to health and life from crowded vessels, are the same whether the persons on board pay or do not pay for their passages, and although it may not be probable that the owners of vessels will bring passengers for nothing, yet the law may be evaded and defeated by secret artifices and agreements on the subject of compensation for the passage, if it is to be understood that paying passengers only are within the law. The payment would thus become a part of the case of the prosecution; and legal proof would be required of it. The only exception or limitation, given by the act of congress, is found in the provision which declares that it shall not apply to the complement of men employed to navigate the ship. The phrase is, "shall exceed, by the number of twenty passengers in the whole;" by which I understand that all persons on board are to be counted; that no exceptions are allowed; but that if, on the whole, that is, all taken, they exceed the limited number, the penalty attaches. The ship's crew are expressly excepted, but no other persons on board.

Another effort was made to withdraw this ship from the penalties of the act. It was said that if her tonnage is estimated according to the Dutch mode of measurement, the number of passengers on board would not exceed two to every five tons, and the requisitions of the act have been strictly complied with. There is considerable uncertainty about the fact here assumed; but the argument founded on it is altogether in-

admissible. It is this, that although the act of congress refers, for the tonnage of the ship, "to custom house measurement," it does not specify what custom house measurement is intended; it does not say "of the United States." It is impossible to imagine, that in the regulation of vessels coming into our own ports, to be entered at our own custom houses, to be there examined and inspected by our own officers, to ascertain whether they have conformed to our own laws, any measurement could be referred to but our own. What did congress know? What can the courts of the United States know, of any other measurement of the tonnage of a vessel than that prescribed by our own laws? If we leave this guide, we shall have a different rule for every vessel that comes into our ports, according to the various modes of measurement that may be used by the various nations of the world. The argument, too, would be absolutely destructive of the law; for if the measurement of the United States is not to be adopted in the construction of this law, because it is not expressly designated, the same reason will exclude every other measurement as no one is named. Although the excess, in this case, above the number, which incurs a forfeiture of the vessel, is small, the excess over the number allowed by the law is considerable. Whether the circumstance of there being so many children has misled the owners and captain of the ship, I cannot take into my consideration of the case. It may be a proper question to be entertained by that department of our government, which administers its liberality and mercy, and may forbear to execute the rigour of the law, where it is believed that its violation has been innocent or excusable. There is no such power here.

Decree that the ship Louisa Barbara, named in the information, be condemned and forfeited to the United States, according to the prayer of the information.

Case No. 15,633.

UNITED STATES v. LOUISVILLE & P. CANAL CO.

[4 Dill. 601; 1 Flip. 260; 1 Cent. Law J. 101.] [1]

Circuit Court, D. Kentucky. Sept. 3, 1873.

FEDERAL COURT PRACTICE—POWER OF A JUSTICE OF THE SUPREME COURT TO ACT OUT OF THE CIRCUIT TO WHICH HE IS ASSIGNED — CANAL COMPANY—THE RIGHTS OF BONDHOLDERS, THE GOVERNMENT, AND THE GENERAL PUBLIC.

1. Where the judge of the district court for the district in which a bill in equity is brought, and the circuit judge for the circuit, and the justice of the supreme court allotted to that circuit, are all absent from the district and circuit, another justice of the supreme court has jurisdiction, at any place in the United States, to hear an application for an injunction, notwithstanding the act of congress of June 1, 1872. See Rev. St. § 719 [17 Stat. 196].

2. The legislative history of the Louisville & Portland Canal Company from its first incorporation by Kentucky, in 1825, down to the present, and its relation to the government of the United States, given by Mr. Justice Miller, who holds that the corporation is still in existence, and has the right to use and control the canal and its revenues so far as may be necessary for the purposes contemplated by the act of the legislature of Kentucky and the joint resolution of the two houses of congress of May 24, 1860.

3. The United States is the only stockholder in the company, and its directors are naked trustees without an interest; and, under the state and federal legislation concerning the canal and the bonds issued to raise money to enlarge and improve it, secured by a mortgage of the revenues and tolls of the canal company, there are three parties interested in the trust and the manner in which its duties shall be discharged by the company: (1) The bondholders of the company; (2) the government of the United States, sole stockholder, and which has expended $1,000,000 upon the canal; and (3) the general public.

[Cited in brief in Poland v. Lamoille V. R. Co., 52 Vt. 158.]

4. The appropriation act of congress of June 10, 1872 [17 Stat. 347], in relation to the canal, construed so as not to impair the rights of the bondholders and the opinion expressed that congress could not abolish or so limit the tolls as injuriously to affect them, "for the plain reason that it would be a legislative attempt to destroy vested rights, and a taking of private property for public use without due compensation."

5. Under the circumstances of the case, the president and directors of the canal company were enjoined, at the suit of the United States, from interfering with its engineer officers and contractors in the prosecution of the work of repairing and improving the canal.

[This was an application at the suit of the United States to enjoin the president and directors of the canal company from interfering with the United States engineer officers and contractors in the work of improving and repairing the canal.] [2]

G. C. Wharton, for the United States.

James Speed, for defendant.

MILLER, Circuit Justice. Upon a bill in chancery directed to the judges of the circuit court of the United States for the district of Kentucky, an application is made to me at Long Branch, in the state of New Jersey, to enjoin the Louisville & Portland Canal Company from interfering with the engineer officers of the United States, and the person with whom they have contracted for the work of making certain repairs and improvements in said canal, under authority of an act of congress appropriating money for that purpose, approved June 10, 1872. An affidavit of the attorneys of the United States accompanies the application, which shows that the judge of the district court for that district, the judge of the circuit court of that circuit, and the justice of the supreme court allotted to

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and by William Searcy Flippin, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 4 Dill. 601, and the statement is from 1 Flip. 260.]

[2] [From 1 Flip. 260.]

that circuit, are all absent from and without the district and circuit. I am of the opinion, therefore, that, notwithstanding the provisions of the seventh section of the act to further the administration of justice, approved June 1, 1872 (see Rev. St. § 719), I have jurisdiction to hear the motion, and that it is my duty to do so.

The language of the act under which the agents of the government are proceeding is important. It is found in the act "making appropriations for the repair, preservation, and completion of certain public works on rivers and harbors, and for other purposes," and is, verbatim, as follows: "For the continuing the work on the canal at the falls of the Ohio river, three hundred thousand dollars. And the secretary of war is hereby directed to report to congress, at its next session, or sooner, if practicable, the condition of said canal, and the provisions necessary to relieve the same from encumbrance, with a view to such legislation as will render the same free to commerce at the earliest practicable period, subject only to such tolls as may be necessary for the superintendence and repair thereof, which shall not, after the passage of this act, exceed five cents per ton."

A brief reference to the history of this canal, and its relations to the government of the United States, is essential to an understanding of the matter now presented for consideration. By an act of the Kentucky legislature of January 12, 1825, a corporation was chartered, by the name of the Louisville & Portland Canal Company, to construct a canal around the falls of the Ohio river, with a capital stock of six hundred thousand dollars, divided into shares of one hundred dollars each, with the right to levy tolls on vessels passing through the canal. By subsequent statutes the capital was increased to ten thousand shares, and the United States, under acts of congress, became the owner of twenty-nine hundred and ten of said shares. The canal was constructed, and has ever since been in successful and profitable operation; and the tolls collected under the limit of the charter granted by the state yielded such a revenue, beyond what was necessary to keep the canal in repair, that, by the joint legislation of the state and the United States, and by the consent of the individual corporators, a plan was adopted and entered upon to make the canal free to the uses of commerce, except so far as might be necessary to keep it in repair. This plan was inaugurated by an act of the Kentucky legislature, passed in 1842, the provisions of which were accepted by the stockholders, including the United States. Its essential features were that the surplus revenues of the corporation should be used to buy up all the stock held by others than the United States, and that when this should be accomplished the canal should be transferred to the control of the government for the use of the public, subject only to such tolls as might be necessary for its superintendence and repair. This plan was so far carried out that in the year 1855 all the shares other than those held by the United States had been purchased in, except five shares left purposely in the hands of as many individuals, to qualify them to hold office as directors of the corporation.

But while this process of extinguishing the individual shares had been going on, it became clear that the demands of commerce required an enlargement of the canal and a change in its place of lower outlet, which could only be made by an additional or branch canal. The successful use of the tolls in buying in the shares of private stockholders, pointed at once to the means of making this increase in the capacity of the canal without burdening either the state or federal government; and, by statute of the Kentucky legislature of 1857, and joint resolution of the two houses of congress of 1860, the canal company was authorized to do this work, and to borrow money for that purpose, and pledge the faith of the company and its tolls or revenues for the money so borrowed. The corporation accordingly issued its bonds for $1,600,000, secured by a mortgage on the canal, its franchises, and its tolls and revenues; and proceeded to expend the sum realized on these bonds in the enlargement and improvement of the canal. It proved, however, that when this money was all expended the canal was still unfinished; and the congress of the United States, in the year 1868, commenced a series of appropriations for the purpose of completing the work, which has been continued to the present time. Over $900,000 have thus been appropriated and expended under the control and direction of the officers of the government, and the appropriation of 1872, already referred to, was in continuation of this work.

During this time the president and directors of the Portland Canal Company and the officers of the United States seem to have acted in harmony, the corporation collecting the tolls and paying for and superintending the temporary repairs. They have also paid the interest on the debt, and redeemed or bought in about half a million in amount of the bonds. This harmony would probably have continued but for the clause in the present act of appropriation, that, "after the passage of this act, the tolls should not exceed five cents per ton." It is the first time that congress has attempted to regulate or limit the tolls to be collected on vessels using the canal. The rate thus limited would not produce enough to make the ordinary and necessary repairs, and pay for the superintendence of the canal. It would leave the interest on the bonds unpaid, and largely impair, if not destroy, the security of the bondholders for the payment of the principal.

The president and directors of the company construe the act as appropriating the money on the condition that the tolls shall be limited to five cents per ton, and they say that an acceptance of the appropriation would be an

implied consent to this limitation. They, therefore, notified the officer in charge that they refused to accept the appropriation. That officer, however, proceeded to let the work and commence operations, and the corporation interfered by physical force to prevent it, and I am now asked by the bill before me, filed in behalf of the United States, to enjoin the corporation from this interference.

The officers of the canal company maintain: (1) That the corporation is the legal owner of the canal, and that neither the government of the United States nor any one else has the right to assume such control of its property, as the action of the engineer officers seek to do, without the consent of the directors of the company; and (2) that a due regard to their duty to the bondholders and other creditors of the corporation forbids them from giving either express consent, or such consent as inaction would imply, to the assumption of the United States to reduce the tolls found in the appropriation act.

The United States, by its counsel, on the other hand, maintain that since the year 1855 the corporation has had no existence as such, or, if it has any existence, it is merely a nominal one, as the agent of the government, for whose sole use it is kept alive; and that as the government owns practically all the stock, it has, and should have, the right to control the use, and direct the changes and improvements in the canal. This view is supposed to receive additional force from the powers and duties of the national government in regard to the navigable waters of the United States.

The first, and perhaps the most important, question to be determined, is the relation of the corporation and its officers to the possession and control of the canal. The proposition of the government counsel is based upon the idea that when, under the act of 1842, all the private stock had been bought, the government became, without other action, the owner, and entitled to the possession and control of the canal; and that, both by operation of that statute and the necessity of the case, the corporation ceased to have an existence, or at least to have any right or title to the canal; and this argument is made stronger, in the opinion of counsel, by the circumstance that at that time, to-wit, on the 31st day of January, 1855, by a report to the secretary of the treasury, the directors advised him of the purchase of private stock, and the readiness of the corporation to transfer the custody of the canal to the United States so soon as the department was prepared to receive it. But it does not appear that the department was ready to receive the transfer. Certainly no formal act, either of congress or of the department, accepting this transfer or acknowledging the obligation on which alone it was to be so transferred, namely, to hold it for the use of the public free of tolls except so much as might be necessary for its superintendence and repair, is shown or claimed. On the contrary, in reply to the notification of the company, the secretary requested them to continue their organization by retaining a share of stock for each director to maintain his eligibility as such, and to manage the affairs of the canal as heretofore.

But whatever doubt may exist as to the precise relations of these officers to the work at that time, is removed by the subsequent act of 1857 of the state legislature, and the joint resolution of congress of 1860. These have already been referred to, as authorizing the company to extend and enlarge the canal, and to contract a debt for that purpose; but as the language of the joint resolution of congress, approved May 24, 1860, seems to me to be conclusive of the continued existence of the corporation, I will give its precise terms. It was resolved: "That the president and directors of the Louisville & Portland Canal Company be, and they are hereby, authorized, with the revenues and credits of the company, to enlarge the said canal, and to construct a branch canal from a suitable point on the south side of the present canal to a point in the Ohio river opposite Sand Island, sufficient to pass the largest class of vessels navigating the Ohio river." The resolution had two provisos—one protecting the United States from liability for the debt so incurred, and the other declaring that when the work was completed, and paid for, no more tolls should afterwards be collected than were necessary to keep it in repair, and pay for its superintendence and management.

This resolution, beyond all controversy, clearly recognizes three facts of important bearing on the matter in hand: (1) The existence of the corporation called the Louisville & Portland Canal Company; (2) that it had revenues and credits which might be sufficient to enable it to raise means for this large and expensive work; (3) that it had the right, or it was then given, so far as the United States could give it, to use these credits and revenues for that purpose. It is inconceivable that this company had any other revenue than the tolls from the canal, or any other credit than that which arose from the right to these tolls, and the ownership or control of the canal. To me it seems that this is conclusive of the existence of the corporation, and of its right to use and control the canal and its revenues, so far as was necessary for the purpose contemplated by the act of the Kentucky legislature and the joint resolution of the two houses of congress.

But, while these considerations prove the continued existence of the corporation, the validity of the contract by which they pledged the canal and its revenues for the money borrowed for its extension, and its duty to secure and protect this revenue, and to do all that lawfully may be done to prevent its

destruction or diversion from that purpose, it is still true that the directors of this corporation occupy a very peculiar position, and one widely different from the directors of railroads, insurance companies, and other corporations for private gain. The United States is the only stockholder of this corporation. The directors have really no personal interest in the corporation or its property. They are to all purposes what equity calls trustees without an interest—the depositaries of a naked trust. For whom do they hold this trust, and for whose benefit must they exercise it? This inquiry, though lying at the foundation of the question to be solved here, is, fortunately, not a difficult one. There are three parties interested deeply in this trust, and in the manner in which its duties shall be discharged, which I review in the order of the superiority of their claims, rather than their importance: (1) The holders of the bonds, secured by the mortgage, authorized and placed under a two-fold legislative sanction by the legislature of Kentucky and the congress of the United States; (2) the United States, the holder of all the stock in the corporation, expending a million of dollars beside, for the benefit of the canal; and (3) the public—the community—to whose use, free of all charges but those necessary to keep it in operation, it has been solemnly dedicated by the legislature of Kentucky, by the congress of the United States, and by the action of the corporation itself, as well as by all the acts of all these parties from 1842 to the present time, so soon as the enlargement is completed, and the debt thereby created discharged.

As regards the first of these, I have no hesitation in expressing my entire conviction that the bondholders have a lien upon the revenues of the canal, and a right to insist that the corporation shall protect these revenues to the extent necessary to make entirely safe the payment of their debt and its accruing interest; and that, until that debt is paid, or the mortgage satisfied, or otherwise discharged, with the consent of these bondholders, this right of theirs remains, with the corresponding duty of the directors of the corporation. But the right of these creditors is limited to this; and so long as their security is unimpaired, it is the duty of directors to advance the other interests I have mentioned, for which they are trustees. The interests of the United States and of the public are, for present purposes, identical. The government has, in all its actions, shown its desire and its intent that, at the earliest moment, the public use of the canal should be freed from all burdens save those necessary for its repair and management; and her very act which has given rise to the present opposition of the president and directors, is wholly in the interest of the public, and designed to hasten the end long contemplated by all parties.

Now, if the act of the United States in completing the enlargement of the canal is an act for the benefit of all these parties, the bondholders inclusive, the resistance of the president and directors is an act in detriment of their trust, injurious to all the interests confided to them, and a mere arbitrary exercise of power which should be restrained. If, on the other hand, any one of those interests would be seriously prejudiced, they should not be disturbed in the exercise of a reasonable discretion in the protection of that interest.

That the work itself which is being done by the government is a useful and a necessary work for the public good, and for that of the United States, as a stockholder, and as the representative of the public, is undeniable. That it also adds to the value of the security of the bondholder, and is to that extent in his interest, is equally clear. But, in regard to the latter, if, as alleged by defendant, the work is being constructed in a manner which so far obstructs the use of the canal as to endanger the revenue from which this interest is to be paid; or if, as the trustees seem to believe, the work, when completed under the present act of congress, will extinguish the right of the corporation to collect sufficient tolls to pay both principal and interest of their debt—then the work should not be done, for these rights are paramount.

In regard to the manner of doing the work, the affidavits submitted satisfy me that no such serious obstruction to the use of the canal, or to the repairs which the directors wish to make, will result from the work as that claimed by the defendant—none which should be set up for a moment in comparison with the great value to all parties of the vigorous prosecution and early completion of the work of extension and enlargement. But I am satisfied that the president and directors are honest in their belief that an acquiescence on their part in the expenditure of this appropriation on the canal would bind them legally, as an acknowledgment of the government limitation of the tolls—an acknowledgment which would be a violation of their official duty. Of this result they will be rid, if their action is controlled by a competent court against their protest. To refrain from disturbing the contractors and engineers in expending this money, when their hands are tied by an injunction, raises no presumption of acquiescence in the claim of the government to reduce the tolls to a minimum.

Should the court so restrain? Or, if they are right in their construction of the statute, should they be permitted to resist congressional interference in this matter? This leads me to a remark or two on the construction of the appropriation act. The first sentence is a distinct and clear appropriation of $300,000 for the continuation of the work in which the government had for several

years been engaged, and in which it had spent, aside from its stock, near a million of dollars. The subsequent sentence directs the secretary of war to report to congress what legislation is necessary to relieve the canal of encumbrance, so that it may be free from all other tolls than what is required for its management and repair; and this sentence declares that such tolls, after the passage of this act, shall not exceed five cents per ton. That the appropriation is absolute, and independent of the clause concerning tolls, I have no doubt. It might as well be argued that it was dependent on the report of the secretary of war. Whether, therefore, the tolls be reduced or not, the appropriation remains, and should be carried into effect. When we consider that the next sentence recognizes the encumbrance on the canal—no doubt meaning the one in favor of the bondholders, so often mentioned in this opinion—and directs an inquiry as to what action by congress is necessary to remove it, I can hardly believe that, in the same sentence, it was intended to destroy the essential thing on which that encumbrance rested—namely, the tolls. The argument is, therefore, not without force, that congress meant, when they said such tolls should not exceed five cents per ton after the passage of this act—such act as they contemplated in future to pass—to satisfy or remove that encumbrance. It must be confessed that the language is not apt for this construction; that, in their caution, the directors might well have supposed that congress intended to limit the tolls at once to five cents per ton. If this construction of the statute be correct, then I have no hesitation in saying that that part of it which so limits the tolls is void, for the plain reason that it is a legislative attempt to destroy vested rights, and a taking of private property for public use without due compensation. I think I have shown that the prosecution of this work is for the benefit and advantage of all concerned; that it does not seriously interfere with the ordinary use of the canal; and that the accomplishment of the work will neither confer on congress the right to regulate the tolls, nor validate the attempt already made to do so, if congress really intended to make such an attempt.

Under these circumstances, I have no hesitation in controlling the president and directors of the canal company in the exercise of the great trust committed to them, so far as may be necessary to permit this work to go on; and, in exercising this control, I feel satisfied that I am relieving them from an embarrassment and responsibility which they will gladly rest on the shoulders of the court. The injunction will be granted.

Ordered accordingly.

NOTE. A marked feature in the foregoing opinion is the favorable light in which it regards the rights of the bondholders of the corporation, the learned justice declaring with emphasis that even congress could not limit the tolls of the canal, pledged for their benefit, so as to impair their rights. In England, parliament would possess this power, as shown by the case of Brown v. Mayor, etc., of City of London (1861) 9 C. B. (N. S.) 726. There a statute discharged the liability of the city of London on bonds payable out of tolls and duties levied on vessels navigating the Thames; and it was held that no action would thereafter lie against the corporation thereon, on the principle that where the performance of an obligation has been rendered impossible by act of the law, the obligation is discharged. See, also, City of St. Louis v. Sheilds, 52 Mo. 351; Dill. Mun. Corp. (2d Ed.) § 41 et seq. note.

As to the right of the United States to bring an injunction bill in the proper circuit court, to protect improvements which she is making under the authority of congress, in navigable waters, from injury which will be caused by acts done by state authority, see U. S. v. Duluth [Case No. 15,001]; sequel to same case, Wisconsin v. Duluth [Id. 17,902].

UNITED STATES v. LOW. See Case No. 15,634.

Case No. 15,634.

UNITED STATES v. LOW et al.

[13 Int. Rev. Rec. 124; 10 Am. Law Reg. (N. S.) 455.]

Circuit Court, S. D. Georgia. April 14, 1871.

PAYMENT OF CUSTOMS DUTIES — ACTION ON BOND —DEFENSES—PAYMENT TO CONFEDERATE AUTHORITIES.

[1. In an action on a bond given for the payment of duties on goods deposited in the public stores in Savannah, it is no defense that the principal actually paid, under compulsion, the amount of the duties to the Confederate collector of customs during the occupancy of Savannah by the Confederate authorities.]

[2. Nor is it a defense that there was no United States collector of customs or other agent at Savannah, to whom payment could be made, during the three years within which the duties were to be paid under the provisions of the bond.]

J. D. Pope, U. S. Dist. Atty.

Law, Lovell & Falligant, for defendants.

WOODS, Circuit Judge (charging jury). This is an action of debt brought by the United States against the defendants [Andrew Low and Charles Green] upon their joint and several bond under seal, dated the 1st day of December, 1860, whereby they bind themselves to pay to the United States the sum of $2,700. The bond is subject to the condition that "if the obligors, or either of them, shall, on or before the expiration of three years, to be computed from the date of the importation of the goods, wares, and merchandise therein mentioned, well and truly pay, or cause to be paid, unto the collector of customs for the port of Savannah, for the time being, the sum of $1,360.54, or the amount of duties to be ascertained as due and owing on goods, wares, and merchandise imported by A. Low & Co., in the British ship Shandon, Munro, master, from

Liverpool, consisting of four hundred and twenty-five tons of pig iron, or shall, in the mode prescribed by law, on or before the expiration of the three years aforesaid, withdraw the said goods from the public stores where they may be deposited at the port of Savannah, then this obligation is to be void, otherwise to remain in full force and virtue."

The bond is produced in evidence, and its execution is not disputed. The only other evidence in the case is the testimony of the witness Z. H. Winkler, which is in substance as follows: "The words written across the face of the bond, namely: 'Cancelled by withdrawal and payment of duties, this 30th day of August, 1861, Z. H. Winkler, Clerk,' were written by me the day they bear date. I was at that time bond and debenture clerk under John Boston, who was Confederate collector of customs at Savannah. It was in the capacity of his clerk that I made the endorsement upon the bond. On the back of the bond are the words and figures: '$1,300 paid August 30, 1861,' which was also written by me on the day they bear date. On the 30th day of August, 1861, there were no United States customs officers in Savannah. At that time the United States had not the custody of the articles mentioned in the bond. At the time the goods were delivered to defendants they were in the possession of the Confederate States. If the duties had not been paid by them they would have been sold by the Confederate States. The United States did not resume their authority over the custom house and port of Savannah till about the 22d day of December, 1864." This comprises all the testimony in the case, and there is no dispute between the parties, or any question of fact. If we have misstated any fact or omitted any fact, it is your province, gentlemen, to correct us.

On this state of facts the defendants claim that the plaintiff ought not to recover—First, because the payment of the duties on the goods mentioned in bond, to the Confederate collector of customs was, in effect, a payment to the United States, and the bond was discharged thereby; second, that the United States undertook, by necessary implication from the terms of the bond, that there should be a collector of customs or other agent of the United States at Savannah, during the three years specified in the bond, to receive the duties or to ascertain the amount to be due, and to deliver the goods to the defendants on the payment of the duties, and having failed in this, and having abandoned the goods, and the same having fallen into the hands of what is known as the Confederate States, to which the defendants were obliged to pay duties to prevent their property from being sold, the United States cannot recover in this action. It is not claimed that the duties were ever paid directly to the United States, nor that the money ever came to the treasury of the United States, or to the hand of any officer authorized to receive it for the United States. Neither is it claimed that the property was lost to the defendants. On the contrary, it is not denied that defendants received their property when they demanded it. Nor is it claimed that the payment of these duties was compelled by superior force or irresistible power, but only by a refusal to deliver the property unless payment of the duties to the Confederate collector of customs was made.

On the first ground of defense raised, we instruct you that payment to an agent or officer of the Confederate States of the duties mentioned in the bond was no payment to the United States nor substitute therefor, nor does it constitute any excuse for nonpayment to the United States. On the importation of the goods the duties became due and payable to the United States; the defendants became the debtors of the United States; and their obligation to pay was evidenced and secured by the bond in suit. This debt could only be discharged by payment to the United States. It is no answer to say that if the duties had not been paid to the Confederate officer the goods would have been sold. The Confederate officer who held these goods and exacted this payment was, to state his character in the mildest form, a naked trespasser, without authority or color of authority. The whole Confederate power under which this officer acted was a usurpation of unlawful authority; its acts can have no force as law in divesting or transferring rights or as authority for any act opposed to the just authority of the federal government. So that the case stands in the same plight as if John Boston had on his own motion and with the strong hand taken possession of these goods, and exacted a ransom for their delivery to their owners. It can scarcely be claimed that a payment to him under the circumstances would discharge a debt due to the United States. Had Boston sold the goods on refusal of defendants to pay the duties to him, the defendants might have had their action against him or the purchaser for unlawful conversion; but such unlawful conversion would not divest the United States of its right to the duties upon the goods.

On the second branch of the defence we say to you that by the terms of the bond the United States entered into no obligation with defendants, the failure to perform which would release defendants from their liabilities on the bond. The United States were not bound, as a condition precedent to a recovery on this bond, at all times to have a collector of customs at Savannah to whom payment of duties could be made. The absence of a collector of customs for a space of time no more defeated the bond than the failure and closing of a bank at which a promissory note is made payable discharges the note. The only obligations created by this bond are obligations assum-

ed by the makers. They owe duties to the United States. They have the option either to pay them at once or twice, to give bond for their payment, and place their goods in a bonded warehouse at their own risk and expense. If the goods are burned, it is their loss. If they are stolen it is their own loss. If they are captured by the superior force of insurgents against the United States, it is their loss. The United States are not insurers, nor even bailees. Nothing short of a voluntary abandonment of the goods by the United States, or their wrongful conversion by the United States, could release the defendants from their obligation to pay duties. The goods were not wrongfully converted, nor is there any evidence that they were voluntarily abandoned; on the contrary, the court judicially knows the historical fact that the custom house and bonded warehouses of the United States at Savannah were taken from the possession of the United States by the superior and irresistible force of an armed rebellion, against which the United States never agreed to become insurers. The obligation to pay these duties secured by the bond is absolute, and nothing but their payment can discharge the bond, unless the conversion of the goods or their voluntary abandonment by the United States might be an excuse, neither of which is claimed or proved. The execution of the bond is not denied. We instruct you that if you believe all the testimony on which defendants rely, still it constitutes no defense to this action, and that it is your duty to return a verdict for the plaintiff for the amount of the duties in gold, namely, $1,360.54, with interest from the 22d day of December, 1864, the date when the United States received possession of the port and custom house at Savannah.

[The jury rendered the following verdict: "We, the jury, under the charge of the court, find a verdict in favor of the plaintiffs for $1,360.54, with interest, in currency, from the 22d day of December, 1864."] [1]

Case No. 15,635.

UNITED STATES v. LOWE et al.

[1 Dill. 585.] [2]

Circuit Court, D. Iowa. 1871.

PUBLIC OFFICERS — COMPENSATION — RECEIVER OF PUBLIC MONEY.

A receiver of public moneys is not entitled to offset against the government rejected accounts for unauthorized clerk hire, fuel, lights, or for transmitting money. Office rent may under extraordinary circumstances be allowed.

[Cited in U. S. v. Stowe, 19 Fed. 808.]

Sapp & Lowe, for the United States.

Polk & Barcroft, for defendants.

Before MILLER, Circuit Justice, DILLON, Circuit Judge, and LOVE, District Judge.

In an opinion prepared by the circuit judge construing various acts of congress relating to the compensation of officers of the United States, the following propositions were decided.

1. A receiver of public moneys at a local land office is not entitled, when sued on his official bond, to set off against the government a rejected account for unauthorized clerk hire, fuel, lights, and for transmitting money to the proper government depositary.

2. The claim of the receiver for office rent may, under circumstances, be allowed as an equitable credit under the act of March 3, 1797 [1 Stat. 512].

[Nowhere more fully reported. Opinion referred to above is not now accessible.]

Case No. 15,636.

UNITED STATES v. LOWRY et al.

[2 Wash. C. C. 169; 1 Am. Law J. 232.] [1]

Circuit Court, D. Pennsylvania. April Term, 1808.

WRIT OF POSSESSION—OBSTRUCTING PROCESS—THREAT TO RESIST.

1. In the execution of a writ of habere facias possessionem, if adverse possession be held, the officer is first to turn out the occupant, and take possession in the name of the law; and, afterwards, deliver it to the plaintiff in ejectment. It is not necessary that the vacant possession shall be immediately delivered to the plaintiff.

2. The offence of obstructing process, consists in refusing to give up possession, or in opposing or obstructing the execution of the writ, by threats of violence, which it is in the power of the person to enforce; and thus preventing the officer from dispossessing the person so acting.

[Cited in U. S. v. Huff, 13 Fed. 640.]

3. A mere threat to resist the execution of the writ, is not an offence under the act of congress; but if, when the officer proceeds with the writ to the land, and is about to execute his process, a threat is used, by a person forcibly retaining the possession, accompanied by the exercise of force, or having the capacity to employ it, and the officer does not do his duty; the offence is complete.

[Cited in U. S. v. Huff, 13 Fed. 640.]

4. The officer is not obliged to risk or expose his person, or to proceed to a personal conflict with the defendant.

[Cited in U. S. v. Huff, 13 Fed. 640.]

These cases were tried by separate juries. The defendants [Morrow Lowry and John Lowry] were indicted, severally, for obstructing the marshal in executing writs of habere facias possessionem, issued from this court. It appeared in evidence, that the writs of habere facias possessionem, issued regularly in each case, on judgments in ejectment recovered in this court, were delivered to a

[1] [From 10 Am. Law Reg. (N. S.) 455.]

[2] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq. 1 Am. Law J. 232, contains only a partial report.]

deputy marshal; whose commission from the marshal was called for and produced, with a certificate of his having taken the oath required by the act of congress, before a state judge, and duly certified to the district judge: that each defendant, when the marshal went with the writs to execute them, closed his door, was armed, and threatened to kill the officer, if he attempted to dispossess them; declaring, that they would lose their lives, rather than permit the execution of the writs. In consequence of this opposition, he was prevented from executing the writs.

Mr. Rawle, for defendant, in the first case, contended that the marshal was not in the capacity to execute the writ; since it appeared in evidence, that neither the plaintiff in the ejectment, or any person representing him, was with the marshal to receive the possession.

Mr. Levy, for defendant, in the second case, insisted that nothing was proved against his claims but a menace, which is not punishable by the act of congress.

WASHINGTON, Circuit Justice (charging jury). In the execution of a writ of habere facias possessionem, there are several acts to be performed, which may all be done within a short space of time; but must necessarily be done in succession. If an adverse possession be held, the officer is first to turn out the occupant, then to take possession in the name of the law, and afterwards to deliver it to the plaintiff in ejectment. The offence, which consists in opposing or obstructing the execution of the writ, is complete, when the person in possession refuses, and by threats of violence, which it is in his power to enforce, prevents the officer from dispossessing him. It is nothing to the person, thus obstructing the execution of the process at the threshold, how far it is in his power immediately to deliver the vacant possession to the plaintiff, in the writ. If, then, the jury are satisfied that such obstruction took place in this case, they must find for the plaintiff.

In the second case, THE COURT said: It is said, that a mere threat to resist the execution of a writ, is not an offence against the act of congress. This is true; but if, when the officer having the writ, proceeds to the land, and is about to execute it, such a threat is made by a person retaining the possession, accompanied by the exercise of force, or having the capacity to exercise it, in consequence of which the officer cannot do his duty; it cannot be seriously contended, that the execution of the process has not been opposed or obstructed; and this is the offence charged, which you are to decide upon. The officer is not obliged to risk his life, or expose himself to personal violence; it is enough that he is prevented, by the exercise of force, or the threat of force, by one in a condition to execute it, from proceeding in the lawful exercise of his functions. It is not necessary for him to proceed to the length of a personal conflict with the defendant, for that would constitute a distinct offence in the defendant, even though the officer should succeed. In this case, the defendant retained, by force, the possession of the house, and threatened to take the life of the officer, if he should attempt to execute the writ; in consequence of which he was prevented from doing it. Should this be your opinion of the evidence, your verdict must be against the defendant.

The jury, in each case, found the defendant guilty.

NOTE [from 1 Am. Law J. 232]. The circuit court of the United States proceeded to pronounce sentence on Morrow Lowrey, Andrew Lowrey, and John Lowrey, convicted of opposing the deputy marshal, when executing writs of possession issued from that court. An excellent admonition was delivered by Judge Washington to the prisoners, previous to pronouncing sentence. The prisoners were separately indicted for obstructing the execution of the process of the circuit court of the United States, on the twenty-second section of the act of congress passed April 30, 1790 [1 Stat. 112], which enacts, "that if any person or persons shall knowingly and wilfully obstruct, resist or oppose any officer of the United Staes, in serving or attempting to serve or execute any mesne process or warrant of any rule or order of any of the courts of the United States, or any other legal or judicial writ or process whatsoever, or shall assault, beat or wound any officer or other person, duly authorized in serving or executing any writ, rule, order, process or warrant aforesaid, every person so knowingly or wilfully offending in the premises shall, on conviction thereof, be imprisoned not exceeding twelve months, and fined not exceeding three hundred dollars." It appeared in evidence that Robert Bowne, a citizen of the state of New York, had obtained judgments in ejectments against Morrow, Andrew and John Lowrey, for the premises held by them respectively, and that writs of possession issued from the circuit court to restore the possession of Mr. Bowne. The deputy marshal in proceeding to execute these writs, found the prisoners with others, their associates, on the premises armed in their defence; the doors of their houses closed against him; admittance refused him; and they moreover threatened to take his life if he persisted to execute the process, declaring at the same time they would lose their own lives in defending the possession. He was obliged in consequence to desist from executing the process, and return home.

"Sentence: Morrow Lowrey, Andrew Lowrey, John Lowrey! You severally stand convicted, two of you by juries composed of your fellow citizens, and the third by confession in open court, of a successful though temporary opposition to the laws of your country, by resisting the legitimate authority of an officer in this court in the regular discharge of his duty. You have experienced on your trials every indulgence which the court could grant, and have had the assistance of able counsel to defend you. Every objection in point of law which had the semblance of plausibility was urged in your behalf: for, unfortunately for you, no circumstance occurred in the evidence, which could cast a doubt over your guilt, or extenuate its enormity. Is it possible that you could for a moment have entertained the expectation, that it was in your power to obstruct, with effect, the streams of justice, which give life to the political body, and by which that liberty which we all profess to love, is refreshed and invigorated? Did it never occur to you, that if a

few interested and misguided men of your neighborhood sanctioned your lawless conduct, that a better intelligence and superior interest would nerve, if necessary, the arms of a thousand fold your number to crush you? Guarded as she is by all the power of this nation, justice sits securely on her seat, and issues her lawful mandates, which no force can successfully resist, but such as is strong enough to overthrow the whole fabric of the constitution. From the nature of our government, it must be so. The courts of justice are the sanctuaries of the law; and it is through the law that our government speaks and acts. Impair, by any means, the power of these tribunals in the lawful exercise of their functions, and you attack the majesty of the law, and sap, most essentially, the foundations of the republic. The government, in a degraded state, may survive the shock, but it ceases to be a government of laws; and liberty expires when force, the only remaining alternative, becomes necessary to coerce obedience to the will of the nation. Recollect that the state of Pennsylvania, powerful and respectable as she is, forms but a small part of the United States; and that the district of Erie, though it were united in a common effort inimical to the tranquility of the whole nation, is but a spot on the map of the state. What folly then could tempt you, who with your associates, if you have any, are I trust an inconsiderable minority in your district, to raise your hands against the government of your country, acting lawfully through one of its constitutional organs? You might for a day or a month impede the administration of justice in your particular cases. But it was utterly impossible that your triumph could be more than temporary, and with a certain loss of possessions which were not legally yours, you doomed yourselves to imprisonment, and to loss of property to which you were entitled. Should you deem too severe the punishment which the law decrees for your offence, reflect for a moment what had been your situation had the officer persisted in his attempt to do what prudence forbade (but which the laws would have sanctioned,) and you had executed the threats which you wickedly denounced against him. Your lives must then have atoned to your country for her violated laws; but where was the circumstance to extenuate your guilt in the eyes of an offended God? Suppose you could have influenced numbers to assist you in opposing the execution of the law, how would your guilt have been increased by the treason and punishment of those you had deluded! I mention these circumstances with a view to impress upon your friends the conviction of this truth, that the highest crimes, against the laws of God and of society, are in the train of the offence of which you are guilty. There is every reason to believe, that had the officer been less prudent, you had, in acts at least, been more criminal. The court has carefully perused the papers which you requested to be read, with a view, as was supposed, to extenuate your offences, and mitigate your punishment. We have to regret, however, that in these documents we discover nothing but an effort, which ignorance only could have suggested, to justify rather than to excuse yourselves. You complain that the judgments in ejectment upon which the process of execution issued were not sanctioned by the principles of law, were rendered by an incompetent tribunal, and were unfairly obtained. Were we for a moment to admit that these objections were well founded, were there no other means by which you could be redressed, but by a resort to force? If the judgment of this court were erroneous in point of law, it was subject to the correction by a higher tribunal, as capable, as it would have been ready, to rectify our mistakes. To this tribunal an appeal was made in a case resembling yours in its essential features, for the purpose of obtaining a just exposition of the law of 1792, the great point in the cause, and there it was investigated by professional talents which would do honor to any country. The decision was against your title, and it became the duty of the presiding judge of this court, who had entertained a different opinion, as it was certainly yours, to submit to this high authority. The question of jurisdiction in your particular cases was decided in this court, how correctly in point of law, it would ill become me to say, but I dare aver that the judgment was influenced by no considerations which could impeach its purity. That the trial, so far as came within our view, was fairly conducted, can be attested by those whose evidence would not be suspected. That it was ably and faithfully managed by your counsel, no man will doubt, who knows who your counsel were. The declaration imputed to the judges of the court, which it is said misled you, is not true; the opinion given in the cause was in direct opposition to the pretended declaration, and it is absurd to suppose that declaration could have been at variance with the former. I should not have condescended in this way to vindicate the justice and integrity of this court, did I not feel a sincere desire to satisfy you, if I can, how grossly you have been deceived by others, or have deceived yourselves, and how totally groundless were the pretexts which led to your misconduct. That you have been misled I can readily believe. Your conduct has evinced either great ignorance or great depravity. Charity teaches us to impute it to the former; and influenced by this consideration, we are induced to diminish your punishment, which would have been otherwise extended as far as the law would sanction. We feel less reluctance on this occasion, in exercising to your advantage the discretion which the law reposes in us, from the hope that when you return to your families, you will carry with you more correct notions of the duties which you owe to your country and its laws, and that the punishment, mitigated as it is, will prevent the repetition of similar offences by yourselves or others. The law authorizes the court to condemn you to twelve months imprisonment, and the payment of three hundred dollars. The sentence which we pronounce is, that you Morrow Lowrey, Andrew Lowrey and John Lowrey, be severally imprisoned for three months, and do pay to the United States each the sum of one hundred dollars, besides the cost of these prosecutions, and that you stand committed until the same be paid, and further that you severally enter into recognizances with sureties to keep the peace and be of good behavior for one year from the expiration of the said three months, each of you in the sum of one thousand dollars, and two sureties in each recognizance in five hundred dollars each."

Case No.15,637.

UNITED STATES v. LOYD.

[See Case No. 15,617.]

UNITED STATES (LUCO v.). See Case No. 8,594.

Case No. 15,638.

UNITED STATES v. LUKINS.

[1 Chit. Cr. Law, 770, note.]

Circuit Court, D. Pennsylvania. 1841.

CRIMINAL LAW—PARDON.

[Defendant was sentenced "to six months imprisonment, to pay a fine of $150, and the costs of prosecution." The president granted a pardon reciting that defendant was sentenced "to pay a pecuniary fine to the United States and to stand committed until the fine and costs be fully satisfied." The pardon then stated that the president "remits the fine aforesaid, hereby ruling and requiring" that defendant, "on payment of the costs of prosecution, be forthwith discharged from imprisonment." At the foot of the record of conviction which had been transmitted to the president was written by him, "Let the fine be remitted on payment of costs." *Held*, that the pardon extended only to a remission of the fine, and the president had no power to order the prisoner discharged from the rest of the sentence.]

The defendant [Nathan Lukins] was convicted and sentenced "to six months imprisonment, to pay a fine of one hundred and fifty dollars, and the costs of prosecution." A motion was made to discharge him, the president of the United States having granted a pardon, reciting "that Nathan Lukins was confined in the gaol of Philadelphia under sentence of the circuit court of the United States, whereby he was bound to pay a pecuniary fine to the United States, and to stand committed until the fine and costs should be fully satisfied." The pardon proceeds to state that the president "remits the fine aforesaid; hereby ruling and requiring that Nathan Lukins, on payment of the costs of prosecution, be forthwith discharged from imprisonment." At the foot of the record of conviction, which had been transmitted to the executive, was written by the president, "Let the fine be remitted on payment of costs."

BY THE COURT. The intention of the president is manifest. It was to remit the fine only. The fine only being pardoned, the president cannot order the prisoner to be discharged from the residue of the sentence. If he pardons generally, remission of fine and discharge follow, of course. But if the pardon apply only to the fine, an order to discharge from imprisonment will not justify the marshal in discharging the prisoner.

The motion was overruled, and during the session of the court the president granted a general pardon. U. S. v. Lukins [Case No. 15,639].

The pardon of a person convicted of forgery, and sentenced to the state prison for life, contained a proviso that nothing in the pardon should be construed so as to relieve the convict of and from the legal disabilities to him from the conviction, sentence, and imprisonment, other than the said imprisonment. It was held that the proviso was repugnant to the pardon itself, and must be rejected, and the party be freed from all legal disabilities. People v. Pease, 3 Johns. Cas. 333, in error. See State v. McCarty, 1 Bay, 334.

Case No. 15,639.

UNITED STATES v. LUKINS.

[3 Wash. C. C. 335.] [1]

Circuit Court, D. Pennsylvania. April Term, 1818.

RESISTING MARSHAL—PROCESS—VIOLENCE.

1. Indictment for resisting the marshal of the United States, in the execution of a warrant issued by the judge of the district court of the United States.

[Cited in U. S. v. Hudson, Case No. 15,412.]

[Cited in brief in Schuylkill Co. v. Reifsnyder, 46 Pa. St. 448.]

2. The twenty-second section of the act of congress, passed on the 30th day of April 1790 [1 Stat. 117], for the punishment of certain crimes, includes every species of process, legal and judicial, whether issued by the court in session, or by a judge or magistrate, acting in that capacity out of court, in the execution of the laws of the United States.

[Cited in U. S. v. Buck, Case No. 14,680; U. S. v. Martin, 17 Fed. 153; U. S. v. Terry, 41 Fed. 775.]

3. On a count in the indictment, for resisting the officer of the United States, it is not necessary that the person resisting should use or threaten violence.

[Cited in U. S. v. Huff, 13 Fed. 640. Cited in brief in Ela v. Smith, 5 Gray, 134. Distinguished in State v. Welch, 37 Wis. 201.]

The defendant [Nathan Lukins] was indicted for resisting and opposing the execution of process, issued against him by the judge of the district court of the United States, for the Pennsylvania district; and for an assault on the deputy of the marshal, when endeavouring to execute the process. The indictment was founded on the twenty-second section of the act of congress, passed April 30, 1790, entitled, "An act for the punishment of certain crimes against the United States." The twenty-second section provides, that "if any person or persons shall knowingly and wilfully obstruct, resist, or oppose any officer of the United States, in serving, or attempting to serve or execute any mesne process or warrant, or any rule or order of the courts of the United States, or any other legal or judicial writ or process whatsoever; or shall assault, beat, or wound any officer or other person duly authorized, in serving or executing any writ, rule, order, process, or warrant aforesaid; every person so knowingly and wilfully offending in the premises, shall, on conviction thereof, be imprisoned, not exceeding twelve months, and fined, not exceeding three hundred dollars."

It appeared in evidence, that some time in November, 1817, John Sisk, one of the deputies of the marshal of the district, having a warrant from the judge of the district court of the United States, for the Pennsylvania district, by which he was commanded to arrest the defendant, and bring him before the judge, went into Montgomery county, where the defendant resided; and on his attempting

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

to execute the warrant, the defendant resisted, in a violent and abusive manner, refused to accompany him, and with a hold-fast, an instrument of iron, used by cabinet-makers (which was the business of the defendant), raised against the officer, obliged him to desist, and to abandon the attempt to take him into custody.

Mr. Kittera, for defendant, contended that the provisions of the act of congress, apply only to resistance of the process of the courts of the United States; and not to a resistance of a warrant issued by a single judge of the courts of the United States, The resistance of the process of a judge, is punishable by the laws of the state of Pennsylvania; and the defendant should have been indicted and tried before a court of the county where the offence was committed.

Mr. Ingersoll, U. S. Dist. Atty., considered the law of the United States as intending to provide against and punish all obstructions, resistance, and opposition to any process, issued under the authority of the United States. by a single judge, as well as by a court. By the act of congress, passed February 28, 1795 [1 Stat. 424]. the marshals of the United States have the same powers to execute process, as is possessed by sheriffs' officers, or their deputies; and the sections of the judiciary law [1 Stat. 73] give to the district judges of the courts of the United States, authority to issue process for arresting, imprisoning, or bailing persons charged with offences against the United States. In 4 Chit. Cr. Law process in the index, refers to process against offenders, in the body of the work, and that process is described as a warrant to arrest a person charged with an offence. Unless the construction contended for by the United States, is correct, the execution of a writ of habeas corpus, issued by a judge of the United States, could be opposed and resisted, and the object of the writ could be defeated with impunity. Process, under the laws of the United States, relative to fugitives from justice, and fugitives from labour, always issued by a single judge; would become useless, and without power; as to oppose the execution thereof, would not be an offence.

WASHINGTON, Circuit Justice (charging jury). It is contended in this case, on the part of the defendant, that if the facts are proved against him, still the case cannot be cognizable before this court, and that it is not a case described in the act of congress. The argument is, that the act of congress applies only to process issued by courts of the United States, and not to that which may have been issued by a judge; and, therefore, that resistance of the process issued by a judge, is not an offence against the statute. If this is the right construction of the law, the counsel for this defendant is entitled to all the merit of having made the discovery; for such a construction never before was given, or contended for. If such a resistance is not an offence, for which a person can be prosecuted, it is better that all the criminal law be struck out from the statute book; as it is there only to show the debility of the general government. No man can be brought for trial before the court, without process; and if he can resist it with impunity, he cannot be brought at all; and he may resist every law of the United States with safety. The remedy proposed is, that the courts of the state may punish for such resistance. It is not admitted, or denied, that state courts have such powers; but if no protection is given by the general government to their officers, it will require no prophet to show what will be the result of such an abandonment of all the rights of the United States. This is not the construction; and strong language would be necessary to show it to be. The first part of the section, applies to process of courts, and to judicial writs issued by the courts of the United States. Was it ever before denied, that a warrant is process? And it is not denied, that the judge who issued the warrant in this case, had a right to issue it. The last part of the section is used to include all legal process in the hands of an officer of the United States; and the legislature did not mean to confine it in any degree. The expressions are consistent with the policy of the law, and the words are general, to comprehend all descriptions of process whatsoever.

The jury are the judges of the facts, and they will say if the facts are proved. The court will say, as there is a point of law involved, that if the witnesses for the prosecution are believed, a clearer case cannot, in the opinion of the court, be presented, of resistance and opposition to process, legally in the hands of the marshal. The officer proceeded in the formal way, read the warrant, and required that the defendant should come with him to Philadelphia; the defendant refused to come, would not come, and the refusal is accompanied with resistance. The assault charged against the defendant, is a distinct offence; and the provisions of the first part of the law, do not require that an assault shall be committed, in order to complete the offence. It was the duty of the defendant to come with the officer; and if he says he will not come, and does not come, this is a resistance of the officer, within the prohibitions of the law, and no excuse will serve him.

The court say nothing about the second count, which charges an assault on the officer; for if the witnesses for the prosecution are believed, it is of little importance, as the punishment of the offence is the same, whether it has been accompanied with an assault or not.

Verdict, guilty.

[See Case No. 15,638.]

Case No. 15,640.

UNITED STATES v. LUMPKIN.

[Nowhere reported; opinion not now accessible.]

Case No. 15,641.

UNITED STATES v. LUMSDEN et al.

[1 Bond, 5.] [1]

Circuit Court, S. D. Ohio. Feb. Term, 1856.

NEUTRALITY LAWS—OVERT ACT—PROVIDING MONEY—EVIDENCE—PRELIMINARY EXAMINATION.

1. An examining court or judge will not require clear and indubitable proof of the guilt of accused parties, to justify an order that they shall answer further to the charge made against them.

2. Section 6 of the neutrality act of April 20, 1818 [3 Stat. 449], punishing the offenses of beginning or setting on foot, or providing or preparing the means for a military expedition or enterprise for the invasion of a country with which the United States is at peace, is not violated without the commission of an overt or definite act.

3. Mere words written or spoken, though indicative of the strongest desire and most determined purpose to do the forbidden acts, will not constitute an offense defined and punished by said section 6

4. If the means provided were procured to be used on the occurrence of a future contingent event, no liability is incurred under the statute.

5. If the intention is that the means provided shall only be used at a time and under circumstances when they could be used without a violation of law, no criminality attaches to the act.

6. To provide the means for such unlawful expedition or enterprise implies that such means must be actually furnished and brought together for a criminal purpose.

7. Proof of declarations made by a defendant is admissible to explain or determine the character of acts ambiguous or unintelligible.

8. Written and printed evidence containing no proof of an overt act, in violation of said section 6, is admissible as confessions and declarations, and to such evidence the rule applies that those parts which admit of an interpretation favorable to defendants must be considered as well as those justifying the implication of guilt.

[This was a preliminary hearing in the case of Samuel Lumsden and 12 others, charged with setting on foot and providing the means for a military expedition against the people of Great Britain, in violation of section 6 of the act of congress of April 20, 1818 (3 Stat. 447).]

Corwin & Probasco and Geo. R. Sage, for the United States.

Groesbeck, Piatt, Mallon & O'Neill, for defendants.

LEAVITT, District Judge. The evidence in this case being closed, after a very protracted examination, it is my duty to state the grounds of the order I propose to make. And I may premise, that sitting as an examining judge, the sole inquiry is, whether the evidence offered, and the law applied to it, make out such a probable case of guilt as will require the accused persons to answer further to the charge exhibited against them. In stating the conclusion to which I have arrived, it is not my purpose to notice at length all the facts adduced in evidence, or the numerous points made by counsel, in the extended discussion of the case. The duty I am to discharge is purely of a judicial character, and will be performed without any reference to popular opinion, or any outside pressure, which it is alleged has been brought to bear on the case. I should be utterly unworthy of the position I occupy, if these considerations could have the slightest influence on my action.

It is undoubtedly a sound and well-settled rule, that an examining court or judge will not require clear and indubitable proof of the guilt of accused parties to justify an order that they shall answer further to the charge made against them. Whether thus held, or whether discharged unconditionally, the order is not conclusive. In the former case, the accused is remitted, first, to a grand jury for an inquiry into the facts; and it is only on their affirmation of the charge, by the return of a bill of indictment, that the party can be put on trial before a traverse jury. On the other hand, if the accused party is discharged by the examining officer, it is no bar to a subsequent prosecution for the same charge. If, however, after a full examination of the facts, the court or judge is satisfied, as a fair legal deduction, that no crime has been committed, it is his duty promptly to order the discharge of the party accused. It is the right of the party at once to be relieved from a position involving a suspicion of crime, which may seriously affect, not only his social standing, but his pecuniary interests. And it may be remarked that the healthful and efficient administration of criminal law is not promoted by prosecutions which, in the last resort, fail to produce the conviction of the person accused. As a general rule, such futile prosecutions tend more to the encouragement than the repression of crime.

The affidavit on which the warrant in this case issued was made on the 4th of January last. Twenty persons were included in the affidavit and warrant, of whom thirteen, namely, Samuel Lumsden, Joseph W. Burke, Edward Kenefeck, Bartholomew O'Keefe, David Reidy, Michael Noonan, James Murphy, James O'Halleron, John Hudson, Thomas Tiernan, William G. Halpin, Daniel Campbell, and John M. C. McGroarty, were arrested. The last-named person, on the motion of the counsel for the defense, and by the consent of the counsel for the prosecution, was discharged at an early day in the progress of this examination. The other

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

twelve are now before the court. They are all natives of Ireland, but naturalized citizens of the United States.

The complaint on which the warrant issued was sworn to by John Powers, a citizen of the United States; and sets forth that the persons named therein, "on or about the 28th day of December, 1855, at the city of Cincinnati, in the Southern district of Ohio, and at divers other times and places within said district, to wit: at sundry times since the 1st day of May, 1854, and at the city of Hamilton, and the town or village of Cumminsville, in said district, did begin and set on foot, and did provide and prepare the means for one military expedition or enterprise, to be carried on from thence against the territory and people of Great Britain, with whom the United States were, and now are, at peace."

It is a fact developed in the progress of this examination, that although the affidavit, on which the warrant is based, was made by Powers, a citizen of the United States, the Hon. Charles Rowcroft, her Britannic majesty's consul at Cincinnati, has had an active agency in this prosecution. This has been frankly admitted by that gentleman, in the presence of the court. He has advanced a large amount of funds in procuring evidence to sustain the prosecution, and has, in other ways, given it his sanction and support. This has been made the occasion of an assault on Mr. Rowcroft, by the counsel of the accused, characterized by great bitterness and severity. While I can not but regret that the obligations of courtesy were not more closely adhered to by counsel, the position of the gentleman named in relation to the prosecution afforded some palliation, certainly, for the course pursued, and rendered it improper for the court to interpose for his protection. But whether he has or has not transcended his legitimate sphere of official duty in this case, is not a question for the consideration of the court; since its action must depend, not on the conduct of the British consul, but on the facts in evidence and the law applicable to them.

With these remarks, I proceed to the inquiry, whether the facts proved establish the legal probability of the guilt of the accused parties. The charge against these defendants is based upon section 6 of the act of congress of April 20, 1818 (3 Stat. 447). It declares "that if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace, any person so offending, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years."

In the progress of the argument, frequent references were made to the early executive and legislative history of the country, illustrative of its policy respecting the preservation of its relations with foreign powers with whom we were at peace. In the year 1794, during the second administration of Washington, the attention of congress was earnestly called to this subject, by the arrogant interference with our national affairs of a diplomatic agent of the French government, threatening to disturb our amicable relations with Great Britain. As the result of this, the law of 1794 [1 Stat. 381], was enacted. After some intermediate legislation on this subject, the act of 1818 was passed, repealing all former laws, and embodying in it most of the provisions of the previous acts. Section 5 of the law of 1794 was transferred to, and became section 6 of the act of 1818, before quoted.

In construing this section, the court is not essentially aided by previous judicial decisions. Of the few reported cases arising under it, none seem to have involved the precise questions now before the court. They were decided with reference to the facts in proof, but these facts were of such an unequivocal character as to leave little room for doubt that they were overt acts, and were sufficient to justify the conviction of the persons implicated, under the section referred to. But they do not furnish an answer to the inquiry arising in this case, namely, whether the circumstances in proof constitute the offenses of beginning, or setting on foot, or providing or preparing the means for, a military expedition or enterprise, designed to invade a country with which the United States is at peace.

No proposition can be clearer than that some definite act or acts, of which the mind can take cognizance, must be proved to sustain the charges against these defendants. Mere words, written or spoken, though indicative of the strongest desire and the most determined purpose to do the forbidden act, will not constitute the offense. It is true that proof of declarations of this nature, previously made, is admissible to explain or determine the character of acts, otherwise ambiguous or unintelligible; but for any other purpose they have no pertinency.

The language of the section is clear and perspicuous; and yet, as in most statutory enactments, it is referred to judicial discretion to determine what acts shall bring a party within its prohibitions, and incur the guilt of its violation. This discretion, however, must not be arbitrarily exercised, but it is to be controlled by known and well-settled rules of construction. One of these rules, applicable to all penal statutes, is, that they must be construed strictly, and not be so extended in their scope as to

include cases not clearly within their terms.

In the case of U. S. v. O'Sullivan [Case No. 15,975], to which reference is made in Whart. Cr. Law, 905, and which has been commented upon by several of the counsel in this case, the learned Judge Judson gives a very clear exposition of the section under consideration. Adopting his views, I will quote some passages from his opinion. It should be premised, however, that the facts involved in the case, tried before Judge Judson, are not given by Mr. Wharton in his reference to it; and I do not know the precise case before the court, to which the views stated by the judge were intended to apply. A knowledge of these facts would doubtless make his analysis and exposition of the section more satisfactory and intelligible. I will, however, give some brief extracts from the elaborate opinion referred to. In the first place, the learned judge says: "Before the jury can convict on this indictment, it must be proved to their satisfaction that the expedition or enterprise was in its character military; or, in other words, it must have been shown, by competent proof, that the design, the end, the aim, and the purpose of the expedition or enterprise, was some military service, some attack or invasion of another people or country, state or colony, as a military force." This remark presupposes that some proof has been adduced that an expedition or enterprise has been begun or set on foot, and is intended to instruct the jury in relation to what must be its character and purpose, in order to subject the defendants to the penalties of the law. He then proceeds: "To constitute a misdemeanor under the law of 1818, there must have been a hostile intention connected with the act of beginning or setting on foot the expedition." In a subsequent part of his charge, the judge defines the terms used in section 6 in these words: "The word expedition is used to signify a march or voyage with martial or hostile intentions. The term enterprise means an undertaking of hazard, an arduous attempt. Begin is to do the first act—to enter upon." And again: "To set on foot is to arrange, to place in order, to set forward, to put in the way of being ready. Then, to provide is to furnish and supply; and to procure the means is to obtain, bring together, put on board, to collect." And subsequently he remarks: "There are four acts declared to be unlawful, and which are prohibited by the statute: 'To begin an expedition, to set on foot an expedition, to provide the means of an enterprise, and, lastly, to procure those means.'" He then adds: "As an illustration of what has been said, I will remark that to purchase, charter, repair, or fit up any vessel or steamboat; to procure and put on board such vessel or steamboat powder, ball, firearms, military stores, ship stores, or any of them, to be used in any place in contravention of and with intent to violate this act; to enlist, engage verbally, or contract with men, as officers, soldiers, or musicians, to go out on such an expedition as I have defined—may be considered as providing and procuring the means of a military expedition or enterprise."

No authority can be necessary to sustain the position that the conclusion of guilt, in reference to any of the four alternative acts forbidden by section 6, follows only from proof of some distinctive, substantive fact looking to, and having for its object, a military expedition or enterprise against a country with which our relations are peaceful. Even as to the first and lowest form of offense designated by the statute—that of beginning a military expedition or enterprise—it must be signalized by some overt act. It is true, as to this offense, the statute is very comprehensive in its terms, and was evidently intended to strike at the first inception of any movement which, in its development, might endanger the peace of the country. Still, the beginning to do a thing imports that there must be an act which marks such beginning. It is difficult to form a clear conception of what will constitute such inceptive act. As before intimated, it requires something beyond a mere declaration of an intention to do it. The actual enlistment or enrollment of men, with the purpose of engaging in an unlawful military expedition or enterprise, is clearly within the scope of the first alternative of section 6. This constitutes a substantive fact susceptible of proof; and being proved, would justify the conclusion of legal guilt. It is not material, in this case, to inquire whether the overt act of beginning an unlawful military expedition or enterprise may not be consummated prior to an actual enlistment or enrollment of men, by some act of a less equivocal character. Probably a previously concerted movement or arrangement, with a distinct reference to the recruitment of men, would be sufficient to constitute such a beginning. And if this was followed up by the designation of a plan for an enlistment or enrollment, though there should be no proof that any were actually enlisted or enrolled, it would bring the parties implicated within the operation of the section referred to.

Bnt in the view I have taken of the evidence in this case, it is quite unnecessary to consider more critically and minutely the import and construction of section 6. I will proceed, therefore, without further reference to it, very briefly to notice such parts of the evidence before me as bears on the question of the guilt of these defendants in reference to the charges exhibited against them. And 'n the first place, I will refer to the documentary or written and printed proofs before the court. These have been put in evidence by the prosecution, and it has been strenuously and forcibly insisted

that they show the existence of societies and organizations among the Irish population of this country, the members of which are actuated by strong hostility to the government of Great Britain, and avow it as their purpose and desire to free their native land from British rule, and eventually to establish its independence. It is contended that in the furtherance of this design movements are in progress, with which these defendants are connected, which threaten to interrupt our peaceable relations with Great Britain, and which call loudly for the vigilant enforcement of the neutrality laws of the United States.

The written and printed evidence, it may be remarked, contains no proof of any overt act in violation of the statute, and is competent so far only as it may be supposed to give character to those acts of the defendants which have been proved by the oral testimony. It is competent, in the light of admissions and declarations by which the defendants are bound; and viewed in this aspect, the well-known rule applies that it must be taken together, and those parts which admit of an interpretation favorable to the defendants must be considered, as well as those justifying the implication of guilt. The first item of this documentary proof is the book containing the constitution and minutes of the proceedings of the Robert Emmet Club of Cincinnati, which is a branch of the Irish Emigrant Aid Association of Ohio. The defendants are all members of this club. It is a secret society, every member being required to take originally an oath—now a promise—whereby he pledges himself, in the presence of God, that he "will persevere in endeavoring to form a brotherhood of affection among Irishmen of every religious persuasion," and that he "will also persevere in his endeavors to uproot and overthrow English government in Ireland." Then follows an obligation to the effect that, under no circumstances, shall the member disclose the doings of the club, or inform on, or give evidence against, any one belonging to it, etc. It is also in evidence that the club have secret signs or passwords, by which the members are known to one another, and by which they obtain admission to any similar society elsewhere. In their constitution they avow, as one purpose of the organization, the subversion of the British power in Ireland. They also adopt the platform of the Massachusetts society, which has been in existence something more than a year. In that platform there are strong expressions of hostility to England, and of a desire to liberate Ireland from her power; and it avows a determination to pursue a course of action "perfectly consistent with our duty and obligations to America, but tending to ensure the success of the cause of liberty in our native land." One of the resolutions forming a part of this platform recommends a convention to be held in New York, "for the purpose of carrying out a united system of action throughout the Union and the colonies, and to adopt an address to our brethren in Ireland exhorting them to be of good cheer, for their friends in America are up and doing, and that they shall not be left alone in the struggle."

The Cincinnati club was organized on the 4th of September last, and at the time of the arrest of these defendants numbered seventy-three members. By the constitution, every member upon his initiation, is required to pay one dollar, and afterward, twenty-five cents, monthly. A printed address, to the "Irishmen of the Buckeye State," dated the 27th of September last, issued in behalf of, and under the direction of this club, has been read in evidence. It is unnecessary to make quotations from it. It is a glowing and fervent appeal to Irishmen to co-operate with the Emmet Club in the purposes of its organization, by the formation of similar clubs throughout the state. And the object of these is avowed to be the achievement of the liberty and independence of Ireland. It does not, however, propose or recommend any course in violation of the neutrality laws of the Union. It was evidently written under the influence of high excitement, and its style is somewhat prurient and hyperbolical; but it does not advise or advocate any military movement in behalf of Ireland. What is said about grasping the liberty of that country with "a strong and armed hand," is evidently a mere figure of speech, and has no reference to any practical military action. Or if such a purpose was in the mind of the writer, he has failed to indicate any time at which it is to be fulfilled, or any specific action by which it is to be effected.

The address and resolutions of the convention of the delegates of the "American-Irish Aid Society," held at New York on the 4th of December last, have also been read in evidence, and referred to in the argument. Samuel Lumsden, one of the defendants, was a member of that convention, as a delegate from the Cincinnati society, and acted as one of its vice-presidents. The defendants, Halpin and Kenefeck, were also present as delegates. I have looked over the published account of the doings of that convention; and whatever views may be entertained of the utility and propriety of such a meeting, nothing appears in the proceedings indicative of an unlawful purpose to invade Ireland. While there are some expressions warranting the inference of such a design, upon certain contingencies, an intention to violate the laws of the United States is explicitly disavowed. One of the resolutions declares "that the first duty of all American citizens, whether native born or naturalized, of whatever political opinions, or of whatever nationalities, is to faithfully respect all their obligations of citizenship,

arising under the laws and constitution of our country."

But it is quite unnecessary to multiply references to these published documents. It is certain that, giving them a construction the most unfavorable to these defendants and to the objects and purposes of these associations of Irishmen, they do not establish the charge exhibited against them, nor fix upon them the guilt of any violation of the laws of the land. They prove no overt act of military movement or organization, looking to an invasion of Ireland, and bringing them within the provisions of the act of 1818. It is equally clear that neither the book containing the record of the constitution and the proceedings of the Emmet Club of Cincinnati, nor any of the papers offered in evidence, show a breach of any of the criminal laws of the United States. Whatever may be thought of the rightfulness or policy of secret societies or organizations, under our form of government, and the practice of enforcing the supposed obligations of their members by solemn appeals to Deity, whether in the form of oaths or promises, it is certain there is no legal prohibition of such acts. Neither is there any law, state or national, forbidding assemblies of the people for any lawful purpose, or restricting the right of a free expression of opinion, either by speaking or writing.

As the result of the views thus indicated, it follows that these written or documentary proofs have no relevancy to the case upon inquiry, except as they may give character to the oral testimony adduced. And I now propose very briefly to consider this testimony, and to state the conclusions to which it leads. To facilitate this inquiry the evidence may be considered, first, as applicable to the charge of beginning or setting on foot a military expedition or enterprise; and second, procuring or providing the means for such expedition or enterprise.

It is insisted by the counsel for the prosecution that the charges under both these divisions are sustained by the evidence. Three witnesses have been sworn and examined by the prosecution, whose evidence is mainly relied on, so far as oral proof is concerned. These are Powers, Hughes, and Barber. Powers is a native of Pennsylvania. The only facts stated by him, material to notice, are that he was present at a conversation between the witness Barber and Reidy, one of the defendants, near the corner of Western Row and Ninth street, in Cincinnati, in which Barber, alluding to the fact that he had paid money upon his enrollment in a military company, said that the company was not the right one, and that he had been imposed on. Reidy then replied, the Washington battalion was all right, and was bound to go to Ireland. This witness was also outside of the house in which the Hamilton meeting was held, and could hear and see what took place, and testifies that the defendant Burke stated the object to be to form societies, and to collect aid and arms to uproot and overthrow the British government in Ireland, and that some arms and men had already gone. As the witness Hughes states nothing material, it is not necessary to refer specially to his testimony.

The principal witness for the prosecution is Barber. He is before the court under somewhat peculiar circumstances. He is an Irishman by birth. On the 24th of October, for the purpose, as he says, of exposing the doings of the Emmet Club, if he found its purpose unlawful, he became a member, and took the oath prescribed, and got possession of the secret signs and passwords. These he communicated immediately to Mr. Rowcroft, the British consul, with whom he conferred, and from whom he received, from time to time, the sum of one hundred dollars. He attended nearly all the meetings of the club, from the time of his entrance into it till these defendants were arrested. He made notes and memoranda of what transpired at those meetings, which he has used on his examination to refresh his memory. This witness has been bitterly assailed by counsel, and denounced as utterly unworthy of credit. Some of his statements on the stand have been directly contradicted, and in some of them he is corroborated by the minute-book of the club and by witnesses. It must be admitted that he is before the court under circumstances suited to create strong doubts of his credibility. It is not important to inquire whether, in so far as he has misstated any facts to which he has sworn, he has willfully and corruptly falsified the truth, or whether from some cause there may not be a perversion of his mental and moral powers, as the result of which he views some subjects through a distorted medium; and thus unconsciously, it may be, to himself, has received erroneous impressions as to the circumstances about which he testifies. However this may be, I am constrained to view his testimony with caution and distrust.

But it may be well doubted whether, if the testimony of Barber is accredited, as to all the facts he states, which are not contradicted by reliable witnesses, the charge against the defendants is sustained. I will advert very briefly, first, to such parts of his testimony as are applicable to the charge of beginning or setting on foot a military expedition or enterprise, premising, as already stated, that nothing short of a previously-concerted agreement or arrangement, or for an actual enrollment or engagement of men, for the purpose of a military invasion of Ireland, will sustain the charge. On this subject the substance of what Barber states is, that he enrolled himself in one military company, connected with the Emigrant Aid Society, called the "Independent Conohan Guards." The statement concerning this enrollment is exceedingly vague and indefinite.

The organization of this company was never perfected, nor is there any evidence that the purpose of getting it up was an expedition against Ireland. Barber also states that Captain Tiernan, one of the defendants, asked him to join a company he was raising to go to Ireland, and that he, Barber, gave Tiernan three dollars for his initiation fee, and five dollars toward buying his uniform. Barber also states that Reidy told him, Tiernan's company was a humbug, and would never go to Ireland, but that his would. This is all the evidence that I am now able to recall, relating to the enrollment of men. And it may as well be stated now that it is in proof by several very respectable and credible witnesses that the companies to which Barber refers were, or had been a part of the Ohio militia, and had no connection whatever with the Emmet Club, and that the enrollment of which Barber testifies had no reference to a military expedition to Ireland. It also appears that not more than two of the members of the club belonged to any of these companies. The statements of Barber, therefore, fail to make out the proof of an enrollment of men for any purpose in violation of the laws of the United States. As the charge of beginning a military expedition or enterprise is not sustained, the second alternative, that of setting on foot, falls with it, since, as already stated, that imports a stage in the proceeding, resulting from the prior act of beginning, and must be preceded by it.

I am brought now to the consideration of the inquiry, whether there is proof of the providing or procuring the means of a military expedition or enterprise. And I may state here, as a governing rule in the application of the evidence on this point, that any providing or procurement of means, to bring the party within the penal sanction of the law, must have reference to the use of such means, under circumstances that would render such use criminal in the eye of the law. If, therefore, the proof shows that means were procured, to be used on the occurrence of a future contingent event, no liability is incurred under the statute. The test of the criminality of the act is the intention; but if the intention is that the means provided or procured shall only be used at a time, and under circumstances in which they could be used, without a violation of any law, no criminality attaches to the act.

I will now inquire what the proof on this point is, according to the statements of Barber, and on the supposition that his testimony is credible. And first, I may remark, that this witness says, on his cross-examination, that he knows of no money paid, or arms procured, for the purpose of a military invasion of Ireland. But it is insisted that he proves a number of isolated facts, which, when brought together, sustain the charge of providing and procuring the means of a military expedition. I will advert very briefly to these facts. Barber says, Burke, one of the defendants, gave him a subscription paper to collect money to aid in purchasing arms or guns for the club to go to Ireland. Burke had previously shown him a shooting-iron, saying it would do good execution in Ireland, and that it was for his company, the Queen City Cadets. Barber also states that Kenefeck, one of the defendants, said at the Cumminsville meeting, that $5,000 could easily be raised for the expedition, and that 100,000 Irishmen would look well in the morning sun on Vinegar Hill. He also states that at a meeting of the Emmet Club, on the 9th of November, Kenefeck said his instructions from New York were to take arms from this city to Ireland, and that in reply, Lumsden remarked that there was no use in that, for they would be furnished with arms in Ireland. It also appears from Barber's evidence, that at one meeting of the club a proposition in regard to procuring arms was submitted and debated.

It does not appear, however, from any part of Barber's statements, that any funds were ever paid, or that any arms were ever purchased. If his evidence is accredited, there was a good deal of talk about raising money and procuring arms, but nothing was ever accomplished in regard to those objects. The facts referred to, therefore, do not prove the charge of providing or procuring any means for a military expedition or enterprise. But it is proved by Barber (and in this he is corroborated by the minute-book of the club), that the defendant, Samuel Lumsden, at the convention in New York, in December last, offered to subscribe $1,000 to a fund which it was proposed to raise in aid of the operations of those who were laboring for the independence of Ireland. The minutes of the club show that the thanks of the members were voted to Lumsden for his "munificent offer;" and it is argued that this fact not only implicates Lumsden in the charge of providing and procuring means for a military enterprise or expedition against Ireland, but that all the members who voted for the resolution of thanks made the act their own, and are therefore criminal. I remark, in the first place, that this was a mere offer to contribute money, made, probably, upon some condition which has not been, and never will be, complied with, and which is neither legally or morally binding on the party making it. Again, there is nothing in the evidence to show that the offer of the $1,000 had any reference to a military descent on Ireland, or any other unlawful purpose. But if it were a criminal act, it was committed in another judicial district, and, therefore, without the jurisdiction of this court. And as to the affirmation of the act by the vote of thanks, whatever might be its effect in a civil suit, in a criminal prosecution it can not be held to implicate the parties thus voting.

Without adverting more minutely to the evidence for the prosecution, I may state, as the result of my deliberation upon it, that I am led to the conclusion it does not sustain the charge against these defendants. But it is proper, however, in order that the whole case may be fully presented, that I should refer to some parts of the evidence adduced by the defense. And first, I refer to the testimony of Michael M. Keating, who says that he was one of the founders and first members of the Irish Emigrant Aid Association, and "its object was to unite old and new Ireland for one particular purpose, and that was to get up an American Fonteroy, in the event of trouble between America and England," and that they were careful to do nothing that would compromise them with this government, or this government with England. This witness heard Mr. Hyde make a stimulating speech to the club, in regard to the probability of a difficulty between the United States and England, and exhorting the members to be ready in that event to aid Ireland. He says, also, that the Emmet Club had nothing to do with any military organization as such.

J. J. Burns, a witness for the defendants, says he is a member of the Emmet Club, and that all the members have been absolved from the obligation of their oaths, so that they could testify freely in this case. He says he is a member of the Methodist Church, and that there is nothing in the principles or constitution of the Emmet Club to prevent a member of any Christian church from belonging to it. He was a regular attendant at the meetings of the club. The club has no connection with any military company. A proposition was once made in the club in relation to arms, but the president ruled it out of order. Nothing was ever said in the club about the present difficulties of England in the Crimea, or about taking advantage of the present difficulties between England and Russia. Edward Dalton testifies that at the Hamilton meeting Burke did not state that the object of the Irish society was to raise men and arms for the invasion of Ireland. He spoke of an invasion of Ireland, by the Irish of this country, in the event of a war with Great Britain. In this, he directly contradicts Barber.

In reference to the witnesses above named, it may be remarked, they are before the court without impeachment, and without any reason to suspect the truthfulness of their statements. The witness Burns, especially, from his manner in court, seems to be a man of more than ordinary intelligence; and it is not controverted that he occupies a highly respectable standing in this community. If the statements of these last-named witnesses are entitled to credence, the proof is clear that the club or association with which these defendants are connected, has not proposed or attempted any military movement, designed either presently or prospectively, for a descent on Ireland. The impracticability of an invasion of that country from the United States, while at peace with Great Britain, and the certainty that any such attempt would result in nothing but disaster to those engaged in it, affords a presumption, at least, that it was not seriously contemplated. And, if there existed in the minds of these defendants any ulterior purpose of such hostile demonstration against that country, it was to be carried out only upon the occurrence of a state of war, and would therefore involve no violation of law.

I have thus hastily noticed what seem to be the material parts of the evidence submitted to the court. Many facts have been developed by the testimony, which are not important, as applicable to the present inquiry. That inquiry is not whether these defendants harbor feelings of deep-rooted hostility to England, and a too ardent desire for the redress of the alleged wrongs of Ireland —not whether, as the result of the almost proverbial warmth and excitability of the Irish temperament, they have been imprudent, or indiscreet in words or actions—not whether their efforts to excite the zeal of their countrymen in the United States may or may not, in its results and developments, prove beneficial to the land of their birth—but whether, from the evidence, there is reasonable ground for the conclusion, that they are guilty of the specific charges against them, or of any other criminal violation of law.

I approve cordially of the policy of our national legislation, for the preservation of our neutral relations with foreign countries, with which we are at peace. It had its origin at an early period of our history, and in the best days of the republic. It was adopted upon the recommendation of Washington, the sanction of whose great name is quite sufficient to commend it to the profoundest regard of every right-hearted American citizen. It has its basis in the incontrovertible truth, that our great country will best subserve its true interests, and attain its highest glory, by avoiding all "entangling alliances" and hostile conflicts with other nations. While we may desire, and by all legitimate modes of action, labor for the political regeneration of every oppressed people, and the universal diffusion of the principles of our free government, we should bear in mind that our mission is, emphatically, one of peace. We are not called upon to proclaim and enforce the great doctrines, which lie at the foundation of our incomparable institutions, at the cannon's mouth, and "with garments rolled in blood." It should rather be our high purpose to recommend their recognition and adoption by other nations, by our elevated and enlightened course of action, and by showing with what scrupulous regard the rights and liberties of the people are protected and maintained. It is thus that we shall successfully demonstrate the great truth, that man is capable of self-government, and that constitu-

tional liberty is above all price. Already, our example has produced a marked influence on other nations. And, if we are but faithful to the principles of the great fathers and founders of our government—to the constitution, as the bond of our Union, and the best guarantor of our rights, we shall go on "conquering and to conquer," till the whole earth shall benignly feel the effects of our example. On the other hand, if, from an unhallowed lust of territorial acquisition, and a specious zeal for the propagation of free principles, we become embroiled in dishonorable wars, the aid of prophecy is not needed to announce, with sad certainty, that the sun of the republic will go down in blood, and that the end must be, the establishment of that most abhorred of all forms of government—a military despotism.

I may be allowed further to remark, that while upon the evidence before me, and the law, which must govern my action, I have no hesitancy in adopting the conclusion that these defendants must be discharged, I am not insensible to the fact, that some of the developments made in the progress of this examination are of a character suited to attract public attention to them. These have been adverted to, and commented upon, by the counsel for the prosecution, with great impressiveness and force. I can not concur with them in the position they urge, that the evidence shows there was the beginning of a military movement or organization, having an immediate reference to the invasion of Ireland, and bringing the defendants within the penalties and prohibitions of the statute. Whatever ulterior purposes they may have had in view, there is a lack of evidence to prove any overt act necessary to constitute the offense charged upon them. Yet, the views and suggestions of counsel, in reference to some of the aspects of this case, are certainly entitled to great consideration. It is true beyond a question, that strenuous and concerted efforts have been made in several of the states of the Union to organize the Irish population into clubs, the members of which are bound by a solemn oath or pledge not to reveal their proceedings, or under any circumstances to give evidence against those who are initiated. Already a national convention, consisting of delegates from these clubs, has been held in the city of New York. The avowed purpose of these movements, I am aware, is to produce unity and harmony of feeling among Irishmen, and prepare them for decisive action in the establishment of the independence of Ireland, in the event of a rupture of the present peaceful relations existing between this country and Great Britain. And doubtless, from a motive of this kind, many Irishmen, who, as adopted citizens of the United States, are loyal in feeling to our government and institutions, have given their sanction to, and aided in, these movements.

Would it not be well for such to pause, and seriously inquire, whether great mischief may not be concealed beneath this plausible assumption, and whether there may not be those who are laboring to produce excitement on this subject, who have less at heart the restoration of Ireland's liberties, than the promotion of their own interested views? Suppose it be true, as averred, that there is no intention to violate our neutrality laws, or compromit the peace of this country; yet, is there not reason for the apprehension that these agitations will produce, as their results, hostile collisions between this country and Great Britain? Can it be otherwise, than that these constant and exciting appeals to the national animosities and religious prejudices of a portion of the Irish population of this country, are suited in their tendency, if not in their design, to involve us in the bloody conflicts of war? I censure no Irishman for sympathizing with his native land, and ardently desiring the restoration of the rights of its people; but with all candor and kindness, I would suggest that these feelings ought not to be indulged at the hazard of the interests and peace of the country of his adoption. That country has freely conferred on all foreigners the rights of citizenship, and extends to them the guaranties of its constitution and laws. In return for these privileges, may it not reasonably be insisted they shall in all respects be loyal to our government? There can be no such thing as a divided national allegiance. The obligations of citizenship can not exist in favor of different nationalities at the same time. The foreigner who takes the oath of fidelity to our government necessarily renounces his allegiance to all others; and the obligation thereby incurred abides upon him so long as he remains within the limits of the country, and enjoys the protection of its laws. And it is an obligation that is paramount to all others, and demands of him who assumes it a course of conduct that shall be free from the suspicion of unfriendliness to the institutions and interests of the country, which he is solemnly pledged to defend.

In closing, I have only to remark, that it is in proof that several of these defendants have been long residents of this city, and occupy a highly respectable standing in this community. I should most reluctantly adopt the conclusion, that in the transactions in which they have been implicated, they were moved by any design to violate the laws of the country, or entertained any purpose inconsistent with their duty and obligation to it, as adopted citizens. I trust there will be no future developments, which will present the charge, from which they are now relieved by the decision of this court, in any different legal aspect from that which it now assumes. But, I may remind them, as already intimated, the order for their discharge from this complaint, will be no bar to its re-investigation, if, in the progress of events, such a course should be deemed necessary. The defendants are discharged.

Case No. 15,642.

UNITED STATES v. LUNT.

[18 Law Rep. 683.]

District Court, D. Massachusetts. Dec., 1855.

CRIMINAL LAW—FORCING ON SHORE AND LEAVING BEHIND SEAMEN.

1. Masters must act on their own responsibility in leaving men in foreign ports, on account of misconduct. It is proper for a master to take the advice of the consul, as of any other judicious person, but his opinion is only advice.

[Cited in Coffin v. Weld, Case No. 2,953.]

2. To justify leaving men in a foreign port, there must be an urgent physical or moral necessity, i. e. such an exigency as would control the judgment of men of reasonable firmness for shipmasters. And a greater exigency would be required to justify leaving men at some ports than at others.

3. On a criminal prosecution for such an offence, the defendant is not guilty if he acted under an honest mistake of judgment, and not from malice, i. e. from the intentional violation of known duty.

This was an indictment against the master of the ship Humboldt [Alfred M. Lunt], for forcing on shore and leaving behind, at Manilla, three of his crew. Two previous trials, one of Captain Lunt for shooting at his crew, and the other of the rest of the crew for mutiny, had resulted in the acquittal of Captain Lunt, and the conviction of the men. [See Case No 15,643.] Captaint Lunt offered in his defence, the certificate of the American consul at Manilla that the men were detained by him to be sent home in another vessel for trial or a charge of mutiny. This was objected to, and ruled out as incompetent. There was then no direct proof that the removal and detention of the men was by the advice or sanction of the consul, as none of the officers or crew were on shore, and the consul did not come on board. The only evidence was, that the master put the men in irons, took them ashore with him in a public guard boat, with soldiers, and that the men did not return in the ship.

B. F. Hallett, U. S. Dist. Atty.

R. H. Dana, Jr., for defendant.

SPRAGUE, District Judge, instructed the jury that there is no statute of the United States authorizing a consul to take seamen from a vessel for criminal conduct, and send them home in another vessel for trial. It is customary for consuls to do so, it is said, under instructions from the department of state, but they have no jurisdiction, and their certificates are not evidence. The master must act on his own responsibility in leaving men in foreign ports on account of misconduct. It is proper for the master to take the advice of the consul, as of any other judicious person, but his opinion is only advice, and the responsibility rests with the master. In this case there is no direct evidence connecting the consul with the transaction in any manner. The question is (1) was the master justified? and (2), if not justified, did he act of malice? First, as to the justification. The maritime policy of the country, as well as the contract of the men, make it the duty of the master to bring home every seaman he takes out with him. If he leaves any man abroad, except for certain causes, he is liable to the man in a civil action, and is liable on his bond at the custom house. If, in addition to this, he leaves a man maliciously, he is liable to a criminal indictment. The justification set up here is, that it was dangerous to bring these men home in the vessel. They were the leaders in the mutiny. To justify the leaving them in a foreign port, there must be a necessity. This is not necessarily a physical necessity, but may be a moral necessity. By a moral necessity, in this connection, is meant such an exigency as would control the judgment of men of reasonable firmness for shipmasters. A greater exigency would be required to justify the leaving a man in a distant port, where there was no consul and no American residents, or where the government is not recognized as an enlightened nation, than in a port of easy communication, where there is a consul, and where the government is on friendly and full terms of diplomatic intercourse with our own. But the law is very jealous of this leaving of American seamen in foreign ports, especially if they are confined in jail there so that they are placed under the control of persons not amenable to our laws. Only a stringent necessity will justify it.

If the jury shall think Captain Lunt justified, he is to be acquitted. If they think the evidence does not establish a justification, the question then is, whether he acted of malice. The meaning of malice is, the intentional violation of known duty. If he acted under an honest mistake of judgment, especially after taking advice of proper persons, he is not guilty criminally. If he acted in known violation, or in wilful indifference, or in disregard of duty, he is guilty.

After being out seven hours, the jury reported that they had agreed on a verdict of not guilty as to the leaving of one of the men, and disagreed as to the other two, and were discharged.

Case No. 15,643.

UNITED STATES v. LUNT.

[1 Spr. 311;[1] 18 Law Rep. 622.]

District Court, D. Massachusetts. Dec. 14, 1855.

ASSAULT WITH DANGEROUS WEAPON — MALICE — MASTER OF VESSEL—BURDEN OF PROOF.

1. In an indictment for an assault with a dangerous weapon, under the United States statute, the word "assault" carries with it an allegation of illegality.

2. Malice is not an ingredient in this offence.

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

3. The burden of proof does not shift.

4. The master of a vessel has a right to defend his authority.

5. If from the grossly mutinous and menacing misconduct of the seamen, he has reason to believe and does believe that the use of a deadly weapon is necessary, he may use it, although the necessity be apparent only.

This was an indictment [against Alfred M. Lunt] for assaulting, with a dangerous weapon, several of the crew of the ship Humboldt, of which the defendant was master.

The facts, as disclosed by the evidence, were as follows: The vessel, with $28,000 of specie on board, was on her passage from San Francisco to Manilla. The crew consisted of fourteen men, who were all foreigners, and shipped in San Francisco. On the morning of the difficulty, a man named Ned had misbehaved at the wheel, and seized the captain; and the captain, with the aid of two mates, got him in irons and placed him in a state-room. While they were doing this, a large man named Rice, who had taken the wheel, left it, and refused to return to it, and attempted to interfere with the officers. Soon after this the larboard watch, headed by Rice, came aft and demanded to have Ned released. This the master refused. It was conceded, by the government, that the conduct of Ned was inexcusable, and that the master was justified in putting him in irons, and in refusing to relase him, on the request of the watch. The two officers testified that when they were trying to secure Ned, he tried to get hold of his knife, and called out to the men, "Now, boys, is your time to rise and take the ship." The officers also testified that, in the course of the morning, they saw several men of the watch below, on deck, and grinding their sheath-knives, and overheard one of them using threatening language about the master, and that they reported these events to the master; that the master then held two conferences with his officers and the only passenger, Mr. Baker, in which it was advised that they should be prepared with fire-arms, if necessary, for defence. The crew, who were witnesses, denied all knowledge of the grinding of the knives and of the threatening language; but the affidavits of two of the crew, taken soon after their arrival in Boston, were produced, in which they admitted these facts. One knife was produced, ground to a point on both sides, which was found on deck soon after the affray. Immediately after dinner, all hands came aft in a body, and requested the release of Ned. This the captain again refused. They then said they would do no more duty until he was released. The men all stood together on the port side of the quarter-deck. Captain Lunt said: "There must be some good men among you who will go to work. Any man who will return to his duty, go over on the starboard side." No man went. He then said: "Any man who will return to his duty, hold up his hand." No man raised his hand. [They had their sheath-knives by their sides, and one of the officers testified that some put their hands on them.] [2] Captain Lunt then drew his pistol, which was a small five-barrelled revolver, and told the men that if they did not return to duty, he should be obliged to fire upon them. No man spoke, and he fired among them. At this point there was a conflict of testimony. The crew testified that they then cried out that they would return to duty, and ran forward to the forecastle, and that the captain followed them, and fired upon them as they ran, and again after they got into the forecastle. The chief mate, at the time the master fired, took his gun, which was a fowling-piece loaded with small bird-shot, and fired once. The officers testified that the captain fired only twice, and before the men turned, and that the men made no offer to return to duty, until after they came from the forecastle; also, that the captain reasoned and remonstrated with them before he fired. One man received a pistol-ball in his cheek, and two were wounded in the side and back, with bird shot. No one was permanently injured. After this, no more difficulty occurred on board. Ned was carried in irons to Manilla, and there he, together with Rice and one other, were delivered to the consul, and retained by him to be sent home in another vessel. The passenger remained in Manilla, and could not be used as a witness.

Mr. Dana, for defendant, contended that the circumstances showed, to a reasonable judgment, such a danger to life, limb and property, as justified the resort to fire-arms by the weaker party against the stronger. And further, that the rights of a master of a ship are not measured by the law of self-defence; since he acts in an office and trust, and must protect the persons and property entrusted to him, and to that end must vindicate his authority, at any hazard to himself; that he has no right to retreat or purchase safety by concession; and even if there is no threat or violence, or impending danger to life or limb, he must use such weapons as will enable him to subdue opposition, and compel a return to duty. He further contended, that the charge of "assaulting" with a dangerous weapon, carried with it the ingredient of malice, and that the burden of proof was on the government.

Mr. Hallett, U. S. Dist. Atty., contended that, if the evidence established the fact that the master used a dangerous weapon, the burden of proof was on him to establish the justification, and that malice need not appear. He also contended that the use of the weapon could only be justified by proof

[2] [From 18 Law Rep. 622.]

of an impending danger to life or limb, or of great bodily harm, and that the evidence did not disclose this.

SPRAGUE, District Judge, charged the jury in full upon the law applicable to the case. He said the word "assault," in the indictment, carried with it the allegation of illegality. It required proof of an unjustifiable offer, or attempt, to do bodily harm to another; but that malice was not an ingredient in this offence, and need not be proved. The burden of proof did not shift. It was on the government, throughout, to establish the fact of an unjustifiable use of the weapon. If the jury were in reasonable doubt, on all the evidence, as to the guilt, they must acquit. On the main question, he ruled that the master of a vessel has not only the right, which every man has, of self-defence against impending danger to himself or his property, but he has also the right to defend his authority. It is his duty to maintain the supremacy of lawful authority over the crew who rise against it. The law requires that he should use no more force than is necessary to accomplish the end. The law is tender of human life. It does not allow the use of deadly weapons, except from necessity. That necessity, however, is not limited to mere personal self-defence. The master of a ship is not bound to surrender his command, in order to avoid a conflict with the crew, but may defend his authority against illegal violence, and may use such force as is necessary for that purpose, and, in some cases, he may use such force as appears to be necessary. If, from the grossly mutinous and menacing misconduct of the men, he, as a man of ordinary firmness, has good reason to believe, and does believe, that the use of a deadly weapon is necessary to protect his authority as master, and to prevent his being deprived by force and violence, of the lawful exercise of his command, he will be justified in using a deadly weapon, although it should subsequently appear, that the necessity was apparent only and not real. As such necessity alone justifies the use of deadly weapons, so it measures the extent of such use. Milder measures must be adopted, whenever they can be with safety. The master must not act from passion, or the pride of command, or the ambition to gain a reputation for energy and promptness, or from that timidity or unmanly fear which does not belong to men of ordinary firmness. It is the duty of the jury to take into consideration all the evidence, to determine from this what the circumstances were, as they presented themselves to the master, at the time, and to apply to his conduct the test that has been laid down.

The jury returned a verdict of not guilty.

[NOTE. For a hearing on an indictment against the master for forcing three of the crew to remain on shore at Manilla, see Case No. 15,642.]

See Roberts v. Eldridge [Case No. 11,901]; U. S. v. Colby [Id. 14,830]; and U. S. v. Borden [Id. 14,625].

Case No. 15,644.

UNITED STATES v. LUTZ et al.

[2 Blatchf. 383.] [1]

Circuit Court, S. D. New York. July 1, 1852.

CUSTOMS DUTIES—SALE BY COLLECTOR FOR UNPAID DUTIES—GOVERNMENT IMPORTATION.

1. Where property is purchased abroad by the United States, and is shipped to this country, to be delivered to the United States on payment of the purchase money, and is landed under the general permit of a collector and placed in a public store, the legal right of property therein is vested in the United States, subject only to the vendor's lien for the purchase money.

2. Such property, being imported for the United States, is not subject to any import duty, and, therefore, the sale of it by a collector, for the non-payment of such duty, is void.

3. And, if such property be in the actual possession of the United States at the time of such sale, and it be taken from that possession by the purchaser of it on such sale, the United States are entitled to recover its possession by an action of replevin against such purchaser.

This was an action of replevin, to recover an apparatus for a light-house. The apparatus was made by Lepante, of Paris, under an order from the government of the United States, and was shipped to New York, in October, 1849, consigned, by bill of lading, to Major Bache, of the United States corps of engineers. The bill of lading was transferred by him to Lepante's agent in New York, who held the property under it, to be delivered to the government on payment of the purchase price of the apparatus. The apparatus was landed from the ship in which it was imported, under a general permit from the collector, and was deposited in a public store. In March, 1851, it was sold at public auction by the collector of the port of New York, for the non-payment of duties, and was purchased by the defendants [Stephen Lutz and others], as the highest bidders, for the sum of $500, which amount was paid by them and received into the treasury of the United States. They then took possession of the apparatus. At the time of the sale the government had not paid to Lepante or his agent the amount of the purchase money, which was over $10,000. When the facts of the case became known to the public authorities, this action was brought. The jury, on the trial, found a verdict for the plaintiffs, and the defendants now moved for a new trial, on the ground of alleged errors in the charge of the court.

J. Prescott Hall, U. S. Dist. Atty.

Benjamin F. Butler and William Allen Butler, for defendants.

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

Before NELSON, Circuit Justice, and BETTS, District Judge.

THE COURT denied the motion for a new trial, and held:

1. That, as the apparatus was in the actual possession of the plaintiffs at the time of the sale, and was taken from their possession by the defendants, they were competent to maintain this action.

2. That the legal right of property in the apparatus was vested in the plaintiffs, subject only to a lien, in favor of the vendor, for the purchase money.

3. That, as the apparatus was the property of the plaintiffs and was imported for their use, it was not subject to an import duty, and that, consequently, the sale of it by the collector, for the non-payment of duties, was without warrant of law and was void.

Case No. 15,645.

UNITED STATES v. LYLES.

[1 Cranch, C. C. 322.] [1]

Circuit Court, District of Columbia. July Term, 1806.

WITNESS—DISQUALIFICATION—INTEREST.

A mere honorary obligation to indemnify a prosecutor, who is liable for costs, is not a sufficient interest to exclude the testimony of the witness.

Indictment, for assault and battery on Joshua Riddle. John Johnston's name, as prosecutor, was indorsed on the indictment. Joshua Riddle was examined as a witness on the part of the prosecution, and on cross-examination said he felt himself bound in honor to indemnify Johnston, in case he should be obliged to pay costs; but he had made no engagement; that Mr. Taylor, his counsel, had managed the business, and that he had no conversation himself with Johnston. See Peake, Ev. 93, 104, 105; 1 Strange, 129.

Mr. Youngs, for the defendant [G. N. Lyles], prayed the court to instruct the jury that Riddle was not a competent witness, being disqualified by his interest.

THE COURT, after considerable deliberation and doubt, refused to give the direction. DUCKETT, Circuit Judge, absent. The general principle seemed to be that it must be a direct interest, and not ideal or imaginary. Here was no promise, no direct engagement, no legal obligation.

Case No. 15,646.

UNITED STATES v. LYLES.

[4 Cranch, C. C. 469.] [1]

Circuit Court, District of Columbia. Oct. Term, 1834.

CRIMINAL LAW—INSTIGATING ASSAULT.

It is a misdemeanor at common law to persuade, instigate, and incite another to commit an assault and battery.

[1] [Reported by Hon. William Cranch, Chief Judge.]

The indictment charged that the defendant [Thomas W. Lyles], "intending to disturb the peace of the United States in the said county, and particularly to cause and procure a certain James Jack, in the peace of God and of the United States then and there being, to be assaulted and beaten, did persuade, instigate, and incite and endeavor to hire and employ a certain Daniel Fowler and a certain Philip Vernon then and there being, to waylay, assault, and beat the said James Jack then and there being, so that the said James Jack was hindered by the said attempts and endeavors, from going about his ordinary business, and other wrongs to the said James Jack, then and there did, to the great damage of the said James Jack, and against the peace and government of the United States."

Mr. Neale, for the defendant, moved to quash this indictment, because, as he contended, it is no misdemeanor to incite a person to commit a misdemeanor; and such misdemeanor is not charged in the indictment, and in fact, was not committed.

Mr. Key, for the United States, cited Rex v. Phipps, 6 East, 464; 2 Chit. 235; Rex v. Higgins, 2 East, 5.

THE COURT (THRUSTON, Circuit Judge, absent) refused to quash the indictment, without prejudice to a motion in arrest of judgment.

Verdict, guilty, and amerced by the jury $20.

Mr. Neale, for the defendant, moved in arrest of judgment.

Mr. Key, contrà, cited 2 Chit. Cr. Law, 50, for the form of the indictment. 3 Bl. Comm. 119, 120, and 4 Bl. Comm. 149.

THE COURT (MORSELL, Circuit Judge, not very clear, and THRUSTON, Circuit Judge, doubting, CRANCH, Chief Judge, not doubting) was of opinion that it is an indictable offence, and overruled the motion in arrest.

See Chit. Gen. Prac. Append. ii., that an attempt to commit a misdemeanor created by statute, is itself a misdemeanor. Rex v. Butler, 6 Car. & P. 368.

Case No. 15,647.

UNITED STATES v. LYMAN.

[1 Mason, 482.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1818.

CUSTOMS DUTIES — HOW RECOVERABLE — DEBT — TAKING BOND—ENTRY OF GOODS.

1. Debt lies in favor of the United States against the importer for the duties due on goods imported. The right to duties accrues by the importation with an intent to unlade; and immediately upon the importation the duties become a personal charge and debt on the importer. A bond taken at the custom house to secure the duties due by the importer is not an

[1] [Reported by William P. Mason, Esq.]

extinguishment of the debt so accruing, but merely collateral security for its payment.

[Cited in U. S. v. Aborn, Case No. 14,418; Brown v. Maryland, 12 Wheat. (25 U. S.) 453. Distinguished in Knox v. Devens, Case No. 7,905. Cited in Harrison v. Vose, 9 How. (50 U. S.) 381; U. S. v. Ten Thousand Cigars, Case No. 16,450; U. S. v. Washington Mills, Id. 16,647; Waring v. Mobile, 8 Wall. (75 U. S.) 116; U. S. v. George, Case No. 15,198; Re Webster, Id. 17,332; Re Rosey, Id. 12,066; U. S. v. Cobb, 11 Fed. 79; U. S. v. Boyd, 24 Fed. 694; McAndrew v. Robertson, 29 Fed. 246.]

[Cited in Boody v. Watson, 64 N. H. 168, 188, 9 Atl. 794; Castor v. Davies, 8 Ark. 213; Jones v. Johnson, 3 Watts & S. 278.]

2. No person but the owner or consignee, or, in case of his sickness or absence, his agent or factor, is by the revenue laws entitled to enter and bond goods at the custom house. A subpurchaser after importation has no such right. The collector has no authority to receive the bond of any person as security for the payment of duties, except such person be legally entitled to enter them.

[Distinguished in Knox v. Devens, Case No. 7,905. Cited in Johnson v. U. S., Id. 7,419; Toler v. White, Id. 14,079; Bottomley v. U. S., Id. 1,688; Greely v. Thompson, 10 How. (51 U. S.) 234; The Sarah B. Harris, Case No. 12,344; U. S. v. The Sarah B. Harris, Id. 16,223.]

3. Debt lies against the importer for the duties on smuggled goods. So, where by mistake or accident, or fraud, no bond is given to secure them. So, where short duties only have been paid.

[Approved in U. S. v. Hathaway, Case No. 15,326. Distinguished in Knox v. Devens, Id. 7,905. Cited in U. S. v. Cobb, 11 Fed. 79; U. S. v. Boyd, 24 Fed. 691; An Ullage Box of Sugar, Case No. 14,324; U. S. v. Segars, Id. 16,249. Cited in note to U. S. v. 12,347 Bags of Sugar, Id. 16,555.]

[Cited in brief in Ransdell v. Patterson, 1 App. D. C. 491.]

4. An information of debt, or an information in the nature of a bill of discovery and account, is a proper remedy for the United States in such cases.

[Cited in Walsh v. U. S., Case No. 17,116; Stockwell v. U. S., Id. 13,466; same case on appeal, 13 Wall. (80 U. S.) 543; Dollar Sav. Bank v. U. S., 19 Wall. (86 U. S.) 240, U. S. v. Elliot, Case No. 15,043.]

5. In what cases the taking of a higher security operates as an extinguishment of a debt, and in what cases not. Where such security is given by the debtor, primâ facie the law presumes it intended as an extinguishment of the debt. Aliter, where it is the bond of a third person.

[Approved in U. S. v. Astley, Case No. 14,472. Cited in Knox v. Devens, Id. 7,905; Harris v. The Kensington, Id. 6,122.]

[Cited in Kelsey v. Western, 2 N. Y. 508. Cited in brief in Ward v. Motter, 2 Rob. (Va.) 539-542.]

6. It seems, that a debt accruing by a statute, though a specialty, is not of so high a dignity as a bond.

This was an action of debt, brought by the United States against the defendant [Theodore Lyman] for $17,242.40, being the amount of duties due on 500 chests of tea, imported into the port of Boston in the ship Alert, in July, 1816. Plea, nil debet. At the trial it appeared, that the defendant was the owner of the ship Alert, and of the 500 chests of tea in question; and that the same were imported by him into Boston, on the 2d day of July, 1816. After the arrival and entry of the ship at the custom house, the 500 chests of tea were, on the 8th day of July, purchased (whether really or nominally was a great question at the trial) by one Warren Lovejoy, who gave bonds at the custom house, in the usual form, upon a deposit of the teas; and afterwards, upon giving other bonds as usual, was permitted to receive the teas again, and they were re-delivered to and sold by the defendant. Soon after these transactions Lovejoy failed in business, and has ever since remained insolvent, and the bonds have never been paid.

Prescott & Thacher, for defendant contended, in the first place, that the action of debt at common law would not lie in this case; that there was a specific remedy for the government provided by statute, and that such remedy, therefore, must be pursued. Wherever a right is given by statute, and no remedy pointed out by which to enforce it, an action of debt at common law will lie; but wherever any remedy is provided by statute, such remedy is in exclusion of all others, and must be adopted. Stevens v. Evans, 2 Burrows, 1152; Smith v. Drew, 5 Mass. 514; Gedney v. Inhabitants of Tewksbury, 3 Mass. 307; Bigelow v. Cambridge & C. Turnpike Corp., 7 Mass. 202; Respublica v. Lacaze, 2 Dall. [2 U. S.] 118. It is contended with great confidence, that the legislature have expressly prescribed in the sixty-second section of the collection act of the 2d of March, 1799 [1 Stat. 673], what security shall be taken by the government for the duties on the article of tea; and that it is upon this security only, that they can have their remedy for the non-payment of such duties. In putting a construction on the different acts in relation to this subject, we should always bear it in mind, that it is not the object of the government to lay any unnecessary impositions upon the commercial part of the community, or uselessly to interrupt the facilities of foreign traffic. That, on the contrary, the essential interests of the country require, that commercial enterprise should receive every encouragement, for this is one of the principal sources of public revenue, and one of the most fruitful inlets to the national wealth; and to burden the merchant with excessive duties, or lay him under unreasonable obligations for their payment, would be striking at the foundation of the general welfare, no less than of individual prosperity. In conformity with such views, we shall find, that every act passed upon the subject of duties since their first establishment, has had it for a principal object to render the payment of them as light and convenient as possible.

The first statute laying a duty on goods, &c. imported into the United States, was

passed on the 4th day of July, 1789 [1 Stat. 24], and by this the importer became indebted to the government immediately upon the importation, and his acceptance of the goods; but as no provision was then made for the collection of the debts, the only remedy for the non-payment of the duties was an action of debt at common law against the delinquent importer. On the 31st of the same month another act was passed, regulating the collection of the duties before established; in the fifteenth section of which it is enacted, that an inspector shall be put on board every vessel, that arrives at any port of entry or delivery, who shall take charge of the goods, &c. in said ship, and not suffer any of them to be delivered without a permit from the proper officer. By this act, then, the government are put in possession of two distinct securities for their duties; one, the personal responsibility of the importer, the other, the actual possession of the goods themselves, on which the duties accrue. Neither of these securities, perhaps, taken by itself, would be sufficient, but when connected, they most perfectly protect the government from any loss, excepting such only as may arise from the indiscretion of their own officers. And we think it will be apparent, that as no better security than this was necessary, so it never has been the intention of the legislature, in their subsequent acts, to provide any in addition to it, but only to specify, what should be received in lieu thereof, when the interest of trade and the convenience of the merchant made it necessary, that this should be given up. We find, accordingly, that in the nineteenth section of the act last referred to, the importer is permitted to take his goods from the vessel, and from the possession of the collector upon complying with one of two conditions—either depositing with the collector so much of the merchandise as will be equal to twice the amount of duties, or else giving his bond with sureties to the satisfaction of the collector. It is very clear, that whichever of these alternatives the owner of the merchandise may think best to elect, the duties will be amply secured. If the former is made choice of, the government have very much the same security as before; a sufficient quantity of the merchandise, and the personal responsibility of the owner. If the latter, they have his bond with any names thereon the collector may demand.

The next act, of the 4th of August, 1790 [1 Stat. 145], makes express provision for the article of tea imported from China, allowing a credit of twelve months, instead of six, as in the case of other merchandise; provided the whole quantity of teas should be deposited, or bond given as before. It is observable, that no bond is here required of the person making entry of the teas, if the same are deposited; but by the statute of the 2d of March, 1799, which repeals the former one, and extends the credit given to the term of two years, the single bond of the owner is required, together with the deposit of the teas, and, as we contend, in lieu of the simple responsibility he was before under to pay the duties, and not in addition to the same. In the sixty-second section of that statute it is enacted that, "on teas imported from China, it shall be at the option of the importer or importers (to be determined at the time of making entry hereof) either to secure the duties thereon, on the same terms and stipulations as on other goods, wares, and merchandise imported," (and these terms and stipulations were by depositing the goods, as before stated, and continuing the personal liability of the importer during their deposit, or by giving a bond with sureties to pay the duties in six months) "or to give his, her, or their bond to the collector of the district, where any such teas shall be landed, in double the amount of the duties thereupon, with condition for the payment of the said duties in two years from the date of such bond." This, then, is the security to be taken by the government in lieu of the personal liability of the importer, and the deposit of the goods, as in the case of other merchandise. The statute then goes on to say, "which bond shall be accepted by such collector without surety, upon the terms following; that is to say, the teas, for the duties whereof such bond shall be accepted, shall be deposited at the expense and risk of the said importer or importers, in one or more storehouses," &c. We contend then, that by the acceptance of the bond as described in this statute, the government released their common law remedy against the importer, and relied altogether upon this higher security, and their possession of the goods. The purpose of the statute was evidently to favor the merchant, and not to demand additional obligations of him. The duties upon tea, in the case of a considerable importation, amount to a large sum of money. It was the intention of the legislature to make the payment of them as convenient as possible. They, therefore, extend the credit to two years; and for this they only require, that, besides the possession of the goods, the owner or importer should come forward and acknowledge in a bond, that he is the person who is indebted to the government, and that he will pay the debt within the time limited. This they demand, instead of his single liability, because it does not lay any additional obligation on him, and at the same time affords to them a more safe and expeditious remedy than the action of debt at common law, by rendering certain the amount due, and the person indebted.

If the court does not agree with us, that the simple liability of the person making the entry is merged in the bond given by him, but continues until the duties are paid; we then contend that the purchaser of goods, while on ship board may lawfully enter and

secure the duties, and thereby discharge the importer; and that, if the jury shall find, that Lovejoy was such a purchaser in this case, then this action lies against him only. The words importer, owner, and consignee are used promiscuously in the acts passed on this subject. The act of 1789 says, that all duties, &c. shall be paid by the importer before a permit be granted for landing the goods, unless the amount of such duties shall exceed fifty dollars, "in which case it shall be at the option of the party making entry, to secure the same by bond." The act of 1790 provides, "That all teas imported from China, may, at the option of the proprietor or consignee thereof, be deposited," &c. The forty-ninth section of the last collection act, of 1799, speaks of the owner or consignee, and provides that the owner's name shall be inserted in the permit. The same act requires, that one appraiser shall be appointed by the owner, importer, or consignee. Besides the evidence to be drawn from the use of these different terms in the statutes, it seems but reasonable to suppose, that it was not the intention of the legislature to confine the making entry to the importer alone. Their only object was to provide the government with sufficient security; this was done by requiring a deposit of the teas in the first instance, and upon the relinquishment of them, a bond with as many sureties as the collector thought best to require. Under these circumstances, it would be of very little importance, who was the principal in the bonds. In addition to this, we find that such has been the construction put upon these statutes by the collectors ever since their passage; and that it has been the universal practice, up to this very moment, at the custom house, to take the bond of purchasers, and permit them to make entry. Upon the same grounds we contend, that Lovejoy might, if necessary, be considered as the consignee of these teas; they were consigned to order, and by purchasing before the entry, he made himself the consignee.

But if the court should be against us on all these points, we then contend that the bonds given by Lovejoy extinguished the defendant's liability; they would in that case be the bonds of a stranger. The duty upon the goods accrues immediately upon their importation; but the personal liability of the importer does not commence until he comes forward and accepts them. Before that time, the government have only a lien upon the goods for the duties; and if the duties are not paid within a certain time, the government are authorized by statute to dispose of the goods. In Hooper's Case, 2 Leon. 110, it was held, that a specialty of itself extinguished a simple contract, when given upon the contract, and at the time it was made. This doctrine has been frequently recognised, and never questioned. The defendant in this case never accepted these goods, never took any steps towards making entry of them before the bond was given by Lovejoy. If therefore Lovejoy should be considered as his agent in this business, then Lovejoy's bond was given upon the defendant's debt and at the time it accrued, and of consequence extinguished the same.

It has been thrown out by the counsel for the government, that the debt due in this case for the duties is a debt by specialty, and therefore not extinguished by a bond. We answer, that it has never been determined, that debts arising on statutes were specialties, excepting to avoid the statute of limitations; they never have been considered so in classing debts. In actions on statutes, the statute itself is not sufficient to maintain the action; the transgression or compliance with it must be proved by evidence dehors the statute. The debt for duties in this case, cannot properly be said to arise from statute; it arises from the importation and acceptance of the goods, and the plea of nil debet is a good plea. But, if the bond of a stranger could not of itself extinguish the debt, yet the acceptance of it in satisfaction would discharge the defendant. Tom v. Goodrich, 2 Johns. 213; Sluby v. Champlin, 4 Johns. 465; Geyer v. Smith, 1 Dall. [1 U. S.] 347; Schack v. Anthony, 1 Maule & S. 573; Drake v. Mitchell, 3 East. 251; Hooper's Case, 2 Leon. 110; Banorgee v. Hovey, 5 Mass. 11; Atty v. Parish, 4 Bos. & P. 104; 3 Bac. Abr. "Extinguishment," D. The acceptance of a bond, or even a note, or bill of exchange in satisfaction of a bond, discharges the debt. The collector represents the United States in every thing relating to collecting the duties. He had taken the single bond of Lovejoy, and still retained the teas in his custody. He then accepts, instead of the teas and the single bond of Lovejoy, his bond with sureties. The law makes the collector the judge of the security: the words are, "to give sureties to the satisfaction of the collector"; and it would be very hard upon the importer, if the government, after receiving through their officer as ample security as they saw fit to demand, should, in the event of its proving insufficient, lay the loss upon the importer. It is to be observed, that it is not required by the law, that the last bond with sureties should be the bond of the importer or person making the entry; it only requires, that he should give a bond with sureties, to the satisfaction of the collector. In this case, the bond of Lovejoy was given, with such sureties as the collector thought sufficient; and the debt of the defendant, if there was any then subsisting against him, was thereby discharged.

Mr. Blake, U. S. Dist. Atty., and Mr. Webster, contended on behalf of the United States, that by the importation, the importer incurred a personal debt, which the government could recover, either by action against the importer personally, or by proceeding against the goods. The statute enacts, that upon all goods imported, duties, at the established rates, shall

be levied, collected, and paid. This enactment creates a direct debt. The English statutes are not more positive. In England, also, there is a right to proceed against the goods themselves; yet it is holden, and was never doubted, that "debt lies for customs due for merchandise, though the goods are forfeited for non-payment." Com. Dig. "Debt" A, 9; 1 Rolle, 383. The king, says Lord Hale, may originally sue for the duty itself, as well as for the forfeiture for landing the goods, the duties not paid. Harg. Law Tracts, 216, 222. Ordinarily there is little motive to sue for the duties, so long as the goods themselves are retained, inasmuch as a more effectual and speedy remedy may be had by a direct proceeding against the goods. But where possession of the goods has been relinquished, through mistake, or otherwise; or where they have never been in the hands of the custom house, and other such cases, duties charged on them are recovered in the exchequer, either by English information, which is the king's bill in equity, or by information of debt, which is his action of debt. Instances of the former mode of proceeding are, among others, Attorney General v. Chitty, Parker, 37; Same v. Cresner, Id. 279; Same v. Stranyforth, Bunb. 97; Same v. Senior, Doug. 411, in notis; Same v. Mico, Hardr. 137; Same v. ——, Id. 201; Waller v. Travers, Id. 301; Attorney General v. Horsham, Id. 477. Of the latter mode, the following are instances: Attorney General v. Jewers, Bunb. 225; Same v. Hatton, Id. 262; Same v. ——, Anstr. 558; Same v. Tooke, Hardr. 334; Same v. Weeks, Bunb. 223. If goods be smuggled, an action will still lie for duties; and after the expiration of the time for bringing a penal suit, and the right of proceeding for a forfeiture being waived, the importer may be called on, by information in equity, to disclose the amount and value of the goods thus smuggled. Parker, 279. So if goods upon which duties are charged perish, the owner is still liable for duties (Anstr. 558) because a charge of duties on the goods is a charge on the owner. It means, that he shall be debited with the amount. Some of the acts of congress say expressly, that the duties shall be paid by the importer. 2 U. S. Laws (New Ed.) p. 23. The action for duties is properly to be brought against the importer, and will not lie against his mere agent or servant; but a factor for a person abroad is treated as owner, and is liable for duties. He is considered as the importer. Bunb. 223.

It has been argued for the defendant, that wherever a statute gives a right, and prescribes the remedy, such prescribed remedy only can be pursued; and that the law having provided for bonds to be given for the duties, the government has no remedy but on the bonds. Various answers might be given to this argument. It would be sufficient to say, that the act laying the duties does not prescribe any mode of proceeding to collect them. The rule, therefore, does not apply to the case; for it is limited to cases, where the right and remedy are given and prescribed in the same statute. If a statute gives a right without prescribing a remedy, all proper legal remedies immediately attach to the right. And if afterwards another statute gives a particular remedy, but without words necessarily importing an exclusion of other remedies, the remedy thus given will be accumulative, and the former remedies will still remain. But another answer is, that no law of the United States prescribes a bond as a remedy, in the sense of the term as used in the cases cited. The United States cannot compel the importer to give bond. It is, therefore, not a remedy to enforce the collection of the duties, but a mere indulgence or option to the importer. A remedy, in the sense of the rule relied upon, means some course of legal proceeding by which the party may enforce his rights. It cannot, therefore, be any thing dependent on the will and pleasure of the party.

It is, in the next place, contended, that the importation is complete, and the obligation to pay the duties incurred, by bringing the goods into port, with intent to unload, and before entry. This point is very clearly settled by the cases. Harg. Law Tracts, 213, 216; Bunb. 97; The Mary [Case No. 9,183]; The Boston [Id. 1,670]; U. S. v. Arnold [Id. 14,469]; [U. S. v. Vowell] 5 Cranch [9 U. S.] 368. The legal meaning of importation and exportation is almost the exact, literal, and etymological signification of these terms. As importation is not the making entry of goods at the custom house, but merely the bringing them into port, and so is complete before entry; so exportation is not the clearance outward, but the actually going out of port. For if a vessel be cleared outwards, and has paid the export duties, and before she actually leaves the port, new export duties are laid, such duties attach on the cargo. 2 Price, 382. The vessel in this case entered the port, with intent to unload her cargo, on the 2d day of July. On that day, therefore, the duties became due. The defendant then became liable to pay them; and he must show, that this liability has in some way become extinguished. The duties not having been paid, nor released, has his original liability been extinguished? The duties having become a debt due to the United States immediately upon the importation of the goods, there were two modes, in either of which the United States might proceed to collect this debt. One was, a personal action against the importer. The other, a seizure of the goods themselves, if the duties were not paid or secured. These remedies were concurrent. Either might be pursued, or both. There being then two remedies, what is the object and effect of taking the bonds, supposing them to be given fairly and by the proper parties. The bond of the party, given for his own simple contract debt will, no doubt, extinguish such debt, because it is a higher se-

curity. But one bond will not extinguish another; nor are any causes shown, in which a bond will extinguish any debt created by specialty. Duties accruing on the importation of merchandise, are not simple contract debts; they arise ex vigore statuti, and therefore partake of the nature of specialties. But if this were otherwise, generally, by the rules of law, yet, by the act of congress the bonds are but security, and are collateral to the original debt. The giving of long credits for duties, and the delivery of the merchandise in the mean time to the importer, were adopted originally for the benefit and promotion of trade, and to aid the capital of the country. Before the delivery of the goods, the government had two securities for the duties —the possession of the goods, and the personal ability of the importer. These were co-existing and concurrent. Then the act provides, that by giving bond, with approved sureties, to secure the payment of the duties, the importer may receive his goods. The bond, then, was intended as security, and to stand in the place of that security, which the government parted with. The bond with sureties is but a substitute for the possession of the goods; and as the two original remedies are concurrent, so the bond and the original remaining remedy are concurrent. The bond is taken, not as payment, but to secure the payment of the duties. The words of the act are, that the duties "shall be paid, or secured to be paid by bond" (Collection Act, 1799, § 62 [1 Stat. 673]); and in the case of teas, it is at the option of the importer, either "to secure" the "duties" in the same manner as on other goods, or to give his own bond, accompanied with a deposit of the teas. The bond being thus considered and treated by law as security for the debt, it is not payment of the debt but collateral to it, and does not extinguish the original personal liability.

If a mortgage be given to secure the payment of a promissory note, and the deed contain a covenant to pay it, this, although a covenant by deed, does not extinguish the note, because intended to be collateral. It may be observed further, that the bond is always given, not to pay a sum then ascertained, but to pay the duties when afterwards ascertained, which is another proof, that it was intended to be collateral to the original debt. It would be inconvenient, and often unjust, to restrain the United States to their remedy on the security. The bonds might be for too small a sum, either by fraud or mistake. They might be lost, or stolen, or given up to the obligors collusively, without actual payment. There may be remedies both in law and equity, by which the government is entitled to discover the value of goods imported, and to ascertain and recover the amount of duties, which would be wholly inapplicable to proceedings on the bond merely. For these reasons it is contended, that although the bond be given fairly, and by the proper parties, it does not extinguish the original debt; but that the United States have their election to proceed on the bond, or to call on the importer, upon the ground of the original debt. This point, however, does not necessarily arise in this case because these bonds were not given by the proper parties. The original debt, in this case, was the debt of the defendant, as importer. The bond was given by Lovejoy and others. By the common law, the simple contract debt of one is not extinguished by the bond of another. It may be proved as matter of fact, that the bond of one man was received and accepted by the creditor in payment and satisfaction of the simple contract debt of another. And so may the promissory note of one be accepted in payment and satisfaction of the bond of another. But such cases are founded on the special agreement to accept, and not on the idea of an extinguishment by operation of law. If the collector in this case had voluntarily and without fraud or imposition accepted Lovejoy's bond for the defendant's debt (which we shall contend he clearly did not, when we come to the facts in proof) it would be a good defence for the defendant, provided the collector had any authority by law to accept such bond. But we deny, that he has any such authority. The defendant is acknowledged to have been the importer of the goods, and the law requires his bond to be taken. The collector is a ministerial officer, and the statute gives him in this particular no discretion. He is an agent, with a public power or authority, as well known to those who deal with him, as to himself; and therefore they are bound to see, that they deal with him only within the limit of his authority. The sections of the statute immediately applicable to this point, are the thirty-sixth and sixty-second. By the first it is provided, that the owner or owners, consignee or consignees, shall make entry of the goods. It is clear, that the owners here intended are the owners at the time of importation, because the form of entry prescribed by the same section is, "entry of merchandise imported by (insert the name of the importer or consignee.)" The entry, therefore, is to be made by the importer or consignee. It is further said, that the entry or sureties to be made by any importer, consignee, or agent, &c. shall be verified by the oath of the person making it. The form of the oath is there given; and the words and clauses of it are absurd in the mouth of anybody, but the importer or consignee He is to swear among other things, that the original cost is correctly stated in the entry. How is this to be done by a purchaser after importation, who knows nothing, and can know nothing himself, of the original cost? He is to swear, that the invoices produced by him are true; whereas, not being the purchaser at the place of exportation, and the goods not having been sent to him, he cannot know, whether the invoices given to him are true or false. This is a matter of the utmost importance. The invoices, until the

act of the last session, have been the basis, upon which all ad valorem duties were calculated. They are to be verified by the oath of the importer, who knows whether they be true or false. But if other persons may enter goods and produce to the custom house such invoices merely as are produced to them, there is not even the security of a custom oath for the revenue.

By the sixty-second section, the duties are either to be paid immediately, or at the option of the importer to be secured to be paid by bond, with one or more sureties. Who is to be principal in the bond? Obviously, we should think, the importer. And in prescribing the form of the bond, in the blank left for the name of the obligors, the direction of the act is, "(here insert the name of the importer or consignee.)" In the case of teas the act declares, that the importer or importers, instead of giving bond with sureties in common form may have an option to give "his, her, or their bond" without sureties, accompanied with a deposit of the teas. In this case, then, the statute expressly required the importer's bond. There is in the same section a provision, that for the purpose of preventing frauds, arising from collusive transfers, all goods imported shall be taken to be, for the purposes of the act, the property of the person, to whom they may be consigned. In this case, the defendant was both owner and consignee. It has been suggested, that this provision was intended only to apply to cases, in which importers, being debtors to the government, and so not entitled to new credits, should assign the property to others, who might be able to obtain credit for the duties. But the provision is general; and if even that evil were the particular inducement to the legislature to make it, still, being general, it is properly applicable to other mischiefs of a similar sort.

On the whole, therefore, it is submitted, on the part of the United States, that the defendant, by the importation of the goods, became personally indebted for the duties. That this debt accrued immediately upon importation, and before entry. That if he had given his own bond with sureties, according to the act, it would not have extinguished the original debt without actual payment of the duties. That, at any rate, the defendant's original liability is not extinguished in this case, because his own bond was not given, and because the collector had no authority to take the bonds of other persons besides the importer.

The counsel then went into a discussion of the facts in evidence, to show even if the court should be against them on the law, that there never was any real sale of the teas by the defendant to Lovejoy. And secondly, that when the collector received this bond, he supposed Lovejoy to be the importer of the teas, and therefore never voluntarily accepted it, even if he had authority to do so, in discharge of a debt of the defendant.

STORY, Circuit Justice, after summing up the facts, charged the jury.

In this case the United States ground their claim to recover from the defendant upon no peculiar rights growing out of their prerogative, but upon principles, which every citizen might justly apply to vindicate his own rights under similar circumstances. There are several questions of law, which have been learnedly and ingeniously argued; and upon which, having formed a most decided opinion, it is my duty to pronounce it.

The first question is, whether an action of debt lies in this case. By the common law, an action of debt is the general remedy for the recovery of all sums certain, whether the legal liability arise from contract, or be created by a statute. And the remedy as well lies for the government itself, as for a citizen. And where the debt arises by statute, an action or information of debt is the appropriate remedy, unless a different remedy be prescribed by the statute. Bullard v. Bell [Case No. 2,121]. In respect to the duties payable upon the importation of goods, the usual proceeding, where no specialty has been taken as a security, is an information of debt, which is emphatically called the king's action of debt. But where a discovery, or account is wanted, either of the nature, or of the value of the goods imported, an exchequer information, in the nature of a bill in equity, for a discovery and account, is generally resorted to. Hale in Harg. Law Tracts, 216, 217; Attorney General v. Stranyforth, Bunb. 97; Attorney General v. Hatton, Id. 262; Attorney General v. Jewers, Id. 225; Waller v. Travers, Hardr. 301; Attorney General v. ——, 2 Anstr. 558. And informations of each kind are very common in cases, where goods have been smuggled, or where, by accident, mistake, or fraud, short duties only have been paid. Attorney General v. Jewers, Bunb. 225; Salter v. Malapert, 1 Rolle, 383; Attorney General v. Stranyforth, Bunb. 97; Attorney General v. Chitty, Parker, 37. The general principle upon which these informations rest, is, that in the given case the common law or the statute creates a debt, charge, or duty in the party personally to pay the duties immediately upon the importation; and that therefore, the ordinary remedies lie for this, as for any other acknowledged debt due to the crown. And it is a general rule in the construction of revenue statutes, that if a duty is charged on any article, the word "charged" means, that the owner shall be personally debited with that sum. Attorney General v. ——, 2 Anstr. 558 These doctrines fully apply to the case now before the court. The act of 27th of April, 1816, c 107 [3 Stat. 310], on which this action is founded, and which, in this respect, follows the language of the former acts upon the same subject, declares, that "there shall be levied, collected, and paid, the several duties therein after mentioned" on the goods therein enumerated,

when imported into the United States. And it has been repeatedly settled, both here and in England, that under such circumstances, the duties are a debt accruing to the government from the time of the actual importation. Salter v. Malapert, 1 Rolle, 383; Attorney General v. Stranyforth, Bunb. 97; Hale in Harg. Law Tracts, 212, 213; U. S. v. Vowell, 5 Cranch. [9 U. S.] 368; The Mary [Case No. 9,183]; U. S. v. Arnold [Id. 14,469]; s. c., 9 Cranch [13 U. S.] 104; Prince v. U. S. [Case No. 11,425]. And the importation is complete, as soon as the goods are brought within any port with the intention of being unladen or sold there.

From whom then does the debt accrue? Beyond all doubt from the importer, be he the owner, or the consignee of the goods; for by the express provisions of the revenue act of 1799, c. 128 [1 Story's Laws, 573; 1 Stat. 627, c. 22], the owner or consignee, or, in case of his absence or sickness, his factor or agent, are the only persons entitled to enter the goods, and the only persons, to whom the law allows (as will be hereafter shown) a credit for the duties to be given at the custom house. Immediately, therefore, upon the importation of these goods, the owner or importer owes a debt to the government, which, independent of any security by bond, it has a right to enforce by an action of debt upon the principles of the common law. To be sure, if a credit be allowable upon the duties, it is a debitum in præsenti solvendum in futuro. But I take it to be very clear, that no person can entitle himself to a credit under the revenue act of 1799, c. 128 [1 Story's Laws, 573; 1 Stat. 627, c. 22], unless he gives bonds in the manner prescribed by that law.

It being then ascertained, that upon the principles of the common law an action of debt is the proper remedy for duties against the owner or importer, the next consideration is, whether a different remedy has been prescribed by any statute of the United States. The argument of the defendant's counsel is, that by the revenue act of 1799, c. 128 [1 Story's Laws, 573; 1 Stat. 627, c. 22], the duties were required to be paid, or secured by bond to be paid, before they were permitted to be unladen; and that this security by bond constitutes the exclusive remedy for the government for the recovery of the duties. I cannot yield the slightest assent to this argument. In the first place, the bond, if given, is not strictly and accurately speaking a statute remedy, but a statute security for the debt. A remedy, as understood in legal phraseology, is a mode prescribed by law to enforce a duty or redress a wrong, and not an obligation to guaranty a right, or to indemnify against a wrong. The remedy for the duties, when a bond is given and remains unpaid, is not, technically speaking, the bond itself, but a suit to enforce the payment of the bond. The technical rule, therefore, that where a statute remedy is given, it excludes the common law remedy by action of debt, does not apply; for the statute prescribes no such remedy.

In the next place, the construction of the statute, assumed by the defendant's counsel, involves this difficulty, that, if true, the government have no remedy, where no bond is taken. Now, by the terms of the act no bond can be taken, where the duties do not exceed the sum of fifty dollars (section 62); and if, by any mistake, accident, or fraud, that sum is not paid, can it be contended, that the United States are without a remedy to recover it? Cases may easily be imagined of great inconvenience, if this doctrine were to prevail; and deeming a just and prompt collection of the revenue of the greatest importance, as well to the citizens as the government, I cannot believe, that any revenue act ought so to be interpreted, unless the interpretation be inevitable. Shall the importer, by his own illegal act, escape from the payment of a debt justly due to the government? Suppose by the purest accident, or mistake, no bond is taken for the duties, is the importer to be exonerated from all liability? Suppose a bond executed by an agent, and it turns out, that his authority had been revoked, or his principal was dead, is there no remedy against the principal or his representatives? Suppose, by mistake, the collector takes a bond for a sum less than the real duties, or for a less quantity of goods than is really imported, shall not the government recover for the short duties? It is clear, that if the collector were to take a bond for more than the legal duties, the importer would be entitled to redress; and why not, in the converse case, the government also? I put these cases, because they are precisely the cases, where the government would be compelled to resort to the general action of debt; and they show, in a strong light, how little reason there would be, to put an interpretation on the revenue act of 1799, which would lead to such mischievous results. If there be nothing in the reason of the thing to support this interpretation, there seems to be as little in the language of the statute to justify it. The revenue act of 1799, nowhere declares, that the duties shall not be due, unless bonds are taken for the payment. But, on the other hand, every section, touching the subject, speaks distinctly of the bonds, not as creating a right to the duties, but as a security for the payment of them. The distinction between a right, and the security of a right, is too obvious to require comment. Besides; it may be added, that the right to duties, grows, not out of the revenue act of 1799, c. 128 [1 Story's Laws, 573; 1 Stat. 627, c. 22]; but out of the duty act of 1816, c. 107. This latter act makes the duties a personal charge on the importer upon the principles, which have been already stated, independent of any other statute. Further; the importer is not com-

pellable in any case to give bonds for the duties; but it is at his option to give bonds, or to suffer the government to take the goods into its own possession, to secure the duties. Yet the right to duties certainly does not arise from the possession of the goods, nor is it confined to the goods. If they are destroyed or lost, or become of less value than the duties after the importation, the government have still a right to the full duties. And the very terms of the act of 1799, in cases of a deposit of the goods, prove them to be at the risk and expense of the parties, on whose account they are deposited. Act 1799, c. 128, §§ 52, 56, 62 [1 Story's Laws, 573; 1 Stat. 627, c. 22].

From all these considerations, I am without the slightest hesitation in pronouncing, that an action of debt well lies in favor of the government, to recover the duties levied under the revenue acts of the United States, independent of any bond which may be taken to secure them under the authority of those acts. Let us now apply the principles thus established to the present case. It is admitted, that the defendant was the owner of the teas at the time of their importation; and it follows, that he is indebted to the government in the sum stated in the declaration (which is the amount of the duties), and that the present action well lies against him for that debt, unless he can show a payment or extinguishment of it. No payment is pretended; but it is said, that there has been an extinguishment or satisfaction of the debt by the supposed purchase made by Lovejoy, and the acceptance of his bond for the duties at the custom house, in lieu of the deposit of the goods. It is to be recollected, that the supposed purchase by Lovejoy was made six days after the arrival and entry of the ship at the custom house. And the first question that meets us, is, whether any sub-purchaser, after the importation of the goods, has a right to enter the goods and secure the duties at the custom house? The language of the revenue act of 1799, c. 128 [1 Story's Laws, 573; 1 Stat. 627, c. 22], in every section bearing on this subject, most distinctly confirms the right to enter the goods to the owner or consignee, or, in case of his absence or sickness, to his agent or factor. And the very terms of the oath taken on this occasion, as well as the terms of the duty bond, expressly declare the party to be the importer in the character of owner or consignee. And the sixty-second section of the act further declares, that "to prevent all frauds arising from collusive transfers, all goods, wares, and merchandise, imported into the United States, shall, for the purposes of this act, be deemed and held to be the property of the persons to whom the said goods, &c. may be consigned, any sale, transfer, or assignment prior to the entry and payment, or securing the payment of the duties on the said goods, &c. and the payment of all the bonds then due and unsatisfied by the said consignee, to the contrary notwithstanding." If in this case Lovejoy had become a purchaser or consignee, while the ship was in transitu, there might have been weight in the argument, that he had a right to enter the goods. But he was in no sense the importer of the goods, having become (if at all) a purchaser after the importation; and therefore, he had not, within the terms of the act, any authority to enter the goods. It is quite another question whether, having entered the goods as importer, he is not estopped to deny his own liability to pay the bonds into which he has entered.

But the court has been pressed with the usage, which has very extensively, and without question very innocently prevailed, to allow sub-purchasers, after importation, to bond the goods at the custom house, in lieu of the original importers. It is a sufficient answer to this statement, that no usage can prevail against the clear and unambiguous terms of the law. The collector is but a mere ministerial officer. It may be his misfortune, or the misfortune of the public, that he misinterprets the law; but certainly he cannot alter it. If it be inconvenient that sub-purchasers should not be permitted to bond goods at the custom house, it lies with the legislature, and not with collectors or courts of justice, to administer the proper relief. The collector then, in this case, had no authority to admit Lovejoy to enter the goods, or give bond for the duties. The whole proceeding was irregular, and not binding upon the United States. I do not say, that the bond was absolutely void; for it did not lie in the mouth of Lovejoy to contest it, after having admitted and sworn himself to be the importer liable to pay the duties. But the receipt of the bond by the collector was no estoppel to the United States, since no act of his, not within the scope of the law, could vary their rights.

In this view of the case, the bond of Lovejoy was no extinguishment of the original debt of the defendant for duties: (1) Because Lovejoy was not the importer entitled to give it; (2) because the collector is not authorized to receive the bond of a third person in extinguishment or satisfaction of any duties due by the importer; and (3) because the bond was in fact received by the collector, not in extinguishment of any debt supposed to be due from the defendant to the United States, but, under a mistake of the law, as security for the duties supposed to be due and payable by Lovejoy. But I am prepared to go yet farther, and to hold that a bond given under the revenue act of 1799, by the importer himself, and a fortiori by a third person (if legal) would not extinguish the original debt created by the act of importation. I admit the doctrine, that in general a higher security taken from the debtor himself extinguishes the original con-

tract. But this proceeds upon a presumption of law, that it is taken in satisfaction of the original debt; for if it appear otherwise upon the face of the security, it will not operate as an extinguishment. Thus, a bond of the debtor with sureties, or a mortgage, may be taken as collateral security for the payment of a promissory note; and in such case it certainly does not extinguish the demand on the note. It is, therefore after all, a mere question of intent; and the law, in the absence of all other evidence of the intent, construes the higher security of the debtor himself, as an extinguishment, because it gives a higher remedy. I admit, also, that a higher security of a third person, if taken at the time of making the original contract, or afterwards, in satisfaction of the debt, operates as an extinguishment. 3 Bac. Abr. "Extinguishment," D; Hooper's Case and Pudsey's Case, 2 Leon. 110; Banorgee v. Hovey, 5 Mass 11. But there is this difference between the case of a higher security of the debtor himself, and of a third person, that in the latter case the law does not presume the security to be taken in satisfaction, unless it is averred and proved to be the agreement of the parties so to consider it. Whether the receiving of a higher security from one partner for a partnership debt be an extinguishment, unless expressly taken in satisfaction of such debt, may perhaps admit of some doubt, notwithstanding the language of some highly respectable authorities. Tom v. Goodrich, 2 Johns. 213; Sluby v. Champlain, 4 Johns. 461; Clement v. Brush, 3 Johns. Cas. 180. Et vide Drake v. Mitchell, 3 East, 251. It is not, however, material to consider this point, for the present is clearly not the case of a partnership.

On the other hand, I admit, according to the authorities cited (Fawkeners v. Bellingham, Cro. Car. 81; Jones v. Pope, 1 Saund. 37; Hodsden v. Harridge, 2 Saund. 64; Pease v. Howard, 14 Johns. 479), that an action of debt founded on a statute is to be considered as an action founded on a specialty. But I cannot admit, that it follows, that it is a debt of equal dignity with a debt due by bond. There may be different grades, even in respect to debts due by specialty; and I cannot consider a debt due for duties, as of a higher dignity than a simple contract debt due to the crown, which is clearly subordinate to all debts due on specialties, technically so called. Toll. Ex'rs, bk. 3, c. 2, §§ 1-3. My opinion, therefore, that a bond taken under the revenue act of 1799, is not an extinguishment of the debt, accruing by the importation of the goods, is founded, not upon the notion, that the debts are of the same nature and dignity, but upon the intent and language of the statute itself. It provides, that within fifteen days after the arrival of the goods the importer may enter the goods, pay the duties at once, or give bond, with sufficient sureties, to secure the payment of the duties at a future period; or otherwise, the goods are to be deposited in the stores of the government, as a security for such payment. Act 1799, c. 128, §§ 36, 49, 62 [1 Story's Laws, 573; 1 Stat. 627, c. 22]. The government, therefore, has a lien upon the goods from the time of their importation for the amount of the duties; and it cannot, for a moment, be admitted, that the existence of this lien extinguishes the original debt. It is clearly collateral thereto; and the government may relinquish its lien on the goods without in any way affecting its right to the duties. The option given to the importer to substitute a bond with sureties in lieu of a deposit of his goods is with a view to relieve the goods from the lien for duties, and enable him to dispose of them freely in the market. The law, therefore, so far from intending to extinguish any existing debt, means no more than to substitute one species of security for another. And throughout the whole act, the bond is uniformly termed a bond to secure the duties, and not a bond in payment of the duties. If, therefore, the statute intended the bond as a mere security for the duties (and this intention is proved irresistibly to my mind) there is an end to the whole question; for in no case can a higher security operate an extinguishment against the plain import of the statute, under which it is taken.

It is not, however, necessary in this case to contend for so broad a doctrine, though I cannot discern any incorrectness in it. For, at all events, if Lovejoy were a real purchaser, his bond, given at the custom house, would be considered only as the security of a third person for the proper debt of the defendant, which would not per se extinguish the debt; and the collector had no authority to receive it expressly in satisfaction. And, on the other hand, if Lovejoy were a pretended purchaser only, then the defence cannot, in any possible view, be sustained consistently with the principles of law.

Verdict for the United States for the whole amount of duties.

Case No. 15,648.

UNITED STATES v. LYNCH et al.

[2 N. Y. Leg. Obs. 51.]

Circuit Court, S. D. New York. 1843.

SEAMEN — REVOLT — REFUSING TO GO TO SEA — ORDERS FROM PILOT—TRIAL—FEDERAL JURISDICTION.

1. Under the act of congress of 1835 [4 Stat. 775], it was held that an indictment lay in the United States circuit court in admiralty, against the seamen and crew of a vessel who had endeavored to commit a revolt and mutiny on board of the ship, while she lay at anchor about 60 yards from the wharf in the city of New York, ready for sea, and in the stream of the East river, where the tide ebbs and flows.

2. The pilot of a vessel cleared at the custom-house and ready for sea with the crew on board,

was an officer of said ship and vessel within the meaning, spirit and intent of the act of congress of 1835, § 2.

3. While the master and mates of the vessel had gone on shore, that the pilot had authority to order the crew to duty, and that a disobedience of his orders, rendered the prisoners liable to indictment under the act.

[Cited in U. S. v. Forbes, Case No. 15,129.]

4. The master had a discretion as to the number of his crew requisite to be employed to navigate the vessel while at sea.

5. In a criminal case, the counsel for the prisoners had a strict legal right to submit the law and the facts of the case to the jury, and call upon them to say, whether the prisoners were guilty in law of the offence charged against them.

6. The court in such a case felt themselves bound distinctly and positively to charge the jury upon the points of law raised by the prisoner's counsel.

7. Where seamen on board of a vessel refused to do duty on the ground they were not bound to go the voyage by the terms of the shipping articles, and to do the duty which they were ordered to do, it was held that they should have made such objection at the time of the disobedience of orders.

8. Although the state courts might have jurisdiction of certain offences committed on board of vessels while lying within the municipal territory of such state, yet the circuit court of the United States would take jurisdiction and exercise their authority in cases of mutiny and revolt, or endeavor to make a revolt on board of such vessels, by virtue of the power conferred in the act of 1835, § 2.

In admiralty. This was an indictment against the prisoners [Lynch and Wilder] under the act of congress of the United States, passed March 3, 1835 (section 2), for an endeavor to make a revolt and mutiny on board of the American ship Gaston, bound on a voyage from the port of New York to the port of Savannah in Georgia. The prisoners upon being arraigned pleaded not guilty, and the cause came on for trial before a jury, and on the trial of which the pilot of the vessel in the harbor of New York was called by the government as a witness. The witness testified that the vessel had cleared at the custom-house for Savannah, Georgia; that the crew shipped for the voyage had rendered themselves on board; and that the vessel had left her fastenings at the wharf and dropped out into the stream, some 50 or 60 yards from the dock at the foot of Maiden Lane into the East river, and was there at anchor when the offence charged against the prisoners was committed. It appeared also in evidence, that the master and mate of the vessel, had rendered themselves on board; that the pilot had also come on board to take the vessel down the bay and out at sea; that the master, finding he had shipped a more numerous crew than he needed, went ashore in a boat, together with the mate and one or two more of the crew for the purpose of leaving them behind; that after the master and mate had left the ship and gone ashore, the pilot directed the prisoners with the rest of the crew on board to weigh anchor and drop down the harbor into the bay below Governor's Island. The two prisoners, in particular, refused to do so, and refused to obey the orders of the pilot. The whole crew were dissatisfied, and said they were going to sea short-handed, and made an opposition to the pilot's orders. This state of things continued until one of the officers of the vessel returned on board, when learning the state of things in regard to the crew, he went to the United States court and had the prisoners arrested, and they were subsequently indicted for the offence, and now put upon trial. The mate testified that he had not particularly ordered the men to duty, but he supposed they were resolved not to do duty on board of the ship by the account the pilot gave of them, when he, the witness, returned on board of the ship.

The prosecutor upon proving these facts rested. The cause was then summed up to the jury, and the counsel for the prisoners stated, that he should insist upon the doctrine, that in criminal cases the jury were judges both of the law and the facts, and that in the present case he intended distinctly to put the case to the jury to decide whether the prisoners upon the facts proved had been guilty of any offence charged in the indictment. The act of congress, passed March 3, 1835, contains the following provision: "That if any one or more of the crew of any American ship or vessel on the high seas, or any other waters within the admiralty and maritime jurisdiction of the United States, shall endeavor to make a revolt or mutiny on board such ship or vessel, or shall combine, conspire or confederate with any other person or persons on board to make such revolt or mutiny, or shall solicit, incite or stir up any other or others of the crew to disobey or resist the lawful orders of the master or other officer of such ship or vessel, or to refuse or neglect their proper duty on board thereof, or to betray their proper trust therein, or shall assemble with others in a tumultuous and mutinous manner, or make a riot on board thereof, or shall unlawfully confine the master or other commanding officer thereof, every such person so offending, shall, on conviction thereof, be punished by a fine not exceeding $1,000, or by imprisonment not exceeding five years, or by both, according to the nature and aggravation of the offence." The first point the counsel stated, was as to the jurisdiction of this court to try the offence charged against the prisoners. The vessel lay in the East river, within 60 yards of the shore, and within the municipal jurisdiction of the city, county and state of New York; and the learned counsel argued that when the state courts had jurisdiction, the United States courts ought not to interfere; that the police department for the city of New York should have been resorted to to preserve

the peace and enforce obedience on board of the vessel; that if the present act of congress gave the court jurisdiction, they ought not to interfere and clash with the state jurisdiction, that under the act of congress of 1790 [1 Stat. 112], the United States would not have jurisdiction of this offence. U. S. v. Bevan, 3 Wheat. [16 U. S.] 390. The next point was, that the prisoners were not bound to go to sea short-handed, with anything less than the original number of the crew who had signed shipping articles for the voyage; that the master had violated his contract with the seamen by turning some of the men ashore, and the remainder were not bound to continue the voyage under such circumstance as existed in the present case. Third, that the pilot was not the master or other officer intended by the act of congress, as the person entitled to command the vessel, and that a refusal to obey the pilot while the mate and captain were neither of them on board was not such a refusal and disobedience of orders on shipboard as would render the men liable to indictment under the act. Fourth, that the shipping articles had not been produced to show that the men had shipped for the voyage, or were bound to duty on board.

The district attorney, for the United States, also summed up to the jury, and urged the conviction of the prisoners.

The District Attorney, for the United States.

Alanson Nash, for the prisoners.

BY THE COURT (charging jury). The course proposed by the prisoners' counsel had been an unusual one. Nevertheless, the court would say that the counsel for the prisoners had a strict legal right to call upon the jury to decide the law and the facts in a criminal case, but the court in such a case would fully express their opinion to the jury what the law was, and felt bound in the present case to charge the jury distinctly and positively upon the points raised by the prisoners' counsel.

In the first place, they would charge the jury that the locus in quo where the offence was committed was clearly within the admiralty and maritime jurisdiction of the United States and of this court. That the act of 1835, was different from the act of congress of 1790. In one case the statute had said that the offence if committed on the high seas, or any other waters within the admiralty and maritime jurisdiction of the United States, this court should have jurisdiction. In the first act of 1790, the offence must have been committed in a place under the sole and exclusive jurisdiction of the United States, out of the jurisdiction of any particular state. That the jurisdiction of the United States court, under the act of 1835, extended to all places and waters where the tide ebbs and flows.

To the next point, the court charged the jury, that it was incumbent upon the prisoners to satisfy the jury that the crew left on board were incompetent in point of numbers to navigate the vessel safely at sea; they had furnished no evidence on this point, and the master was invested by law, in the absence of any proof to the contrary, with a discretion as to the number of men that would be required to navigate his vessel. All parties were interested, the master as well as the crew, to go to sea with a sufficient number of men and not short-handed, and the law would presume that he did the best for all parties of whatever was necessary to be done, until proof had been offered to the contrary.

To the third point, the court said that they charged the jury, that the pilot was within the intent, spirit, and meaning of the act of congress, an officer on board of the vessel, and as such the prisoners were bound to have obeyed the lawful orders and commands of the pilot on board when he had rendered himself on board to pilot the vessel to sea; that the navigation laws clearly contemplated that a pilot should be employed to take out and bring in vessels. This was the common maritime usage and custom of all nations; and that the jury in the present case were bound to consider that the pilot's orders to put the vessel to sea was a lawful order of the master or other officer of the ship, and that a refusal to obey the pilot was a refusal and neglect of the proper duty of the prisoners on board of such ship, and rendered them clearly liable under the act of congress.

To the fourth point, the court stated that the shipping articles had not been produced, and that if the prisoners were really ordered to go a voyage they had not shipped for, they should have made the objection at the time of their refusal to do duty, which they had not done. The court, under the circumstances, would presume that the orders given by the pilot were such as show that the prisoners were bound to obey by the terms of the shipping articles, and, if so, the jury ought to convict the prisoners.

The jury thereupon retired and came into court and said they found the prisoners guilty in manner and form charged in the indictment.

THE COURT on a subsequent day passed sentence and ordered the prisoners to be confined in the county gaol for 60 days and pay a fine of $1 each.

Case No. 15,649.

UNITED STATES v. LYNN.

[2 Cranch, C. C. 309.] [1]

Circuit Court, District of Columbia. May Term, 1822.

WITNESS—PRIVILEGE—INCRIMINATING TESTIMONY —SECONDARY EVIDENCE.

1. A witness is not bound to answer a question, if it shall appear to the court that the answer would have a probable tendency to criminate the witness.

2. The contents of a written paper cannot be proved by parol, unless the paper be lost or destroyed.

The defendant [Adam Lynn] was indicted for sending a challenge to James McGuire to fight a duel. James McGuire, who stood indicted for accepting the challenge, was produced as a witness for the United States, and was asked whether such a written challenge is in existence.

Mr. Hewitt and Mr. Taylor, for the witness, objected, that the answer might tend directly to prove a fact necessary to convict Mr. McGuire.

Mr. Swann, for the United States, mentioned the Case of Kearney, at the last term in Washington [7 Wheat. (20 U. S.) 39], when a majority of this court determined that a similar question must be answered by the witness. The chief justice of the United States, in Burr's Case [Case No. 14,692e], went too far in saying that the witness was not bound to answer the question, if the answer might tend to prove a fact which would be a necessary link in the chain of evidence to support a prosecution against the witness.

Mr. Taylor, in reply. There is a difference between Kearney's Case [supra] and this. There, Kearney was not indicted for being concerned in the duel; and the court did not know whether he was present as a party, or only as an accidental witness.

THE COURT (THRUSTON, Circuit Judge, absent) said, that as there is a prosecution against the witness for accepting the challenge and as the existence of the challenge would be a material fact in the evidence against him upon the trial, and as he stated that he could not answer the question without implicating himself, he was not bound to answer.

MORSELL, Circuit Judge, stated his opinion to be, that as in the present case there was a prosecution against the witness for accepting the challenge, the witness was not bound to answer the question, if he had in fact accepted the challenge, (which he himself best knew,) because it appeared to the court that the answer would have a probable tendency to criminate the witness.

Evidence having been given that the challenge, if any, was in writing, and in the possession of a witness residing in Washington, THE COURT refused to permit parol evidence to be given of its contents, and refused to adjourn the jury over, to give the United States time to send for that witness.

Verdict for the defendant.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,650.

UNITED STATES v. LYON.

[See Case No. 8,646.]

Case No. 15,651.

UNITED STATES v. LYON et al.

[2 McLean, 249.] [1]

Circuit Court, D. Michigan. Oct. Term, 1840.

PRACTICE—JUDGMENT ON MOTION—SURETIES.

The act of March 3, 1797 [1 Stat. 512], which provides that judgment shall be given at the return term against debtors of the United States, on motion, is limited to cases in which the principal debtor is a party to the action.

[This was an action, on a bond, by the United States against Lucius Lyon and others.]

The District Attorney, for the United States.

Mr. Frazer, for defendants.

OPINION OF THE COURT. This action is brought on an official bond, signed by the defendants as the surety of ——, receiver of public moneys. The receiver is deceased, and, being a defaulter, his account was regularly certified from the proper department of the government, together with a certified copy of his bond; and the writ being returnable to the last term of this court, a motion was made for judgment, under the act of congress. The motion was continued to the present term, and it is now renewed.

The continuance of the motion can not change the principles on which it must be decided. It must now stand as it stood when first made at the return term of the writ; and the question for consideration is, whether the plaintiff is entitled to judgment. It is insisted that the act of congress, of the 3d of March, 1797, provides for judgment, on motion, unless the defendant shall, in open court, make oath that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the consideration of the accounting officers of the treasury, and rejected, specifying each particular claim, so rejected, in the affidavit; and that he can not then come safely to trial. These are the words of the statute, and, if they apply to the case under consideration, the judgment must be entered, as no affidavit has been made by either of the defendants. The principal in the bond, being dead, is not a party to the suit, and it is contended that the above provision can apply only to the principal. To this it is answered, that there

[1] [Reported by Hon. John McLean, Circuit Justice.]

is no exemption as to securities in the statute, and, consequently, the provision must apply to them equally as to their principal. And that duty bonds, on which judgments are uniformly entered at the first term, come under the same provision.

This question has not been raised in this circuit, and, from the limited examination which has been made, it does not appear to have been decided in any of the circuits. The first section of the act provides, that when any revenue officer, or other person, accountable for public money, shall neglect or refuse to pay into the treasury the sum or balance reported to be due to the United States, &c., the comptroller shall institute suit, &c. This evidently refers to the principal debtor. It embraces a revenue officer, or other person, who owes to the United States a balance on the "adjustment of his account." The words of the fourth section are: "Where suit shall be instituted against any person indebted to the United States, the court, where the same shall be pending, shall grant judgment at the return term, on motion, unless the defendant shall," &c. Now, this provision would seem, also, to apply to the debtor of the United States, as described in the first section,—a debtor whose account has been adjusted, and additional force is given to this view, when the conditions are considered on which a continuance may be granted. The defendant is required to make an affidavit that he is equitably entitled to credits, which, before the commencement of the suit, had been presented and rejected at the treasury; and he is required to "specify each particular claim so rejected." Now, how can any one, except the principal debtor, make this oath? He is, very properly, supposed to be acquainted with his accounts including the rejected items. And he may well be required to specify these items, and to say that they were presented to the treasury. But a security is not supposed to be, and, in fact is not, acquainted with the accounts of his principal, or with their adjustment by the accounting officers of the treasury.

No case could better illustrate the propriety and force of this view than the one under consideration. The receiver is dead, and suit is brought on his bond against his sureties, on a balance stated to be due on the adjustment of his account. The balance is large, and is the result of a large account, consisting of debits and credits. The first notice to the sureties, perhaps, of the defalcation, is the service of the process some fifteen or twenty days before the commencement of the court. They are necessarily strangers to the accounts, much less are they acquainted with the mode of their adjustment. How then can they swear that they have credits which ought to be allowed? Credits which have been presented to the treasury and rejected. And how can they specify these credits particularly? It is impossible in the nature of things. And this is enough to show that congress could not have intended to require impossibilities, or to make the courts of the United States the instruments of injustice. If it were necessary I would say that congress have not the power, by an act of legislation, to take away the exercise of that discretion by a court, which is essential to the attainment of justice. They have not power to say how a court shall decide a case, nor that they shall decide it without evidence. The practice of the court may, undoubtedly, be regulated by congress. But in the administration of justice contingencies may occur which could not have been foreseen, and for which the law has made no provision, and which call for the exercise of the judicial discretion of the court.

As regards the present question the plain import of the language of the act, in the different sections, limits the provision to the principal debtor. Where he is a party to the suit, with the sureties, the affidavit required must be made before a continuance is granted. For, in such case, if there be any rejected credits he must know them, and can state them on oath. And this protects his innocent securities. It is presumable that the practice referred to of entering judgment at the return term on duty or other bonds, must be cases where the principal debtor is a party to the suit. Any other construction subjects the sureties to the grossest injustice. Although in this case a continuance was had, at the instance of the court, the court overrules the motion for judgment. The defendants, under the rules of the court, have a right to plead, and until they shall have been ruled to file a plea a judgment will not be entered against them.

Case No. 15,652.

UNITED STATES v. LYTLE et al.

[5 McLean, 9.] [1]

Circuit Court, D. Ohio. Oct. Term, 1849.

EXECUTIVE DEPARTMENTS—CONSTRUCTION OF LAWS—HOW FAR CONCLUSIVE.

1. The executive in carrying into effect laws, must necessarily give a construction to them, and such construction is binding upon the judiciary, when private rights are not affected.

[Cited in Westbrook v. Miller, 22 N. W. 256, 56 Mich. 152.]

2. The treasury department cannot enlarge the district of a surveyor general, but where such district depends upon the construction of various acts of congress, and those acts have been uniformly construed one way, and such construction has been repeatedly sanctioned by legislative action, it must be considered as conclusive on the judiciary.

[Cited in brief in People v. Commissioners State Contracts, 11 N. E. 181.]

3. And where such construction had been fixed for years, a security to a surveyor general's bond, cannot set up in defence as a bar to a suit on the bond that the duties as performed were beyond the proper limits of the surveyor general's district.

[1] [Reported by Hon. John McLean, Circuit Justice.]

At law.

Mr. Bartley, U. S. Dist. Atty., and Mr. Stanbery, for the United States.

Ewing & Swayne, for defendants.

OPINION OF THE COURT.[2] This action is brought on an official bond given by Robert T. Lytle, as surveyor general, dated 29th April, 1836. The bond recites, "that whereas, the president of the United States had, pursuant to law, appointed Robert T. Lytle, the surveyor general of the public lands, in the states of Ohio, Indiana, and Michigan territory," &c., the conditions of which were, "that the said Robert T. Lytle should faithfully disburse, according to law, all moneys placed in his hands for disbursement, and should faithfully discharge the duties of said office."

The declaration contained many counts, to which several pleas were filed, setting up that the duties of Lytle were to be performed, and his disbursements made, within the states of Ohio and Indiana, and that part of Michigan territory east of a line drawn due north from the Wabash river and Port Vincennes to the Canada shore; and that a large part of the moneys placed in his hands for disbursement, was required to be disbursed beyond these limits, and for the faithful disbursement of which, the sureties of the said Lytle are not responsible; and that the accounts kept by the government do not distinguish between the sums disbursed by him beyond those limits, and those paid within them. The plaintiffs demurred to these pleas.

By the pleadings, the issue is made to turn upon the extent of the legally constituted district of the surveyor general. The first section of the act of May 18, 1796 [1 Stat. 464], provided, "that a surveyor general shall be appointed, whose duty it shall be to engage a sufficient number of skillful surveyors as his deputies, whom he shall cause, without delay, to survey and mark the unascertained outlines of the lands lying north-west of the Ohio river, and above the mouth of the Kentucky river, in which the titles of the Indian tribes have been extinguished," &c. The act of March 26, 1804 [2 Stat. 277], extends the power of the surveyor general over "all the public lands of the United States, to which the Indian title has been or shall be hereafter extinguished, north of the river Ohio, and east of the river Mississippi." On the 28th February, 1809, the Illinois territory was established, to consist of "all that part of Indiana territory which lies west of the Wabash river, and a direct line drawn from said Wabash river and Port Vincennes, due north, to the territorial line and Canada shore." The act of April 29, 1816 [3 Stat. 325], authorizes the appointment of a "surveyor of the lands of the United States, in the territories of Illinois and Missouri. And he is required to cause so much of the public land to be surveyed as the president of the United States shall direct, and to which the titles of the Indian tribes have been extinguished, in the manner, and to do and perform all such other acts in relation to such lands, as the surveyor general is authorized and directed to do in relation to the same." And all repugnant acts are repealed.

These acts, it is admitted, reduced the district of the surveyor general, to the states of Ohio and Indiana, and so much of the Michigan territory as lies east of the line above designated, as constituting the eastern boundary of the Illinois territory. By the act of April 18, 1818 [3 Stat. 428], the people of Illinois were authorized to form a constitution and establish a state government. The state to be bounded on the north by latitude 42 deg. 30 min., and all the country north of that line was annexed to Michigan territory. This is the tract of country embraced by Wisconsin. And it is claimed that the annexed territory was taken out of the jurisdiction of the surveyor for Illinois and Missouri, and placed in that of the surveyor general, who, it is contended, had jurisdiction over all the public lands, to which the Indian title was extinguished, and which were not made subject to any other surveyor.

When the surveyor general was first appointed, his jurisdiction was limited and special over the public lands, and it has continued to be so. In this respect his powers appear to be similar to those of the surveyors which have since been appointed. His district was large at first, but it was reduced by the establishment of other and independent districts, and the law confers upon him no general powers which do not belong to other surveyors. There seems to be, therefore, no ground for the position that his powers extend to all the public lands wherever situated, which do not lie within a special jurisdiction. He is called the surveyor general, but he has no superintendency over the other surveyors, and the name having been given, it is presumed, to distinguish him from the deputy surveyors he was authorized to appoint, it is still accorded to him generally, although the same reason would apply it to other surveyors who exercise similar powers, and who, in various other acts, are called surveyors general.

The great question in the case is, whether the district of country west of Lake Michigan, and within the territory of Michigan, was embraced by the district for which Lytle was appointed surveyor general. There can be no doubt that the treasury department considered the country west of Lake Michigan as being within his district.

[2] This opinion was prepared, though not delivered. The case was taken up and adjusted on equitable principles, by Mr. Meredith, the secretary of the treasury. As the questions raised by the demurrer are not understood to have influenced the adjustment of the claim, on its merits; and as the view of the court on the demurrer embraced some matters of interest, the opinion is published.

In explanation of the estimates of the expenses of surveying the public lands, for the year 1833, submitted by the secretary of the treasury, there was an item of $50,000 "for Ohio, Indiana, and Michigan peninsula; also surveys west of the lake." These items were contained in the report of the commissioner of the general land office. And in an official letter of Mr. Williams, the predecessor of Mr. Lytle, November 7, 1832, the following items of expenditure are required: "For surveying the public lands in the Michigan territory, west of Lake Michigan, for contracts now existing, $20,000. For other surveys in Ohio, Indiana, and the peninsula of Michigan, $5,000." In a letter of the commissioner of the general land office, dated February 9, 1836, in answer to inquiries made of him by a member of the house of representatives, he says: "As those lands lying north of the state of Missouri are in the territory of Michigan, they would, therefore, be under the jurisdiction of the surveyor general, at Cincinnati." And in an official letter to Mr. Lytle, dated August 16, 1836, he says: "$50,000 have been appropriated for surveying in Michigan territory, west of the Lake, and in Wisconsin territory, which amount exceeds, by $25,000, that submitted in your last annual report." These, and other official letters of the surveyor general and of the treasury department, show, that before the date of Lytle's bond, and after it, his district was considered as embracing the whole of Michigan territory.

In the argument it was stated, that the terms "surveyor general" were applied only to the surveyor of the above district. In this the counsel are mistaken. In the correspondence of the land office, other surveyors are occasionally called surveyors general; and also in the reports of committees. In the act of March 3, 1831 [4 Stat. 492], to create the office of surveyor of the public lands for the state of Louisiana, the first section provides, "that a surveyor general for the state of Louisiana shall be appointed," &c. And also in the act of May 7, 1822 [3 Stat. 697], by the first section, "every surveyor general is required to give bond." And in the second section, "the commission of every surveyor general in office was to expire on the 1st day of February ensuing; and every surveyor general's commission afterwards, was limited to four years." But, generally, the name of surveyor general was applied to the surveyor of Ohio, Indiana, and Michigan. And where such designation is used in any of the acts, which have a bearing on this controversy, there can be no doubt of its application.

The views of the treasury department in regard to the extent of the surveyor general's district, were sanctioned by numerous acts of congress. This has been done uniformly since the passage of the act of April 18, 1818, authorizing the people of Illinois to establish a state government, and annexing the territory north of the state boundary to Michigan. Such annexation seems to have been considered by congress and the treasury department, as extending the surveyor general's district. By the act of March 3, 1831, all the public lands to which the Indian title had been extinguished, lying north of the northern boundary of the state of Illinois, west of Lake Michigan, and east of the Mississippi river, were required to be surveyed in the same manner, and under the same regulations, &c., as other lands are surveyed. The act of June 28, 1834, attached the country north of the state of Missouri, west of the Mississippi, and east of the Missouri river, to Michigan territory. This district afterwards constituted the territory of Iowa. The act of May 11, 1820 [3 Stat. 572], continued the powers of the commissioners to decide on the "rights of certain claimants of land in the district of Detroit, and, for other purposes," appointed under the act of April 23, 1812 [2 Stat. 710]. And the commissioners were authorized to ascertain the claims to land at the settlements of Green Bay and Prairie du Chien; and the second section of the latter act was revived. By that section the tracts confirmed were directed to be surveyed under the direction of the surveyor general, by such of his assistants as the said surveyor general shall appoint. By the act of February 21, 1823 [3 Stat. 724], the above act of 1820 is revived and extended to claims in the county of Michilimackinaw, and the sixth section provides, that it "shall be the duty of the surveyor general of the United States, under the direction of the secretary of the treasury, to cause the land confirmed by this act to be surveyed," &c. These claims were west of Lake Michigan. The act of July 2, 1836 [5 Stat. 70], required the surveyor general to lay off the towns of Fort Madison and Burlington, Belleview, Dubuque, and Peru, in the territory of Wisconsin. By the act of April 20, 1836 [Id. 10], the Wisconsin territory was organized, and Iowa was annexed to it. The twelfth section enacted that the laws of the United States are hereby extended over, and shall be in force, in said territory, so far as the same or any provisions thereof may be applicable.

A letter from the commissioner of the general land office, dated August 28, 1831, to Mr. Williams, the predecessor of Lytle, directed him to cause to be surveyed without unnecessary delay, the four principal meridian lines in continuation of that meridian which will be run by Col. McKee, (the surveyor of Illinois and Missouri) to the northern boundary line of Illinois. That line strikes the Wisconsin river, north of Illinois, not far from the Mississippi. In the appropriation bills since 1827, the surveyor general of Ohio, Indiana, and Michigan, is named, as the other surveyors are, of the states and territories which compose their several districts. This shows the view of congress as to the extent of their respective districts. The territory of Wisconsin was created by the act of April

20, 1836; and by the act of June 12, 1838 [5 Stat. 243], provision was made for the appointment of a surveyor of the territory, "who shall have authority and perform the same duties respecting the public lands, and private land claims in the territory of Wisconsin, as are now vested in and required of the surveyor of the lands of the United States in Ohio." And the second section requires the "surveyor for Ohio to deliver to the surveyor of Wisconsin territory, all the maps, papers, records, and documents, relating to the public lands and private land claims in the said territory of Wisconsin, which may be in his office."

This latter act is conclusive as to the construction given by congress, in regard to the extent of the district of the surveyor general. The act was passed subsequent to the date of Lytle's bond, and it cannot, therefore, affect the legality of the bond, but it is referred to as showing the uniform construction of the district, and in corroboration of prior acts. The appropriation bill for 1818, gives $1000 to the surveyor of the Illinois and Missouri territories. In a similar bill for 1819, the state of Illinois having been established, the appropriation was for the like sum to the surveyor in the state of Illinois and the Missouri territory. And such was substantially the designation given to the above surveyor down to the year 1836. Prior to that, the appropriations for surveying were made in gross; but in that year they were made specifically, for the Michigan peninsula, and for Michigan west of the Lake, and in Wisconsin; and also for Illinois and Missouri. This mode of making such appropriations has since been observed Since the act of 1816, constituting a surveyor's district of the Illinois and Missouri territories, and which limited the jurisdiction of the surveyor general of Ohio to the eastern line of Illinois, there has been no direct legislative action on the subject. And it is contended that the boundaries of a surveyor's district can only be extended or altered by direct legislation.

In establishing surveyor's districts, states and territories are referred to, as a convenient mode of fixing their boundaries. They might have been described by water courses, degrees of latitude, or by mathematical lines between given points. But the boundaries of states and territories being better known, generally, than other lines, they have been preferred. Surveyor's districts thus formed, are in no way connected with the political organization of a state or territory, or affected by the change of their boundaries. By the act of March 3, 1807 [2 Stat. 448], the president of the United States was authorized to lease lead mines in the Indiana territory; but those mines were included within the Illinois territory, subsequently established, and it was objected, therefore, on that and other grounds, that the president had no power to lease. But the court, in U. S. v. Gratiot [Case No. 15,249], said: "The act authorizing the president to lease lead mines refers to them as situated in the territory of Indiana; but this is merely descriptive of the locality of the mines, and does not limit the exercise of the power to the boundaries of Indiana, as they might afterwards be changed. The lead mines within the original limits of the territory were the mines which the law authorized the president to lease; and no subdivision of the territory, or change from a territorial to a state government, can affect the exercise of the power."

These remarks have some application to the principle of the case under consideration. And if it stood upon the acts of 1816 and 1818, it would seem that the surveyor general's district was limited to the eastern line of the Illinois territory. The act of 1818, which attached the land north of the state line of Illinois to Michigan, enlarged that territory, but this did not necessarily enlarge the district of the surveyor general. But a different construction has been placed upon that act by the treasury department, and by congress. It cannot be doubted that they construed the district of the surveyor general as embracing the whole of the Michigan territory. And this construction has been acted upon by the treasury department from 1818, in directing surveys to be made, and in issuing patents; and by congress, in making appropriations for such surveys; in requiring private claims to be surveyed west of Lake Michigan, by the surveyor general, and by making no other provision for surveys within that territory.

It is admitted that the treasury department has not power to establish or alter the district of the surveyor general. But the executive branch of the government is bound to give effect to the laws which regulate its duties. And this necessarily requires a construction of those laws. And where such construction has been acted on for a great number of years, under the sanctions of the law-making power, it becomes a serious question how far the judicial power can or should interfere. So far as the public are concerned, there can be no doubt that the surveys made by the surveyor general, in every part of Michigan, are valid. And we suppose that the surveys of private claims, under the special acts, within the same territory, are also valid. Under these acts of the government, rights have been acquired, which ought not, and, perhaps, cannot be shaken. Lapse of time, with its healing effects, and in all its force, applies to such rights. Where, under an executive construction of the law, a wrong is done to an individual, the courts will give him redress. But where no such wrong is done, it is supposed that acts of the executive within the general scope of its powers, and by virtue of law, cannot be reviewed, though, to some extent, the letter of the law may not have been followed. There is no court

of errors, in which executive decisions that do not affect individual rights, can be reversed.

Congress have, since 1827, in prescribing the duties of the surveyor general, in appropriating his salary, and in all legislative reference to him, spoken of him as the surveyor general of Ohio, Indiana, and Michigan. And the other surveyors are named as surveyors of the states or territories which compose their respective districts. This designation is important as showing the view of congress in regard to the jurisdiction of the surveyor general; and when taken in connection with other acts, can leave no doubt upon the mind of any one, that they authorized and required him to perform his functions within the entire territory of Michigan. This, then, is not a mere legislative construction of a previous act, but a recognition of rights, and an imposition of duties by the paramount authority. That the surveyor general was as responsible for the duties thus imposed, as for the performance of any other duties which belonged to his office, we suppose to be unquestionable. He was then, in making surveys in the territory west of Lake Michigan, acting in the line of his duty under the sanctions of law. The surveys were required to be made by law; the surveyor general was instructed, by the proper authority, to cause them to be made; and they were made accordingly, under his direction. They were made within the territory of Michigan, and that, by the concurrent views and action of the treasury department, and of congress, was within the district of the surveyor general. Whether this resulted from a construction of the act of 1818, or the act of April 20, 1836, which organized the territory of Wisconsin, and extended the laws of the United States over it, or of some other act, may not be material; the fact of the exercise of jurisdiction under the direction of the law-making power is undisputed.

From these facts the question arises, whether the defendants, as sureties of Lytle, are responsible for his disbursements west of Lake Michigan. The first bond of Lytle was dated April 23, 1835, the second, on which this suit is brought, April 29, 1836. Before the date of the first bond, and in the time of Williams, the predecessor of Lytle, contracts were made, and surveys were being executed west of the Lake. And the first report of Lytle contained requisitions for appropriations to continue those surveys, and cover expenses in making them, already incurred. There could have been no surprise to the surveyor general, or to his sureties, that he was called upon to superintend these surveys. They constituted no inconsiderable part of his duties, as they had done those of his predecessor.

In the general appropriation law of 1837, there was appropriated "for completing the surveys, &c., in Ohio, Indiana, Michigan, and Wisconsin, $3,040," and "for surveying of the public lands in the district composed of the states of Illinois and Missouri, $36,000." Here, as in other cases of appropriations for surveys, the districts are designated. The question does not arise whether the sureties are responsible for the performance of new and additional duties, imposed by law on the surveyor general, after the date of the bond. If the Michigan territory, west of the Lake, was within the district of the surveyor general, it is not pretended that the duties required of him did not belong to the office, when the defendants became bound as sureties. The recital in the bond stated that "pursuant to law the president had appointed Lytle surveyor general of the public lands, in the state of Ohio, Indiana, and Michigan territory." And if the whole of Michigan territory was embraced in the district, then the bond does not extend beyond the law. That the entire territory was within the district appears from the action of the treasury department, and the authoritative action of congress.

But it is objected, "if the territory now Wisconsin and Iowa, the latter lying west of the Mississippi river, became a part of the surveyor general's district, by being attached to and made a part of the Michigan territory, that the same territory, by being detached, on the same principle, ceased to be a part of the district." This consequence does by no means follow. The above territory was made a part of the Michigan territory, and, by various acts of congress, the duties of the surveyor general were required to be performed within the annexed territory, as a part of Michigan. Subsequently, the Wisconsin territory was established, and the surveyor general, under the orders of the treasury department and the sanctions of congress, continued to discharge his functions until, by the act of 1838, provision was made to appoint a surveyor general for Wisconsin. In that act congress provide that the new surveyor "shall have authority and perform the same duties respecting the public lands and private land claims in the territory of Wisconsin, as are now vested in and required of the surveyor of the lands of the United States in Ohio." They give to the Wisconsin surveyor, by this act, no more power over the public lands of the territory than was vested in the surveyor general. If he had no power to make surveys in this territory, then the surveyor of the territory received none under the act.

Where the boundary of a state or territory constitutes the surveyor's district, and that boundary is enlarged, the argument is not without plausibility, that the district is also enlarged. But when the district thus enlarged is sanctioned by numerous acts of legislation, and by a uniform course of the treasury department, for a great number of years, there would seem to be little ground for doubt on the subject. Congress had the

power to require the surveyor general to perform duties in any state or territory, without fixing the boundary of his district. The law requiring his duties to be performed in a territory or state, makes such territory or state his district. Now, this was done, substantially, in Wisconsin territory. The law required the lands in that territory to be surveyed, to which the Indian title had been extinguished. Those lands, by the uniform action of congress, and of the executive department, for eighteen years before the appointment of Lytle were considered within the district of the surveyor general. No other surveyor had any jurisdiction over them. None other claimed or exercised such right, or was authorized to do so under the acts of congress. This would seem to be conclusive as to the jurisdiction of the surveyor general.

After the most deliberate examination of this case, and under the pressure of the executive construction of the laws, sanctioned in various forms by the legislative power, I am brought to the conclusion, contrary to my impression during the argument, that the whole of the territory of Michigan was embraced in the district of the surveyor general; and, consequently, that the bond of the defendants is not void or inoperative, on the ground stated in the pleas. The demurrers to the pleas are, therefore, sustained.

Case No. 15,653.

UNITED STATES v. McARDLE.

[2 Sawy. 367.] [1]

District Court, D. Oregon. April 1, 1873.

SEAMEN—SHIPPING ACT—FOREIGN VESSELS—AMBIGUITIES.

1. Section 51 of the act of June 7, 1872 (17 Stat. 273), commonly called the shipping act, applies to seamen engaged on foreign vessels while in American waters.

[Followed in U. S. v. Sullivan, 43 Fed. 604. Cited in Grant v. U. S., 7 C. C. A. 436, 58 Fed. 696.]

2. The title of an act cannot control plain words in the body of the statute, but taken in connection with other parts, it may assist in removing ambiguities; but the title of the act of June 7, 1872, supra, does not allude to the subject of the conduct and discipline of seamen provided for in sections 51 to 59 inclusive.

[Cited in Hahn v. Salmon, 20 Fed. 809.]

This indictment charges that the defendant [James McArdle], on February 26, 1873, being lawfully engaged as a cook upon the British ship Gemini, within the district aforesaid, did then and there "wilfully and continuously disobey the lawful commands" of the chief officer of said ship—stating the command—contrary to the statute, etc. On the trial the jury found a verdict of guilty of disobedience, but not continuous. Afterward the defendant's counsel moved in arrest of judgment, which motion was argued and submitted on March 19.

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

Addison C. Gibbs, for the United States.
Cyrus Dolph, for defendant.

DEADY, District Judge. The ground of the motion is, that the facts stated in the indictment do not constitute a crime against the laws of the United States. Section 51 of the act of June 7, 1872 (17 Stat. 275), commonly called the shipping act, provides: "That when any seaman who has been lawfully engaged * * * commits any of the following offenses, he shall be liable to be punished as follows, that is to say: * * * Fourthly, for wilful disobedience to any lawful command, he shall be liable to imprisonment, etc. Fifthly, for continued wilful disobedience to any lawful commands * * * he shall be liable to imprisonment for any period not exceeding six months," etc.

Counsel for the motion maintain that this act does not apply to seamen other than those on board American vessels. In support of this position, he cites sections 47, 50, 55 and 65, and the title of the act as being incompatible with the idea that the act was intended to apply to seamen on foreign vessels, even in American waters. But it does not necessarily follow that if sections 47, 50 and 55 are inapplicable to seamen on foreign ships, section 51 should be construed to be so also. In scope and purpose they differ very much from the latter one. Sections 47 and 50 relate to the collection and disposition of the unpaid wages and effects of seamen dying in the United States, while section 51 relates solely to the misconduct of seamen. Besides, these sections 47 and 50 do not in terms exclude from their operation the wages and effects of seamen belonging to foreign ships. Like the section under consideration, their language is general and unqualified, and includes all seamen in the circumstances therein described. The subject matter—the collection and disposition of the unpaid wages and effects of seamen dying in the United States—is as much within the jurisdiction of the national government in the case of seamen belonging to foreign ships as American ones, and, so far as appears, I see no reason why these sections should be held inapplicable to either.

Section 55 relates to the disposition of seamen's wages and effects forfeited for desertion and other offenses against the act. It is also general and unqualified in its terms, and may as well apply to the wages of a seaman belonging to a foreign ship, where the act causing the forfeiture takes place within the jurisdiction of the United States, as those of any other.

But section 65 is the one principally relied upon by counsel, as showing, that the whole act, and every section of it, however general and unqualified in its terms, must be restrained to the cases of seamen on vessels belonging to the citizens of the United States. It provides:

"Sec. 65. That to avoid doubt in the con-

struction of this act, every person having the command of any ship belonging to any citizen of the United States shall, within the meaning and for the purposes of this act, be deemed and taken to be the 'master' of such ship; and that every person (apprentices excepted), who shall be employed or engaged to serve in any capacity on board the same, shall be deemed and taken to be a 'seaman' within the meaning and for the purposes of this act; and that the term 'ship' shall be taken and understood to comprehend every description of vessel navigating on any sea or channel, lake or river to which the provisions of this law may be applicable; and the term 'owner' shall be taken and understood to comprehend all the several persons, if more than one, to whom the ship shall belong."

Now the effect of all this is only to declare, in a certain class of cases, to wit, ships "belonging to any citizen of the United States," two things already well established: (1) that the person having the command of a ship, shall be deemed the master thereof; and (2) that every person employed thereon shall be deemed a seaman. But the section does not declare that the term "seamen," as used in the act, or that the act itself, shall be held to apply only to seamen serving on ships belonging to citizens of the United States, and therefore it does not affect the question under consideration.

Moreover, the definition here given of the term "ship," furnishes evidence that congress did not intend to limit the operation of the act in all respects to American ships and their crews. If such had been the intention of the law maker, the language employed would have been to this effect: the term "ship" shall be taken to comprehend every description of vessel belonging to any citizen of the United States, and not otherwise; instead of which the term is defined so as to comprehend, at least, every description of vessel, whether foreign or domestic, navigating "on any" water within the jurisdiction of the United States; for the provisions of this law must be applicable to "any sea or channel, lake or river," within the jurisdiction of the government which enacted it.

It is also insisted that the title of the act indicates that it was not the intention of congress to include seamen belonging to foreign ships within its operation. The title reads: "An act to authorize the appointment of shipping commissioners by the several circuit courts of the United States, to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen."

The title of an act cannot control plain words in the body of the statute, but, taken in connection with other parts, it may assist in removing ambiguities. U. S. v. Fisher, 2 Cranch [6 U. S.] 386. I find the latest enunciation of the general rule upon this subject laid down in Hadden v. The Collector, 5 Wall. [72 U. S.] 110, by Mr. Justice Field, as follows: "The title of an act furnishes little aid in the construction of its provisions. Originally in the English courts the title was held to be no part of the act; 'no more,' says Lord Holt, 'than the title of a book is part of the book.' Mills v. Wilkins, 6 Mod. 62. It was generally framed by the clerk of the house of parliament, where the act originated, and was intended only as a means of convenient reference. At the present day the title constitues a part of the act, but it is still considered as only a formal part; it cannot be used to extend or restrain any positive provisions contained in the body of the act. It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight. It is seldom the subject of special consideration by the legislature. These observations apply with special force to acts of congress. Every one who has had occasion to examine them has found the most incongruous provisions, having no reference to the matter specified in the title."

Admitting for the time being that it is doubtful whether the words "seamen," as used in section 51 should be held to include the defendant, does the title aid in solving such doubt, and how? It specifies three subjects: (1) The employment of shipping commissioners; (2) the employment and discharge of seamen; and (3) the further protection of seamen.

If in the body of the act it is doubtful, as it appears to be, whether these commissioners are only to superintend the employment and discharge of seamen engaged on ships belonging to citizens of the United States, then this plain indication in the title, of the purpose of the act in this respect, would resolve such doubt accordingly. But section 51 does not relate to the employment of seamen, but their discipline and punishment for desertion, disobedience and disorder, and therefore this specification in the title does not affect the question of what seamen this section includes.

The third specification in the title is, "the further protection of seamen." This clause does not in terms confine the operation of the act in this respect to any particular seaman, but so far as it goes, indicates that the term, except in the matter of their employment and discharge, was intended to include "seamen" engaged on any ship while within the jurisdiction of the United States.

The subject of the protection of seamen is provided for in what may be called a chapter of the act entitled "Protection of Seamen," being sections 61 to 64 inclusive. They relate to the attachment and assignment of seamen's wages, and the unlawful boarding of vessels and soliciting seamen to go on shore.

From the terms used and the nature of things, their operation is confined to ports and waters of the United States, and all their provisions are alike applicable to any seaman in an American port, without reference to the nationality of the vessel on which he is engaged; and there can be no doubt but that the best public policy of a commercial people and the comity of civilized nations demand that this should be so.

The act from section 51 to 59, inclusive of both, relates to the conduct of seamen, and so far is designated, "Discipline of Seamen." The subject is not mentioned in the title, and therefore it can have no effect in the construction of these sections. As in the case of the sections relating to the "Protection of Seamen," no discrimination is attempted to be made in the sections between seamen on account of the nationality of the vessels in which they are engaged or for any reason. Wherever the term "seamen" occurs it is used generally and without qualification.

The first of these, section 51, is the one under which this indictment is found. It relates wholly to the definition and punishment of offenses by seamen, such as desertion, disobedience, embezzlement of cargo and the like, all or any of which may be committed in an American port by seamen serving on foreign vessels as well as on American. The language of the section is plain and peremptory, and includes the case of the defendant, and unless it appears from some other provision of the act, that the word "seamen," as here used, should be construed to apply only to seamen engaged on board ships belonging to citizens of the United States, there must be judgment in pursuance of the verdict.

Every commercial nation is directly interested in maintaining discipline, and preventing desertion and disobedience among the crews of foreign vessels while in its ports. If such conduct is allowed to go unpunished, so far as they are concerned, the example will become contagious and lead to general disorder, to the injury of commerce and the country. The comity of nations requires that each one shall furnish the means of arresting and punishing any seaman guilty of these offenses while in its ports.

The argument for the defendant assumes that his case is not within the letter of the act, and cites U. S. v. Sheldon, 2 Wheat. [15 U. S.] 120, to show that a penal act ought not to receive an equitable construction so as to extend it to a case not within the correct and ordinary meaning of its language. The rule, as stated in the authority, is admitted, but it is an error to assume that the case of the defendant is not within the letter of section 51. In fact, the defendant seeks to have the act equitably construed in his favor, so as to take his case out of the plain letter of the section.

Take the section as it reads, and the defendant being a seaman, lawfully engaged on the ship Gemini, within the jurisdiction of this court, at the time of the commission of the willful disobedience alleged in the indictment, he is within the correct and ordinary signification of its language, and as there is nothing in the act, its title, purpose or nature to justify a narrowing construction of this language, so as to exclude from its operations the case laid in the indictment, there is no ground upon which the motion can be allowed.

Case No. 15,654.

UNITED STATES v. McAVOY.

[4 Blatchf. 418;[1] 18 How. Prac. 380.]

Circuit Court, S. D. New York. Jan. 28, 1860.

CRIMINAL LAW—INDICTMENT—SIGNATURE OF DISTRICT ATTORNEY—SETTING FIRE TO SHIP.

1. Where a grand jury was empanneled and sworn during the lifetime of a district attorney, and was charged by the court to enquire into the cases of all persons imprisoned for criminal offences against the laws of the United States, and then the district attorney died, and afterwards the prisoner was examined and committed by a commissioner, and an indictment was found against him while the office of district attorney was vacant, *held* that the grand jury was empowered to take cognizance of the case.

2. The indictment not having been signed by any district attorney, and a new district attorney having caused the prisoner to be arraigned and tried on the indictment, *held*, that such action of the new district attorney was full evidence to the court of his concurrence in the action of the grand jury, and of his prosecution of the prisoner in the name of the United States, pursuant to the directions of the statute.

3. The signature of a district attorney is no part of an indictment, and is only necessary as evidence to the court that he is prosecuting the offender conformably to the duty imposed on him by statute.

4. No power is conferred, by statute or usage, on the courts of the United States, to recognize a suit, civil or criminal, as legally before them, in the name of the United States, unless it is instituted and prosecuted by a district attorney legally appointed and commissioned conformably to the statute.

[Cited in Confiscation Cases, 7 Wall. (74 U. S.) 457; U. S. v. Doughty, Case No. 14,986; U. S. v. Stone, 8 Fed. 261.]

[Cited in brief in U. S. v. Draper, 8 Mackey, 85.]

5. Where the offence of wilfully setting fire to a ship at sea, with intent to burn her, under section 7 of the act of July 29, 1850 (9 Stat. 441), being a felony, was charged in an indictment, in the words of the statute, *held*, that it was not necessary that the indictment should charge that the offence was committed feloniously.

This was a motion in arrest of judgment. The defendant [John C. McAvoy] was indicted, under section 7 of the act of July 29, 1850 (9 Stat. 441), for setting fire at sea to the ship Japan, with intent to burn her, and was tried and convicted. The grounds urged in support of the motion were (1) that the indictment did not bear the signature of a

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

district attorney, that office being vacant when the indictment was found; (2) that the indictment did not charge that the offence, being a felony, was committed feloniously. The grand jury which found the indictment was empanneled, and sworn during the lifetime of District Attorney Sedgwick, and entered on its duties on the 7th of December, 1859. On being sworn, it was charged by the court to enquire into the cases of all persons imprisoned for criminal offences against the laws of the United States. Mr. Sedgwick died on the 8th of December, 1859. The prisoner was examined and committed by a commissioner after the decease of Mr. Sedgwick, and the indictment against him was found and filed in court on the 21st of December, 1859, while the office of district attorney was vacant. District Attorney Roosevelt, the successor of Mr. Sedgwick, assumed the duties of the office on the 4th of January, 1860. On the 10th of January, 1860, the new district attorney arraigned the prisoner on the indictment, and he pleaded to it, and a day was fixed for the trial. On the same day, the grand jury was discharged. No exception was taken by the prisoner to the sufficiency of the indictment until after the verdict was rendered.

James I. Roosevelt, U. S. Dist. Atty.
James Ridgway, for the prisoner.

BETTS, District Judge.[2] [The main objection taken by the prisoner's counsel to the indictments was that the grand jury originated them of their own accord, and that they were brought into court, and the prisoners were put to trial under them, without the signature of a district attorney being affixed to the indictments; and that, in fact, the office of district-attorney was vacant when the grand jury acted upon the cases, and found and brought the indictments into court. It was also objected that the indictments were void in not charging that the various offences, being felonies, were committed feloniously. The judge observed, that the facts attending the course of the proceedings in the cases before the grand jury, had been more accurately ascertained since the trial than they were known to the court at the time the motions in arrest of judgment were first presented. The grand jury were empannelled and sworn during the lifetime of the late district attorney. All the prisoners but one had been arrested upon these charges, taken under the directions of an official assistant attorney before proper magistrates, and examined and committed by such magistrates for trial upon these charges, before the grand jury were qualified and charged by the court. The court instructed the grand jury explicitly to take cognizance of these commitments. They entered upon their duties on the 7th of December last, having some of these papers laid before them by the district attorney that day; and how far they proceeded in their action upon the cases on the 7th and 8th of December is not made to appear by any record or papers in court. On the night of the 8th of December, Mr. Sedgwick, the district attorney, died, and on the 4th of January instant, his successor assumed the duties of office. The grand jury returned the bills of indictment into court December 21st, and on the 10th of January the official assistant of the present district-attorney called up the indictments, had the prisoners arraigned in court, who all pleaded not guilty to the indictments, and a day was designated by the court for their trials. No exception was then taken in their behalf to the indictments. The grand jury, having completed their business, were the same day discharged for the term by the court. The prisoners were put upon their trial at the time appointed, and no exception to the sufficiency of the indictments was taken until verdicts of guilty were rendered in all the cases. The court, upon these facts, ruled the following points:

[1. The grand jury did not originate any of the indictments of their own motion and accord, but the cases were submitted to their attention and action by the express instructions of the court.

[2. One case was actually laid before the jury on the 7th of December by the then district attorney, and there is reasonable ground to presume that all the other cases but one, in the same condition at the time, were also brought before the jury on the commitments theretofore made by magistrates during the life of the then district attorney.

[3. McAvoy alone was examined and committed by a commissioner after the decease of Mr. Sedgwick, and the indictment against him was found and filed in court while the office of district attorney was vacant; but the grand jury were charged by the court to inquire into all cases of parties imprisoned for criminal offences against the laws of the United States, and were thus empowered to take cognizance of his case.][2]

4. The signature of a district attorney constitutes no part of an indictument, and is only necessary as evidence to the court that he is officially prosecuting the delinquents conformably to the duty imposed upon him by statute.

5. The action of the new district attorney, in arraigning and trying the prisoner upon the indictment, was an adoption of it, and was full evidence to the court of his concurrence in the action of the grand jury, and of his prosecution of the prisoner in the name of the United States, pursuant to the directions of the statute.

6. That there is no power conferred, by

[2] [From 18 How. Prac. 380.]

[2] [From 18 How. Prac. 380.]

statute or usage, on the courts of the United States, to recognize a suit, civil or criminal, as legally before them, in the name of the United States, unless it is instituted and prosecuted by a district attorney legally appointed and commissioned conformably to the statute.

7. That the offence of wilfully setting fire to a ship at sea, with intent to burn her, being charged in the indictment, in the words of the statute creating the crime, the allegation was sufficient without adding the word "feloniously."

[The motion in arrest of judgment in this case, and all the others in which the same questions are involved, is accordingly denied.][2]

Case No. 15,655.

UNITED STATES v. McCANN et al.

[1 Cranch, C. C. 207.] [1]

Circuit Court, District of Columbia. Dec. Term, 1804.

WITNESS — COMPETENCY — RELEASE OF INTEREST.

The owner of the goods stolen may release to the United States his interest in the fine which may be imposed, and be examined as a competent witness in chief in behalf of the prosecution, under the act of congress.

Indictment [against McCann and Dulany] for stealing a steer, the property of Thomas Young and Thomas Files, under the act of congress. Young and Files having executed a release to the United States of all interest in the fine, &c., were admitted by the court as witnesses generally on behalf of the United States.

Mr. Key, for the prisoners, argued that the United States were not competent to receive a release; that the interests of the United States and the owner were several, not joint; that as a body corporate they could not take a gift of personal property, unless there were some officer authorized by law to accept; that there was nothing in esse which could be the subject of the release.

But THE COURT, contrà. This question has already been decided by this court, and they see no reason to alter the former decision. They are confirmed in their former opinion by Esp. Ev. 106, 163, and the case of Goodtitle v. Welford, Doug. 139. See U. S. v. Clancey [Case No. 14,800]; U. S. v. Hare [Id. 15,302].

Case No. 15,656.

UNITED STATES v. McCARTHY.

[4 Cranch, C. C. 304.] [1]

Circuit Court, District of Columbia. March Term, 1833.

FORGERY—UTTERING—INDICTMENT.

In an indictment upon the act of congress of the 2d of March, 1831, § 11 [4 Stat. 449], for uttering a forged check, it is not necessary to aver that the uttering was "to the prejudice of the right of any other person;" nor that the check was "a paper writing or printed paper." That act was not intended to alter the description of the offence of forgery as defined in the common law, or statute law of Maryland, but to designate the punishment, however the offence may be described in those laws. And although certain kinds of forgery may by those laws be made felony, they are punishable under the said eleventh section of the act of 2d of March, 1831, usually called the "Penitentiary Act of the District of Columbia."

[Cited in U. S. v. Coppersmith, 4 Fed. 207.]

The defendant [Lewis McCarthy] was convicted on the second count of the indictment, for "feloniously" uttering as true, a forged "check, on the Bank of Maryland, which is as follows, that is to say: 'No. ———. Bank of Maryland: Pay to Wm. C. Campbell or bearer, the sum of one hundred dollars and ——— cents. $100 dollars, ——— cents. Samuel H. Williams,'—with intent to defraud the said Lewis Fauzie, (he the said McCarthy at the time he so uttered and published the last mentioned false, forged, and counterfeited check as aforesaid, then and there well knowing the same to be false, forged, and counterfeited,) against the form of the statute," &c.

W. L. Brent, for defendant, moved, in arrest of judgment: (1) That the indictment does not charge that the uttering was "to the prejudice of the right of any other person," &c. (2) It does not charge that the check was "a paper writing or printed paper." The eleventh section of the penitentiary act of the 2d of March, 1831, says, "that every person duly convicted of having uttered as true, any such falsely made, altered, forged, or counterfeited paper writing or printed paper, to the prejudice of the right of any other person, body politic," &c., "knowing the same to be falsely made," &c., "with intent to defraud such person, body politic," &c., "shall be sentenced," &c. The word "feloniously" is not used in the description of the offence. The first section of the act, which enumerates the offences punishable by imprisonment and labor in the penitentiary, uses the word "forgery" alone to describe the offence. This indictment, being for felony, is not good under the penitentiary act, which makes the offence only a misdemeanor; and under an indictment for felony the defendant cannot be convicted of a misdemeanor; nor can the court render judgment as for a misdemeanor, upon a verdict finding the defendant guilty of felony. 1 Chit. Cr. Law, 281, 282; 2 Chit. 4; 3 Chit. 1022, 1041.

Mr. Key, U. S. Atty., contrà. The indictment is good upon both statutes. The penitentiary act describes the common-law offence exactly as it is described by Blackstone (4 Bl. Comm. 247) who says: "It may, with us, be defined, at common law, to be the fraudulent making or alteration of a writing, to the prejudice of another man's right. The act intended therefore to punish the common-law offence, and the indictment well describes the

[2] [From 18 How. Prac. 380.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

common-law offence; and that is all that is necessary. If the act be done with intent to defraud a person, it is done to the prejudice of the right of that person; and both averments are not necessary. It is only necessary to aver matter of substance. Com. v. Carey, 2 Pick. 47; and it is expressly stated in the books that is not necessary to constitute forgery, that any person should have been actually injured or defrauded. The words, "to the prejudice of the right" of a person, mean only with intent to injure that person.

(2) It is not necessary, under the penitentiary act, to state that a check is a paper writing. The word "check," describes a certain species of paper writing, and is equivalent to an averment of all the particulars which constitute the definition of the word. But the indictment is good under Act Md. 1799, c. 75, which makes it felony, knowingly to utter as true, a false draft or order for the payment of money; for a check is a draft. Or by rejecting the words "feloniously" and "contrary to the form of the statute," &c., it will be a good indictment at common law. Com. v. Hoxey, 16 Mass. 385. It is not necessary to follow the words of the statute in the indictment. 2 East, P. C. 896, 986, 987; Com. v. Richards, 1 Mass. 337; Brown v. Com., 8 Mass. 59; People v. Holbrook, 13 Johns. 90; Ross v. Bruce, 1 Day, 103.

THE COURT (CRANCH, Chief Judge, contrà) overruled the motion in arrest of judgment, and decided that the prisoner should be punished under the eleventh section of the penitentiary act of March 2, 1831 (4 Stat. 448).

MORSELL, Circuit Judge, cited the Maryland laws of 1790 (chapter 5) and 1793 (chapter 35; § 2) to show that a check is known as a description of paper, or security; and the Maryland act of 1797 (chapter 96), which punishes forgery of a check on a bank chartered by the United States, or by a particular state, and 1799 (chapter 75, § 2), which punishes the forgery of any draft, warrant, or order for the payment of money or delivery of goods, &c., and thought the indictment good as for a felony under the acts of Maryland of 1797 and 1799; and that the penitentiary act only altered the punishment without altering either the common law or the statutable definition of the offence; but that, however the offence may be described in the statute of Maryland, and however it may be described in the eleventh section of the penitentiary act, if the indictment describes an offence under the Maryland act, the judgment may be rendered under the penitentiary act, although it requires it to be the uttering of "a paper writing, or printed paper," forged, "to the prejudice of the right of some other person, body politic, or voluntary association," and although the indictment does not so state it.

CRANCH, Chief Judge. All indictments upon statutes must state all the circumstances which constitute the definition of the offence in the act, so as to bring the defendant precisely within it; and a conclusion "contrary to the form of the statute," will not aid a defect in this respect. 1 Chit. Cr. Pl. 281. It is, in general, necessary, not only to set forth on the record all the circumstances which make up the statutable definition of the offence, but also to pursue the precise and technical language in which they are expressed. Fost. Crown Law, 424; Cro. Jac. 607; 11 Coke, 58; 2 Hale, P. C. 170; 2 Leach, 1107; 2 Hawk. P. C. c. 25, § 110; Bac. Abr. "Indictment," H, 2; Hardr. 21; 8 Term R. 536; 2 East, P. C. 985, c. 19, § 58. So, in an indictment for perjury upon the statute, the word "wilfully" must be inserted, because it is part of the description which the act gives of the crime, though in an indictment for the same offence at common law, that precise term is not essential, but may be supplied by others that convey the same idea. These rules respecting the exact words of the statute by which the offence was created, apply equally to acts of the legislature by which the benefit of clergy is taken away from offences which existed at common law; for, if the crime be not, in general, brought within the exact words, the prisoner can recover judgment only as if no alteration had taken place, and the statutes had never been enacted. 1 Chit. 195. And the same rule applies where an offence at common law is made a crime of a higher nature; as where a misdemeanor is made a felony; or a felony a treason. 2 Hale, P. C. 192. Upon an indictment for murder, the jury may find the prisoner guilty of manslaughter, because the crimes are of the same nature, and only differ in degree. 1 Hale, P. C. 449.

In the present case the indictment is for a felony. It charges that the defendant did "feloniously utter," &c. If the word "feloniously" and "against the form of the statute," can be rejected as surplusage, the indictment seems to describe a common-law offence with sufficient certainty, but that offence is only a misdemeanor. 3 Chit. Cr. Pl. 1022. Can the court, upon an indictment for felony, give judgment as for a misdemeanor, upon a general verdict? By the English common law, it cannot; nor is it competent for the jury to find a verdict for a misdemeanor upon an indictment for felony. 1 Chit. Cr. Pl. 310, 367–369. The judgment must correspond with the verdict, and the verdict with the indictment; so far, at least, as regards the nature of the offence. Here the verdict is, guilty of felony. No precedent of a judgment as for misdemeanor, on such a verdict, can be found. It does not seem to me that this indictment describes a case within the statute (the penitentiary act of 2d of March, 1831). It does not aver that the defendant uttered "a paper writing," or "printed paper;" nor does it aver that the check, which was uttered, was "to the prejudice of the right of any other person," &c. At common law, to constitute forgery, it is not necessary that the right of

any person should have been actually prejudiced. The forgery may, or may not, have produced the intended injury; and it is not necessary to aver, in an indictment for forgery at common law, that the act was done to the prejudice of the right of any person. It is sufficient to state that it was done with intent to injure or defraud some other person. If the forgery be detected before the injury has been done, it is less prejudicial to society, than if the fraudulent object had been attained; and therefore congress may have thought proper to punish a forgery which has been effectual, more severely than one which has not produced an actual injury to some individual or body politic. The words, "to the prejudice of the right of any other person," cannot be used as merely indicative of the intent with which the act must be done; for that intent is expressly declared by the words which immediately follow, namely, "with intent to defraud such person." The act may be done to the prejudice of the right of another, but it is not forgery, either under the statute, or at common law, unless it be also done with intent to defraud some person. I therefore doubt whether, in order to bring the offence within the penitentiary act, the indictment should not have stated the uttering of a forged "paper writing," or "printed paper," "to the prejudice of the right of some person."

But it is said to be a good indictment under the Maryland act of 1799, c. 75. I think it is not. That act makes it felony to forge, &c., "any order for the payment of money;" and a check may be an order, but it ought to have been so called in the indictment. Neither the indictment nor the verdict can now be amended. It is an indictment for a felony, with a general verdict; and if the word "check" is a sufficient substitute for the word "warrant, draft, or order" for the payment of money, it is a good indictment for felony; and upon an indictment for felony, as before observed, judgment cannot be given as for a misdemeanor. But this principle is now denied, and the Case of Scholfield, in 2 East, P. C. 1028, is referred to. That indictment was not for felony, but for a misdemeanor in attempting to commit a felony. So in Holmes's Case, 2 East, P. C. 1023, the offence described in the indictment was only misdemeanor as it appeared upon the face of the indictment, although the act was stated to be done feloniously; and the court, seeing that the offence, as charged, could not be a felony, gave judgment as for a misdemeanor. So also in Westbeer's Case, for stealing a commission (Strange, 1137), and Joyner's Case, J. Kelyng, 29, for stealing a fixed copper boiler, it was manifest that the offences, as charged, could not be felonies. Chitty (1 Cr. Law, 456), speaking of the plea of autrefois acquit, says "if the first charge were such an one as that the defendant could not have been convicted of the latter upon it, the acquittal cannot be pleaded. Thus, if the first charge were a felony, or stealing, and the second for a mere misdemeanor, the previous acquittal will be no bar; for a felony, or larceny, cannot be modified, on the trial, into a trespass or misdemeanor." See, also, 1 Chit. 638, where the principle is stated which forbids judgment to be given as for a misdemeanor upon an indictment for felony. See, also, 2 Hale, P. C. 172. For these reasons I think the judgment ought to be arrested.

The prisoner was pardoned, upon the recommendation of the court.

Case No. 15,657.

UNITED STATES v. McCARTY.

[1 McLean, 306.] [1]

Circuit Court, D. Indiana. May Term, 1838.

RECEIVER OF PUBLIC MONEYS—COMMISSIONS.

1. A receiver of public moneys is entitled, under the law, to one per cent. on moneys received, until the allowance shall amount to twenty-five hundred dollars, though the same shall accrue within the first six months of the year.

2. This per centum cannot be graduated, as an annual salary, to be paid quarterly. Especially this cannot be done, where the officer is changed.

3. The commission should be paid quarterly as it arises—and this payment cannot be refused by the treasury department, because the whole amount accrues the first two quarters of the year.

[This was an action at law by the United States against Abner McCarty.]

Mr. Howard, U. S. Dist. Atty.

Mr. Stevens, for defendant.

OPINION OF THE COURT. This action is prosecuted against the defendant, to recover from him a balance which remains in his hands, as late receiver of public moneys at Indianapolis. The defendant sets up in his defence that he is entitled to an allowance for his per centage, which has been rejected by the treasury department, and which, if allowed, would offset the amount claimed by the government. This case is similar in principle to the case of U. S. v. Edwards [Case No. 15,026], in Illinois, and it will be unnecessary therefore, to go at large into a construction of the acts of congress, which were examined in that case. The law gives the receiver one per cent. on the amount of moneys received, but this allowance shall not exceed twenty-five hundred dollars per year, and there is a salary of five hundred dollars annually, allowed, in addition to the above per cent. The secretary of the treasury has directed that this per centum shall be paid quarterly, the same as the five hundred dollars' salary. The salary, as a matter of course, is payable quarterly; and where the receiver continues in office the four years for which he is appointed, no great injustice is done him, by allowing the

[1] [Reported by Hon. John McLean, Circuit Justice.]

per centum quarterly where the sum received exceeds the limits fixed by the law. But, even in this case, some inconvenience must arise. For if it should happen that for the first quarter of the year the receiver should not receive a sum which would amount to the limitation, he would receive less than the one-fourth part of the twenty-five hundred dollars; but if he should receive a sum, which at one per cent. would give one thousand or two thousand dollars, he receives no more than the one-fourth of the per cent. allowed for the year.

This construction, even where the receiver remains in office, neither conforms to the justice of the case, nor the letter of the law. But it does positive injustice to the receiver, where he is removed from office, or abandons his office before it expires. And this is the predicament of the present defendant. He resigned six months before his term of office closed, having received an amount, which, at the per cent. allowed, gave him the sum of twenty-five hundred dollars. Under the secretary's decision, he has been allowed but half this sum. The successor of the defendant was appointed, not to fill the vacancy of six months, but for the full term of four years. His per cent. on moneys received is calculated from the time his duties commenced, without reference to the amount of moneys received or the per centum allowed to his predecessor. It does not appear, in this case, whether any or what sum of money was received by the successor of the defendant, for the first six months of his term. And if no money was in fact received by him in his official character, then the construction of the treasury department would pay only one-half the amount allowed by law for the service rendered. The per centum cannot, with propriety, be graduated into quarterly payments, especially where the officer is changed within the year; but should be paid quarterly as the services are rendered. And if, within the first six months of the year, the per centum on moneys received shall amount to the sum limited for the year, it should be paid. The per centum is allowed on moneys received; and the service contemplated by the law is rendered where moneys are received. No provision is made for the vacuation of the office by removal, resignation or death; and the limitation does not authorize the secretary of the treasury to withhold the per centum, within the limitation, on the moneys as received.

We think, therefore, that the defendant, having received an amount which would give him, at one per cent. the full extent of his allowance, for the year, is entitled to it, though he served but half the year. The salary of five hundred dollars will of course be allowed for the portion of the year the defendant remained in office.

The jury found fifteen dollars in favor of plaintiffs. Judgment.

Case No. 15,658.

UNITED STATES v. McCARTY.

[1 Woolw. 93.] [1]

Circuit Court, D. Minnesota. June Term, 1865.

CRIMINAL LAW—PROCURING BY FRAUD EXEMPTION OF DRAFTED PERSON—ARMY—PERIOD OF PUNISHMENT.

1. The act of February 24, 1864 (13 Stat. 10), assumes to fix a definite period of imprisonment as a punishment for the offence of procuring, by fraud, the exemption of a drafted person, and leaves to the court no discretion in that regard.

2. The period of punishment therein fixed is the same as the period for which the party drafted had to serve, which, as provided by section 11 of the act of March 3, 1863 (12 Stat. 733), is to the end of the Rebellion, but not more than three years.

3. The offender may not be imprisoned three years, for the Rebellion may not continue so long.

4. He cannot be sentenced to confinement during the Rebellion; for, shortly after he is condemned, the Rebellion may terminate, and then the court could not inquire into the matter.

This was an indictment found against the defendant for procuring by fraud the exemption of a drafted person. His counsel moved to quash the bill, and, among other reasons for the motion, insisted that the act of congress, under which the indictment was found did not assign a certain period to the imprisonment, to which, in the event of his conviction, he would be subject.

Before MILLER, Circuit Justice, and NELSON, District Judge.

MILLER, Circuit Justice. The act of February 24, 1864, § 21 (13 Stat. 10), under which this indictment is found, after describing the offence, says, that the convicted person shall "be punished by imprisonment for the period for which the party was drafted," meaning the party whose exemption was procured by fraud. This statute clearly contemplates a definite period of penal imprisonment, and does not leave the court any discretion in regard to its duration. When we come to inquire for what period the party was drafted, we look to the law under which the draft was made. Section 11 of the act of March 3, 1863 (12 Stat. 733), was the law governing the time of service of drafted men, when the act was passed under which this defendant stands indicted. We are not aware that it has since been modified so as to affect the case under consideration. That section provides, that all persons duly enrolled "shall be subject, for two years after the first day of July succeeding the enrolment, to be called into the military service of the United States, and to continue in service during the present Rebellion, not, however, exceeding the term

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

of three years." The offence charged against the defendant was committed during the war; and as well his liability to, as the extent of the punishment which we must impose, must depend upon the facts and the law as they then existed. What sentence, then, shall be pronounced? Is he to be imprisoned for three years? If so, it is obvious that the confinement may continue longer than the period for which the party whose exemption he procured was drafted. That period could extend to three years, only in the event that the Rebellion continued so long. There seems every probability that the Rebellion has not continued so long, that it is now ended. But can this court take judicial notice that such is the case? There is no proclamation to that effect. Is it consistent with the act prescribing the punishment, to suppose that its extent was to be fixed by any evidence to be received by the court as to the length of time the Rebellion lasted after the exempted party was drafted? This cannot be; because an offender might be tried and convicted within a few months after the law was passed, and before the time for which the Rebellion might continue could possibly be predicted. It is clear, from this examination, that the time which might elapse between the drafting of the exempted person and the close of the Rebellion cannot, if the defendant be convicted, be adopted as the duration of his punishment. As three years would probably much exceed the time during which the drafted man would have had to serve, a sentence for that period would, to that extent, be in excess of the punishment prescribed by the law, and beyond the authority of the court. And as the statute has not, in reference to the duration of the Rebellion, prescribed any period, or furnished any authority to the court to fix it, or any criterion by which it can be fixed, we are driven to the conclusion that there is no ascertainable period of punishment presented by the law. For this reason the indictment must be quashed.

Motion to quash the indictment sustained.

Case No. 15,659.

UNITED STATES v. McCLARE.

[17 Law Rep. 439.]

District Court, D. Massachusetts. Sept., 1854.

ASSAULT—CRIMINAL INTENT—BURDEN OF PROOF.

The defendant [Henry McClare] was indicted for an assault with a dangerous weapon, on an emigrant passenger in the ship George Peabody from Liverpool, of which the defendant was the second mate. It was admitted that the defendant did hit the complainant, who was a boy, on the head with a belaying-pin, which it was conceded was a dangerous weapon. The defence was that the blow was received by misadventure. It appeared that the defendant went down into the lower between-decks of the ship, at night, where it was quite dark, to suppress a noisy disturbance among the emigrant passengers, and there had a conflict with one passenger, and went through the passage-ways, striking with the belaying-pin against the berth-boards and bulkheads, and calling the passengers to order. The evidence for the defence tended to show that it was necessary for self-defence that the officer should have some weapon, there being over six hundred passengers, and that the boy was hit by accident, when leaning out of his berth, or received a chance blow during the conflict with the other passengers, and that the language and conduct of the defendant, after he found he had hit the boy, was such as to prove the blow to have been unintentional. On the other hand, the complainant and three other steerage passengers represented the language of the defendant, after the blow, to be such as indicated either an intention to hurt the complainant, or a recklessness and indifference as to whom he hit.

R. H. Dana, Jr., for the defence, argued the case to the jury, upon the evidence, and asked the court to instruct the jury, that although the indictment contained no allegation of a criminal intent or malice, in specific terms, yet that the allegation was included in the technical signification of the word "assault." Every indictment must contain an allegation of the animus as well as of the corpus delicti, and without such an allegation it would be subject to demurrer. In criminal assaults and batteries, the animus is included in the terms "assault, battery." Com. v. McKee (March, 1854) 17 Law Rep. 51; 3 Bl. Comm. 121; 4 Bl. Comm. 217; 5 Dane, Abr. 584; Selwyn, N. P. "Assault," note 1; Com. v. Clark, 2 Metc. (Mass.) 23. The burden of proof is on the government to sustain the entire allegations of the indictment, the criminal intent as well as the overt act. The defendant pleads no special defence of justification or excuse. He pleads only the general issue, which puts in issue the animus, which is the gist of the indictment. There can be no confession and avoidance of a good criminal indictment. The burden of proof does not shift. Com. v. McKee (March, 1854) 17 Law Rep. 51; Com. v. Dana, 2 Metc. (Mass.) 329; Com. v. Kimball, 24 Pick. 366; Com. v. Bradford, 9 Metc. (Mass.) 268; opinion of Wilde, J., in Com. v. York, Id. 93; Powers v. Russell, 13 Pick. 69; Best, Presumptions, § 230; North American Review, Jan., 1851, article "Homicide," by Hon. Joel Parker. In the circuit court of the United States for this district, at the trial of U. S. v. Mingo [Case No. 15,781], in June last, for murder, the two judges coincided in the ruling, (differing from the majority of the supreme court of this state, in York's Case,) that it was incumbent

on the government to prove a felonious killing, and if they failed to satisfy the jury, beyond a reasonable doubt, that the killing was felonious, the verdict must be not guilty.

H. L. Hallett, for the United States, conceded the general doctrine of the burden of proof in criminal cases to be as contended by the counsel for the defendant, and submitted the other points to the judgment of the court, without argument.

SPRAGUE, District Judge, ruled that the indictment must be considered as alleging a criminal intent. The mere fact that a blow is struck, does not necessarily make out a crime. It may be unintentional; or, if intentional, it may be in self-defence, or in the execution of a legal duty. In charging a crime, the government charges a criminal intent, and must prove it. Proving a blow may, in some cases, be of itself sufficient evidence of a criminal intent; but such intent may be repelled by the circumstances. If, on all the evidence, the jury are left in reasonable doubt as to the intent of the defendant, they cannot convict him of the crime, for the crime is not proved. The overt act is proved, but the character of the act, whether criminal or not, is left in doubt. In this case it is conceded that a blow was struck with a dangerous weapon. The only question is as to the character of the act. Was it criminal or was it not? It is not pretended that the complainant was intentionally struck in self-defence, or in the execution of a duty. The only defence is that he received the blow by misadventure. If the defendant was using this weapon, which he knew was dangerous, in a reckless manner, so that he had reasonable cause to believe that he might injure some one, he is equally guilty of a criminal intent, as if he had a special intention to injure the complainant. If in a contest with another person he used it unlawfully, and hit the complainant by accident, he would be guilty. But if he hit the complainant accidentally, either while engaged in a contest in which he had a right to use the weapon, or when using it to make a noise and warn the passengers, if used so as not to be likely to endanger any one, he would not be guilty. In determining the motive, the state of mind of the defendant, you will take into view, not only his acts when below, but the language and acts attributed to him by the witnesses on each side after the occurrence, the reasonableness of his going below armed with such a weapon, and the evidence of his general peaceable and temperate character and conduct on this and other similar voyages. If, on all the evidence, you are satisfied beyond a reasonable doubt that the act was accompanied with a criminal intent, according to the definition I have given you, you will find the defendant guilty. If you are not so satisfied, he is entitled to an acquittal.

The jury found a verdict of not guilty.

Case No. 15,660.

UNITED STATES ex rel. BULL et al. v. McCLAY.

[4 Cent. Law J. 255; 23 Int. Rev. Rec. 80; 15 Alb. Law J. 257; 24 Pittsb. Leg. J. 140.] [1]

District Court, D. Nebraska. Feb., 1877.

KIDNAPPING—EXTRADITION—ARREST ON REQUISITION—JURISDICTION—HABEAS CORPUS.

1. In the trial upon writ of habeas corpus, in a case involving an alleged kidnapping, it is proper to allow the relators to go behind the indictment for the purpose of showing (1) the identity of the parties, and (2) that the relators were indicted for acts alleged to have been done under a requisition of the executive of one of the states of the Union; but it is incompetent in such cases to show that the indictment, upon which the requisition was issued, was procured improperly, or upon insufficient evidence.

2. Federal courts have jurisdiction to issue the writ of habeas corpus when parties are held in custody under state laws, for acts done by virtue of requisitions by the executive of one state upon the executive of a sister state.

3. The extradition act of 1793 construed and commented upon.

At law.

Lamb, Billingsley & Lamberton and R. E. Knight, for relators.

James Hunter and E. E. Brown, for respondent.

Geo. S. Smith, State Dist. Atty.

DUNDY, District Judge. On the 7th day of February, Jesse A. Bull and William Turtle, the relators, through their counsel, presented to me their complaint in writing, properly verified, setting forth in substance, that they were restrained of their liberty and unlawfuly imprisoned by Samuel McClay, sheriff of Lancaster county, the respondent; that they were so restrained and imprisoned solely for acts lawfully done by them under and by virtue of the constitution and laws of the United States; that the state of Nebraska was proceeding to try and seeking to convict and punish them for said acts in violation of the constitution of the United States, and the laws made in pursuance thereof; that the respondent claimed the right to hold the said relators, by virtue of a capias issued by authority of law from the state district court of Lancaster county; that the capias was based upon an indictment found by the grand jury of said county in May, 1876, against the relators, for kidnapping one John H. Blair, on or about the 6th day of November, 1875; that the laws of the United States specially and specifically authorized the relators to do the acts complained of, and for which they were indicted; that the said Blair had been indicted in Cook county, state of Illinois, for the crime of perjury there committed, and had fled to the state of Nebraska, when and where he was duly arrested as a fugitive from justice; that the governor of the state

[1] [Reprinted from 4 Cent. Law J. 255, by permission. 15 Alb. Law J. 257, and 24 Pittsb. Leg. J. 140, contain only partial reports.]

of Illinois issued his requisition in due form upon the governor of Nebraska, demanding the surrender and return of the said Blair to the state of Illinois; that Jesse H. Bull was duly appointed messenger to receive and convey to said state the said Blair; that the governor of the state of Nebraska duly honored the said requisition, and caused the arrest of said Blair, who was properly and lawfully delivered to the said messenger; that said Turtle was present assisting said Bull, at his request, and that the several things here enumerated are the identical acts for which they were indicted, and are now held in custody.

The complaint was deemed sufficient to require the issuing of a writ of habeas corpus, which was done as prayed for therein. The respondent lived at a greater distance than twenty miles, and a less distance than one hundred miles, from Omaha City, the place fixed for hearing. This fact made it necessary to issue the writ in such manner as to give the respondent ten days from the time of serving the writ on him in which to make his return and produce the relators. The writ was issued on the 7th day of February, and on the 14th day of same month the respondent made return to the writ, and produced the relators as he was commanded to do. The return to the writ shows clearly enough that the respondent then held the relators on a capias duly issued from the district court of Lancaster county, as stated in the complaint. When the writ was returned, the relators filed a replication to the return, reiterating the substance of the petition or complaint. Counsel for the respective parties being present, and all being anxious to proceed without further delay, the hearing was at once entered upon. Proceedings were had "in a summary way to determine the facts of the case, by hearing the testimony and arguments" for the purpose of disposing of the relators, "as law and justice require," as provided by section 761 of the Revised Statutes of the United States.

When hearing commenced a question was raised involving the right of the relators to go behind the indictment found against them in Lancaster county for kidnapping Blair. I then held that the relators might properly do so, for two reasons: First. For the purpose of showing that the John H. Blair described in the indictment for kidnapping, was the identical Blair indicted for perjury in Cook county, and demanded by the governor of Illinois from the governor of Nebraska, as a fugitive from justice. Second. For the further purpose of showing that the relators were indicted for what they did in removing Blair from the state of Nebraska on the requisition of the governor of Illinois. I also then held that no testimony, whatever, would be received to show that the grand jury in Cook county, state of Illinois, acted improperly, or had not sufficient evidence before it to justify the finding of the indictment against Blair for perjury. Subsequent reflection and further consideration of these matters only convince me of the correctness of the rulings then made. Whether the grand jury of Lancaster county had, or had not sufficient evidence before them to justify the finding of the indictment against the relators for kidnapping Blair or whether the indictment against them is a good and valid one, technical and sufficient in form, are questions with which we have nothing whatever to do; for the reasons stated, viz.: That the inquiry was limited to the identity of Blair, and the character, nature and identity of the offence for which the relators stand indicted. Inquiry respecting the indictment of Blair in Cook county, and the extradition papers issued for him by the governor of Illinois, was limited to the regularity of these proceedings. Nothing transpired during the hearing to convince me that this view is wrong, nor is it believed that its soundness can be successfully questioned. It would result from this that even if the indictment against the relators was baseless and groundless, and the capias on which they were held was, or is, absolutely void, and that one or both of them were informal and utterly worthless, yet I think this proceeding could not be sustained and the relators properly discharged unless they are held for some act done and committed or omitted under and in pursuance of the constitution of the United States or some act of congress made pursuant thereto. This is viewing the matter from the most favorable standpoint for the relators. But we are not required to go so far in the case before us. An inspection of the indictment against the relators shows it to be sufficiently technical and good, and the capias on which they are held seems to be regular on the face thereof.

This much I have thought it necessary to say in explanation of questions which arose whilst the testimony was being taken and also for the purpose of indicating in a general way what the practice will be in similar cases hereafter. This case possesses an unusual degree of interest, not only on account of the number and ability of the counsel engaged for the respective parties, but because of the unusual amount of intelligence possessed by each of the relators, and the witness Blair, who is claimed to be the kidnapped victim. Additional interest attaches to it in consequence of the great and extended notoriety it has attained. It has heretofore engaged the attention of our own government and that of Great Britain. Diplomacy effected the release of Blair from a British prison and returned him in triumph to our own country. The action taken by this government in behalf of Blair; the action taken by the British government which led to Blair's release and return to this country; the extended newspaper comments thereon in the two countries; the proceedings in the courts already commenced and hereafter to be instituted and the important questions involved,

both national and state, bid fair to make this one of the most important cases ever brought before one of the courts of the United States. I think I fully realize the importance and magnitude of the issues involved and questions to be determined, and have tried to meet them in a manner commensurate to their great importance.

To show the detention and imprisonment of the relators to be wrong and unlawful, they produce an exemplified copy of an indictment found by the grand jury of Cook county, state of Illinois, in which one John H. Blair is formally and properly indicted for the crime of perjury alleged to have been committed in that county. The indictment seems to have been filed in the criminal court for that county, on the 1st day of November, 1875. On the 2d day of November of the same year, the governor of the state of Illinois issued his requisition, in due form, upon the governor of the state of Nebraska, demanding the arrest and extradition of the said John H. Blair, who was claimed to be a fugitive from justice from the state of Illinois, and was believed to have taken refuge in the state of Nebraska. On the same day, the governor of the state of Illinois appointed and duly commissioned as his messenger, Jesse A. Bull, one of the relators, for the express purpose of receiving and conveying the said Blair to the state last named. On the 6th day of the same month, the governor of the state of Nebraska, issued his warrant in due form of law, directing the arrest of said Blair, and also directing that he be delivered to said Bull, who was authorized by the governor of Illinois to receive him. Parol testimony produced before me shows conclusively that Blair was soon after arrested on this warrant and turned over to the relator Bull as the messenger appointed to receive him, and that he was removed from the state of Nebraska by the said Bull as he seemed authorized to be; and that no unnecessary force was used to effect such removal. The relators and Blair all unite in their testimony to establish the truth of these propositions, and they are no longer open to doubt. Neither is it claimed, nor could it be denied, that relator Turtle was acting as the assistant of the said messenger. The testimony of these three witnesses shows clearly that they went from Lincoln to St. Louis, Missouri, where they stopped for some time, but for what particular purpose does not fully appear. In this there is but little, if any, substantial difference between the testimony of the three witnesses. Down to this point there is no apparent real conflict in testimony given by the three witnesses. Here is where the irreconcilable conflict in the testimony commences; and the difference between the statements of Bull and Turtle on the one side, and Blair on the other, is as great as the difference between truth and falsehood. About one thing, however, there is no dispute, and that is that Blair was never taken to Cook county on the warrant to answer the indictment there found against him. But instead of taking him there as ought to have been done, he was taken through the states of Illinois, Indiana, Ohio, Pennsylvania and New Jersey, to New York City, where he either went on board of a steamer, or as he claims, he was forced on board, and went from there to England. On reaching Great Britain he was at once arrested, and confined some three or four months in an English prison, where he was detained until demanded by this government and released by the government of Great Britain. The relators claim and positively swear that the design to take Blair to New York instead of Chicago was first formed at St. Louis after they had left this state with Blair; and the testimony of Blair seems to confirm that of the relators in that respect. Bull swears positively that this arrangement was agreed to by Blair, and that Blair went with him to New York of his own free will. Yet he paid Blair's railroad fare and other expenses from St. Louis to New York. Bull and Turtle both swear positively that Blair went on board an English steamer in New York harbor, and voluntarily started for England. Yet his hotel bill in New York and his passage to Liverpool were paid by some one other than himself. If all this be so, it shows a sort of benevolence, liberality and disinterestedness such as no other country has ever known. And yet it may all be true. On the other hand, Blair states that he supposed he was going to Chicago, and desired to go there, but was forced to go to New York, and from there to England, by the relators. He would have us believe that Bull alone, without the use of physical force, without his even being handcuffed, took him to New York, where he claims the relators and one other forced him on the vessel which he supposed was to sail for Boston instead of Liverpool. The journey from St. Louis to New York was made on passenger trains on railroads, and the route taken was through Indianapolis, Pittsburg and Philadelphia. Yet the said Blair knew that no legal process existed for taking him to any other place than Chicago, and made no effort to leave said Bull, neither did he in any way make known to any one about him, or where he went, that he was wrongfully held in custody, until he was placed on board the steamer, and then, as he states, he informed the captain of the steamer of the fact, but not until they were many miles out to sea. But even that the captain of the steamer swears to be untrue. That as intelligent a man as Blair seems to be should pass through the great cities of St. Louis, Indianapolis, Pittsburg, Philadelphia and New York, in custody of another, knowing that no authority existed therefor, and being around and about thousands of people who would have gone to his rescue if outcry

had been made, passes comprehension, and seems to me almost incredible. Yet he would have us believe this to be true. Incredulity under such circumstances, if not wholly justifiable, may, at least, be pardonable. And it would perhaps be doing no great injustice to any of the witnesses to say that neither version of the parties to this remarkable transaction is taken or believed with full and implicit confidence of truthfulness.

The authority under which the writ was invoked and these proceedings are had, must be sustained, if at all, under section 753 of the Revised Statutes of the United States. That section embodies most of the legislation of congress, had since the formation of the government on the subject of the jurisdiction of the federal courts in cases of habeas corpus. That portion of the section which is material to consider for present purposes, is as follows: "Sec. 753. The writ of habeas corpus shall in no case extend to a prisoner in jail unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof, or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof, or is in custody in violation of the constitution or of a law or treaty of the United States. * * *" If one of the federal courts or a judge thereof has the jurisdiction to issue a writ of habeas corpus and hear and determine the same, the power so to do is conferred by the section just quoted. And if I had the lawful right to issue the writ in this case and to hear the cause and determine it on its merits, that authority must be conferred by the second clause of the section which authorizes the issuing of the writ, where the petitioner "is in custody for an act done or omitted in pursuance of a law of the United States." The petition, or complaint, expressly alleges that the relators were indicted and in custody, solely for acts done and committed under a law of the United States. And it is conceded by the counsel for the relators, that, unless the acts charged against the relators were required or permitted by some act of congress so as to bring the case within the provision of the section last quoted, they must be remanded to the sheriff of Lancaster county, to be proceeded against for the crime with which they stand charged. There can no longer be any reasonable doubt about the right and jurisdiction of the federal courts and judges to issue writs of habeas corpus, and to hear and determine questions arising thereon, and to discharge a petitioner from custody when imprisoned for acts required or permitted by an act of congress, or done in connection with the execution of process issued from the federal courts, notwithstanding the petitioner may be in custody under the state law, or whether held on indictment or otherwise, for such acts or omissions. The federal courts and judges have, in numerous instances, exercised and upheld the jurisdiction invoked in such cases. And the mere question of jurisdiction would be regarded as no longer debatable in the federal courts. See U. S. v. Jailer [Case No. 15,463]; Ex parte Robison [Id. 11,934j; Ex parte Jenkins [Id. 7,259]; In re Neill [Id. 10,089]; Ex parte Smith [Id. 12,968].

I now pass to the consideration of the great question involved in this inquiry, and I fully concede the fact that it is not free from embarrassment. I refer of course to the apparent conflict of jurisdiction between the national and state tribunals. The relators state in their complaint, and counsel earnestly contend in their argument that Blair was arrested in, and removed from the state of Nebraska under, and in pursuance of the constitution and laws of the United States. The constitutional provision on the subject of extradition is found in the second subdivision of section 2 of article 4, and is as follows: "A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled be delivered up, to be removed to the state having jurisdiction of the crime." At first view it might seem that this provision of the constitution is plain and explicit enough to accomplish the object evidently designed by it, without the aid of legislation to carry it into effect. But it had not long been in operation before grave difficulties were encountered in undertaking to enforce it. It is known that bad feeling existed, and that much indignation was expressed when the governor of Virginia refused to surrender a fugitive from justice on the requisition of the governor of Pennsylvania. It is claimed that no palliating excuse could possibly exist for such a refusal. But a strict constructionist in that day as well as the present, could probably find sufficient justification on which to base a refusal to surrender. The refusal of the governor of Virginia to surrender the fugitive was regarded by President Washington as of sufficient importance to justify him in sending a special message to congress on the subject of extradition.

This action on the part of the president finally led to the passage of an act of congress on the 12th of February, 1793 [1 Stat. 302], which has since regulated the demand for and surrender of fugitives from justice. The substance of that act, so far as it relates to the subject under consideration, is incorporated into and forms sections 5278 and 5279 of the Revised Statutes of the United States, and is as follows:

"Sec. 5278. Whenever, the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory

to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory.

"Sec. 5279. Any agent so appointed who receives the fugitive into his custody, shall be empowered to transport him to the state or territory from which he has fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars or imprisoned not more than one year."

In the great case of Prigg v. Pennsylvania, reported in 16 Pet. [41 U. S.] 608, the court carefully considered the whole subject of the surrender of fugitives from justice in connection with the surrender and return of fugitives from labor. A majority of the court held in that case that these subjects were under the exclusive jurisdiction of congress, and that the state's legislature possessed no rightful jurisdiction over them. In this case it appeared that Prigg had been indicted and convicted for kidnapping a Margaret Morgan, in the state of Pennsylvania. The supreme court of the state affirmed the judgment and directed the sentence to be carried into execution. The case was removed to the supreme court of the United States, when the judgment of the supreme court of the state of Pennsylvania was reviewed and reversed, for the reason that Prigg was justified in removing the said Morgan from the state, she being a slave. The court very plainly held that the right to remove a fugitive slave, as well as a fugitive from justice, from one state to another, existed under the constitution and laws of the United States, and that state legislation could not be permitted to interfere with the exercise of that right; and that the courts of the state could not properly punish a person for what was done thereunder, so the terms of the law were not transgressed. Prigg had been convicted under a law of Pennsylvania for doing the very thing authorized and permitted by the constitution and laws of the United States. The conviction could not be sustained for that reason, and he was discharged.

In the case of Governor of Kentucky v. Governor of Ohio, reported in 24 How. [65 U. S.] 66, it is held that "Congress may authorize a particular state officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced or punished for his refusal." If, then, congress can lawfully authorize a state officer to do a "particular thing," does it need any argument to show that the state officer cannot be punished for doing that particular thing so authorized? The constitution of the United States and the laws made in pursuance thereof are the supreme laws of the land, and anything in conflict with either must yield to their superior force and authority. The constitutional provision quoted, and also the act of congress, authorizes the governor of a state from which a fugitive from justice has fled, to demand his return from the governor of the state where the fugitive is found. This may be done when the commission of the crime is shown by indictment, or by a proper affidavit, one of which is to accompany the requisition. The governor may appoint a messenger, or agent, to receive the fugitive and convey him to the state from which he fled. The govnernor of the state on whom a requisition is made, is authorized to cause the arrest of the fugitive and deliver him to the messenger or agent of the other state. All this, and more, is specially provided for and authorized by the extradition law. The papers in the case under consideration were all regular and valid. The governor of Illinois issued a lawful requisition for Blair, and Bull was lawfully appointed messenger on behalf of the state of Illinois to receive him. The governor of Nebraska issued his lawful warrant, on which Blair was arrested and delivered to the messenger from Illinois. These were "officers of states," and each one of them did a particular thing in connection with the extradition of Blair; and each one of the "particular things" so done by each and every one of these "state officers" they were specially and specifically authorized to do by the highest authority in this land. It would seem from this reasoning, then, that the relators are actually "in custody for an act done or omitted in pursuance of a law of the United States." This would give them what seems to me to be a clear and undoubted right to the writ. And unless there is some potent reason for refusing it, they are entitled to a discharge.

In Ex parte Smith,—the Mormon prophet [Case No.12,968],—a case not unlike the present one in some respects, the United States circuit court of Illinois held that a messenger who was authorized by the governor of Missouri to receive Smith from the governor of Illinois, was acting under a law of the United

States, and that Smith was in custody of such messenger under a law of the United States. It was no where claimed that Smith had violated any such law, or was in custody for, or charged with, such violation. He was simply charged with being an accessory to the crime of assault with intent to kill—with simply violating the criminal laws of the state of Missouri. Smith was arrested by the sheriff of Sangamon county, on the warrant of the governor of the state of Illinois, and was held by him for the purposes of extradition, when the writ of habeas corpus issued. Yet a hearing was had which led to the discharge of Smith; and I think the only ground on which the jurisdiction of the court could attach in that case was, that Smith was in custody under the provisions of a law of the United States, and that the sheriff who held him on the governor's warrant was acting under the provision of the same law. Again, in a case before referred to [U. S. v. Jailer, Id. 15,463], it was held by Judge Ballard to be immaterial whether the petitioner is held under state or federal process. If he is confined for an act done in pursuance of a law of the United States or of a process of any judge or court thereof, he is entitled to a discharge. In this case the relator was in custody of a state officer on a charge of murder. But the testimony presented at the hearing of the complaint showed that the relator was a deputy United States marshal, who had in his hands for service a writ issued by a United States circuit court commissioner, and whilst he was endeavoring to serve it, he was resisted, and killed his assailant, the party for whom the writ is issued. The learned judge discharged the relator from custody of the state officer, notwithstanding the process on which he was held was regular and valid on its face.

In Ex parte Jenkins [Case No. 7,259], the same questions were raised, and decided in the same way. It appeared that Jenkins was a deputy marshal, and undertook to arrest a fugitive slave, in doing which a serious affray occurred, in which Jenkins participated, causing his arrest under a criminal law of the state of Pennsylvania. The late Mr. Justice Grier, of the supreme court, who heard this case, discharged the relator, because he was "an officer of the United States, in confinement for acts done in pursuance of a law of the United States, and under process from a judge of the same, and had not exceeded the exigency of the process under which he acted." This same Jenkins was soon after arrested on the charge of assault with intent to kill, and whilst he was in custody of the state officer on this charge a writ of habeas corpus was issued by Judge Kane. On the hearing it appeared that Jenkins had been indicted under the state law for assault with intent to kill. But the acts charged were alleged to have been committed under an act of congress which justified the relator in the premises, and the judge proceeded to hear the complaint on its merits, notwithstanding the relator had been indicted in the state court, and finally discharged him from custody. Other cases were cited by counsel, bearing directly on the question discussed, but enough have been referred to for present purposes.

Another class of cases has been cited by counsel for the respondent, which, when properly understood, will be found in harmony with, or at least not in opposition to, the principles on which the others are based. In Ex parte Forbes [Case No. 4,921], it very plainly appears that the court had no jurisdiction in the case before it. The petitioners were in custody of a sheriff for an alleged contempt of a state court, though it is claimed the state court which committed them had no jurisdiction over the subject matter of the suit out of which the alleged contempt had originated. There is nothing about the report of this case to show that it falls within the provisions of the habeas corpus act, but on the contrary it is pretty clearly shown that it does not, and it was for these reasons that the petition for discharge was denied. In the case of U. S. v. Rector [Id. 16,132], the court said, "when a person is in custody under the state authority, this court has no power to take the accused from such custody; nor has a state court power to remove by a habeas corpus a defendant from the custody of a court of the United States." This is undoubtedly the general rule, and it is undenied. The relators in this case were indicted in the United States circuit court of Ohio, for counterfeiting coin of the United States. When the writ was applied for they were in jail on a charge of violating a criminal law of the state, but for what offence does not appear. We are not advised as to whether or not they were charged with passing counterfeit money by the state court. But even if they were so charged the state courts might, perhaps, very properly hold and punish them for just such an act. In such a case, when the federal and state courts have concurrent jurisdiction over the offences, the court which first arrests and gains jurisdiction over the offender, will maintain it to the end. If the petitioners in this case were in custody of the state officers on process issued from the state courts, charging them with counterfeiting United States coin, or larceny, or robbery, or any other crime, no one will at this late date hold that they ought to have been discharged, or that any sort of a case was made so as to bring them within the provisions of the habeas corpus act. It was not claimed in that case that the petitioners were held in custody of the state officer, by reason of any act or thing committed or omitted in pursuance of, or permitted by an act of congress; but on the other hand we might reasonably infer

that they were in custody for the very reason they had violated both national and state laws which prohibit counterfeiting the lawful money of the United States.

Counsel for respondent earnestly claim and strenuously insist that if the relators failed to return Blair to Chicago in pursuance of the authority conferred on Bull, but instead thereof took him to New York and eventually to Liverpool without authority, they would be guilty of kidnapping; that the failure to return Blair to Chicago as directed by Governor Beveridge, was a fraudulent act, and vitiated the whole proceedings, and made the capture and removal of Blair wrongful and unlawful ab initio. There is some force in this reasoning. But it derives its force mainly from the ingenious manner in which the proposition was stated, and the very able argument made in support of it. The proof shows that Blair was indicted in Chicago for perjury, said to have been committed in connection with procuring a justice of the peace to issue a writ of replevin for goods in possession of a railroad company in Chicago. Suit was commenced by Blair, and the goods recovered, when he abandoned the suit and made no further appearance thereon. This led to the indictment. There was some testimony tending to show that Turtle had expressed an intention, or at least knew of an intention on the part of others, to take Blair to England to answer to the charge of fraudulently removing goods from that country. But there is no testimony which shows Bull had any such intention, or any knowledge of any such intention on the part of others before he reached St. Louis with Blair.

If Bull had taken Blair back to Chicago, who can doubt that he would have stood justified in all places for what he was so authorized to do? There would, then, have been no question about the validity of the capture and removal of Blair. Unquestionably Bull ought to have taken Blair back to Chicago as he was authorized to do by Governor Beveridge's warrant. But if he failed to discharge the duty then resting on him in the premises, and betrayed the trust reposed in him by the governor, and thus violated the laws of the state of Illinois, to which he may be amenable, can it therefore be said that he was guilty of the great crime of kidnapping in this state, when he was clothed with all necessary authority of law to do what was actually done in this state in and about the arrest and removal of Blair? If the process on which Blair was arrested and removed from the state was regular on its face, and therefore lawful, can it be claimed that Bull might have been arrested and held for kidnapping in any state through which they passed before reaching the state of Illinois? To do this would be equivalent to disregarding the indictment against Blair—the requisition of Governor Beveridge and the appointment of Bull as his messenger—the warrant of Governor Garber, the arrest of Blair on the warrant of the governor, and his removal from this state on the requisition aforesaid. To do this we would be required to hold that if the officer, Bull, was dishonest and exceeded his authority as messenger and committed a wrong in removing Blair beyond the confines of Illinois, the wrongful acts so done and committed would relate back to the arrest and removal of Blair from this state, and invalidate the whole proceedings had under the requisition. I am not prepared to go to that extent. I think it would take an extreme case to justify me in holding to be criminal an act which appears to be not only harmless and justifiable, but sanctioned by the supreme law of this land. This would be carrying the doctrine of "relation" too far; and where neither the lawmaking power nor the courts have defined the duty or marked the way, I think no judge ought to undertake to follow a path that leads but to darkness and doubt. For my part, I prefer to keep within the "plain and well beaten path of duty," made so by the constant use of the courts and judges for many years past.

These views lead me to conclude:

1. That Blair was properly indicted in Cook county, state of Illinois, for the crime of perjury.

2. That the requisition, and warrant, issued by Governor Beveridge, under which Bull acted as messenger, were regular in form, and therefore valid and binding on all concerned.

3. That the warrant issued by Governor Garber, on which Blair was arrested and removed from this state was regular on its face, and was a valid and lawful one.

4. That all of these proceedings were had under and in pursuance of the constitution of the United States, and the act of congress passed in pursuance thereof, known as the "Extradition Act."

5. That any effort or attempt on the part of the state authorities to hold or punish the relators for the removal of Blair under the requisition for extradition, are without authority and void.

6. That the writ in this case was properly issued, and inquiry thereunder properly made, for the purpose of showing that the relators were held in custody for removing Blair from this state on the requisition of the governor of Illinois.

It necessarily follows that the relators have not invoked in vain the aid of this "high prerogative writ." They must, therefore, be discharged from the custody of the respondent, and it is so ordered.

Case No. 15,660a.

UNITED STATES v. McCORMICH.

[2 Hayw. & H. 156.] [1]

Circuit Court, District of Columbia. June 1, 1854.

VOTERS—QUALIFICATIONS—EVIDENCES OF.

1. In addition to the qualification to vote under the act of 1820 [3 Stat. 543], that of 1848 [9 Stat. 223] superadded the payment of a school tax.

2. Where every qualification was shown to be complete, the citizen possessing them is entitled to vote.

3. The evidence of qualification afforded by the registry is not exclusive; other testimony may be admitted, although registration is convenient and proper. Yet if not done, and all other things performed, the party is entitled to vote.

[This was an action by the United States, on the part of Charles S. Wallach, against William J. McCormich, register of the corporation of Washington. Heard on motion for a mandamus.]

The case was brought before the court by Mr. Wallach, who is a tax payer, has always resided in the city, and has been a legal voter for many years, but whose name has not been registered by the assessors.

Mr. Carlisle addressed the court on behalf of the corporation, and in reply to the petition of Mr. Wallach. He wanted uniformity at the polls, and asked a decision of the court for the guidance of the corporation and the commissioners. He read the petition at length, stating that he is every way a qualified citizen, and had paid all his taxes as called for by the two charters of 1820 and 1848. He therefore demanded his right to be considered as a legal voter. It is the view of the corporation, that by the charter of 1848 it is necessary to obey all the requisites to be entitled to vote. The claim of Mr. Wallach was based on the charter of 1820, and he (Mr. Wallach) asks that if his name was omitted through inadvertence or mistake, it might be now restored.

Mr. Carlisle based the right to vote under the present charter as the payment of the school tax, and held that the property qualification under the charter of 1820 is abolished; also if a citizen be not assessed before the 31st December he is not liable to be taxed afterwards. So far as the qualification of voters is concerned, the opinion of the corporation has been that the charter of 1848 supersedes that of 1820, and it was their desire to know from the court if their construction is right or wrong.

Mr. Chas. S. Wallach stated that there were three classes of individuals affected in this case. Did the charter of 1848 supersede that of 1820, or was it only cumulative and supplementary? Can a party be made to suffer through the inadvertence or carelessness of the assessors or the register? He contended that the act of 1848 merely granted an extension of the right of suffrage, and did not invalidate the charter of 1820.

Mr. Coxe remarked that a very brief time had been given to reflect on this question, and asked if a citizen were to be denied his rights through the inadvertence of a corporation officer or officers; whether the same thing could not be done by design? For himself, he had never seen one of the poll-lists spoken of, they were almost invisible; one friend of his had seen one in a barber's shop, and another had seen one somewhere else. No ordinance of the city of Washington can have force, if without or against the law, or going beyond the law. The charter of 1848 continues that of 1820 in force, and enlarges it. The other side asserts that the payment of a school tax is what entitles to a vote; but if that is so, aliens and free negroes are entitled, contrary to the provisions of the act of 1820.

Mr. Coxe insisted that Mr. Wallach, or any citizen similarly situated, is entitled to an action at law against any judges or commissioners of election refusing to accept his proffered vote. He also insisted that, by its ordinance of 1849, the corporation had transcended its powers, under the charter, in denying the right to vote, to all others than those who were registered in a certain way, and in fixing the 31st of December, nearly six months in advance of the time of election, as the day beyond which the names of citizens could not be registered. When assessors omitted giving in the names of parties as liable to school tax they violated their duty, either by accident or design; but a citizen was not to be made to suffer through their fault, nor to be deprived of the right to vote. Equally incapable is the corporation to refuse the power to revise the lists and correct mistakes and supply omissions; in doing this they transcend their powers. The Case of the Church, in Philadelphia, quoted by Mr. Carlisle. he thought went the other way. The powers were much larger than those granted to this corporation. He reasserted that the act of 1848 was cumulative and not destructive of the act of 1820, and that according to the decision of the court of king's bench, in England, in Ashby v. White [2 Ld. Raym. 938], Mr. Wallach would be entitled to an action against an officer of election, who should refuse his offer to vote.

Mr. Bradley, for the corporation, characterized the petition as seeking to repeal an ordinance of the corporation, which had stood the trial of three elections, and had until now been quietly acquiesced in by all our citizens. He denied that the corporation had no power to pass these regulations since congress had given it all powers necessary to carry greater powers into effect. The act of 1848 covered the whole ground, and compels the school tax in addition to other taxes, as necessary to qualification to vote. The corporation have done nothing beyond the exercise of this power. The ordinance of 1849 is

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

not contrary to the charter. If Mr. Wallach's exercise of suffrage is endangered, the fault is nobody's but his own, in not having examined the printed and published lists. Besides, the period for operation of a mandamus is now too late, it could apply only previous to the 31st of December.

Richard S. Coxe, for the citizens.

James M. Carlisle and Joseph H. Bradley, for the corporation.

THE COURT, after briefly consulting, decided that in addition to the qualification under the act of 1820, that of 1848 superadded the payment of a school tax, that all the requirements of the act of 1848 must be complied with. In Mr. Wallach's case, every qualification was shown to be complete. It is the assessor's duty to seek out citizens, and that of citizens to find if they have been enrolled, and if all his qualifications are complete, the citizen is entitled to vote. Mr. Wallach had a right to presume he was on the list. All persons having the requisite qualification, and subject to the school tax, ought to have been assessed, and are entitled to vote. Congress appeared to have two purposes in view in this act of 1848, one to describe the proper qualifications of a voter, and the other to raise a tax for the support of the public schools of the city. There were other purposes, but they were subordinate and directory, and not indispensable. The evidence of qualification afforded by the registry is not exclusive, other testimony might be admitted. Although registration is convenient and proper, and although ordered to be done, yet if not done, and all other things performed, the party is entitled to vote.

THE COURT granted no formal mandamus in Mr. Wallach's special case, the decision being general, and as such to be applied by the commissioners of election to his and all similar instances. He will therefore, under this judgment, be entitled to vote, notwithstanding the omission of his name on the list.

Case No. 15,661.

UNITED STATES v. McCORMICK.

[4 Cranch, C. C. 104.] [1]

Circuit Court, District of Columbia. Dec. Term, 1830.

KEEPING PUBLIC GAMING HOUSE — INDICTMENT — TIME.

Upon an indictment for keeping a public gaming house, the day laid in the indictment is not material, so that it is within the time of limitation, and not within the time of a previous conviction or acquittal. All the acts of keeping such a house before finding the indictment constitute but one offence.

[Followed in U. S. v. Ringgold, Case No. 16,167. Cited in Ex parte Snow, 7 Sup. Ct. 562, 120 U. S. 286.]

Indictment [against James McCormick] for a nuisance in keeping a public gaming house from April 10 to June 10, 1829.

THE COURT (nem. con.) permitted the United States to give evidence of acts done before the 10th of April, considering the day not material, so that it was within the time of limitation, and not within the time of a previous conviction or acquittal; all the acts of gambling, and keeping a gaming house, previous to the finding of the indictment, constituting but one offence.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,662.

UNITED STATES v. McCORMICK.

[1 Cranch, C. C. 106.] [1]

Circuit Court, District of Columbia. Dec. Term, 1802.

WITNESS—INFORMER—INTEREST—INDICTMENT FOR MARRYING WOMAN UNDER AGE.

1. The informer is not entitled to one half of the penalty on a minister for marrying a woman under sixteen years of age without the consent of her parents or guardian; and is therefore a competent witness.

2. Quære, whether, on an indictment, upon a statute, charging an act to be done knowingly, the scienter must be proved "if the statute does not use the word 'knowingly.'"

The Rev. A. T. McCormick, an Episcopal clergyman, was indicted for marrying Mary Ann Densley to Matthew Lawler, without the consent of her parents, (she being under the age of sixteen) against the act of Maryland, February, 1777, c. 12, § 9, which is in these words: "And be it enacted, that if any minister shall join in marriage any male under the age of twenty-one years, or any female under the age of sixteen years, and not before married, without the consent of the parent or guardian of every such person, personally given, or signified under the hand and seal of the said parent or guardian, and attested by two witnesses, he shall forfeit and pay five hundred pounds current money." The indictment was as follows:

"United States, District of Columbia and County of Washington, to wit: The jurors for the United States for the District of Columbia and county of Washington, upon their oath, present that Andrew Thomas McCormick, late of the county of Washington, clerk, upon the twenty-third day of July, in the year of our Lord Christ one thousand

[1] [Reported by Hon. William Cranch, Chief Judge.]

eight hundred and two, with force and arms, at the county of Washington aforesaid, did unlawfully, knowingly, and wilfully solemnize matrimony between Henry Lawler, late of the county of Washington aforesaid, then a bachelor, and one Mary Ann Densley, then a single woman, daughter of one Hugh Densley, late of the county of Washington, without the consent of the said Hugh Densley, and without the consent of Mary Ann Densley, wife of the said Hugh Densley and mother to the said Mary Ann Densley first named, personally given or signified under the hand and seal of the said Hugh Densley, or the said Mary Ann his wife, and attested by two witnesses, the said Mary Ann Densley daughter to the said Hugh Densley, and Many Ann his wife, then and there being under the age of sixteen years, and not before married; in contempt of the laws of the land, to the evil example of all others in like cases offending, against the form of the statute in that case made and provided, and against the peace and government of the United States."

At the trial, Mr. Key, for the traverser, objected to Hugh Densley, as a witness, contending that he was entitled, as informer, to half the penalty, under the second section of the act of congress, supplementary to the act concerning the District of Columbia. 2 Stat., 115.

But THE COURT overruled the objection.

Mr. Mason, for the United States, prayed the court to instruct the jury that it is not necessary to prove that the traverser knew that the girl was under the age of sixteen.

Mr. Key, contended that there could be no offence, if the traverser did not know that fact. The indictment has charged it to be done knowingly, and it would have been bad if it had not. The scienter, therefore, must be proved.

KILTY, Chief Judge, was decidedly of opinion that it was not necessary to prove that the traverser knew she was under age. It was his duty to know it. The law was intended to punish his negligence as well as his guilt. He takes the risk upon himself, if he marries without the consent of the parent.

CRANCH, Circuit Judge, inclined to be of the same opinion, but expressed a wish that the point might be argued, upon a motion for a new trial, if the verdict should be against the traverser.

Verdict for the United States.

A motion was made for a new trial, but was afterwards withdrawn, and a motion made in arrest of judgment (1) because the indictment does not aver that the traverser was a minister, or person capable of legally joining persons in marriage, at the time of the offence; (2) because it does not aver that the marriage was without the consent of the guardian.

Adjourned for argument. See U. S. v. McCormick [Case No. 15,663].

Case No. 15,663.

UNITED STATES v. McCORMICK.

[1 Cranch, C. C. 593.] [1]

Circuit Court, District of Columbia. Jan. 17, 1810.

INDICTMENT AGAINST MINISTER FOR MARRYING WOMAN UNDER AGE—REQUISITES—NEGATIVE WORDS.

1. An indictment against a minister for joining in marriage persons under age, without the consent of their parents or guardians, contrary to Act Md. 1777, c. 12, § 9, must aver that the defendant was, at the time of solemnizing the marriage, a minister authorized and qualified according to the act to celebrate the rite of matrimony. It must, also, (if it contain an averment that it was done without the consent of the parents,) aver that there was a parent then living, and that there was no guardian who could consent, or that it was without the consent of the guardian as well as without the consent of the parents.

2. Where a statute inflicts a penalty upon persons of a certain description only, it is necessary, in an indictment upon that statute, to aver all the facts necessary to show that the defendant was a person of that description at the time of committing the act.

3. The addition "clerk," to the name of the defendant, is not a sufficient averment that he was, at the time of the marriage, a minister duly authorized to solemnize that rite.

4. When negative words constitute a part of the description of an offence, they must be used in the indictment.

This cause was tried at December term, 1802 [Case No. 15,662], when a verdict was found for the United States.

Upon the motion in arrest of judgment the case was argued, at July term, 1805, by Mr. P. B. Key, in support of the motion, and by Mr. Jones, U. S. Atty., for the prosecution, before KILTY, Chief Judge, and CRANCH and FITZHUGH, Circuit Judges.

During the subsequent vacation, while the court held the case under consideration, KILTY, Chief Judge, having been appointed by the governor and council of Maryland, chancellor of that state, resigned his office of chief judge of the District of Columbia, and CRANCH and FITZHUGH, Circuit Judges, being divided in opinion, and the Hon. ALLEN BOWIE DUCKETT, having been appointed a judge of this court, the case was again argued at December term, 1808, by Mr. Jones, for the United States, and Caldwell & Law, for the defendant. At the next term, June, 1809, while the case was still under advisement, Mr. DUCKETT left the court intending to return, but did not, and died in August following. In December, 1809, the Hon. BUCKNER THRUSTON was appointed a judge in the place of Mr. DUCKETT, and at the December term of that year, the case was again argued by the same counsel.

For the defendant, the motion in arrest of judgment was urged upon two grounds: (1) Because the indictment does not aver that the traverser was a minister, or per-

[1] [Reported by Hon. William Cranch, Chief Judge.]

son capable of legally joining persons in marriage at the time of the supposed offence. (2) Because it does not aver that that marriage was without the consent of the guardian.

(1) The only part of the indictment in which the ecclesiastical character of the defendant is designated is the addition to his name, which was required by the statute of additions (1 Hen. V. c. 5; 2 Hale, P. C. c. 25, p. 176), and in which it is said that the jurors, "upon their oath present that Andrew Thomas McCormick, late of the county of Washington, clerk," &c. This is only an averment that he was a clerk at the time of the finding of the indictment, not that he was, at the time of the supposed offence, a minister competent to celebrate the rite of matrimony. Even if it was an averment that the defendant was a clerk at the time of the supposed offence, yet he might not have been such a minister as is contemplated by the statute; for the term "clericus" included inferior ecclesiastical officers as well as those in orders, and those who were not authorized to administer the several sacraments, as well as those who were. 2 Hawk. P. C. c. 33, § 4; 4 Bl. Comm. 366. And Lord Mansfield, in Rex v. Wheatly, 2 Burrows, 1127, says: "In a criminal charge there is no latitude of intendment to include any thing more than is charged. The charge must be explicit enough to support itself." The term "clerk," as used in this indictment cannot answer both purposes, namely, as an "addition" and as an averment that the defendant was at the time of the supposed offence, such a person as by the statute of Maryland, was liable to the penalty. The statute of 1 Hen. V. c. 5, which, in Judge Chase's letter to Judge Tilghman of the 20th of October, 1798, is said to be in force in Maryland, requires that "in all indictments, in the names of the defendants, additions shall be made of their estate, or degree, or mystery," &c. And it is evident that the word "clerk," was inserted in the indictment merely in compliance with that statute. There is therefore no averment that the defendant was, at the time of the supposed offence a minister, or other person liable to the penalty.

(2) The indictment contains no averment that the marriage was without the consent of the guardian. It is now said that there was no guardian; but that does not appear by the indictment. It might as well be said that there were no parents living at the time, for it is not averred in the indictment; and even if the parents had been then living, it is possible that the young woman might have had a guardian other than either of her parents. 1 Bl. Comm. 461, 462; Laws Md. 1786, c. 45, § 8. The indictment must set out an offence; and if the description of the offence contains negative words, or an exception, there must be a correspondent averment, or no offence will be charged; and the negative averment must cover the whole extent of the exception. Spieres v. Parker, 1 Term R. 141; Rex v. Sparling, 1 Strange, 497; Rex v. Wheatman, Doug. 345; Rex v. Jarvis, 1 Burrows, 148; Rex v. Collins, Palmer, 367, 373; Com. v. M'Monagle, 1 Mass. 517; 2 Hawk. P. C. c. 25, §§ 112, 113; Rex v. Hill, 2 Ld. Raym. 1415; Crown Cir. Comp. 176–194 and 220–234. Forms of indictment for offences by constables, sheriffs, coroners, &c., for malfeasance in office. 2 Hawk. P. C. c. 25, § 60.

Mr. Jones, contra.

(1) The cases cited by the defendant's counsel are where the offence is only in the exercise of a particular office, &c. The great nicety in indictments is, in general, required in favorem vitæ, where the prisoner, under the English practice, is not entitled to counsel. The reason does not apply to this country, where counsel is allowed, and especially in misdemeanors which do not imply moral turpitude. 2 Hawk. P. C. c. 25, § 61. It is true that where a statute is applicable to persons of a particular description only, the indictment must bring them within that description. Here the defendant is averred to be a clerk, which means a minister; and it is settled that it is a sufficient description of the defendant that he, existens such a person as is described in the statute, did the thing which the statute prohibits. The averment that Andrew Thomas McCormick, clerk, did the prohibited act, on a certain day, is equivalent to an averment that he being a clerk on that day did the act; which would be a sufficient averment. It is not necessary in this country that there should be an addition to the name of the defendant in an indictment, because the proceeding to outlawry is not practised here; and the statute of Henry V. was only to designate the person in an outlawry. If the designation of the defendant as a clerk, was not necessary as an addition under the statute, it must be considered as a direct averment that the defendant was a minister at the time of the marriage. No precedent can be found in which there is a substantive averment that the defendant was a minister.

(2) It was not necessary to aver that "the marriage was without the consent of the guardian." It is questionable whether any averment is necessary that it was without the consent of anybody. Where the exception, or the facts which justify the act, can be given in evidence by the defendant on the general issue, the indictment need not aver the want of that excuse. In a prosecution for being absent from church without reasonable excuse, the indictment need not state that the defendant had no reasonable excuse. When the fact in justification is in the purview or body of the act, and is contained in a negative proposition, it is not necessary to aver such negative proposition. If the parents are living it is sufficient to aver it to be done

without their consent; if no parents living, then without the consent of the guardian. The averment that it was without the consent of the parents implies that the parents were living at the time, and capable of consenting, and therefore that there was no guardian. The court will not presume that the parents were dead, or non compotes mentis. The cases cited are cases of summary convictions before justices of the peace, in which a greater nicety is required than in indictments.

In reply, it was said by the counsel for the defendant, that in the cases in which the word "existens" has been considered as a positive averment of the existence of the fact at the time of the offence committed, it is expressly referred to that time. All the precedents say that A. B. of &c., clerk or gentleman, &c., on the —— day of ——, at, &c., being a constable, or sheriff, &c., did the act complained of; so that "existens" refers to the very time of committing the act; but the "addition" refers only to the time of finding the indictment. All the cases cited were not cases of summary convictions. Spieres v. Parker, 1 Term R. 141, was an action of debt for a penalty under a statute.

Before CRANCH, Chief Judge, and FITZHUGH and THRUSTON, Circuit Judges.

CRANCH, Chief Judge. This is an indictment on the act of assembly of Maryland, 1777, c. 12, § 9, for joining in marriage one Mary Anne Densley, being under the age of sixteen years, without the consent of her parents. The indictment sets forth that Andrew Thomas McCormick, clerk, &c. without the consent of the said Hugh Densley, the father, and without the consent of Mary Anne Densley, the mother, unlawfully, knowingly, and wilfully, &c. It has been moved in arrest of judgment, (1) that it is not alleged in the indictment, that the traverser was a minister, or person capable of legally joining persons in marriage; (2) that it does not state the marriage to have been without the consent of the guardian. The act of assembly is in these words: "If any minister shall join in marriage any male under the age of twenty-one years, or any female under the age of sixteen years and not before married, without the consent of the parent or guardian of every such person, personally given or signified under the hand and seal of the said parent or guardian, and attested by two witnesses, he shall forfeit and pay £500 current money."

It has been correctly contended, on the part of the traverser, where an act is by statute forbidden to be done by persons of a certain description only, an indictment, grounded on such statute, must by a substantive averment, bring the traverser within that description. No offence can be committed under the ninth section of the act of 1777, c. 12, on which this indictment is founded, but by a minister. And it seems, by the purview of the act, that it must be by such a minister as by the third section of the same act is authorized to celebrate rites of marriage between white persons. It was necessary therefore that the indictment should state by a direct allegation that the traverser was such a minister at the time when the offence is charged to have been committed. This necessity seems to be admitted by the attorney for the United States, who has with much ingenuity contended that there is such a direct allegation in the indictment. The traverser is called Andrew Thomas McCormick, clerk. It is said that a clerk, in the technical language of the law, means an ordained minister of religion; that there is no statute in force here which makes it necessary in an indictment to give the offender his proper addition, or to name him by his mystery or degree; and as the process of outlawry is unknown in the practice of our courts, the word "clerk" shall not be considered as a mere addition descriptive of the person at the time of finding the indictment, but may stand for a positive affirmation that the traverser was at the time of committing the offence such a minister as is contemplated in the ninth section of the act; that the word "being" is necessarily to be understood, and that the meaning is the same as if it had been written thus,—that A. T. M. being clerk committed the offence; which, according to the books would be a sufficient averment.

But without deciding whether the statute of additions is in force here, or whether process of outlawry will lie upon an indictment, it is evident that the word "clerk" is used by way of addition, or description of the person, and although such an addition may not be absolutely necessary, yet it does not follow that it must therefore have another meaning. In its present form it is only an allegation that the traverser was a clerk at the time of the indictment found; and the allegation would be equally true although the traverser were not a clerk at the time when the offence is charged to have been committed. To give it the meaning which is contended for on the part of the prosecution, the word "being" must be added, which would not be justified by any precedent. But if the word "clerk" implies a direct averment that the traverser was a clerk at the time of the offence alleged, yet it is not an averment that he was a minister authorized to celebrate the rites of marriage; for the term "clerk" includes both the regular and secular clergy, all of whom were not authorized to solemnize marriage. It may also include clerks of courts, &c., and therefore the averment would be too uncertain.

The second objection to the indictment seems to be equally fatal, for I deem the position to be correct that all the circumstances which are necessary to constitute the offence must be set forth in the indictment; and that an indictment cannot be good which if true in all its parts yet leaves a possibility that the traverser may be innocent. It is true that if a statute contains a saving clause, an

exception, or a proviso, which did not constitute a part of the description of the offence, it is not necessary that the indictment on that statute should aver the traverser not to be within the benefit of such saving clause, &c., for there the traverser is left to avail himself of the exception by plea or evidence. But if a part of the description of the offence consists of a negative proposition it is as necessary, in an indictment for that offence, to state the negative as the affirmative part of that description. If the indictment had not alleged the want of consent of either parents or guardian, it would not have described any offence at all. The want of consent is the essence of the misdemeanor. If then an averment of the want of consent of parents is necessary, why not also an averment of the want of that of the guardian? It is said there was no guardian; but that does not appear. As well may the traverser say there were no parents, and therefore there was no offence in marrying without the consent of parents. The indictment does not aver that the parents were living, and if they were, still there might be a guardian. The indictment would have been equally good if it had stated that the marriage was without the consent of the guardian, and had omitted to aver the want of consent of the parents. Yet it cannot be contended that such an indictment would have been sufficient, without an averment that there were no parents living, or none competent to consent, and that there was a guardian who could consent. The offence therefore is not sufficiently set forth. The indictment does not aver all the facts which constitute the misdemeanor.

The judgment must be arrested.

FITZHUGH, Circuit Judge, contra. This is a motion in arrest of judgment on a verdict finding the traverser guilty under an indictment which charged "that, Andrew Thomas McCormick, clerk, on 23d of February, 1802, did with force and arms, unlawfully, knowingly, and wilfully solemnize matrimony between Henry Lawler, a bachelor, and M. A. Densley, a single woman, daughter of one H. D. without the consent of the said H. D., and without the consent of M. A. D., wife of said H. D., and mother of said M. A. D., personally given or signified under the hand and seal of said H. D. and M. A. D. his wife, and attested by two witnesses, the said M. A. D. daughter of said H. D. being an infant under the age of 16 years, and not before married," &c. Two reasons have been assigned for arresting the judgment: (1) Because the indictment does not aver that the traverser was a minister or person capable of legally joining in marriage, at the time of the offence. (2) Because it does not state that the marriage was without the consent of the guardian.

In support of the first ground, it has been insisted by the counsel for the traverser, that the word "clerk" is not a sufficient allegation that the defendant acted in the character of a minister, and they therefore infer that he may have acted innocently, and that as the act of the Maryland assembly subjects no other persons except ministers to the penalty, the court cannot by any argument intendment, or implication, condemn for a crime when the jury have not expressly found him guilty. By the third section of the act of 1777, c. 12: "The rites of marriage between any white persons, subjects or inhabitants of this state, shall not be celebrated by any persons within this state, unless by ministers of the Church of England, ministers dissenting from that church, or Romish priests, appointed or ordained according to the rites and ceremonies of their respective churches; or in such manner as has been practised in the state by the society of people called Quakers; and if any person shall celebrate marriage, &c., contrary to the meaning of this act, he shall forfeit &c., five hundred pounds current money." Section 9: "If any minister shall join in marriage any male under the age of 21 years, or any female under the age of 16 years and not before married, without the consent of the parent or guardian of every such person, personally given or signified under the hand and seal of the said parent or guardian and attested by two witnesses, he shall forfeit &c., five hundred pounds current money."

In determining on the weight of the first objection it will be necessary to see what is the legal acceptation of the word clerk, particularly as it has been contended that it is not synonymous with clergyman. "Clerk," as defined in the law-books, is one who belongs to the holy ministry of the church and is properly a minister or priest. The word "clerk" is supposed to be derived from the Greek word καλειο —voco, to call, because ecclesiastical persons insisted that they were called into the service and ministry of God and therefore claimed exemption from temporal jurisdiction. Hence a clerk, minister, or servant are synonymous. Or from κληρος —sortitio, because the clergy were supposed to have been allotted to divine service. It seems to be nomen generalissimum under which are comprehended both regular and secular clergy, not only such as live within certain prescribed rules, as abbots, priors, monks, &c., but also bishops, deacons, parsons, and vicars,—and is generally deemed descriptive of all ecclesiastical persons in holy orders. Indeed ecclesiastical persons are said to be well described by the words, "legum doctor" and "sacris ordinibus constitutus." 1 Hawk. P. C. c. 19, § 3. The statute of 1 Eliz. c. 2, subjects "any parson, vicar, or other minister whatsoever, who ought to say the common prayer and shall refuse to use it in church, to one year's profits of all his spiritual promotions and one month's imprisonment for the first offence," &c., and yet in an indictment for an offence against this statute, it has been

held that the word "clericus" shows sufficiently that the party was within holy orders, although the word "clerk" is not used in the statute. 1 Hawk. P. C. c. 7. The word "clerk" then being equivalent to, and descriptive of, clergyman in England, where there are various grades of clergy with various privileges and emoluments, some sinecures, others with cures. I conclude á fortiori, that the word "clerk" describes a clergyman with sufficient certainty here, where no such variety exists, and where no ambiguity can arise as to the character in which the defendant acted.

But it has been argued that where a statute creates an offence, the words of description should be precisely pursued in an indictment under the statute. The quotation just mentioned, respecting the exposition of the statute of Elizabeth is alone an answer to, and obviates this objection; for there the word "clerk" was not used and yet it might have been insisted there, as it has been here, that the word "clerk" might refer to and describe a clerk of court, and so by possibility the defendant be innocent notwithstanding the indictment be literally true; or it might, with a fairer prospect of success, have been urged that, though clerk meant clergyman, yet it might be understood as applicable to the regular clergy instead of the secular clergy, and therefore not contemplated by that statute. If the offender be brought within the purview of a statute, it is sufficient; and if by a rational construction of the whole indictment a person is described with such certainty that it is impossible to mistake him for another, or the character in which he acted; or that he may know how to defend himself against the charge; or that he may plead in bar of another prosecution; or if it can judicially appear to the court what punishment is proper, such an indictment ought to be sustained. In the case now before us, the traverser has been convicted of having in character of clerk, solemnized marriage. If the word "clerk" receives one acceptation the offence is indisputably made out: if tortured to mean a clerk of a court or any thing else except minister, then he cannot be guilty of solemnizing marriage, though that fact is expressly found by the jury. In one sense of the word, the defendant may have consummated the marriage: in the other he could not. In this view of the case no rule of construction justifies the court to lay hold of a solitary expression for the purpose of acquitting the traverser; when a liberal view of the whole indictment taken together with the verdict could leave no doubt on the mind as to the character in which he acted. Though judgments in favor of life and in avoidance of penalties are generally construed strictly, yet they are expounded like other writings by taking them altogether and introducing one part in explanation of another (4 Com. Dig. 397, G, 5), so that a general or ambiguous expression may be rendered certain; and certainty to a common intent is sufficient in an indictment. Co. Litt. 303a; 5 Coke, 121a.

There seems more difficulty in the second objection, that the indictment does not set out the want of the guardian's consent; but still I am inclined to think that this omission is not fatal. It is a rule that when there is a negative in the description of an offence in a statute, the affirmative of which would excuse the traverser, it need not be set forth in the indictment, but must be pleaded by the defendant or shown as his excuse or justification. 5 Term R. 84; 1 Hawk. P. C. c. 10; 2 Hawk. P. C. c. 25, § 115; 2 Ld. Raym. 1370; 2 Burrows, 1035. And I can find nothing which looks like an exception to this rule but cases of indictments in England for offences under the game laws, where the qualifications must be all negatived in the indictment. This may be accounted for on the ground of there being an immense number of statutes restrictive of the privilege of killing game, commencing as early as 13 Rich. II., with such a variety of penalties and qualifications, that it might be uncertain what judgment the court could render or by what evidence the traverser could protect himself, unless the supposed offence should be reduced to the most definite and unquestionable form. Another reason why the game laws form an exception to the general rule may be, that the offences under them are punishable by justices of the peace, whose limited jurisdiction, the supreme courts have been unwilling to enlarge or favor. But in the case of Reg. v. Matthews, 14 Vin. Abr. 3, 10 Mod. 27, on an exception taken to a conviction on 4 & 5 Anne, for the preservation of game, it was held that if it had been laid generally, "that he not being a person qualified according to the law," it would have been well enough; but the qualifications having been distinctly and severally mentioned, the omission of one is fatal. It might perhaps have been sufficient if the indictment in the present case had barely stated the solemnization of the marriage of an infant, omitting consent altogether, because the mischief intended to be avoided by the law, was the improper influence which might be used on persons wanting discretion and judgment to direct them in so important a step as marriage, and any thing which would justify or excuse such intermeddling might come out in evidence or be pleaded. The prosecutor cannot prove the negative, that consent was not given in writing, but the traverser could have done so; and the law evidently meant to impose on him this necessity by requiring a license in writing properly authenticated, thereby furnishing defendant with the means of justifying himself; this being in writing might and ought to have been preserved if it ever existed. When the parent delivers this writing to the minister, it is no longer within his control or of any other person

except the minister, and therefore it would be requiring an impossibility to insist on its being produced on the part of the prosecution, and it is a rule that that which need not be proved need not be averred.

The statute of additions is said to be in force in Maryland. Be it so. 1 Hawk. P. C. c. 7, shows that clerk is definite enough; clerk is a good addition for a doctor of divinity. 2 Hawk. P. C. c. 23, § 109. The addition should refer plainly to the person indicted, so that one may not be substituted for another. But it has been objected, that the person who drew this indictment was sensible that the indictment should have been special in its avernient of the requisites of the law, and having inserted some, the omission of others is fatal. This offence is in my opinion completely stated by making out either alternative requisite, and the guardian's consent is as distinct from the parent's as if it had been in another section—as much so as the written license of the clerk, which is also made a protective requisite; and it has not been contended that the indictment should have negatived that. But with respect to the insertion of one requisite and the omission of others; where an indictment is brought on a statute which has general prohibitory words, it is sufficient to charge the offence generally in the words of it; and if a subsequent statute or clause in the same statute, excuse or except persons particularly circumstanced out of the general words, it must be pleaded, or given in evidence; as an indictment on 5 Eliz. c. 4, for exercising the trade of a tanner, not having served an apprenticeship of seven years, is sufficient without averring the want of other qualifications, &c.

But when the words of a statute are descriptive of the nature of the offence or the purview of the statute, or are necessary to give a summary jurisdiction, the indictment must specify it in particular words, as game acts; swearing; counterfeiting coin; &c. 4 Com. Dig. 397, G, 5. An indictment need not ascertain more than shows the offence, not that which aggravates it. Id. 398, G, 5. Nor more certainty than the words of the statute import. But it should use terms proper or peculiar to the offence. If an offence appears in the indictment for which it may be maintained it is sufficient, though bad in other parts. Id. 408, "Judgment," N; 1 Salk. 384, 385. This offence is completely stated by either disjunctive. In Tremaine, P. C., a person was indicted under the statute of Elizabeth, to impose a pecuniary fine on a resident within the king's realm for not going to church, not having a reasonable excuse. The indictment averred, that the defendant had no reasonable excuse, but omitted his being a resident of the king's realm. This shows that the insertion of one of the requisites does not render it necessary to enumerate them all. 4 Hawk. P. C. c. 10, says it is unnecessary to negative the excuse. The obvious meaning and purview of the law is that the consent of the parents is to be had if there be any capable, &c.; if not, then of the guardian, if there be one legally appointed. The traverser's counsel have resisted the claim of the United States on another ground: that it is uncertain from the indictment when he was clerk,—whether at the time of the supposed offence committed, or at the date of the indictment. In 2 Hawk. P. C. c. 25, §§ 61, 114, it is said to be a sufficient description of a defendant to say that he, existens so and so, as brings him within the purview of the statute, did the act without alleging that he was so at the time of the fact; that shall be intended: but where existens applies to the fact, it is otherwise; as if an indictment states that A. disseised B. of land being the freehold of the said B., it is fatal, because it is indifferent whether it was B.'s freehold at the time of the disseisin, or the finding the indictment—and in section 61, it is said to be the natural construction of the participle existens going before the verb to which it is the nominative; but in the case of the disseisin, it is doubtful whether it is nominative to the verb, or applied to the thing which is the subject of the action; so that the difference as to its construction appears to be between its application to the person and the fact, and Johnson's Case, Cro. Jac. 610, is pointed in support of this distinction. So, 4 Com. Dig. 397; 2 Rolle, Abr. 226.

From the view I have taken of the points submitted to the court, it would appear to be over nice and critical if this judgment should be arrested, and in the language of a learned law writer, "as on the one hand the court will not by any argument or inference condemn for a crime whereof the jury have not found the party guilty; so on the other hand it will not suffer him to escape on a trivial exception: but the judgment must be in great measure left to the discretion of the court, who from the circumstances of each particular case, the comparison of precedents, and the plain reason of the thing, seem to have gone within those rules as near as possible." In a case circumstanced like the one before us, where the indictment brings the offence within the purview of the statute; where the traverser with a knowledge of the infancy of the daughter, solemnizes a marriage without the consent of her parents, and without pleading or showing any justification or excuse, I think the judgment should not be arrested.

Case No. 15,663a.

UNITED STATES v. McCORMICK.

[2 Hayw. & H. 189.] [1]

Circuit Court, District of Columbia. June 4, 1855.

VOTERS—REQUISITES—NATURALIZATION—WASHINGTON CITY.

1. The fifth section of the charter of the city of Washington of 1848 [9 Stat. 226], cannot be construed so as to make the qualification of a resident of the city to vote, that he must be a citizen of the United States one year next preceding the day of election.

2. It is the duty of the assessors to register the name of all white male residents of the city of Washington, who are subejct to a school tax, whether they are foreigners or not.

3. The list having passed out of the hands of the register, and being in the hands of the commissioners of election, the latter cannot be controlled by mandamus as their duties are judicial, being quasi judges and not ministerial.

This is a rule on [W. D. McCormick] the register of the city of Washington, to show cause why a writ of mandamus shall not issue to compel him to record the relator's name [Thomas J. Green] on the list of voters. The petition sets forth: That he was naturalized during the month of May, and therefore claimed the right to vote; but this was refused on the ground, that he has not been a "citizen of the United States" for the term required by the fifth section of the city charter of 1848, which is as follows: "Every free white male citizen of the United States, of lawful age, who shall have resided in the city of Washington for one year next preceding the day of election, and shall be a resident of the ward in which he shall offer his vote, and who shall have been assessed on the books of the corporation for the year ending on the 31st day of December next, preceding the day of election, and who shall have paid taxes legally assessed and due on personal property when legally required to pay the same, and no other person shall be entitled to vote at any election for members of the two boards." That he is a free white male citizen of the United States, is over the age of 21 years, and has resided in the city of Washington for one year next, preceding the date hereof, and that he is a resident of the Fourth ward. That on the 31st day of December last, the relator was a free white male citizen of this city, and that at that time he was subject to a school tax for the past year, and has not been entered on the lists according to the terms of an ordinance of the corporation of Washington, passed the 30th day of May, 1849, and of ordinance of said corporation passed the 17th of October, 1850. The relator shows that he has applied to the city register to inscribe his name on the said lists and returns as subject to school tax as aforesaid, and has tendered the amount of said tax to the corporation; but the said register refuses to inscribe his name on the said lists and returns, whereby he (the relator) unless the court shall declare the law to be otherwise, will lose his privileges and right of voting, and that through no fault, neglect, or disqualification of his own. The facts set forth in the petition were admitted, but it was contended that the judges of election could only look at the lists presented to them in conformity to the laws of the corporation, and that the person claiming to vote must have resided here as a citizen of the United States "one year next preceding the day of election."

A. H. Lawrence and James M. Carlisle, for the relator.

Robt. E. Scott and Jos. H. Bradley, for respondent.

Mr. Lawrence opened the case by reading to the court the petition of Thomas J. Green.

Mr. Bradley read various clauses from the statutes bearing on the subject of taxation and voting, and from the charter of the city, that part which declared that "every free white male citizen of the United States of lawful age, who shall be a resident of the ward in which he shall offer to vote, and who shall have been assessed on the books of the corporation for the year ending on the 31st December next preceding the day of election, and who shall have paid all taxes legally assessed and due on personal property when legally required to pay the same, and no other person shall be entitled to vote at any election for members of the two boards." If a man, whether an alien or a native, was a fixed resident on the 31st of December last, he was subject to the capitation or property tax. The alien is just as much subject to the payment of taxes as the native citizen, but this does not necessarily give him the right to vote. The clause of the charter which he had read, he contended, required the person claiming to vote to have resided here, "as a citizen of the United States" "one year next preceding the day of election." He is not to go to the polls directly from the court house, but must have resided here as a citizen for one year. The court has no power to order the register to put the name of the relator on the list of voters.

Mr. Lawrence in reply said: This was a simple case of construction of a law passed by an American congress, to be executed by American officers. It was not a case in which an American native born citizen and a naturalized were placed in hostility to each other; (the one asking what he had a right to ask, and the other refusing what he had a right to refuse;) but the question was: what has congress declared in the law which it has passed, touching the qualification of naturalized foreigners to vote, here or elsewhere? It was simply a question of a naturalized citizen of the United States who has been a resident of this city for one year before the time of election, and who was, on the 31st of December last, subject to the school-tax. The

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

act of 1848 alone presented the question, whether, under that act, a man who was a resident one year prior to the annual election, would not be a legally qualified voter at such election, if, at the time the election took place, he was that which is described in the law itself, namely, a citizen of the United States. It is said by his friend, Mr. Bradley, that the naturalized citizen must not only be a citizen at the time he shall offer to vote, but must have been a citizen of the United States a year preceding the election. To this construction my colleague and I demur. It is in violation of the plain language of the statute itself. There is no reason for it in public policy, and would require a large interpolation in the statute to arrive at such a conclusion. The other qualification in the act shows that it was altogether a personal and not a political residence—just as much as a qualification respecting age was a personal and not a political qualification. Mr. Carlisle said "that there was not in the charter of 1848 any distinction between a native citizen and a naturalized citizen; none." It was a new notion; it was a sheer delusion. He asked the gentlemen on the other side of the question to point him to the constitution or the law of the land which authorized them to make such a distinction between a man who has drawn no breath out of the land and the man who, this day, under the law and the constitution become a citizen. In 1848 there was no existing reason governing congress, so as to provide that a citizen should not be a citizen for one year after becoming such. The native who arrives at age after the 31st of December, is not entitled to vote, because in addition to his being a citizen he must be liable to taxation at that time, the 31st of December, and being a minor he cannot be subject to taxation, while the citizen is liable to the tax, whether naturalized or not. That the argument on the other side was in effect an attempt by implication to repeal an act of congress and impose a new obligation on the voter, and to make a distinction which they never before heard.

Mr. Scott, in reply. The gentleman had asked to be pointed to the constitution, which drew a distinction between a native-born citizen and the naturalized citizen. (Mr. Carlisle: "Except the president of the United States.") He might point him to many such instances in constitutions of various states, but he was not here for that purpose. The question was, in what manner by the terms of the compact contained in the written charter the right of voting is regulated? The man of foreign birth is an alien until he is naturalized, the subject of a foreign potentate, and owes allegiance to the prince from whose country he comes. Would the declaration of intention to become a citizen liable to be abandoned at any moment, render him liable to be put in the list of voters, and authorize the right of voting merely on condition that at the moment of election he shall pass through the ceremony of naturalization? Such is not the meaning of the charter. There is no right to argue the question of citizenship, outside of the charter, and interpret another of a different signification in its place. It was the intent of the act to confer the right of suffrage only on "citizens of the United States;" restricted to such persons as are named in the charter, and we have no right by any rule of construction to erase the word "citizen" and substitute for it another of different signification. The naturalized foreigner must have resided in the city one year preceding the election: the word "who" referred to "citizens of the United States" and not to mere residents. The court has no power to direct the register to insert the name of the relator on the list of the assessors. Under the charter and law, this duty was confided to others. The right of suffrage must be restricted to such citizens of the United States as were returned on the books of the corporation during the year ending the 31st day of December next preceding the day of election. This is imperative. There is no power conferred in this court to determine either before or after election day, who shall or who shall not vote. This is an authority conferred on the commissioners of elections, appointed in the manner prescribed by the charter, under such penalties as the instrument imposes.

Mr. Carlisle. The case was brought here to obtain an authoritative interpretation of the charter. As we live in a law-abiding community, when the court shall decide the question, the people will be governed by it. There will be no resistance. We should like to see the judge of election, when the right of this man to vote has been decided to take upon himself to deny it. If the court shall decide the law, he was free to say, and in this he believed he expressed the opinion of all our citizens, that they would take care the law should be faithfully executed.

Mr. Scott said, that the idea of citizen of Washington was an abuse of terms, which he did not understand. He (Mr. Carlisle) supposed that everybody knew, and nobody better than the gentleman, the primary meaning of citizen, it means the inhabitant of a city; and whenever it is intended in the charter to extend to the political distinction of citizen of the United States, it says so in as many words. There seemed to be some confusion of ideas on the part of the gentleman (Mr. Scott) when he thought that while the court is inquiring into the question of residence, which is a legal idea, it is to be mixed up with an intention whether something also did not exist.

Mr. Bradley, in explanation, repeated that what he meant was: The relator in this court (Mr. Green) is not entitled to vote. If there is no power to alter the list, the judges of election will have a plain duty to perform. In the discharge of that duty he knew that

they will be fearless, though they may be threatened with law suit.

The arguments having concluded, MORSELL, Circuit Judge, said: There is some difficulty about immediately making up our minds. The subject will require some reflection, and we should like to look into authorities, perhaps especially with respect to one point; therefore we shall deliver our opinion on Monday morning.

DUNLOP, Circuit Judge. The first question to be decided is as to the right of a citizen, naturalized since the 31st day of December last, to vote, having all the other qualifications required by the city charter. It is insisted on one side that the charter requires a residence of a year after the person claiming to vote shall have received his naturalization papers. That depends on the strict and fair construction of the fifth section of the charter of 1848, which says, "every free white male citizen of the United States, &c." It is supposed to be the true construction of the charter, not only that he must be naturalized before the election, but shall have resided as a naturalized citizen in the city a year before the day of election. But this is not a true construction of the charter. It would require us to interpolate after the words, "resided in the city of Washington," the words "as a citizen of the United States," which we have no authority to do. The party offering to vote must by the charter be a free person, white, a male, and a citizen of the United States, and must have attained the age of 21 years and resided here one year next preceding the day of election. There is no necessity for this restriction, it would, in effect, be asking the court to add another year of probation. The law of the land requires a residence of five years. By affirming the construction sought, it would require a residence of six years in order to enjoy the full privileges of a citizen. Whether this is expedient or not it is for the legislature to determine. It seems to me, therefore, that the term "resident" does not relate to his political character as a citizen of the United States, but his residence as a person. The true construction of the charter is, that if a person be subject to the school-tax, and is a resident, he has a right to vote; in the case of the petitioner Green, it is for him to say whether he is a legal voter. It appears that he has resided in the city of Washington one year previous to the filing of his petition in the present case, and was, as he states, entitled to be enrolled on the school-tax register; but that his name was not enrolled.

The question is: First, whether the petitioner is entitled to enrollment. Although conceded by Mr. Bradley that the alien, who was a resident, was subject to be enrolled; yet his colleague (Mr. Scott) argued earnestly, and with much ingenuity, that that concession ought not to have been made. That depends on the second section of the charter, which says, "the corporation shall have power to lay and collect a school-tax on every free, white male citizen of the age of 21 years and upwards." It will be observed in the first place, that the terms in the second and fifth sections are different. In the fifth, to qualify a man to vote he must be a free, white, male citizen of the United States; but in the second section (which gives the corporation power to lay and collect the school-tax) he must be a free, white male citizen, omitting "of the United States." It is supposed that the legislature intended the language to be different, if it did, it should have said so. A foreigner may be a citizen, an inhabitant, or a resident of a town, while so, he has a duty to perform; he is bound to obey the laws, and is entitled to protection; he may, without being a citizen of the United States, be a citizen of Washington, a dweller, and an inhabitant, all these meaning the same thing, Dryden so defines them. If a foreigner has a right to come to this city, and has resided here, is there any reason why he should not be subject to the burdens of the city, and contribute to its support? It is admitted that as to real and personal property he is subject to taxation. Here foreigners are to some extent quasi citizens, without being citizens of the United States. In relation to the school-tax: Every child between 5 and 16 years of age has a right of admission into the public schools, whether the child of an alien or naturalized citizen. He enjoys the benefit of the school system, and for this reason he contributes a school-tax. We are warranted in this opinion, not only by the laws of the corporation but by the charter. I think it clear, therefore, that the foreigner who resides in the city of Washington is subject to the school-tax, and as the petitioner says he was subject to the school-tax on the 31st of December last, it was the duty of the assessors to register his name. This they have failed to do. When the Case of C. S. Wallach [U. S. v. McCormick, Case No. 15,661a], was last year before the court it was held, that where the party was entitled to be registered, but the assessor had omitted his name by neglect, or inadvertence or carelessness, the person thus entitled should not be deprived of his right to vote, on producing the proper proof to the commissioners of election.

But the question to coerce the city register by mandamus to enter the name of the petitioner on the school-tax list involves matters of considerable importance. The law however is familiar to the court. The supreme court at the last term decided it in two cases. The doubt here is as to what officer, if any, can be operated upon and controlled. The mandamus applied for is to compel the register of this city to enter the name of the applicant on the list. In the Case of Wallach [supra], there was no mandamus issued. The opinion of the court was sought at the instance of all parties, the judges of election included. We think now, as we thought

then, that the register, having passed out of the hands of the assessors by whom it was made, is now in the hands of the commissioners of election. Those were the only parties who could be controlled; but this court could not operate upon them by mandamus, the list now being in possession of the commissioners of election. These latter are quasi judges, and are sworn to decide the qualification of voters, according to their judgment and the law. Their duties are not ministerial, therefore the court cannot control them by a mandamus, and the supreme court of the United States has laid down the principle,

MORSELL, Circuit Judge, did not deem it necessary to occupy much time, but if desired or wished for on this occasion he should certainly concur in the views of his brother judge. He felt satisfied with the construction of the statute as he (Judge DUNLOP) had thought proper to give it, and on those views he relied. The court has no jurisdiction to award a mandamus. A mandamus under the circumstances may issue, if it can be issued to an officer whose duties are ministerial and not judicial. In the present case the list has passed out of the hands of the register, who is a ministerial officer, and therefore the mandamus is dismissed.

Case No. 15,664.

UNITED STATES v. McCRACKEN.

[3 Hughes, 344.] [1]

Circuit Court, E. D. Virginia. Jan. 10, 1878.

OBSTRUCTING MAIL—WHAT IS.

Under section 3995 of the Revised Statutes of the United States, *held*, that no offence is committed unless the mail is in transitu, and unless the horse or vehicle taken is employed in carrying the mail.

[Cited in U. S. v. Sears, 55 Fed. 270.]

On an indictment for obstructing the United States mail.

There were two indictments in this case, one of them charging that the defendant [M. McCracken] obstructed and retarded the passage of the mail by the detention of a horse, and the other for doing the same by the detention of a horse and carriage or sulky. The proof was that the mail-carrier took the mail to the defendant's livery stable in Fredericksburg, and was about to take out a horse which he was in the habit of using for carrying the mail to Orange Court-House, when the horse was held by the defendant for money due for keeping the horse. This was the gist of the testimony submitted to the jury. After the evidence was all in the judge asked if the district attorney thought it worth while to go on with the case, intimating that the evidence did not bring the act of the defendant within the terms of section 3995 of the Revised Statutes of the United States, under which the prosecution was instituted.

HUGHES, District Judge. The law declares that no one shall obstruct or wilfully retard the passage of the mail, or any carriage, or horse, or carrier, carrying the same. It contemplates an obstruction while the mail is passing from one place to another, and the obstruction of a carriage and horse while engaged in carrying the mail, the mail being in transitu. The indictments under trial are for the offence just described, of obstructing and retarding a horse and vehicle in and while actually carrying the mail. Now this is a very different offence from that of preventing a horse from being taken out of a stable to be used for the purpose of carrying the mail. This particular section of the law does not contemplate such an act, and therefore it is useless to go on with the case. I would have to set aside the verdict if the jury should render one of guilty.

The prosecution submitted to a verdict of not guilty.

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

Case No. 15,665.

UNITED STATES v. McCULLOUGH.

[22 Int. Rev. Rec. 202.]

District Court, S. D. New York. June, 1876.

INTERNAL REVENUE—KEEPING BOOKS—DEALERS IN FOREIGN SPIRITS—"PREMISES."

1. Dealers in foreign, as well as in domestic spirits, are subject to the requirements of the 45th section of the act of 1868 [15 Stat. 143], incorporated into the Revised Statutes, and are obliged to keep the books therein provided, and, in so far as they can, to make the entries therein specified.

2. Under this act, and under the warehouse act, the bonded warehouse in which the liquor dealer stores his goods, is to be regarded as his premises for the purposes of this suit, the warehouse becoming, by a transfer of the goods in bond, the premises of the vendor instead of the vendee.

[This was an information against Seymour McCullough, for the violation of section 45 of the act of congress of 1868 (15 Stat. 143).]

Roger M. Sherman, Asst. U. S. Atty.

G. W. Cotterill, for defendant.

BLATCHFORD, District Judge. This matter seems to me very plain. The information in this case is based upon a sale and delivery—a removal out of the stock or possession of the party of a package of spirits, containing not less than five wine gallons. It does not involve a question of receiving, and I see no difference whatever between the law as it was in 1868, and the section in the Revised Statutes; because in 1868 the provisions in regard to wholesale liquor dealers were precisely the same as they are in the Revised Statutes—that is, that a.

wholesale liquor dealer had to pay a tax; that every person who sells or offers for sale foreign or domestic distilled spirits shall pay the tax, and this Mr. McCullough paid the tax, although he never dealt in domestic spirits, only in foreign spirits; never dealt in domestic wine, only in foreign wine. Now, the 45th section of the statute of 1868, which contained these same provisions provided that every wholesale liquor dealer—that is, every person within this category of selling or offering for sale either foreign or domestic spirits—shall provide a book, in the form prescribed by the commissioner of internal revenue; and whenever he sells any spirits—of course that means any spirits which, as a wholesale liquor dealer, he pays a tax in respect to which is foreign and domestic both—he shall enter, etc. Therefore to put the words "foreign and domestic" into the Revised Statutes is a mere interpretation of the law as it was at that time, and upon that the supreme court of the United States, in a recent case, has decided that we are to take the Revised Statutes as declaring what the law was at the time. And that is the sense in which we are to look at the Revised Statutes, and not as containing anything new. And I have no doubt whatever that under that authority, and as matter of fact, in the 45th section of the act of 1868, the word "spirits" meant foreign or domestic spirits. Now, this provision is very specific: "Every wholesale liquor dealer." And this defendant was in point of fact a wholesale liquor dealer, because he did deal in "foreign or domestic spirits," did in point of fact sell and offer for sale. And he recognizes himself as a wholesale liquor dealer by very properly paying his license, his taxes, and, therefore, he is a wholesale liquor dealer, and he is estopped from saying he is not a wholesale liquor dealer. Then the statute says, "Every person who sells or offers for sale foreign or domestic distilled spirits in quantities of not less than five wine gallons at the same time shall be regarded as a wholesale liquor dealer." Now, an importer of foreign spirits who, instead of putting them into consumption, entering them for consumption and putting them on a floor of his store, leaves them in the bonded warehouse of the government, has them in his stock quite as much as if they were in the floor of his store. They are his property, subject merely to the duty, and to the privilege which the government gives him in keeping them in warehouse subject to the payment of duty; and he is the owner of them, subject of course to the control which the government has for the purpose of securing its duty, and subject to the privilege that he has of having them exported out of the country by a drawback, without paying duty. But they are his stock, his property; and it would seem to me that the intention of the law when it says, "shall at the time of sending out of his stock or possession any spirits," covers having them in a bonded warehouse; in order to avoid the difficulty of the importer saying, "Well, they are not in my possession; they are in the possession of the government." Then the point is taken, that the statute goes on to say, "and before the same are removed from his premises," as if that required that they should be upon his premises. Well, I think, if that were necessary, that under the warehouse act, and the privilege given to him, the party puts his goods into a bonded warehouse, for the purpose of this case. Those are his premises; the bonded warehouse is his premises; therefore even if that were necessary, as I have said, the prescription there is this, the undoubted sense of it is that the party shall at the time of sending out the spirits, and before he parts with such control and possession of them as he had, shall make this entry. That is the meaning and the sense of it, and even if it meant that it is necessary that they should be upon his premises, why, they are in his premises, under the warehouse acts. Because the provision of the warehouse acts is that they shall be sent to such bonded warehouse as he designates. That is, the law gives him the privilege of selecting the bonded warehouse; and, therefore, that they are in his premises for all practical purposes—for the purposes of this suit, I have no doubt whatever.

Now, it is said that this penalty is imposed only for a neglect or refusal to make entries therein specified; and that, that means that the refusal to make each and every of the above specified entries is necessary, to impose the penalty; and that the penalty cannot be imposed if a man is able, for instance, to make four entries and only makes three of them, that the penalty cannot be imposed for a failure to make four. I do not think the statute is capable of any such construction. I think that is one of those cases where the construction of the statutes is well settled and laid down; that it means a failure to make any of the above entries which he can make. Well, of course, he is not obliged to make entries which it is impossible to make. If he is required to put down in the book the serial number of the package, and it has no serial number on it, why, of course, he cannot put that on it; because there is no neglect or refusal to do what it is impossible to do. There can be no neglect or refusal to do what does not exist. But the meaning of the statute is that he shall do what he can do; that is, he shall enter the day when, the name and place of business of the person or firm to whom, the spirits are to be sent. That he can do. And he can also enter the quantity of spirits. Next is the number of gallons and the proof. If it is utterly impossible, then he is not obliged to do it, but, if he can, he must do it. Then if it is a branch of the statute which is applicable only to domestic spirits, that is incumbent on those

who deal in domestic spirits. It is not obligatory on those who deal in foreign spirits, simply because these foreign spirits have no serial numbers. Here is a statute which applies to wholesale liquor dealers, who deal both in foreign and domestic spirits; and, in so far as the requirements can be carried out, by dealers in foreign spirits, they are to do it. In so far as it requires things, some of which the foreign man cannot do, but the domestic man can do, of course the foreign man is obliged to do only those things which he can do, and the domestic man is obliged to do those which he can do. The reason of this statute is this, that the country, as we all know, as congress knew, is flooded with spirits concocted and made up here in imitation of foreign spirits. Every one—you and I—go to-day to our groceryman, and get something called imported which never saw the other side of the water. Therefore it is that congress says, "We are going to compel every man to take out a license as a wholesale liquor dealer, even though he deals wholly in foreign spirits, and then we are going to require, as near as we can, this man who has a license to deal in foreign spirits to keep a record in a book of those foreign spirits, so that, when we are hunting round to see whether we have been defrauded, in respect to domestic spirits, and find that he has entered there some foreign spirits, then we have to trace back those spirits to see whether they are really foreign or domestic spirits. If they are foreign spirits, we find a record of them as foreign spirits; we have that record, and it enables us in that way to avoid being deceived, and to find out whether they are really domestic or foreign." It is suggested that there is a hardship to gentlemen in the foreign trade in keeping these books, because these books are books which are to be open to the examination of the revenue officers. Well, it is no more of a hardship than it is upon those persons who are dealers in domestic spirits. And so long as the necessity of the government, a legacy left us by the war, compels us to raise this revenue to pay our debts, and to be honest men, requires that we shall raise this revenue from spirits—and the experience of all governments shows that that is a thing which can best pay a large revenue—so long as we keep up that system of government we shall find it necessary not only to impose a tax upon persons who deal wholly in foreign spirits, but to have such safeguards in respect to all the spirits which pass through the hands of dealers, that the government may, if possible, identify those spirits and have a record of them. Of course it is a hardship on every one. I suppose no one ever wants to have any restriction. It is a hardship to have to pay a hundred dollars a year. But if a person chooses to come to the United States and do business here, he must do it subject to such reasonable and proper laws as, in the collection of the revenue, and in the payment of our honest obligations, it becomes necessary to impose. I see nothing that is harsh or unequal in this law. It is no more subject to criticism on that ground than any law on the subject of distilled spirits. It has been in force now a great many years, left upon the statute books, not annulled, and re-enacted by successive congresses, elected by the people, fresh from the people, only two years from the people, and who declare solemnly that these provisions are necessary for the proper enforcement of these revenue laws. And, like other laws which are subject to abuse, when they are abused, the proper authority, when called upon, will see that they are not used for any improper purpose. If I had any hesitation or doubt upon it I should take it into consideration, but I have not any doubt whatever that I must direct a verdict for the United States for $100. Because, as I understand it, the proof in this case is that Mr. McCullough sold these imported spirits, and himself was the means of delivering them from the bonded warehouse. The commissioner of internal revenue, in these two letters which have been furnished me here, makes this same ruling. These letters are a clear ruling against the position taken by the defendant in this case—very clear—and to this effect, that when these spirits are inside of the bonded warehouse, and are sold from one person to another, in the bonded warehouse, the government is not disposed to consider them as subject to this provision in regard to sending out the spirits from his stock or possession; they are not to be regarded as sent out from his stock or possession. That I understand to be the ruling. That so long as they remain in the bonded warehouse they may change hands as often as you please. That seems to be about the idea.

Mr. Sherman.—Do I understand that your honor concurs with the commissioner?

THE COURT.—No. I have not said that. I have said that, for the purposes of this case, that decision covers this case. Because this is a case where, as I understand from the proof, Mr. McCullough says that he sold and delivered these spirits from the bonded warehouse. "But the party who receives them into his own private premises," that is into his store, "or takes them out of the government custody, must enter them in the prescribed book, whether he be the importer or a purchaser from the importer, or from a subsequent owner; and it will be sufficient identification of 'the place where received' to designate the particular bonded warehouse."

Referring to that letter, the commissioner says, in the following March: "So long as your imported spirits remain in the government warehouse, you are not required to enter the same in the wholesale liquor dealer's book. But when such spirits are re-

moved from the custody of the government, they must be entered as stated in my letter to Mr. Elliot." And in that view, which is very limited, it would cover a case where a party had sold them and delivered them from the bonded warehouse. But I am not disposed, myself, to give the statute so limited a construction as the commissioner of internal revenue seems to have given it. And I do this upon the ground that under this warehouse act, it seems to me, and under both branches of this law (although this particular statute does not cover the receipt), that under both branches of this law, and under the warehouse act, where a party receives foreign spirits and enters them for warehouse, and designates the warehouse that he has them in, for any purpose where the question arises under this statute, those are, for the purposes of this suit, to be regarded as the premises of that party—for the purposes of this suit—and as entering them into this man's stock in trade, becoming part of his stock in trade. He has the control of them. He can sell them, export them by drawback, or withdraw them for consumption or for any purpose whatever. Nobody else can sell them, unless somebody else pays the duty and withdraws them.

Mr. Cotterill.—If the goods remain in bond, and are not removed by the party who sold them for consumption, is he obliged to enter them in the book?

THE COURT.—I think so.

Mr. Cotterill.—He must even then make the entry?

THE COURT.—I think so.

Mr. Cotterill.—Then he would be obliged to make the entry in all cases of any importations, if he received the goods?

THE COURT.—I think so under the law, and under the laws of the warehouse act, which I have had occasion recently to examine in other cases, and which gives to the importer the privilege of designating the warehouse, I think the place where, after he imports those goods into this country, he puts those goods for safe-keeping, for his own convenience, are his premises, for the purposes of this suit; and that he receives those goods within the meaning of this statute, whether he puts them in his own store, or whether he puts them in a bonded warehouse, for the purpose of having the privilege of not paying the cash down for the duty, for the purpose of waiting to see whether he can satisfactorily sell them to somebody who will pay the duties, and thus relieve him from the necessity of paying them, or, if you please, getting a drawback for export, he substantially receives them. Because somebody must receive them. They are imported into this country, so they are received by some one; they are received by the importer; they are received by the consignee; they are received by the owner. This statute, however, is limited to a person who is a wholesale liquor dealer, and does not apply to anybody else. This statute applies to a person who "sells or offers for sale foreign or domestic spirits," according to this definition, "in quantities not less than five wine gallons at the same time." I see no greater hardship imposed upon these gentlemen who deal only in foreign stuff, than there is imposed upon those gentlemen who deal solely in domestic; not a particle. Practically, there is no greater duty imposed upon the one than on the other. There is nothing that this dealer in foreign spirits is required to do over and above what the domestic man is required to do. I should think it was just the other way. The domestic man is required to do more because he can do more. What I mean to say, is, there is no inequality in the law that requires the foreign man to do something in addition to anything that the domestic man can do. Therefore, there is no inequality in the law, none whatever. And when you find it as a branch of the law, which always, from the commencement, has required that the person who sells, or offers for sale, these foreign spirits, in terms, shall pay this one hundred dollars, the same as the man who offers for sale domestic spirits, it is perfectly clear that to keep up a uniform system, these provisions ought to be applicable to both classes, as congress has made them.

Mr. Cotterill.—I understand the court to state, that the entry should be made at the time the goods were received. May it not be a very serious question as to whether the goods are received?

THE COURT.—I cannot imagine now all possible cases. I believe the law declares that as soon as the goods arrive within the district, they are subject to duty.

Mr. Cotterill.—Of course, but they are in the custody of the collector. May not the term "receive" apply to that particular time when the importer withdraws the goods for consumption? Is not that the time that he receives his goods?

THE COURT.—No, sir; I think not. I think there would be confusion. He should be considered as receiving them when he puts them into the bonded warehouse. But that is a matter of latitude. The designation of a bonded warehouse is an act of potential control over the goods, and it seems to me that you may fairly assume that he receives the goods when, instead of putting them on a car and carrying them to his own shop or store, he says. "Put them in the bonded warehouse," that then he receives them by putting them into that bonded warehouse. That is a privilege which has always attached under the warehouse act. The importer has the privilege of designating the warehouse, as all these warehouse acts are matters of privilege. But for that the government would require, and for years did before we had the warehouse system, that the duty should be paid immediately

on the importation of the goods. No goods could be landed in this country without paying duty. They could be entered only for consumption.

Mr. Cotterill.—Having received them at at that particular time, suppose the importer afterwards sells them in bond; they might be successively sold in bond, and the entries would bear just this evidence of those transfers.

THE COURT.—Exactly, and, I think, in that same connection, that is a fair and reasonable interpretation of the statute, when it says, "at the time of sending out of his stock or possession any spirits, and before the same are removed from his premises." I think it is a fair and reasonable interpretation, that when he sells them in bond, and they stay in bond, that is, sends them out of his stock, they are no longer in his stock; and, notwithstanding, the mere fact that the other man does not choose to remove them from that bonded warehouse, and take them to another bonded warehouse, but chooses to leave them in that bonded warehouse, still that bonded warehouse ceases, by that act of the transfer of the goods, to be the premises of the vendor; they become the premises of the vendee. And that is a symmetrical system, it seems to me, and a system that can take care of itself.

Another fact that occurs to me as having great force is, that while it is, of course, an additional trouble to these gentlemen to make the entry, and while this law is subject, as all other revenue laws are, to this suggestion, that revenue officers may abuse it, yet so long as this system of a tax on domestic spirits exists, so long as we have so many of these spurious imitations of foreign spirits, it seems to me that this system is one which is quite as much for the benefit and protection of these gentlemen, who deal solely in genuine foreign spirits, as for the protection of anybody else; because it enables them to have a record of the spirits they have dealt in, and that if at any time the allegation is made that they have been dealing in domestic spirits which are fraudulent, and have not paid the tax, why, they have a record kept for themselves to which they can refer from time to time, to show precisely what spirits they have been dealing in, and have been sending out; and, therefore, it seems to me that, properly looked at, is a law which is for their benefit and protection decidedly, and ought to be looked at in that view.

I ought to add another thing, that my views on this subject are strengthened by this fact: that while this special tax on wholesale liquor dealers applies to anyone who sells or offers for sale foreign or domestic spirits or wines, that the provision in this section in regard to this case, applies only to spirits, and does not apply to wines.

With the views I have suggested, it seems to me that the government intended to have a record of both foreign and domestic spirits, for the purpose of indicating the facts in regard to them.

Case No. 15,666.

UNITED STATES v. McDANIEL.

[4 Cranch, C. C. 721.] [1]

Circuit Court, District of Columbia. March Term, 1836.

LARCENY OF BANK NOTE—INDICTMENT.

In an indictment under the penitentiary act for the District of Columbia (section 9) for stealing a bank-note, it is not necessary to state that it is a bank-note "for the payment" of money or other valuable thing.

[Cited in Arnold v. State, 52 Ind. 285.]

The indictment charged the defendant [George McDaniel] with stealing "one bank-note of the Union Bank of Georgetown, to the amount of five dollars, and of the value of five dollars; one bank-note of the Union Bank of Georgetown, to the amount of ten dollars, and of the value of ten dollars, &c., stating several others, in like terms. The defendant, having been found guilty, moved, in arrest of judgment, by his counsel, Mr. Brent and Mr. Bradley, because, in the indictment, it is not averred that the bank-notes were "for the payment of money or other valuable thing." By the 9th section of the penitentiary act for the District of Columbia of March 2, 1831, it is enacted: "That every person convicted of feloniously stealing, taking, and carrying away any goods or chattels, or other personal property of the value of five dollars, or upwards, or any bank-note, promissory note, or other instrument of writing, for the payment or delivery of money, or other valuable thing, to the amount of five dollars or upwards, shall be sentenced to suffer imprisonment and labor," &c.

The defendant's counsel cited 3 Chit. 973a, 974; Starkie, Cr. Pl.; U. S. v. Barry (in this court, at November term, 1835 [Case No. 14,530]).

THE COURT (CRANCH, Chief Judge, doubting,) refused to arrest the judgment, being of opinion that the averment that it was a bank-note of the Union Bank of Georgetown, to the amount of ten dollars, of the value of ten dollars, was sufficient, and that it was not necessary to aver it to be a bank-note "for the payment of money to the amount of ten dollars."

Verdict, "Guilty."

THE COURT sentenced the defendant to three years' imprisonment and labor in the penitentiary, but he was pardoned by the president of the United States.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,667.

UNITED STATES v. McDONALD et al.

[8 Biss. 439.] [1]

Circuit Court, E. D. Wisconsin. March, 1879.

RESISTING OFFICER—SEIZURE OF PROPERTY—GOOD FAITH OF OFFICER—JOINT INDICTMENT —SEPARATE ACTS.

1. Under section 5398, Rev. St., it is as much an offense to resist an officer who is attempting to execute process, as it is to resist him when serving or attempting to serve process. Holding attached property after seizure is part of the execution of the process; and if a person resists or obstructs an officer thus holding property, he commits the statutory offense.

2. Resistance to a special custodian of such property, who is employed by a United States marshal—though such custodian be not a regularly appointed sworn deputy—is resistance to the marshal within the meaning of the statute.

3. If an officer holding a writ of attachment against A., seizes the property of B., and in so doing acts in good faith, and on reasonable grounds for believing the ownership of the property to be in A., resistance by B. to service or execution of the process is unlawful.

4. But if an officer with process against A. seizes the property of B., and in so doing acts in bad faith, or without reasonable grounds for believing the ownership of the property to be in A., forcible assertion of the right of possession by B., would not constitute the offense named in the statute.

5. Willful resistance and obstruction of an officer defined.

6. Where two or more persons are jointly indicted for the commission of one and the same offense, to convict all, it must appear that the offense wholly arose from the joint act of all.

7. Such an indictment is not sustained by proof merely that each of the defendants separately committed at different times a separate and distinct offense of the character charged, with which the other defendants were not connected, and in which they did not participate.

[This was an indictment against John McDonald and others.]

G. W. Hazleton, U. S. Dist. Atty.

Finch & Barber, W. W. D. Turner, and George B. Goodwin, for defendants.

DYER, District Judge (charging jury). This is an indictment which charges the defendants with the offense of obstructing and resisting an officer of the United States in the service and execution of process issued from the United States circuit court.

The allegations of the indictment in brief are, that on the 11th day of January, 1879, one Isaac Cook, a citizen of Missouri, commenced in the circuit court of the United States, for this district, an action against the defendant McDonald, to recover a certain demand, in which action a summons was issued and placed in the hands of the marshal for service; that a writ of attachment commanding the marshal to attach the property of the defendant, McDonald, was also issued in the same action, out of and under the seal of the court, the plaintiff in the action having made or procured to be made the affidavit and undertaking required by law in such cases; and that the writ of attachment, affidavit and undertaking were placed in the hands of the marshal in connection with the summons for service and execution.

That on or about the 16th day of January, the marshal caused and directed two of his deputies to proceed to the premises of the defendant, McDonald, to serve the summons and execute the writ of attachment, and that they did, on or about that day, serve the summons, and attach and take into custody a certain quantity of personal property, found by them upon the premises of the defendant, McDonald, as his property by virtue of the writ of attachment; that an inventory and appraisal of the attached property were made, and that thereafter copies of the writ of attachment, affidavit, undertaking and inventory were served upon McDonald; that at the time of such service, one of the marshal's deputies, W. A. Nowell, made an arrangement with the defendant, McDonald, to leave the attached property on his premises, in the charge and custody of one Jas. H. Hubbard, who was there present at the special request and by direction of deputy Nowell, and that such arrangement was agreed to by the defendant McDonald, and was acted upon by the deputy; and that the property was left upon the premises in the special care and custody of Hubbard.

It is then alleged that on or about the 22d day of January, Hubbard was specially authorized and directed by the marshal to keep possession of the attached property, and to protect the same, and his letter of authority and direction is set out in the indictment. It is further charged, that on the 27th day of January, the attached property being in the care and custody of the marshal in the manner alleged the defendants did forcibly, willfully and unlawfully take and remove a large portion thereof from the possession of the marshal and of Hubbard, against and in defiance of the authority of the marshal, and so it is charged that they did knowingly and willfully obstruct, resist and oppose an officer of the United States in serving and attempting to serve and execute a mesne process of the United States, namely, the writ of attachment before mentioned.

This is the first count of the indictment. The second count, in more abbreviated form, charges the commission of a similar offense by the defendants on the 27th day of January, and is understood to be but a repetition of the charge contained in the first count.

The statute of the United States, upon which this indictment is based, is as follows: "Every person who, knowingly and willfully, obstructs, resists or opposes any officer of the United States in serving or attempting to serve or execute any mesne process or warrant, or any rule or order of any court of the United States, or any other legal or judicial writ or process" (Rev. St. § 5398), shall be

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

punished in the manner prescribed by the statute. And the question is, Have the defendants committed this offense, and so made themselves amenable to the penalties of this law?

There has been put in evidence the judgment roll in the case of Cook v. McDonald, consisting of the summons, complaint, writ of attachment, affidavit, undertaking, inventory of attached property, returns of service, affidavit of no answer and judgment. The return of service on the summons, shows that it was served on the defendant, McDonald, on the 14th of January, 1879, and the return upon the writ of attachment shows that the marshal on the same day attached the personal property described in the inventory, and that on the 16th day of January, the writ of attachment, affidavit, undertaking and copy of inventory were served on McDonald as the defendant in that action.

This writ of attachment was mesne process within the meaning of the statute referred to, and was such process as the statute makes it an offense for any person to knowingly and willfully obstruct or resist an officer of the United States in serving or attempting to serve or execute.

The point has been made, that if any levy by attachment upon the property in question was made, it was completed prior to the 27th of January when the alleged resistance to the officer transpired, and that if such levy was so made and the writ was returned to the clerk of the court before the 27th of January the acts complained of, if proven, did not constitute obstruction of or resistance to the officer in the service or execution of the writ, and consequently that there can be no conviction. My view of that question is this: The statute makes it an offense to knowingly and willfully obstruct, resist or oppose any officer of the United States in serving or attempting to serve or execute any mesne process. Now, even though the attachment levy was made on the 14th day of January, and before the alleged acts of resistance, and even though the writ was returned to the clerk of the court before the 27th of January, if on that day the marshal was, through a special custodian, holding the property under a levy, so previously made, this was part of the process of executing the writ, and obstruction of or resistance to the officer at that time, if otherwise unlawful would be as much an offense under the statute, as if such obstruction or resistance had transpired while the attachment levy was actually in progress or before the writ was returned. The offense does not consist alone of obstructing or resisting an officer in serving or attempting to serve process. It includes as well obstruction of or resistance to an officer in attempting to execute the writ, and holding attached property after levy and seizure is part of the execution of the process.

* * * * * * * *

It is claimed further that there was no resistance by the defendants to any officer of the United States; that the person resisted, one Hubbard, was not such officer, and that the alleged resistance to him, was not a resistance to the marshal or to any of his regularly appointed deputies. The prosecution has given evidence tending to show that the first proceedings upon the writ of attachment were had under the immediate direction and supervision of the marshal's deputies; that after the alleged levy by attachment had been made, Hubbard was employed by one of these deputies to assume custody and care of the property; and that on the 22d day of January, 1879, the marshal wrote and sent to Hubbard a letter directing him to hold the property.

It is not claimed that Hubbard received directly from the marshal any other authority to act than this letter, nor that he was a regularly appointed sworn deputy marshal under the statute. And as I have said, it is contended in behalf of the defendants, that resistance to him, if any be shown, was not resistance to the marshal nor to any officer of the United States. I do not concur in this view of the law. It is not and cannot be required or expected, that the marshal shall be always personally present when process is served or is in course of execution, or that he can always exercise personal and immediate control over property that may have been seized upon such process. He has the right and power to designate and appoint a custodian of such property and to hold it by the hand of such custodian, and when it has been seized and is so held, it is, in law, in the charge and custody of the marshal, and in such case, the marshal, as an officer of the United States, by the hand of such custodian so appointed, executes the writ. I therefore instruct you, that if the property in question had been previously attached by the marshal's deputies, and if subsequently Hubbard received from the marshal the letter of authority before referred to, and was on the 27th of January, 1879, acting thereunder, then any obstruction of or resistance to Hubbard as such custodian, was obstruction of and resistance to the marshal, and proof to that end is competent under the allegations of the indictment.

The defendants have given evidence tending to show that on the 9th day of December, 1878, the defendant, McDonald, executed to the defendant, Mrs. La Mothe, his two promissory notes, one for $4,961.84, and one for $5,000, and that to secure the payment of such notes he, at the same time, executed to her a mortgage upon the property in question, which mortgage contains the usual provisions to be found in chattel mortgages and was duly filed in the office of the town clerk. Testimony has also been offered tending to show, that at some time subsequent, but prior to the service of the summons upon the defendant McDonald, in the case of Cook against him, Mrs. La Mothe took possession of all of this property under her mortgage, and that the defendant, Thompson, was her

agent for the purpose of taking and maintaining such possession, and it is claimed upon the evidence that she was in actual personal possession of the property by virtue of provisions of the mortgage giving her such right, at the time of the alleged levy under the attachment. Upon such a state of facts, if proved, it is contended that the marshal and his deputies or agents had no right to take the property from her upon the writ of attachment, and that such facts, if established, constitute an absolute defense to the charge contained in this indictment. Prima facie the mortgage was valid and the burden of showing it to be invalid, falls upon the party attacking it; and there is no doubt, if the mortgage in question was executed in good faith to secure a bona fide indebtedness, and if Mrs. La Mothe by herself or her agent did in like good faith take actual possession of the property under the mortgage, so that she had the absolute and exclusive dominion and control over it as against the mortgagor, that she thereby became vested with the legal title to the property. Touching the principal question involved, there is some apparent diversity of opinion in the authorities. Courts of equal respectability seem to differ somewhat upon it, and we must therefore adopt such rule as best commends itself to our own judgment as most consonant with right and with sound legal principles. And after reflection upon the question, I have come to the conclusion that the true rule to lay down in a case of this character is this: that if the marshal and his deputies in their proceedings under the writ of attachment acted in good faith and on reasonable grounds for believing that the property in question was the property of the defendant, McDonald, then the defendants had no right to resist the officers in serving or attempting to serve or execute the process. But if the mortgage in question was in good faith executed to secure a bona fide indebtedness, and if Mrs. La Mothe in good faith took actual possession of the property under the mortgage, so that she had the absolute and exclusive control and dominion over it, and if the marshal or his deputies acting for him, did not act in their proceedings under the writ of attachment, in good faith, or acted without reasonable grounds for believing that the property was in fact owned by the defendant, McDonald, then the forcible assertion of possession by Mrs. La Mothe and any duly authorized agent of hers acting in good faith for her, as against the officer, would not be such resistance to the officer as the statute was intended to make a punishable offense.

In considering and passing upon the alleged possession of the property in question by Mrs. La Mothe, you should determine whether such possession was taken in good faith under her mortgage, and whether it was or not an actual, exclusive possession free from any right of the mortgagor to control it. It must have been a possession taken in good faith, and so taken as to give her the absolute, exclusive and unqualified dominion and control over it, to make it such possession as under the mortgage would carry the title. And in determining this question of possession, the jury should consider all the facts and circumstances attending and surrounding the transaction, such as the situation of the property, its character, its continuance upon the premises of the mortgagor, the occupation of the premises by both the mortgagor and mortgagee as their common home, the necessity for constant care of and attention to the property, the season of the year, and the facilities for or difficulties of removing the property. In short, all of the circumstances are to be looked into with a view of determining whether the property passed under the mortgagee's absolute and exclusive control and possession.

In considering whether the marshal and his deputies acted in good faith in their alleged attachment of the property, you will inquire whether, as the property was situated at the time, and in the light of all facts and circumstances then brought to their knowledge, the question of property right was so far doubtful that the officers acted without wantonness, recklessness or oppression and on reasonable grounds for believing the property to be that of the defendant, McDonald. It is not disputed that they knew of the mortgage, and of Mrs. La Mothe's claim to possession and ownership. Reasonable grounds for believing the property to be that of the defendant, McDonald, would be such grounds as would influence the judgment of a careful and prudent man in his own affairs, and, in considering whether the officers acted in good faith and on reasonable grounds for believing that the property belonged to McDonald, you are again to consider the nature and situation of the property, the relation of the parties thereto, any information they had as to the mortgage and Mrs. La Mothe's claim to possession, the apparent character of such alleged possession, in short, as before stated, all the facts and circumstances of the situation as they were then presented.

To constitute the offense of resisting an officer as is apparent from the language of the statute, the resistance or obstruction or opposition must be willful. The term willful as here used, means something more than intentional. It is to be here considered as implying an evil intent without justifiable excuse. An act willfully done, means that it is done wrongfully, in bad faith, with evil intent; that it is done with a bad purpose. and as an act which a person of reasonable knowledge and ability must know to be contrary to duty. This is its sense when used in a criminal statute like this. So, to establish the offense charged, it must be shown that the alleged acts of resistance, if any were committed, were done knowingly and willfully, that is, with evil intent or purpose and as acts known to be contrary to duty.

The words of the statute are, "obstructs, resists or opposes any officer of the United

States." Resistance to an officer is to oppose him by direct, active and more or less forcible means. It means something more than to hinder, or interrupt, or prevent, or baffle, or circumvent. The gist of the offense of resisting is personal resistance of the officer, that is, personal opposition to the exercise of official authority or duty by direct, active, and in some degree forcible means. State v. Welch, 37 Wis. 196. The statute, however, does not limit the offense to resistance alone, it includes also willful acts of obstruction or opposition; and to obstruct is to interpose obstacles or impediments, to hinder, impede or in any manner interrupt or prevent, and this term does not necessarily imply the employment of direct force, or the exercise of direct means It includes any passive, indirect or circuitous impediments to the service or execution of process; such as hindering or preventing an officer by not opening a door or removing an obstacle or concealing or removing property. State v. Welch, supra. So, that, although to establish a case of resistance, it must appear that the party was personally present and personally resisting, liability to the charge of obstructing may be established by showing that the party has willfully caused any impediment or hindrance to be interposed, though not personally present and actively co-operating in the direct act of obstructing. It should appear, however, that such party in some manner and at some stage aided or abetted the act of obstructing.

Thus understanding the meaning and significance of these terms as used in the statute, and what constitutes the statutory offense, you will be prepared to consider and determine in the light of the evidence whether the defendants are guilty of having knowingly and willfully obstructed, resisted or opposed the service of or the attempt to serve or execute the writ of attachment in question.

* * * * * * *

Now, gentlemen, if you find from the evidence that there were no acts committed, by which the service or attempt to serve or execute the writ of attachment was obstructed, resisted or opposed, that of course would dispose of the case and your verdict in such case should be for the defendants.

If you find that though certain acts were done by the defendants, they did not knowingly and willfully obstruct, resist or oppose the service or the attempt to serve or execute the writ, then your verdict should be in their favor.

* * * * * * *

Again, if you find from the evidence, that the mortgage in question was in good faith executed to secure a bona fide indebtedness, and that the defendant, Mrs. La Mothe, by herself, or by an agent in good faith appointed for the purpose, in like good faith took, and was holding at the time alleged, the actual possession of the property—that is, the absolute and exclusive control and dominion over it—and if you further find that the marshal and his deputies acting for him did not in their proceedings under the writ of attachment, act in good faith, or acted without reasonable grounds for believing that the property was in fact owned by the defendant, McDonald, then your verdict as to Mrs. La Mothe and as to the defendant Thompson, if he was her agent and acted only as such, should be in their favor. In this connection I should say that I do not think the mortgage or any possession of the property thereunder by Mrs. La Mothe, would be a justification for resistance to or obstruction of the officer by the defendant McDonald, if he committed any acts of resistance or obstruction.

On the other hand, if you find from the evidence that the mortgage in question was not made in good faith, or that the defendant, Mrs. La Mothe, did not in good faith take and was not at the time alleged, holding such possession of the property as I have defined, by virtue of the mortgage, and if you further find that the defendants did on the day stated, knowingly and willfully obstruct or resist, or oppose the service or the attempt to serve or execute the writ of attachment, then your verdict should be in favor of the United States.

Further, if you find from the evidence that the mortgage in question was in good faith made as claimed by the defendants, and that the defendant, Mrs. La Mothe, did in good faith take and at the time alleged hold possession of the property under the mortgage, and if you furtner find that the marshal and his deputies acted in good faith in their proceedings under the writ of attachment, and with reasonable grounds for believing that the property was in fact owned by the defendant, McDonald, and if you further find that the defendants did on the day stated, as charged, knowingly and willfully obstruct, or resist or oppose the service or attempt to serve or to execute the writ of attachment, then your verdict should be for the United States.

* * * * * * *

The indictment in this case is against three defendants and charges the commission by them of the same offense. They are indicted together for one offense. To convict all of them, it is therefore essential that it be shown that the offense committed, if any offense is proven, wholly arose from the joint act of all. All of the defendants cannot be convicted unless each and all of them were parties to the commission of one and the same offense. An indictment in the form of this, is not sustained by proof merely that each of the defendants has separately committed at different times a separate and distinct offense of the kind charged here, with which the other defendants were not connected and in which they did not participate, and which did not spring from the joint act of all. So, if you are satisfied from the evi-

dence, applying to it the legal principles I have stated, that the offense charged was committed, and that it arose wholly from the joint act of all of the defendants, then your verdict may be guilty as to all, otherwise, not.

If you find that the offense charged was committed by any two of the defendants and that it arose wholly from the joint act of such two defendants, and that the other defendant is not guilty, then your verdict may be guilty as to the two defendants, and not guilty as to the other.

So, if you should find one of the defendants guilty of the offense charged and that two of the defendants are not guilty, you may convict the one and acquit the others.

If you should find that each of the defendants did commit the offense of obstructing or resisting the officer, but that the offense so committed by each defendant was complete in and of itself, and was entirely separate and distinct from that committed by any other defendant, neither defendant in the commission of his or her offense having any connection with the offense of any other defendant, so that each complete offense was wholly independent of, and disconnected from, each other offense, then there could be no conviction of any of the defendants. So, if you should find that any two of the defendants committed the offense charged, such offense arising from the joint act of the two defendants, and if you should also find that the other defendant also committed the offense of obstructing or resisting the officer, but that the offense committed by the two defendants was wholly separate and distinct from that committed by the one defendant, the two defendants having no connection with the offense committed by the one defendant, and the one defendant having no connection with the offense committed jointly by the two defendants, then there could be no conviction. For as before indicated, it is the law, that when two or more persons are indicted together for an offense of this character and for one and the same offense proof of entirely separate, distinct, unconnected offenses committed by each, will not sustain a conviction.

Verdict for defendants.

Case No. 15,668.

UNITED STATES v. MACDONALD et al.

[2 Cliff. 270;[1] 26 Law Rep. 558.]

Circuit Court, D. Maine. April Term, 1864.[2]

COLLECTOR OF CUSTOMS — EMOLUMENTS — PUBLIC STOREHOUSES—EXPENSES.

1. Provision for commissions and allowances to collectors of customs was first made by the act of July 31, 1789 [1 Stat. 29].

2. New regulations were instituted by the acts of February 18, 1793 [Id. 316], of March 2, 1799 [Id. 627], and by the compensation act.

3. A maximum rate of compensation was first prescribed by the act of the 30th of April, 1802 [2 Stat. 172].

4. By the act of May 7, 1822 [3 Stat. 693], collection districts were divided into two classes, viz. the enumerated and non-enumerated ports.

5. The emoluments of collectors of the non-enumerated ports might reach the sum of four thousand dollars; but the collector, after deducting the necessary expenses incident to his office, was required to pay any excess over that sum into the treasury of the United States.

[Cited in Donovan v. U. S., 23 Wall. (90 U. S.) 399.]

6. The maximum rate of compensation allowed to collectors of the non-enumerated ports was three thousand dollars, and a similar provision relating to any excess over that sum was made, as in the first-named class.

[Cited in Donovan v. U. S., 23 Wall. (90 U. S.) 399.]

7. By the act of March 3, 1841 [5 Stat. 432], collectors were required to include in their quarter-yearly accounts all sums received by them for storage of goods in the public storehouses for which a rent was paid beyond the rents paid by the collectors.

[Cited in U. S. v. Lawson, 101 U. S. 166; U. S. v. Ellsworth, Id. 173.]

8. In U. S. v. Walker, 22 How. [63 U. S.] 313, the conclusion of the court is, that the compensation of a collector of one of the enumerated ports may be six thousand dollars, and of the other class five thousand.

9. Collectors are charged with the custody and control of all merchandise warehoused under the laws of the United States, and it is their duty to demand and receive of the importer the appropriate expenses of such custody and control.

10. The sums thus demanded and received by collectors are storage within the meaning of the act of March 3, 1841, whether the goods were deposited in stores leased by the United States, or other storehouses.

11. Whether deposited in public or other storehouses, the goods were to be kept under the joint locks of the inspector and importer, and such storehouse then became a public storehouse for the purpose of securing goods under the warehouse system.

12. Under the act of March 3, 1841, as well as by all the subsequent acts of congress upon the same subject, private bonded warehouses are public storehouses, and collectors are authorized to retain, as part of their emoluments, sums received for the deposit of importations in such bonded warehouses, under the same provisions applicable to public storehouses.

13. When deposit of merchandise was made in public or private stores, appropriate expenses were to be paid by the party making the deposit; and the whole proceedings show that the goods in both cases alike were regarded as warehoused in the public stores of the United States.

This was an action of debt [by the United States against Moses Macdonald, Levi Morrell, Samuel Jordan, and Harrison J. Libbey], and the case came before the court upon the demurrer of the plaintiffs to the rejoinder of the defendants. The declaration was drawn upon the bond of the first-named defendant as collector of the customs for the district

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[2] [Affirmed in 5 Wall. (72 U. S.) 647.]

of Portland and Falmouth in the state of Maine, and the other defendants were his sureties. He was appointed collector prior to the 20th of January, 1858, and between that day and the 18th of April, 1861, received for storage of merchandise in bonded warehouses the sum of $6,281, as appeared by his quarter-yearly account, regularly rendered to the department. The pleadings showed that the moneys so received accrued, were accounted for quarter-yearly, and were retained by the collector, by virtue of his office, for storage of merchandise in bonded warehouses. The rejoinder also alleged that the moneys so received and retained by the collector in any one year did not exceed the sum of two thousand dollars, and the demurrer admitted the allegation. The receipt of the money was admitted by the defendants, but they claimed that the collector lawfully retained it under the act of the 3d of March, 1841, as part of his annual compensation. The plaintiffs denied his right to retain the amount, or any part of it, insisting that collectors cannot lawfully retain as compensation any portion of the moneys accruing from the storage of merchandise deposited in private bonded warehouses.

G. F. Talbot, U. S. Dist. Atty.

The provisions of the fifth section of the act of March 3, 1841, do not apply to the storage of goods in private bonded warehouses. There were in fact no bonded warehouses established or known to the law at the time this act went into operation. See 3 Stat. 469; 4 Stat. 591. Two classes of stores were known to the law at the time of the passage of the act of March 3, 1841, namely, public stores and other than public stores. By the act of March 3, 1841, the source from which the surplus storage is received, and which the collector is allowed to retain, is confined to the public warehouses. 5 Stat. 432. There is no judicial construction by which the strict terms of this statute have been enlarged. The act of August 6, 1846, limited the power of collectors to levy the proper duties upon warehoused goods and the expenses incurred. 9 Stat. 53. The instructions of the secretary of the treasury could not enlarge this power. The instructions to carry into effect this act define the second class of warehouses to be stores in the possession of an importer, in his sole occupancy, which he may desire to place under the customs lock in addition to his own lock. Of the expenses of this kind of warehousing, storage is not reckoned as an item, because for the privilege of storing dutiable merchandise himself, the importer was required to pay monthly to the collector of the port, a sum equivalent to the pay of the officer necessarily in attendance, or one half the amount which would accrue as storage on the goods so stored, at the regular rates charged at stores, class No. 1. It is not necessary to consider whether the act of 1846 authorized the collector to exact from the importer anything for storing his own goods, since the sum exacted does not exceed the pay of the officer required to be in constant charge of the goods. Storage is not to be incurred, of course, when the importer undertakes to do his own storing. The purpose of the regulations of 1849 was to "separate the government as much as possible from the business of storage"; and it would be strange if these same regulations should prescribe a system of collecting storage when the law of 1846 only authorized the collection of "expenses." The same arguments apply to class 3; i. e. "stores in the occupancy of persons desirous to engage in the business of storing dutiable merchandise under the warehousing act." The same election is given whether to pay the officer in charge or the amount of half-storage at the public stores. See sections 28 and 34, Act 1846; 9 Stat. 53.

From the acts of congress prior to March 28, 1854, and the treasury regulations thereon, it is thus plain that storage as such, in bonded or private stores, could not be considered as the consideration of a legal exaction of imposts from the owner of warehoused goods. None of the provisions of the first or third section of the act of March 28, 1854 [10 Stat. 270], warrant the levying of storage in private bonded warehouses. Nothing is named as chargeable in either class of warehouse, but expenses. When the private warehouses come to be named, storage is not mentioned as an element of expense; it is only provided that the "labor" must be performed by the owner, "at the expense of the owner." By the second section storage is named with labor and other charges on unclaimed goods. In the fourth section storage is mentioned as due in the public stores, labor as performed in the private stores. The treasury regulations of July 5, 1855, and February 1, 1857, under this act, speak of storage as an incident of expense only in the public stores. See section 542, Treas. Reg. Feb. 1, 1857. Since the government carefully framed statutes to separate itself from storage in bonded warehouses, nothing accrued to the government for such storage, and there was no fund from which the collector could retain any sum. The whole argument of defendants is based upon the collector's claim to a share of the "government storage," under the fifth section of the act of 1841. The defendants' replication then is in law wholly insufficient:

First. Because they do not therein say that the storage, which the said Macdonald retained by virtue of his said office of collector, was storage of goods, wares, and merchandise stored in the public warehouses, the storage of goods in the bonded warehouses, which were in fact and in law private stores, not being an expense to the United States, from the sum paid to reimburse which, the said collector might retain any part; nothing being in fact claimed by, due, or paid to the

United States for said storage under the law.

Second. Because they do not therein say, that said storage accrued for goods, &c., stored in the public warehouses for which a rent is paid.

Third. Because they do not therein say, that said sum, &c., as aforesaid retained, was retained from an excess of rent and storage received by the United States for storage of goods, &c., in the public warehouses, for which a rent is paid beyond the rent paid by the said collector.

Fourth. Because they do not therein say, that said sum of $6,281 so retained by the said Macdonald, by virtue of his said office, was retained in instalments of not more than $2,000 for any one year.

Every one of these clauses and limitations in the act of March 3, 1841, is vital and essential. To sustain his claim under the act, the late collector of Portland must bring himself within each of them. To argue that public warehouse means private warehouse, is as hopeless a task as to argue that in a statute public way means private way, or public lands means lands of individual proprietors, or public buildings the houses of citizens. To argue thus, is to disregard the sound maxim that, where one class of several distinct classes is named in a statute or contract, the term becomes one of express exclusion as to other classes of the same general thing or subject. The classification of warehouses as public and private warehouses is not the new suggestion of a distinction for the purposes of the argument, but is a distinction that has been kept up in all the legislation of congress, in all the instructions of the treasury department, and in all the practice of the revenue service from the first establishment of warehousing.

It is equally requisite that storage to be claimed by the collector as emoluments of office must have accrued from rented stores, stores for which a rent is paid by the collector, and also that it must have accrued from an excess of storage received above rent paid, and that in no one year it has exceeded the sum of $2,000. If collectors at each of the ports are permitted to take as emoluments the storage of dutiable goods in private bonded warehouses, where such storage does not exceed $2,000 per annum, then the government, contrary to what may be considered in the warehouse acts as a stipulation between itself and the importer, is exacting an extra duty on foreign merchandise simply to increase the emoluments of collectors.

The inequity of the collector's claim to retain this money becomes more apparent from these considerations. The service rendered in the case of dutiable goods warehoused in bonded stores is either storage, or the care of the customs officer in charge. But the storage is not to be charged to the merchant, who, under the law permitting it, stores his own goods at his own expense. Only such care of the inspecting officer can be actually charged as expense incurred, although it may be called half-storage for the purpose of fixing its maximum rate. Now to whom ought this in equity to be paid? Not to the collector; for under the law he has rendered no service and incurred no responsibility whatever. For the entry, and various papers and records, required to be made to legalize the warehousing of goods in private stores, he has been remunerated by fees fixed by law. The custody of the goods is in another officer, whose functions are distinct from his. Not to the inspector himself; for he is the employee of the government, and is paid by his regular per diem wages at a rate fixed by law, and because he is prohibited by section 73 of act of March 2, 1799, from taking any extra fee for official service; but clearly to the United States, who, through the inspector employed and paid by them for such service, by the charge and care of the warehoused goods, maintain the security of their lien as the law permits.

The storage which collectors are properly allowed to receive is the excess of storage received for goods stored in the public warehouses above the rent paid by the collectors. In this case the collector appropriated the gross receipts of storage, and also a fund accruing from another source than storage in the public warehouses. The plain provision of the act of March 3, 1841, under which the fund is claimed by defendant is, that in fixing the rates of storage on dutiable warehoused goods, in such of the public warehouses as are rented to the government, if an excess of storage accrues above rents paid, the government donates such excess, when not over $2,000 per annum, to the collector.

Shepley & Dana, for defendants.

The opinion of the court in U. S. v. Walker, 22 How. [63 U. S.] 299, decided three questions: First. Whether the tenth section of the act of the 7th of May, 1822, was repealed by any subsequent act; and if not then, Second. What is the true construction of the act of the 3d of March, 1841? Third. Whether by the true construction of the two acts the defendant had a right to retain to his own use the moneys received from rent and storage, to an amount not exceeding $2,000? The court decided that every collector had the right to retain to his own use storage receipts to the amount and in the manner before indicated. Upon the third question they decided that collectors of the non-enumerated ports may receive as an annual compensation $3,000, and that they are entitled in addition, to whatever sums they may receive for rent and storage not exceeding $2,000; but the excess beyond that sum they must pay into the treasury.

The pleadings admit that the money claimed by the government was received and re-

tained as storage. Then the question is, do receipts for storage of merchandise in bonded warehouses come within the fifth section of the act of March 3, 1841. This act is the first and only one requiring an account from collectors of money received for storage. The aim of the fifth section was to require an account of the storage "heretofore retained by collectors for their own use." To answer the design, the remedy must be regarded as broad as the mischief. It applies to all storage receipts; makes no exclusion. It covers as well the sums of money received for deposit of merchandise in the public stores, under the laws of April 20, 1818, and July 14, 1832, as the receipts (in futuro) from the newly rented stores under the sixth section of the act of 1841. Unless this construction is accepted, and this scope allowed to the provisions in relation to accounting for storage receipts, the mischief intended to be remedied will be but imperfectly met, as there would be entire failure of law, requiring an account, except for the newly rented stores, prescribed in 1841. Not only the storage received from the stores owned by the United States would be unprovided for, but all sums due and accruing for rent and storage, for stores previously rented in the name of collectors, and still occupied as depositories, pursuant to the provisions of law.

Nothing in the language of the fifth section authorizes its limitation in this manner. It provides, in the words following, "that every collector shall render a quarter-yearly account under oath," &c., of all sums of money received "for rent and storage of goods," &c., "which may be stored in the public storehouses, and for which a rent is paid, beyond the rent paid by the collector." The natural meaning of this language, and its only purpose, was to require an account "for the rent and storage of goods," &c., which may be stored in the public storehouses, &c., beyond the rents paid, &c., viz. an account for the profits of custom-house storage. It was not intended to, and it does not, define the place, or prescribe the mode, in which the privilege may be enjoyed. The reference made to the public storehouses, is designatory of the merchandise allowed to be stored, and should not be regarded as characteristic or distinctive of storage, or the sums of money for which an account is required to be rendered quarter-yearly.

If merchandise, and not storage, is designated, the mischief intended to be remedied is completely met, for the enactment relating to all goods allowed by law to be deposited in the public storehouses is both retrospective and prospective. Storage, whenever and wherever derived, comes within its meaning, and must be accounted for in obedience to its requirements.

"Where the interpretation of the revenue laws and regulations are involved, great weight is given to the practice of the government under them, as the contemporaneous construction of their intent and meaning." Relying upon this familiar principle for statutory construction, the practice of the department is most confidently appealed to in support of our last proposition. Both in the enumerated and unenumerated ports, the sources from which storage is derived are the same. The collectors in each class of ports are under the same responsibility, and perform the same duties. Since the law of 1854, no stores have been leased by the government for the deposit of merchandise in course of importation, except for the use of the United States appraisers, at any port where a bonded warehouse existed. The public stores, previously rented for the purpose of storing warehoused or unclaimed goods, were expressly discontinued by the seventh section of the law of 1854. This section directs, "that all leases of stores now held by the United States for the purpose of storing warehoused or unclaimed goods, shall, on the shortest period of termination named in said lease, be cancelled, and that, after the 1st of July, 1855, no lease shall be entered into by the United States, at any port where there may exist a private bonded warehouse. While the government is thus prohibited from renting stores for the purpose of warehousing goods, the law of 1854 provides for custom-house storage by substituting bonded warehouses for the stores previously rented. These bonded warehouses are public stores, being subject, as to rates of storage, to regulation by the secretary of the treasury. The use of these newly constituted depositories for duty-paying importations, was the same as the public storehouses existing anterior to their establishment; and like them, they were appropriated exclusively to receiving foreign merchandise. Importations deposited in the bonded warehouse, were at the sole and exclusive risk of the owner or importer. The new system increased the care and responsibility of collectors, occasioned by the storing of merchandise. The privilege granted to the importer was enlarged. All the rights of the government under previous laws were carefully preserved, and further guaranties provided. The possession of the merchandise was as complete under the new system as the old; in the bonded warehouse, as in the store owned or leased by the government. Cargo taken possession of by the collector might be stored in any private bonded warehouse authorized by the act of 1854, "and all charges for storage" were required to be paid by the claimant in the same manner as though the merchandise had been stored in any public warehouse owned or leased by the United States. See Clark v. Peaslee [Case No. 2,831]. "The meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive on which the legislature proceeded, from the end in view, or the purpose de-

signed." The aim of the law of 1841 was to require an account of money received as storage from the public storehouses; and as it has been already shown that "bonded warehouses," under the existing laws, are "public storehouses," under the rule laid down, this money must be taken to be within the meaning of that act, notwithstanding its precise words.

In accounting for storage receipts under the law of 1841, the court have decided that in no case was a collector obliged to pay into the treasury anything "but the excess beyond the $2,000," that being the sum allowed as additional compensation. The storage receipts, under the subsequent statute of 1854, coming within the meaning of the former statute, this rule for accounting necsarily obtains. Under it, storage received from bonded warehouses, is allowed as an element of additional compensation for the collectors of the enumerated ports, and it should not be denied to the collectors of the non-enumerated. Previous to 1841, there being no law requiring collectors to account for receipts for storage, they retained whatever sum was not required to pay the rent of the occupied stores, to their own use, and it went to swell the amount of their annual compensation. "To correct that supposed abuse, the act of the 3d of March, 1841, was passed." Congress has passed no subsequent law on the subject; and unless the construction is sustained, that the storage received from bonded warehouses comes within the meaning of this act, the treasury will be in the same dilemma which occasioned its enactment. That is, there will be found no law, requiring collectors to account for receipts of storage from the occupants of private bonded warehouses.

The various suggestions submitted in support of the defendant's claim to retain the money to his own use, demanded by the government, are believed to successfully establish the following conclusive propositions: (1) That the payments by occupants of bonded stores, under the warehouse laws, are storage. (2) That this storage comes within the meaning, and is recognized by the fifth section of the act of March 3, 1841, the true construction of which allows "every collector" an additional compensation out of the profits of custom-house storage. (3) That if these payments are not recognized in the act of 1841, there is no law requiring an account, and they may be retained by collectors. (4) That either view is equally fatal to the demand of the government, and judgment should be given in favor of defendant.

CLIFFORD, Circuit Justice. Unaided by former decisions, the question is one which would require an elaborate consideration, but it is not a new question, as will presently more fully appear. U. S. v. Walker, 22 How. [63 U. S.] 303.

Collectors receive a prescribed sum called salary, but their principal compensation is now, and always has been, derived from certain enumerated fees, commissions, and allowances authorized by acts of congress. Provision for such fees, commissions, and allowances was first made by the act of the 31st of July 1789, which also allowed to those officers certain proportions of fines, penalties, and forfeitures. 1 Stat. 64.

Those regulations were not satisfactory, and new ones were enacted in their place, as appears by the act of the 18th of February, 1793, and by the act entitled "An act to regulate the collection of duties on imports and tonnage," passed on the 2d of March, 1799, and by the compensation act, passed on the same day (1 Stat. 316, 627, 786).

By those several acts collectors of the customs were required to keep accurate accounts of all fees and official emoluments by them received, and to transmit the accounts to the comptroller of the treasury; but the collectors were allowed to retain to their own use, the whole amount of emolument derived from these sources, without any limitation. A maximum rate of compensation was first prescribed by the act of the 30th of April, 1802, as appears by the third section of that act. 2 Stat. 172.

Whenever the annual emoluments of any collector, after deducting the expenses incident to the office, amounted to more than $5,000, the directions and requirements of the act were, that such collectors should account for the surplus, and pay the same into the treasury of the United States. Collection districts were, by the act of the 7th of May, 1822, divided into two classes, usually denominated the enumerated and the non-enumerated ports. 3 Stat. 693.

Emoluments of collectors for the enumerated ports, under the provisions of that act, might reach the sum of $4,000; but the ninth section of that act provided, that whenever the emoluments should exceed that sum in any one year, the collector, after deducting the necessary expenses incident to his office, should pay the excess into the treasury for the use of the United States. The maximum rate of compensation allowed to collectors of the non-enumerated ports, under the provisions of that act, from all sources of emolument therein recognized and prescribed, is $3,000; and the tenth section of the act contains a provision similar to that contained in the ninth section, requiring collectors of the non-enumerated ports to account for, and pay over, the excess beyond the amount allowed as the maximum rate of compensation. Under those provisions, collectors might receive the maximum rate of their offices, if the office produced that amount, after deducting the necessary expenses incident to the office, from all the sources of emolument recognized and prescribed by the then existing laws. No one could receive more than the maximum rate,

and his lawful claim might be much less, according to the amount of business transacted in the office. The compensation of collectors remained without any material change from that time until the act of the 3d of March, 1841, was passed, which is the act that gives rise to the principal question in this case. 5 Stat. 432.

Every collector is required by the fifth section of that act to include in his quarter-yearly account, among other things, all sums received by him for rent and storage of goods, wares, and merchandise stored in the public storehouses, for which a rent is paid beyond the rents paid by the collector.

The supreme court held in U. S. v. Walker, 22 How. [63 U. S.] 313, that, if from such accounting the aggregate sums received from that source exceeded $2,000, the collector, by the true construction of the section, was directed and required to pay the excess into the treasury as part and parcel of the public money. But the same court held, that when the sums so received from that source did not in the aggregate exceed $2,000, the collector might retain the whole amount to his own use, and that in no case was he obliged to pay into the treasury anything but the excess beyond the $2,000. The conclusion of the court, therefore, was, and it was an unanimous conclusion, that the compensation of a collector of one of the enumerated ports may be $6,000, and that the compensation of a collector of one of the other ports may be $5,000, according to the state of the importations, and the amount received from rent and storage. The port of Portland is one of the non-enumerated ports. Consequently the collector here may receive as an annual compensation for his services the sum of $3,000 from the sources of emolument recognized and prescribed by the act of the 7th of May, 1822, provided the office yields that amount from those sources, after deducting the necessary expenses incident to the office, and not otherwise; and in addition thereto, he is also entitled to whatever sum or sums he may receive for rent and storage, provided the amount does not exceed $2,000, but the excess beyond that sum he is required by law to pay into the treasury as part and parcel of the public money. None of these principles are attempted to be controverted by the plaintiffs, nor can they be with any success, as they are definitely settled by the unanimous opinion of the supreme court. The plaintiffs admit that such is the fact, but insist that no storage as such, within the meaning of the fifth section of the act of the 3d of March, 1841, ever accrued to the United States from dutiable merchandise warehoused in any other than the public stores mentioned in the sixth section of the act of the 14th of July, 1832, entitled, "An act to alter and amend the several acts imposing duties on imports." 4 Stat. 591.

They do not controvert the fact that the collector is charged with the custody and control of all merchandise warehoused under the laws of the United States, nor that it is his duty to demand and receive of the importer the appropriate expenses of such custody and control; but the argument is, that none of the sums demanded and received for such expenses are properly denominated storage, unless the merchandise was warehoused and deposited in stores leased by the United States. According to their theory, a collector must account for all sums received for such expenses, in every case under the act of the 3d of March, 1841; but unless the same were received on account of merchandise deposited in a public store held under lease, he must in all cases pay the whole amount into the treasury of the United States. But the construction is one that cannot be sustained. First, because if the act of the 3d of March, 1841, applies at all to the case, that part of it that provides for the appropriation of the money so received, is as applicable to the case as that which requires the account. Secondly, because storehouses other than those owned or leased by the United States, were recognized in the acts of congress prior to the act authorizing collectors to retain to their own use all sums received for storage, not exceeding $2,000 in any one year. Wines and distilled spirits, under the act of the 20th of April, 1818, might be warehoused "in such public or other storehouses" as might be agreed upon between the importer and surveyor, or officer of inspection of the revenue for the port where the wines or spirits were landed. 3 Stat. 469.

Whether deposited in the public or other storehouses, the goods were to be kept under the joint locks of the inspector and importer, and no delivery of the same could be made unless the duties were first paid or secured, nor without a permit in writing, under the hand of the collector and naval officer of the port. Custody and control were the same, whether the merchandise was deposited in a public or other storehouse; and whether in the one or the other, the expenses of safe-keeping were to be paid by the importer or his agent. The importer and the proper revenue officer might agree upon a storehouse, as a place of deposit, other than one owned or then held under lease by the United States; but as soon as the merchandise was deposited in the storehouse, and the locks of the inspector were affixed to the doors, it became a public storehouse for the purpose of securing the goods under the warehouse system. Suppose it to be so, still it is contended by the United States that the provisions of the act of the 3d of March, 1841, do not apply to the bonded warehouses described in the rejoinder of the defendants, because they insist that the bonded warehouses therein mentioned were private bonded warehouses, and they contend that pri-

vate bonded warehouses are not public storehouses within the meaning of that act, which in point of fact is the only question of any importance in the case. As before remarked, they concede that the act applies to public stores, and that collectors are in all cases required to account quarter-yearly, but insist that they are not authorized to retain any portion of the amount, because private bonded warehouses are not public storehouses. The instructions of the department require collectors to account quarter-yearly for all sums received as storage, whether the merchandise was warehoused in the stores held under lease, or in bonded warehouses, or in any other storehouses authorized to be used for that purpose, as the depositories of imported dutiable merchandise; and unless the act of the 3d of March, 1841, authorizes that requirement, it is difficult to see on what law the instructions are based. But it is not necessary to place the decision upon that ground, because I am of the opinion that private bonded warehouses are public storehouses within the meaning of that act, and of all the subsequent acts of congress upon the same subject. Entry for warehousing, under the act of the 6th of August, 1846, was required to be made in writing, in such form, and to be supported by such proof, as should be prescribed by the secretary of the treasury. Deposit of the merchandise might be made in the public stores, or in other stores, to be agreed on by the collector or chief revenue officer of the port, and the importer, owner, or consignee; but the requirement was that the collector should first take possession of the merchandise, and such other stores as were to be secured in the manner provided in the prior act, for the deposit in public warehouses of wines and distilled spirits, to which reference has already been made. Appropriate expenses were to be paid by the party making the deposit; and the whole proceedings show that the merchandise in the latter as well as in the former case is regarded as being warehoused in the public storehouses of the United States. 9 Stat. 53.

All of the sums in controversy in the case of U. S. v. Walker, 22 How. [63 U. S.] 299, had been received under that law, and yet the distinction set up in this case never occurred to the supreme court. On the contrary, the court in that case expressly held that the collectors of the non-enumerated ports might receive, in addition to the $3,000 authorized by the act of the 7th of May, 1822, whatever sum or sums they might receive for rent and storage, provided the amount did not exceed $2,000 in any one year; and directed the charges against the defendant in that case to be settled in accordance with those principles. Considered in that point of view, that case is decisive of the question under consideration. The demurrer, it should be remembered, admits whatever is well pleaded. The rejoinder not only alleges that the whole sum sued for accrued for storage between the 20th of January, 1858, and the 18th of April, 1861, inclusive, but that the sum accrued was accounted for quarter-yearly, and retained by the collector by virtue of his office, and that the sum accrued was so accounted for and retained, in sums not exceeding $2,000 in any one year. Taking the admission as made, then it is clear that the only practical question is, whether the bonded warehouses described in the rejoinder are public storehouses within the meaning of the provisions of the act of the 3d of March, 1841, under which the same accrued, and was received, accounted for quarter-yearly, and retained. Argument upon that question is unnecessary in this court, as the question was recently presented to the court in another district of the circuit, and after full consideration was directly decided in the affirmative. Clark v. Peaslee [supra.]

A repetition of the reasons there given for the conclusion is unnecessary, as the opinion has been published, and is in the hands of the parties in this case. Half-storage had been demanded by the collector in that case, and the same had been paid by the merchant under protest. Having made the payment under protest, he brought suit to recover back the money, upon the ground that private bonded warehouses were not public storehouses within the meaning of the several acts of congress authorizing the warehousing of dutiable merchandise. Able counsel were heard in support of the proposition, but upon full consideration, this court held otherwise, and gave judgment for the collector. Both parties, I believe, have acquiesced in that judgment as a correct exposition of the law of the case, and until reversed by the supreme court, I must adhere to that opinion. Demurrer overruled. Rejoinder adjudged good. Judgment for the defendants.

[On writ of error this judgment was affirmed by the supreme court. 5 Wall. (72 U. S.) 647.]

Case No. 15,669.

UNITED STATES v. McDONALD.

[1 Cranch, C. C. 78.] [1]

Circuit Court, District of Columbia. March Term, 1802.

MARSHAL'S FEES—IMPANELLING JURY.

The marshal is entitled to a fee of ninety pounds of tobacco for impanelling a jury in a criminal prosecution.

Ca. sa. for a fine.

Mr. Mason, attorney for the United States, moved the court to strike out of the execution, the charge of ninety pounds of tobacco for a fee to the marshal for impanelling a jury; contending that the charge was not

[1] [Reported by Hon. William Cranch, Chief Judge.]

authorized by law. But the court rejected the motion, after considering the act of congress of 27th Feb., 1801, concerning the District of Columbia (1 Stat. 103); and the act of 28th Feb., 1799, providing compensation for the marshals, &c. (1 Stat. 624); and the act of assembly of Maryland, Nov. 1799, c. 25, regulating officer's fees.

Case No. 15,670.

UNITED STATES v. McDONALD et al.

[3 Dill. 543.] [1]

Circuit Court, E. D. Missouri. 1876.

CRIMINAL LAW — CONSPIRACY—JOINDER OF OFFICIALS AND PRIVATE PERSONS—MERGER.

1. Under the legislation of congress, an officer of the internal revenue, named as such in the indictment, cannot be jointly indicted for a conspiracy to defraud the revenue, with private persons.

2. The doctrine of merger does not apply to misdemeanors; and the present indictment held good, though it charged a completed offence, in addition to a conspiracy to commit it.

[Cited in U. S. v. Gardner, 42 Fed. 830. Distinguished in U. S. v. Van Leuven, 62 Fed. 68.]

Certain internal revenue officers were joined in an indictment with distillers, charged with a conspiracy to defraud the government of the tax on distilled spirits. The indictment [against John McDonald and others] alleged not only a conspiracy, but also in executing it that a completed offence had been committed. Demurrer was interposed, and was brought on for hearing before MILLER, Circuit Justice, and TREAT, District Judge. It was objected, in support of the demurrer, that officials and private persons could not be joined, and that the offence of conspiracy was merged.

Mr. Dyer, Dist. Atty., and Mr. Henderson, for the United States.

Mr. Krum et al., for defendants.

MILLER, Circuit Justice, in deciding the demurrer, in substance said: We think the objection, as to the joinder of officials and private persons, is well taken. This difficulty, however, may be avoided by the action of the district attorney. The Revised Statutes clearly make the offence committed by a class of one character, widely different from the same offence, when committed by persons of another character. Section 3169 declares that where the officers of the government conspire to defraud the United States of the internal revenue tax, they shall be sentenced to a dismissal from office; moreover, it prescribes a different and more severe punishment in the way of fine and imprisonment, than section 5440 where a private individual, and not an officer of the government, is the offender, for he is under no such special honorable obligation to protect the government, though it is, of course, a dishonorable act in anybody to cheat the government.

All the world over, those who have a trust reposed in them, are held to a more rigid accountability than others, and a violation of that trust is punished more severely when committed by them than where no such special trust is reposed. This, then, is a good indictment as against the officers of the government. It is equally a good indictment against those who are not officers; but it is not a good indictment as against both the officers and the others. It is in the power of the district attorney to cure this fault by dismissing the indictment either as to the officers or as to the private individuals; but he can have no trial as to all the parties upon the indictment as it now stands.

District Attorney Dyer: With reference to indictment No. 667, the government will enter a dismissal as to those who are not officers, and proceed against those who are officers. The same offences charged in that indictment as overt acts committed in presence of, and as evidence of the conspiracy on the part of the distillers, form grounds for separate indictments already pending in the district court.

MILLER, Circuit Justice: The district attorney will prepare and file a paper over his own signature to that effect.

As to the question of merger: After having charged the conspiracy against all of these parties to cheat the government in various ways, and having also gone on and specified twenty or thirty distinct acts, each committed by one or by several of these parties, some of which acts are undoubtedly made felonies, the indictment concludes by charging, after all these overt acts are set out and a long history given, that all the defendants did cheat and defraud the government. So that, in fact, there is a charge of conspiracy to cheat and defraud the government, accompanied by a charge that the defendants—all the defendants—did cheat and defraud the government; and it is a fact that the law provides distinctly for the punishment of these two distinct offences. An examination of the authorities, as careful as we have been able to make, leads to a strong inference that the minor offence of misdemeanor may, in certain cases, be merged in the higher offence of felony. Yet it is everywhere conceded that one misdemeanor cannot be merged in another misdemeanor; and this, upon the ground that, by the division of offences into felonies and misdemeanors, the higher grade swallows up the lower—that which constitutes a part of it—and subjects the person that perpetrates it to a more rigorous punishment. The doctrine of merger, therefore, does not apply as between misdemeanors themselves, although one may be a step in the progress of the execution of another. Consequently we hold that this indictment is not subject to the doctrine of merger, and that it is a

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

good indictment, provided that the district attorney avoids the difficulty I have mentioned, by electing to dismiss, either as to the officers, or as to those who are not officers. Ordered accordingly.

Case No. 15,671.

UNITED STATES v. McDOWELL.

[4 Cranch, C. C. 423.] [1]

Circuit Court, District of Columbia. March Term, 1834.

KEEPING HOUSE OF ILL FAME—WITNESS.

1. Upon an indictment for keeping a house of ill fame, evidence may be given of the ill fame of its inhabitants, but the witness will not be required to disclose their names.

2. The attorney of the United States will not be permitted to prove that his own witness is a woman of ill fame.

Indictment [against Sally McDowell] for keeping a bawdy-house.

Mahala Tennison, a witness for the United States, had stated that she had lived in the house, and was asked what other women lived there.

W. L. Brent, the defendant's counsel, objected to the question, and cited Hodgkins' Case, Russ. 619.

THE COURT (nem. con.) overruled the objection, but refused (CRANCH, Chief Judge, doubting) to require the witness to disclose the names of the women; because the persons, if named, would have no means of repelling the infamy which it would cast upon them.

Mr. Key, for the United States, then called a witness to prove that his witness, Mahala Tennison, was a woman of ill fame.

Mr. Brent, for the defendant, objected, and THE COURT (nem. con.) sustained the objection.

Verdict, "Not guilty."

Case No. 15,672.

UNITED STATES v. McDUELL.

[5 Cranch, C. C. 391.] [1]

Circuit Court, District of Columbia. March Term, 1838.

KEEPING DANGEROUS DOG—INDICTMENT—SCIENTER.

1. Quære, whether, in an indictment for keeping a large dog of a fierce and furious nature, and suffering him to go at large in and about the public streets, &c., to the terror of the people and common nuisance, it is necessary to allege a scienter?

2. It is an indictable offence at common law, to incite, provoke, and encourage a fierce and dangerous dog to bite and tear a cow.

Indictment [against Henry McDuell] containing two counts: First, for keeping a "certain large dog of a very fierce and furious nature," and suffering the same "to go unmuzzled and at large in and about the public streets and highways in the county," "by reason whereof the good citizens of the United States," "were in great danger and hazard of being bit, maimed, and torn by the said dog, and of losing their lives, to the great damage, terror, and common nuisance of the good people of the United States, at the county aforesaid, passing and repassing; to the evil example of all others, and against the peace and government of the United States." The second count charged that the defendant, "at the county aforesaid, in the public streets of the said county, did unlawfully incite, provoke, and encourage a certain fierce and dangerous dog to bite a certain cow belonging to one Thomas Stanley, and the said cow seriously and severely to maim and tear, whereby the said cow was much injured, to the great damage of the said cow, and to the great damage of the said Thomas Stanley, and against the peace and government of the United States."

Mr. Hoban, for the defendant, moved to quash this indictment for want of a scienter; and cited Starkie, Cr. Pl., and Mason v. Keeling, 12 Mod. 332, and 3 Bl. Comm. (Am. Ed.) 154, in notes.

Mr. Key, contra, cited 3 Chit. 643.

THE COURT (nem. con.) refused to quash the indictment, but told Mr. Hoban they would hear the question again, upon a motion in arrest of judgment, if the defendant should be convicted.

Verdict, not guilty on the first count; but guilty on the second count.

Motion in arrest of judgment, overruled. Fined $20 and cost.

Case No. 15,673.

UNITED STATES v. McENTEE.

[10 Chi. Leg. News, 41; 2 N. W. (O. S.) 13; 23 Int. Rev. Rec. 368.]

District Court, D. Minnesota. Oct., 1877.

PUBLIC LANDS—CUTTING TIMBER—WHEN ALLOWED.

[Cited in U. S. v. Murphy, 32 Fed. 379, to the point that a settler on public lands has no authority to cut down and sell timber for other than purposes of cultivation.]

This is an action to recover the value of a large quantity of timber cut by the defendant [Thomas McEntee] upon a section alleged to be a portion of the public lands, and removed therefrom. It is claimed by the defendant that the timber was cut upon a tract of land entered by him under the act of congress approved May 20. 1862 [12 Stat. 392], entitled "An act to secure homesteads to actual settlers upon the public domain." It was undisputed that the timber was cut down upon land for which defendant had paid the entry fee and made an affidavit required by the law, April 12, 1874. There was some evidence tending to show that the timber was cut for

[1] [Reported by Hon. William Cranch, Chief Judge.]

purposes of traffic and sale alone. The court was requested to instruct the jury, "that if the defendant had made an affidavit and paid the entry fee for the land, he was entitled to cut and remove the timber thereon for any purpose whatever."

Wm. W. Billson, U. S. Dist. Atty.

J. J. Egan and Wm. W. Irwin, for defendant.

NELSON, District Judge (charging jury). I decline to give the instruction requested. The defendant has attempted to show that the timber was cut upon his homestead, as the land was being put in suitable condition for cultivation, so that the title thereto might be perfected. If you so find, the verdict must be against the government; but if you should determine the proof showed the cutting and removal were for sale and traffic alone, then a question is presented—an important one—what rights and privileges are secured by virtue of an entry under the homestead law before a patent has issued? Until 1862, congress had passed no general law offering the public domain in a limited quantity to any person, the head of a family, who would cultivate and make a permanent home thereon. Pre-emption laws securing the rights to enter land by purchase at a minimum price fixed per acre, had been enacted and donation laws applicable to particular states had been passed, but the liberal policy of offering homesteads had not before been extended to all persons. There can be no doubt it is a wise policy and beneficial in its results. The quantity of land is limited to 160 acres, the patent is not issued until after proof of residence upon, and cultivation for the term of five years, and no land acquired under the act shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor. If there is an actual change of residence or abandonment of the land for more than six months at any time before the expiration of the five years, the land entered will revert to the United States.

It becomes an important question, then, if the homestead entry is wholly timber land, or nearly so, as in this case, what rights and privileges with reference to the timber are acquired. Congress, by this law, intended to foster and encourage the agricultural interests of the country and induce settlement of the vast vacant public domain, and secure permanent homes of settlers. Everything necessary for the cultivation of the land and manifesting an intention to make permanent occupancy and bona fide settlement, is legitimate and proper to be done. The land can be cleared and timber sold, if cut down for the purpose of cultivation; but if sale and traffic is the only reason for severing the timber, and it is not done with a view of improving the land, the intentions of the lawgiver are subverted. Each case, however, must depend upon its attendant circumstances, and it is a question of fact for a jury to determine whether the person claiming the benefit, is acting in good faith. I know of no better rule to apply than the one adopted in the case of a lessee for life or a term of years, charged by his lessor with waste. If the land leased is wild and uncultivated and wholly covered with timber, the lessee would undoubtedly have a right to cut so much as may be necessary for cultivation, and the extent to which timber may be cut is always a question of fact for a jury. Unless there is something exceptional, which does not appear, the defendant could not sever all timber and sell it, without making some provision for fences and other neccessities of his farm, and such as he does cut and sell must be incident to the improvement of the land. A little common sense and good judgment applied to the facts in this case will give a correct verdict.

The jury found for the plaintiffs.

Case No. 15,674.

UNITED STATES v. McFARLAND et al.

[1 Cranch, C. C. 140.] [1]

Circuit Court, District of Columbia. Nov. Term, 1803.

RIOT—UNLAWFUL INTENT—WHEN FORMED.

To constitute a riot it is not necessary that the unlawful intention should have existed at the time of meeting; but if having met for a lawful purpose, the unlawful intent be afterwards formed and executed, it is sufficient; and the unlawful act is evidence of the unlawful intent.

Indictment for a riot.

Mr. Youngs, for the defendant, moved to instruct the jury that if they are satisfied that the defendants did not assemble together with the intention to do an unlawful act, but met together innocently, and that the present affray happened without a previous intention formed by the defendants to do a wrong, then they must find for the defendants, on the 1st count—and on the 2d find only those guilty who are proved to have committed the unlawful act. 1 Hawk. 294; Act Va. Rev. Code, 33, 39.

THE COURT instructed the jury that if they found that an injury was done by four persons to the person or property of another, accompanied with force, it is not necessary to prove that they should have met with an intention to commit such acts in order to constitute a riot, but that without having met with such previous intention, if such acts are committed, arising from an intention or agreement formed after their meeting, they amount to a riot, and the jury may judge of and infer their intention or agreement from the acts committed.

As to the 2d part of the prayer, THE COURT said that all who were aiding, assist-

[1] [Reported by Hon. William Cranch, Chief Judge.]

ing or giving countenance, were equally guilty on the count for an assault and battery.

[See Case No. 15,675.]

Case No. 15,675.

UNITED STATES v. McFARLANE et al.

[1 Cranch, C. C. 163.] [1]

Circuit Court, District of Columbia. June Term, 1804.

RIOT—ASSAULT AND BATTERY—INDICTMENT—PUNISHMENT.

Riots are punishable at common law, notwithstanding the statute. Riot, and assault and battery, may be joined in the same indictment. Imprisonment is not a necessary part of the punishment of riot at common law. Upon an indictment for riot at common law, the term of imprisonment is not to be assessed by the jury.

Indictment at common law for a riot, and for assault and battery. [See Case No. 15,674.]

Mr. Youngs moved in arrest of judgment. 1st. Because an indictment will not lie for a riot, the act of assembly of Virginia, of December 4, 1786 (Old Rev. Code, pp. 38, 39), having prescribed a certain mode of prosecution. 2d. Because assault and battery cannot be joined with riot, in the same indictment. They require separate and different kinds of punishment. Riot is of a higher nature, and the assault and battery merges in the riot. The assault and battery may be justified, but the riot cannot. 1 Hawk. 294, 295. 3d. Because no specific, unlawful act is charged for which they assembled. "With intent to disturb the peace," is too general. Reg. v. Gulston, 2 Ld. Raym. 1210.

Mr. Mason, contra. 1st. Riot is a common law offence. The statute is cumulative. See the last clause, which speaks of persons legally convicted otherwise than in the manner directed by that act. The statute of Virginia is copied from the English statute of 19 Hen. VII. c. 13; it has no negative words, and, therefore, the common law mode of trial is not taken away. 2d. As to the second point, no authority is cited, and no reason is given, why assault and battery, and riot, should not be joined in the same indictment, in separate counts. 3d. The third objection, is, that the indictment charges no specific unlawful act for which they assembled. The charge is, "to disturb and break the peace of the United States." This is a specific and sufficient charge. Stubbs, Crown Cir. Comp. 386, 391.

Mr. Youngs, in reply, cited U. S. v. Simms [1 Cranch (5 U. S.) 25] in the supreme court of the United States, February, 1803. If you indict under a statute, you must bring the case within the statute, and cannot resort to the common law.

Motion overruled, and judgment entered.

It was a question, whether, under the last section of the act, the jury were to ascertain the term of imprisonment, and whether imprisonment were not a necessary part of the punishment; but the court decided both in the negative. Quære—see Old Rev. Code, p. 287, §§ 3, 4; Id. pp. 33, 38; Id. p. 112, § 26.

Case No. 15,676.

UNITED STATES v. McGILL.

[4 Dall. 426; 1 Wash. C. C. 463.]

Circuit Court, D. Pennsylvania. Oct. Term, 1806.

JURISDICTION OF FEDERAL COURTS — MURDER ON HIGH SEAS.

[In order to give to the United States courts jurisdiction of a prosecution for murder as having been committed on the high seas, the death, as well as the mortal stroke, must have happened on the high seas.]

This was an indictment [against James McGill] for the murder of Richard Budden, containing three counts: 1st. Charging the murder to have been committed on the high seas. 2d. Charging it to have been committed in the haven of Cape Francois. 3d. Charging the mortal stroke to have been given on the high seas, and the death to have happened, on shore, at Cape Francois. The indictment was founded on the 8th section of the penal law (Act April 30, 1790 [1 Stat. 113], which provides "that if any person, or persons, shall commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder, &c. every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death." Upon the evidence it appeared, that the prisoner was mate of the brig Rover, of which Richard Budden, the deceased, was master; that, on the 3d of May, 1806, while the brig lay in the harbour of Cape Francois, the prisoner gave the deceased a mortal stroke, with a piece of wood; that the deceased, languishing with the wound, was taken on shore, alive, the next morning; and that he died the day subsequent to that, on which he was taken on shore.

After a defence on the merits, the prisoner's counsel (Ingersoll and Joseph Reed) objected, in point of law, that the death, as well as the mortal blow, were necessary to constitute murder; and that both the death and the blow must happen on the high seas, to give jurisdiction to this court, under the terms of the act of congress. These positions were elaborately argued; and the following authorities were cited in support of them: 1 Hale, P. C. 425b; Id. 427; 4 Coke, 42b; 2 Hale, P. C. 188; 3 Hawk. P. C. 188, 333; Plow.; Leach, 432, 723; 4 Bl. Comm. 303; 2 Coke, 93; 2 Inst.; 1 Hawk. P. C. 187; East, P. C. 365; 1 Leon. 270; Cro. Eliz. 196.

The attorney of the district premised, that

[1] [Reported by Hon. William Cranch, Chief Judge.]

he was aware of this objection to the jurisdiction; but, as there was no judicial decision upon it, he thought it a duty to bring it before the court, for an authoritative opinion; and with that view alone, he meant to submit all the ideas which he could suggest, in maintenance of the jurisdiction. He then considered the case:

1st. On the constitution and laws of the United States, which provide for the definition and punishment of felonies and murders on the high seas; Const. art. 1, § 8, which provide for the locality of the commission of the offence, to vest a federal jurisdiction; [1 Stat. 113,] §§ 3, 8, which provide for the place and tribunal of trial; Const. art. 3, § 2, which provide as to the manner of trial; Const. art. 3, § 2, and which provide, generally, that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. Thus, for every crime, whether of common law, or admiralty, jurisdiction, a common law trial is provided by jury, and a place of venue prescribed; but two things are to be remarked: 1st. That there is no definition of the offence of murder (for instance) with a reference to the common law, any more than to the civil law, which is the law of the admiralty. 2d. That locality, as to the commission of a crime, is no further limited, than as it respects the high seas, or is out of the jurisdiction of any particular state.

2d. On the law of England. The case would be within the constable and marshal's jurisdiction, at civil law, if the blow and death were both in a foreign country; or the blow in a foreign country, and the death in England: 13 Rich. II. c. 2; 3 Inst. 48; 1 Wood. Lect. 139; 4 Bl. Comm. 268. If the blow was on sea, and the death on land, neither the common law, nor the admiralty, have jurisdiction; nor is it a case under the statute of 28 Hen. VIII. "for the murder was not committed on the sea;" but the constable and marshal may try it, by 13 Rich. II. Offences committed upon the seas, or in other haven, river or creek, are triable, by jury, in a county to be mentioned in a commission, issued under 27 Hen. VIII. c. 4; 28 Hen. VIII. c. 15. The 33 Hen. VIII. c. 23, provides that "persons, who have been examined before the king's council upon treasons, murders, &c. may be tried in any shire to be named in a commission," in whatever shire, or place, within the king's dominions, or without, such offence was committed. The 35 Hen. VIII. c. 2, provides for the trial of treasons, committed out of the realm, by a jury, in the king's bench, or before commissioners. The 11 & 12 Wm. III. provides for the trial of offences in the colonies. The 2 Geo. II. c. 21, provides for the trial of a murder where the mortal blow is given on the sea, or out of England, and the death happens in England; or where the blow is given in England, and the death happens abroad. Then, the only statute that provides for the case of the mortal blow and the death both happening abroad, is the 33 Hen. VIII. c. 23, under the modification of a previous examination, &c. before the king's council: and in England the admiral's civil law jurisdiction, in criminal cases, is at an end.

3d. On the civil law. The judicial power of the United States, extending to all cases of admiralty and maritime jurisdiction, ex vi termini, embraces criminal, as well as civil, cases; and the civil law, being the law in such cases, it is to be considered, what the civil law defines to be murder, as to the act and the place The intent, not the event, constitutes the crime. Dig. ad Leg. Corn. l. 14; Dom. Civ. Law, 211. The crime is committed, if there be the will to commit it. Id. In France, where the criminal law is founded on the civil law, if a man strikes another, with intent to kill him, he is punished with death, though the man is not killed. 1 Denizart. 585. The doctrine of all the cases cited for the prisoner, which requires the stroke and the death to be in the same county, or within the same jurisdiction, is an incident to the common law trial by jury; where the jury of the vicinage are supposed to know the fact of their own knowledge; but it clearly has no application, in cases where the jury does not come at all from the place, where any part of the crime was committed. "Cessante ratione, cessat et ipsa lex." The civil law being considered, therefore, as the law of the admiralty, remains under the general delegation of judicial power to the courts of the United States, unless it is expressly modified by statute. So far as respects the definition of murder, it has not been modified; but the constitution and acts of congress do provide, that all crimes, wherever committed, shall be tried by jury; and that crimes committed on the high seas, shall be tried in the district where the offender is apprehended, or into which he may first be brought. [1 Stat. 113],[1] § 8. If, indeed, this reasoning fails, it may be doubted, whether even congress can amend the law, so as to reach cases, like the one under consideration, notwithstanding the power "to define and punish piracies and felonies committed on the high seas;" Const. art. 1, § 8, since the crime of murder (adopting the common law definition) must be consummate, in the mortal act and consequence, within the jurisdiction of the United States.

Before WASHINGTON, Circuit Justice, and PETERS, District Judge.

[1] After the death of Capt. Budden, McGill had been sent on board the Mediator, an armed vessel, there put in irons, and carried to Baltimore, from which place (without any arrest, or process issuing against him) he voluntarily came to Philadelphia; and surrendered himself for trial to a magistrate. The attorney of the district suggested, that, having been first brought into the district of Maryland, his trial must be there. But, after argument, Judge Peters decided that the provisions of the act were in the alternative: and that McGill, being first apprehended in Pennsylvania, might be tried, and ought to be tried, here.

PETERS, District Judge. It is a general rule with me, to abstain from the exercise of jurisdiction, whenever I doubt my authority to exercise it. On the present occasion, it is not necessary to give an opinion, whether the present is a case of admiralty and maritime jurisdiction, upon the general principles of the admiralty and maritime law; for, confining myself to the 8th section of the penal act, I find sufficient to decide, that, at all events, it is not a case within the jurisdiction of this court. The court can only take cognizance of a murder committed on the high seas; and as murder consists in both the stroke and the consequent death, both parts of the crime must happen on the high seas to give jurisdiction; not one part on the high seas, and another part in a foreign country.

WASHINGTON, Circuit Justice (charging jury). The point, principally, urged by the prisoner's counsel, is so clear, that it can receive little elucidation from argument. The offence, of which we have cognizance, is murder committed on the high seas. Now, murder is a technical term, of known and settled meaning; and, when used by the legislature, it imports the same, as if they had said, that the court shall have jurisdiction, in a case of felonious killing upon the high seas. We have no doubt, therefore, that the death, as well as the mortal stroke, must happen on the high seas, to constitute a murder there.

But the more important question is, whether the present case remains unprovided for, by the laws of the United States? The judicial act gives jurisdiction to the circuit court, of "all crimes and offences, cognizable under the authority of the United States." 1 vol. 55, § 11. There are, undoubtedly, in my opinion, many crimes and offences against the authority of the United States, which have not been specially defined by law; for, I have often decided, that the federal courts have a common law jurisdiction in criminal cases: and in order to ascertain the authority of the United States, independent of acts of congress, against which crimes may be committed, we have been properly referred to the constitutional provision, that "the judicial power shall extend to all cases of admiralty and maritime jurisdiction." But still the question recurs, is this a case of admiralty and maritime jurisdiction, within the meaning of the constitution? The words of the constitution must be taken to refer to the admiralty and maritime jurisdiction of England (from whose code and practice, we derive our systems of jurisprudence, and, generally speaking, obtain the best glossary) but no case, no authority, has been produced to show, that in England such a prosecution would be sustained (independent of acts of parliament) as a cause of admiralty and maritime jurisdiction. Nor, am I disposed to consider the doctrine of the civil law, which has been mentioned, as furnishing a guide, to escape from the silence of our own code, as well as of the English code, upon the subject.

Upon the whole, therefore, I am of opinion, that the present is a case omitted in the law; and that the indictment cannot be sustained. It is some relief to my mind, however, that I have no doubt of the power of congress to provide for such a case. It is true, that it would be inconsistent with common law notions to call it murder; but congress, exercising the constitutional power to define felonies on the high seas, may certainly provide, that a mortal stroke on the high seas, wherever the death may happen, shall be adjudged to be a felony.

Upon this charge, the jury immediately acquitted the prisoner.

Case No. 15,677.

UNITED STATES v. McGILL.

[1 Hayw. & H. 59.] [1]

Circuit Court, District of Columbia. Dec. 24, 1841.

OFFICER—MISCONDUCT IN OFFICE.

A constable will be dismissed on a petition and proof of misconduct while in the exercise of the duties of his office.

Rule to show cause.

Rule on William McGill, constable, to show cause on the 22d of December, 1841, instant, why he should not be dismissed from the office of constable.

The following statement by W. Hebb, was sworn to before a justice of the peace:

That William McGill, after asking to be allowed to look at certain papers, took the papers, tore up a certain appeal bond, one of the said papers, and carried the other papers away. That he, McGill, cut loose a criminal confined and in charge of an officer while waiting to be taken to the work-house, and set the said criminal at liberty.

James Hoban, for the motion.

Mr. McGill did not appear to answer the rule.

THE COURT passed the following order: It is by the court, after hearing the testimony of witnesses and the reading of the affidavit of Mr. Hebb, ordered that William McGill be discharged from the office of constable of this court.

Case No. 15,678.

UNITED STATES v. McGINNIS et al.

[1 Abb. U. S. 120; [2] 3 Int. Rev. Rec. 83, 159.]

District Court, D. New Jersey. March Term, 1866.

CRIMINAL LAW—JOINDER IN INDICTMENT—VIOLATION OF REVENUE LAW.

1. Where two persons composing a partnership make and sign, in their partnership name,

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

[2] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

a false return to the assessor of internal revenue, they may be jointly indicted therefor.

2. Manufacturers of tobacco are not exempt from indictment for violation of the internal revenue laws. The government is not confined to proceedings in rem, but may prosecute the individuals concerned, personally.

Motion to quash an indictment.

William Reed, Charles J. Bonsell, and D. W. Sellers, for the motion.

A. Q. Keasbey, U. S. Dist. Atty.

FIELD, District Judge. This is an indictment against Silas J. McGinnis and George Mountjoy, manufacturers of tobacco, for making a false and fraudulent return under the internal revenue act. The motion is to quash the indictment. There are two classes of objections taken. The former apply only to the first count; the latter go to the whole indictment. I will consider the latter first; for if these are sufficient, the motion must be overruled, although the first count may be defective.

It is objected, in the first place, that the defendants are improperly joined in the same indictment. The general rule is that where two or more join in the commission of an offense, they may be indicted either jointly or separately. The rule is admitted. But it is said, there is an exception to it in the case of perjury, and that this, although not a case of perjury, is yet analogous to it; or, to use the language of counsel, it is "next of kin." But perjury is no exception to the rule. It is rather an illustration of it. The rule is, when the offense is joint there may be a joint indictment. But in perjury, from the very nature of the case, the offense cannot be a joint one. Nor is this peculiar to perjury. It applies as well to other offenses; such as the speaking of seditious and blasphemous words, or the publication by two booksellers of the same libel. In all these cases the offense is, from its very nature, several and not joint. But when two joined in singing a libelous song, it was held by Lord Mansfield, that they might be jointly indicted. Rex v. Benfield, 2 Burrows, 983. So if two booksellers, who are partners, publish a libel, they may be joined in the same indictment. Archb. Cr. Pl. 59.

Here the defendants are partners in the business of manufacturing tobacco, and they are indicted for making a false return to the assessor. The return is made and signed by them in their partnership name. It is their joint act; and if the return is false they have committed a joint offense, and may, therefore, be jointly indicted. I do not see how they could be indicted in any other way. It could hardly be said that the false return was the act of McGinnis alone, or the act of Mountjoy alone. It was the joint act of the firm of McGinnis & Mountjoy. There is nothing, I think, in this objection.

The other objection goes, not only to the substance of the indictment, but it strikes at the foundation of the whole prosecution. The criminal provisions of the internal revenue act, it is said, do not apply to the manufacturers of tobacco. They may be proceeded against in rem, but not by way of indictment.

I confess I was somewhat startled by this proposition. It was an entirely new idea. And I said to myself, while counsel was urging it so earnestly, can this be so? Is it possible that congress, after all the pains they have bestowed upon this act, and the repeated revisions to which they have subjected it, should have made this serious omission? If the business had been one from which little or no revenue was expected, we could better understand how congress might have overlooked it. But it is a business from which a larger amount of revenue is derived than from almost any other single source. It is a business, too, in which the temptations to fraud, and the facilities for committing it, are greater, perhaps, than in any other, owing to the fact that the duties are so high, and the articles so easily concealed. It might have been supposed, therefore, that when the criminal provisions of the act were framed, congress would have had in view, in an especial manner, the manufacturers of tobacco. And yet, we are told, they are the very manufacturers to whom these criminal provisions do not apply. You may seize their tobacco, if they happen to have any on hand, when their frauds are discovered, but they are not liable to indictment.

Let us see if this be so. Section 15 of the internal revenue act (13 Stat. 227) provides "that if any person shall deliver or disclose to any assessor or assistant assessor appointed in pursuance of law, any false or fraudulent list return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made," he shall, on conviction, be fined in any sum not exceeding one thousand dollars, or be imprisoned for not exceeding one year, or both, at the discretion of the court. And by section 82, the word "person" is made to include "partnerships, firms, associations, and corporations." Id. 258.

Section 15 would seem to be as comprehensive as language could make it, and to embrace within its scope every possible case of a false or fraudulent return. But still, it is said, it does not apply to the manufacturers of tobacco. Why? The argument, if I understand it, rests entirely upon an expression which occurs in section 11. By that section it is provided, "that it shall be the duty of any person, partnership, firm, association, or corporation made liable to any duty, license, stamp, or tax imposed by law, when not otherwise provided for, on or before the first Monday of May in each year, and in other cases before the day of levy, to make a list or re-

turn, verified by oath or affirmation, to the assistant assessor of the district where located, of the amount of annual income, the articles or objects charged with a special duty or tax, the quantity of goods, wares, and merchandise made or sold, and charged with a specific or ad valorem duty or tax," &c. 13 Stat. 225. This section simply requires yearly returns of incomes and articles subject to taxation. Yearly returns were thought to be sufficient in ordinary cases. But there were associations, and there were manufacturers, from which, it was believed, more frequent returns ought to be required, and these were to be provided for in subsequent sections. Among these were the manufacturers of tobacco. Hence the introduction of the words "when not otherwise provided for." These words do show that section 11 was not intended to apply to the manufacturers of tobacco. But how do they show that the provisions of section 15 are not applicable to them? What possible bearing or effect can they have upon the latter section? The case, then, stands thus: By section 11, yearly returns are required, unless in cases otherwise provided for. The case of manufacturers of tobacco is otherwise provided for in section 90. Monthly returns are there required of them. But by section 15, "any false or fraudulent return" is an offense, to be punished by indictment. Why does not this apply equally to the yearly returns required by section 11, and the monthly returns required by section 90, from the manufacturers of tobacco? Can any possible reason be assigned why yearly returns, if false, should be the subject of an indictment, and not monthly returns?

Such would be a fair, and, I think, a necessary construction of the act, even if section 90 did no more than provide for monthly returns by the manufacturers of tobacco. But as if to remove all doubt upon this subject, and make assurance doubly sure, there is a clause inserted in section 90, which seems to render all further reasoning unnecessary. After providing that manufacturers of tobacco shall make returns or statements to the assessor on or before the tenth day of each month, and that in case the duties are not paid within five days after demand thereof, distraint may be made for the amount thereof, with ten per cent. additional, we find these significant words: "Subject to all the provisions of law relating to licenses, returns, assessments, payment of taxes, liens, fines, penalties, and forfeitures, not inconsistent herewith, in the case of other manufacturers." [2] 13 Stat. 474.

The clause was not, perhaps, necessary, and might be deemed superfluous. And yet, it seems to have been inserted out of abundant caution, and as if to guard against just such an objection as that which has been taken. It is in effect saying, that although monthly returns, and returns of a peculiar nature, are required of the manufacturers of tobacco, they shall, nevertheless, be subject to all the provisions of the act relative to false returns, and the penalties consequent thereon, as in the case of other manufacturers.

It was intimated that by the word "penalties" in this clause, was meant pecuniary penalties, and not liability to indictment. But there are no pecuniary penalties provided for the making of false returns, otherwise than by indictment. Unless, then, manufacturers of tobacco can be proceeded against by way of indictment for making false and fraudulent returns, they are liable to no penalty whatever. Such, certainly, could not have been the intention of the act.

I am of the opinion, therefore, that the criminal provisions of the internal revenue act do apply to the manufacturers of tobacco. If I am right in this conclusion, the motion to quash must be denied, without considering the objections which have been taken to the first count of the indictment.

It was stated by the learned counsel who argued this case upon the part of the defendants, that in the state of Pennsylvania there had been no criminal prosecutions under the internal revenue act. They had been satisfied there with proceedings in rem. But in this state, such proceedings have been found in many cases to furnish a very inadequate remedy. There have been, therefore, a number of criminal prosecutions in this court. And there have been convictions, too. And it is come to be generally understood, that where individuals or associations are guilty of making false and fraudulent returns, they expose themselves, not only to seizure and forfeiture of their property, but to fine and imprisonment. To this may be owing, in part, the remarkable fact, that while New Jersey is but the sixteenth state in the Union, in point of population, there are but five that contribute so large an amount as she does to the internal revenue of the government. It is to the vigilance and fidelity of our revenue officers, and the effective manner in which the provisions of the act are carried out, that I believe this result is in some measure to be ascribed.

The motion to quash is denied.

[See Case No. 15,829.]

UNITED STATES (McGLINCHY v.). See Case No. 8,803.

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[2] In the amendment of section 90, by the act of July 13, 1866 (14 Stat. 124, 125), the words quoted in the opinion above are omitted, and the following clause inserted: "And all the provisions of law relating to manufacturers generally, so far as applicable and not inconsistent herewith, shall be held to apply to the manufacture of tobacco, snuff, and cigars."

Case No. 15,679.

UNITED STATES v. McGLUE.

[1 Curt. 1;[1] 2 Liv. Law Mag. 395.]

Circuit Court, D. Massachusetts. Oct. Term, 1851.

CRIMINAL LAW — MURDER — MALICE — INSANITY — DELERIUM TREMENS — PRESUMPTIONS.

1. A blow, with a dangerous weapon, calculated to produce, and actually producing, death, if struck without such provocation as reduces the crime to manslaughter, is deemed by the law malicious, and the killing is murder.

2. The accused must be presumed to be sane till his insanity is proved.

[Cited in Perkins v. Perkins, 39 N. H. 169. Quoted in Carter v. State, 12 Tex. 500.]

3. It is not every kind or degree of insanity which exempts from punishment. If the accused understood the nature of his act; if he knew it was wrong and deserved punishment, he is responsible.

[Quoted in Parsons v. State, 81 Ala. 577, 2 South. 872; Spencer v. State, 69 Md. 46, 13 Atl. 814. Cited in Hovey v. Hobson, 55 Me. 283. Quoted in Cunningham v. State, 56 Miss. 269. Cited in State v. Lewis (Nev.) 22 Pac. 248. Quoted in Carter v. State, 12 Tex. 500; State v. Harrison, 36 W. Va. 747, 15 S. E. 988.]

4. Experts are not allowed to give their opinions on the case, where its facts are controverted; but counsel may put to them a state of facts, and ask their opinions thereon.

[Cited in The Clement, Case No. 2,879.]

[Cited in Rush v. Megee, 36 Ind. 76; Guetig v. State, 66 Ind. 105; Fairchild v. Bascomb, 35 Vt. 414. Cited in brief in State v. Hayden, 51 Vt. 301.]

5. If a person suffering under delirium tremens, is so far insane as not to know the nature of his act, &c., he is not punishable.

[Cited in Beasley v. State, 50 Ala. 149. Quoted in Carter v. State, 12 Tex. 500. Cited in State v. Robinson, 20 W. Va. 733.]

6. If a person, while sane and responsible, makes himself intoxicated, and, while intoxicated, commits murder by reason of insanity, which was one of the consequences of intoxication, and one of the attendants on that state, he is responsible.

[Cited in Hopt v. People, 104 U. S. 633.]

[Cited in Upstone v. People, 109 Ill. 178. Cited in note in O'Herrin v. State, 14 Ind. 422. Cited in Goodwin v. State, 96 Ind. 556; Spencer v. State, 69 Md. 47, 13 Atl. 816; People v. Rogers, 18 N. Y. 17; Evers v. State, 31 Tex. Cr. R. 318, 20 S. W. 748; State v. Robinson, 20 W. Va. 737. Quoted in Carter v. State, 12 Tex. 500.]

7. The law does not presume insanity arose from any particular cause; and if the government asserts that the prisoner was guilty, though insane, because his insanity was drunken madness, this allegation must be proved.

This was an indictment [against James McGlue] for the murder of Charles A. Johnson, first officer of the bark Lewis, of Salem, by the second officer of the bark. One count alleged the offence to have been committed on the high seas, and another in a bay within the dominions of the Imaum of Muscat, a foreign prince or sovereign. The facts, so far as they are necessary to raise the questions of law, appear in the charge to the jury.

Mr. Lunt, U. S. Dist. Atty.

R. Choate and Mr. Northend, for the prisoner.

Before CURTIS, Circuit Justice, and SPRAGUE, District Judge.

CURTIS, Circuit Justice (charging jury). The prisoner is indicted for the murder of Charles A. Johnson. It is incumbent on the government to prove, beyond a reasonable doubt, the truth of every fact in the indictment, necessary, in point of law, to constitute the offence. These facts need not be proved beyond all possible doubt. But a moral conviction must be produced in your minds, so as to enable you to say that, on your consciences, you do verily believe their truth. These facts are in part controverted, and in part, as I understand the course of the trial, not controverted; and it will be useful to separate the one from the other. That there was an unlawful killing of Mr. Johnson, the person mentioned in the indictment, by means substantially the same as are therein described; that the mortal wound, immediately producing death, was inflicted by the prisoner at the bar; that this wound was given, and the death took place on board of the bark Lewis, a registered vessel of the United States, belonging to citizens of the United States; that Johnson was the first, and the prisoner the second, officer of that vessel, at the time of the occurrence; that the vessel at that time was either on the high seas, as is charged in one count, or upon waters within the dominion of the Sultan of Muscat, a foreign sovereign, as is charged in another count; and that the prisoner was first brought into this district after the commission of the alleged offence;—do not appear to be denied, and the evidence is certainly sufficient to warrant you in finding all these facts. They are testified to by all the witnesses. It is not upon a denial of either of these facts that the defence is rested; but upon the allegation, by the defendant, that, at the time the act was done, he was so far insane as to be criminally irresponsible for his act. And this brings you to consider the remaining allegation in the indictment which involves this defence. It is essential to the crime of murder that the killing should be from what the law denominates malice aforethought; and the government must prove this allegation. But it is not necessary to offer evidence of previous threats, or preparation to kill, or that there was a previously premeditated design to kill.

These things, if proved, would be evidence of malice, and proof of this kind is one of the means of sustaining the allegation of malice. But, besides this direct evidence, of what is called in the law express malice, malice may also be inferred, or implied, from the nature of the act of the accused. If a per-

[1] [Reported by Hon. B. R. Curtis, Circuit Justice.]

son, without such provocation as the law deems sufficient to reduce the crime to manslaughter, intentionally inflicts, with a dangerous weapon, a blow calculated to produce and actually producing death, the law deems the act malicious, and the offence is murder. The law considers that the party meant to effect what was the natural consequence of his act; that if the natural consequence of his act was death, he meant to kill; and if he so intended, in the absence of such provocation as the law considers sufficient to account for that intent, from the infirmity of human passion, then it is to be inferred that malice existed, and that from that feeling the act was done. In other words, an intention to kill unlawfully, without sufficient provocation, is a malicious intention, and if the intent is executed, the killing is, in law, from malice aforethought, and is murder.

Keeping these principles in view, you will proceed to inquire what the evidence is of a premeditated design to kill; and secondly, whether the act of killing, and the circumstances attending it, were such that malice is to be inferred therefrom. The only evidence, at all tending to show premeditated design, is given by the master of the vessel, and by Saunders, the cabin-boy. The master states that, in a previous part of the voyage, four or five weeks before the time in question, while the vessel was in port, and he himself was absent on shore, some difficulty occurred between the first and second officers, in consequence of which the latter applied to him for his discharge. The witness does not know any thing of the nature or extent of the difficulty, nor of the feeling to which it gave rise in the breast of either party to it, saving that it produced, in the prisoner, a reluctance to continue under the command of the first officer. His discharge was refused; and there is no evidence of any further quarrel between them. It is also sworn by the master and the cabin-boy, that when Mr. Johnson fell, after being stabbed by the prisoner, some of the crew raised him up, and the prisoner said, "It is of no use; I meant to kill him, and I have done it." These expressions are not testified to by any of the crew. In such a scene, it is in accordance with experience, that some witnesses may observe and remember what other witnesses either did not hear or attend to, or have forgotten. And, therefore, when these two witnesses swear to this expression, if you consider they are fair witnesses, and intend to tell the truth, they should be believed in this particular, although others present do not confirm their statement. But, at the same time, upon this question of malice, it does not seem to me the expressions, if used, are important, because they only declare in words what the act of the defendant, in its nature and circumstances, evinces with equal clearness. It is testified, by all the witnesses present at the time, that the vessel being at anchor about three miles from the shore of the Island of Zanzibar, orders were given by the master to get under way; that the first officer was forward, on the house over the forecastle, attending to his duty; that the crew were variously employed in preparations to make sail; and that the prisoner, being aft, ran forward, jumped on to the house, seized Mr. Johnson by the collar with his left hand, and with his sheath knife, which he held in his right hand, stabbed him in the breast, and he dropped dead. When the prisoner seized him, Mr. Johnson said, "What do you mean?" and the prisoner, at the instant he struck the blow, replied, "I mean what I am doing."

Now, gentlemen, if you believe this statement, and there is certainly no evidence in the case to contradict or vary it, every witness concurring with the rest in the substance of it, there can be no question that the killing was malicious, provided the prisoner was, at the time, in such a condition as to be capable, in law, of malice. If you are satisfied the prisoner designedly stabbed Mr. Johnson with a knife, in such a manner as was likely to cause and did cause death, no provocation whatsoever being given at the time, then, in point of law, the killing was from malice aforethought, unless you should also find that the prisoner, when he did the act, was so far insane as to be incapable in law of entertaining malice; for the rules of law concerning malice are all based upon the assumption, that the person who struck the blow was at the time in such a state of mind as to be responsible, criminally, for his act. If he was then so insane that the law holds him irresponsible, it deems him incapable of entertaining legal malice; and, therefore, no malice is, in that case, to be inferred from his act, however atrocious it may have been. And, undoubtedly, one main inquiry in this case is, whether the prisoner, when he struck the blow, was so far insane as to be held by the law irresponsible for intentionally killing Mr. Johnson.

Some observations have been made, by the counsel on each side, respecting the character of this defence. On the one side, it is urged upon you, that the defence of insanity has become of alarming frequency, and that there is reason to believe it is resorted to by great criminals, to shield them from the just consequences of their crimes, when all other defences are found desperate; that there exist in the community certain theories, concerning what is called moral insanity, held by ingenious and zealous persons, and brought forward on trials of this kind, tending to subvert the criminal law, and render crimes likely not to be punished, somewhat in proportion to their atrocity. On the other hand, the inhumanity, and the intrinsic injustice of holding him guilty of murder, who was not, at the time of the act, a reasonable being, have been brought before you in the most striking forms.

These observations of the counsel, on both

sides, are worthy of your attention, and their just effect should be to cause you to follow, steadily and carefully and exactly, the rules of law upon this subject. The general question, whether the prisoner's state of mind, when he struck the blow, was such as to exempt him from legal responsibility, is a question of fact for your decision; the responsibility of deciding which rightly rests upon you alone. But there are certain rules of law, which you are bound to apply, and the court, upon its responsibility, is to lay down; and these rules, when applied, will conduct you to the only safe decision; because these rules will enable you to do what you are sworn to do, that is, to render a verdict according to the law and the evidence given you.

You will observe, then, that this defence of insanity is to be tested and governed by principles of law, and is to be made out in accordance with legal rules. No defendant can be rightly acquitted of a crime by reason of insanity, upon any loose, general notions which may be afloat in the community, or even upon the speculations of men of science. In a court of justice, these must all yield to the known and fixed rules which the law prescribes. And I now proceed to state to you such of them as are applicable to this case.

The first is, that this defendant must be presumed to be sane till his insanity is proved. Men, in general, are sufficiently sane to be responsible for their criminal acts. To be irresponsible because of insanity, is an exception to that general rule. And before any man can claim the benefit of such an exception, he must prove that he is within it. You will therefore take it to be the law, that the prisoner is not to be acquitted, upon the ground of insanity, unless, upon the whole evidence, you are satisfied that he was insane when he struck the blow.

The next inquiry is, what is meant by insanity—what is it which exempts from punishment, because its existence is inconsistent with a criminal intent? Clearly, it is not every kind and degree of insanity which is sufficient. There have been, and probably always are, in the world, instances of men of great general ability, filling, with credit and usefulness, eminent positions, and sustaining through life, with high honor, the most important civil and social relations, who were, upon some one topic or subject, unquestionably insane. There have been, and undoubtedly always are, in the world, many men whose minds are such, that the conclusions of their reason and the results of their judgment, tested by those of men in general, would be very far astray from right. There are many more, whose passions are so strong, and whose conscience and reason and judgment are so weak, or so perverted, that not only particular acts, but the whole course of their lives, may, in some sense, be denominated insane. And there are combinations of these, or some of these deficiencies, or disorders, or perversions, or weaknesses, or diseases. They are an important, as well as a deeply interesting study; and they find their place in that science which ministers to diseases of the mind, and which, in recent times, has done so much to alleviate and remove some of the deepest distresses of humanity. But the law is not a medical or a metaphysical science. Its search is after those practical rules which may be administered, without inhumanity, for the security of civil society, by protecting it from crime. And, therefore, it inquires, not into the peculiar constitution of mind of the accused, or what weaknesses, or even disorders, he was afflicted with, but solely whether he was capable of having, and did have, a criminal intent. If he had, it punishes him; if not, it holds him dispunishable. And it supplies a test by which the jury is to ascertain whether the accused be so far insane as to be irresponsible. That test is, the capacity to distinguish between right and wrong, as to the particular act with which the accused is charged. If he understands the nature of his act; if he knows his act is criminal, and that if he does it, he will do wrong and deserve punishment, then, in the judgment of the law, he has a criminal intent, and is not so far insane as to be exempt from responsibility. On the other hand, if he is under such delusion as not to understand the nature of his act, or if he has not sufficient memory and reason and judgment to know that he is doing wrong, or not sufficient conscience to discern that his act is criminal and deserving punishment, then he is not responsible.

This is the test which the law prescribes, and these are the inquiries which you are to make on this part of the case—Did the prisoner understand the nature of his act when he stabbed Mr. Johnson? Did he know he was doing wrong, and would deserve punishment? Or, to apply them more nearly to this case—Did the prisoner know that he was killing Mr. Johnson; that so to do was criminal and deserving punishment? If so, he had the criminal intent necessary to convict him of the crime of murder, and he cannot be acquitted on the ground of insanity. It is not necessary here to consider a case of a person killing another under a delusive idea, which, if true, would either mitigate or excuse the offence, for there is no evidence pointing to any such delusion.

It is asserted by the prisoner, that when he struck the blow he was suffering under a disease known as delirium tremens. He has introduced evidence tending to prove his intemperate drinking of ardent spirits during several days before the time in question, and also certain effects of this intemperance. Physicians of great eminence, and particularly experienced in the observation of this disease, have been examined on both sides. They were not, as you observed, allowed to give their opinions upon the case; because the case, in point of fact, on which any one might give his opinion, might not

be the case which you, upon the evidence, would find; and there would be no certain means of knowing whether it was so or not. It is not the province of an expert to draw inferences of fact from the evidence, but simply to declare his opinion upon a known or hypothetical state of facts; and, therefore, the counsel on each side have put to the physicians such states of fact as they deem warranted by the evidence, and have taken their opinions thereon. If you consider that any of these states of fact put to the physicians are proved, then the opinions thereon are admissible evidence, to be weighed by you. Otherwise, their opinions are not applicable to this case. And here, I may remark, gentlemen, that, although, in general, witnesses are held to state only facts, and are not allowed to give their opinions in a court of law, yet this rule does not exclude the opinions of those whose professions and studies, or occupations, are supposed to have rendered them peculiarly skilful concerning questions which arise in trials, and which belong to some particular calling or profession. We take the opinions of physicians in this case for the same reason we resort to them in our own cases out of court, because they are believed to be better able to form a correct opinion, upon a subject within the scope of their studies and practice, than men in general, and, therefore, better than those who compose your panel. But these opinions, though proper for your respectful consideration, and entitled to have, in your hands, all that weight which reasonably and justly belong to them, are nevertheless not binding on you, against your own judgment, but should be weighed, and, especially where they differ, compared by you, and such effect allowed to them as you think right; not forgetting, that on you alone rests the responsibility of a correct verdict. Besides these opinions, upon cases assumed by the counsel, which you may find to correspond more or less nearly with the actual case on trial, the physicians have also described to you the symptoms of the disease of delirium tremens. They all agree that it is a disease of a very distinct and strongly marked character, and as little liable to be mistaken as any known in medicine. All the physicians have described it substantially in the same way. I will read to you from my notes that given by Dr. Bell. He says the symptoms are: (1) Delirium, taking the form of apprehensiveness on the part of the patient. He is fearful of something,—fears pursuit by officers or foes. Sometimes demons and snakes are about him. In the earlier stages, in attempting to escape from his imaginary pursuers, he will attack others as well as injure himself. But he is much more apprehensive of receiving injury, than desirous of inflicting it, except to escape. He is generally timid and irresolute, and easily pacified and controlled. (2) Sleeplessness. I believe delirium tremens cannot exist without this. (3) Tremulousness, especially of the hands, but showing itself in the limbs and the tongue. (4) After a time sleep occurs, and reason thus returns. I do not recall any instance in which sleep came on in less than three days, dating from the last sleep. At first it is rather broken, not giving full relief; and this is followed by very profound sleep, lasting six or eight hours, from which the patient awakes sane.

Dr. Stedman, who, from his care of the Marine Hospital at Chelsea, and of the City Hospital at South Boston, has had great experience in the treatment of this disease, after describing its symptoms substantially as Dr. Bell did, says its access may be very sudden, and he has often known it first manifest itself by the patients attacking those about them, regarding them as enemies; that it is in accordance with his experience, that a case may terminate within two days of the time when the delirium first manifests itself, and that it rarely lasts more than four days; that he has arrested the disease in forty-eight hours by the use of sulphuric ether.

Taking along with you these accounts of the symptoms and course and termination of this disease, you will inquire whether the evidence proves these symptoms existed in this case; and whether the previous habits and the intemperate use of ardent spirits, from which this disease springs, are shown; and whether the recovery of the prisoner corresponded with the course and termination of the disease of delirium tremens, as described by the physicians.

In respect to the previous intemperance of the prisoner, and the symptoms, course, and termination of the disease, you are to look to the accounts of the conduct and acts of the prisoner, given by his shipmates. Their testimony will be fresh in your recollection, and it is not necessary for me to detail it. How recently before the homicide had he slept? Was his demeanor, for two or three days previous, natural, or was he restless? Was any tremor of the hands or limbs visible, and if so, was it very marked or not? Did he utter any exclamations manifesting apprehensiveness before or immediately after the act? When, and under what circumstances, did he recover his reason, if he was delirious, and especially did he recover it without sleep? These are all important inquiries to be made by you, and answered, as a careful consideration of the evidence may convince you they should be answered.

It is not denied, on the part of the government, that the prisoner had drunk intemperately of the ardent spirit of the country during some days before the occurrence. But the district attorney insists, that he had continued so to drink, down to a short time before the homicide; and that when he struck the blow it was in a fit of drunken madness. And this renders it necessary for

me to instruct you concerning the law upon the state of facts, which the prosecutor asserts existed.

Although delirium tremens is the product of intemperance, and therefore in some sense is voluntarily brought on, yet it is distinguishable, and by the law is distinguished, from that madness which sometimes accompanies drunkenness. If a person suffering under delirium tremens is so far insane as I have described to be necessary to render him irresponsible, the law does not punish him for any crime he may commit. But if a person commits a crime under the immediate influence of liquor, and while intoxicated, the law does punish him, however mad he may have been. It is no excuse, but rather an aggravation of his offence, that he first deprived himself of his reason before he did the act. You will easily see that there would be no security for life or property, if men were allowed to commit crimes with impunity, provided they would first make themselves drunk enough to cease to be reasonable beings. And, therefore, it is an inquiry of great importance in this case, and, in the actual state of the evidence, I think, one of no small difficulty, whether this homicide was committed while the prisoner was suffering under that marked and settled disease of delirium tremens, or in a fit of drunken madness. My instruction to you is, that if the prisoner, while sane and responsible, made himself intoxicated, and while intoxicated committed a murder by reason of insanity, which was one of the consequences of that intoxication, and one of the attendants on that state, then he is responsible in point of law, and must be punished. This is as clearly the law of the land as the other rule, which exempts from punishment acts done under delirium tremens. It may sometimes be difficult to determine under which rule, in point of fact, the accused comes. Perhaps you will think it not easy to determine it in this case. But it is the duty of the jury to ascertain from the evidence on which side of the line this case falls, and to decide accordingly. It may be very material for you to know on which party is the burden of proof in this part of the case. I have already told you, that it is incumbent on the prisoner to satisfy you he was insane when he struck the blow; for the reason that, as men in general are sane, the law presumes each man to be so till the contrary is proved. But if the contrary has been proved; if you are satisfied the prisoner was insane, the law does not presume his insanity arose from any particular cause; and it is incumbent on the party which asserts that it did arise from a particular cause, and that the prisoner is guilty, by law, because it arose from that cause, to make out this necessary element in the charge to the same extent as every other element in it. For the charge then assumes this form,—that the prisoner committed a murder, for which, though insane, he is responsible, because his insanity was produced by, and accompanied a state of intoxication. In my judgment, the government must satisfy you of these facts, which are necessary to the guilt of the prisoner in point of law, provided you are convinced he was insane. You will look carefully at all the evidence bearing on this question, and if you are convinced that the prisoner was insane, to that extent which I have described as necessary to render him irresponsible, you will acquit him; unless you are also convinced his insanity was produced by intoxication, and accompanied that state; in which case you will find him guilty.

The prisoner was acquitted.

Case No. 15,680.

UNITED STATES v. McGURK.

[1 Cranch, C. C. 71.] [1]

Circuit Court, District of Columbia. March Term, 1802.

CRIMINAL LAW—MURDER—EVIDENCE—DYING DECLARATIONS.

On a trial for murder the dying declarations of the deceased are evidence.

Indictment [against James McGurk] for the murder of his wife, by beating her, while pregnant with twins, so as to produce a miscarriage and consequent death.

THE COURT permitted her dying declarations to be given in evidence. The authorities, cited upon the trial were 1 Hawk. P. C. 124; Fost. Crown Law, 138, 256, 259; Leach, 141; 4 Bl. Comm. 195; 1 Gilb. Ev. 303; 2 Hale, P. C. 289; Woodcock's Case; Leach, 437, 563, case 218; 1 Bl. Comm. 442.

The prisoner was condemned, and executed October 28th, 1802.

Case No. 15,681.

UNITED STATES v. McHENRY.

[6 Blatchf. 503; [2] 10 Int. Rev. Rec. 42.]

Circuit Court, S. D. New York. June, 1869.

JUROR — CHALLENGE — READING NEWSPAPER ACCOUNT—PERJURY—INDICTMENT—AVERMENTS OF MATERIALITY.

1. A challenge to a juror, for principal cause, is properly overruled, where it appears that the juror, although he has read about one-half of a column in a newspaper concerning the case, has never formed any fixed opinion, or made up his mind, respecting the guilt of the prisoner.

2. The decision upon a challenge for favor is not reviewable.

3. Where, on the trial of an indictment, evidence to show that a witness for the prisoner has made statements inconsistent with his tes-

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

timony, is admitted without the attention of the witness having first been called to such statements, the error is cured, if the witness, on being afterward called by the prisoner, denies such statements.

4. On the trial of an indictment against a person who was an officer of the internal revenue, for perjury in swearing, on a criminal complaint made by him against another officer of the internal revenue, for taking a bribe, that he saw the bribe taken, it is not error to charge the jury that they may consider the circumstance, that it was not until some months after the time at which the prisoner said he saw the bribe given, that he made such criminal complaint.

5. Where, in an indictment for perjury, containing two counts, the first count charges the prisoner with having sworn to a false story, in an affidavit presented to a committing magistrate, as a criminal complaint, and the second count charges him with having sworn to the same false story, and also to other false matters, on an examination held by the magistrate on the complaint, and, on the trial, the jury are instructed that a verdict against the prisoner on the second count will not be inconsistent with a finding in his favor on the first count, it is not error to say to the jury, that, if they find against the prisoner on the first count, a verdict will almost certainly follow on the second count, there being no contradictory evidence, and no failure of full proof as to the taking of the oath by the prisoner, on the examination before the magistrate.

6. Where, in an indictment for perjury, the averments as to the materiality of what it alleges to have been falsely sworn to, are defective, the indictment is, nevertheless, good, if such materiality sufficiently appears upon its face.

7. What are proper averments of materiality, in an indictment for perjury, considered.

This was an indictment [against John D. McHenry] for perjury, tried before BENEDICT, District Judge. After conviction, the prisoner moved in arrest of judgment, and for a new trial.

Joseph Bell, Asst. U. S. Dist. Atty.
Edward D. McCarthy, for the prisoner.

BENEDICT, District Judge. The several propositions which have been pressed upon my attention, with such commendable earnestness, in support of these motions, have received my careful attention.

The first error supposed to have been committed, consisted in overruling the challenge of the prisoner to the juryman Brown. Upon this point, it seems sufficient to say, that the testimony of the juror showed, beyond question, that, although he had read about one-half of a column in a newspaper concerning the case, he had never formed any fixed opinion, or made up his mind, respecting the guilt of the prisoner. The authorities relied on by the defence are, therefore, not applicable to the present case. The most that could be said, upon the evidence, is, that a challenge for favor should have been allowed. But the decision upon a challenge for favor is not reviewable (People v. Mather, 4 Wend. 229); and, if it were, I should feel bound to say, that the candid and cautious manner of the juryman, together with his evident fairness, and freedom from bias, entirely satisfied me that the prisoner could receive no injustice at his hands.

The next point urged is, that an error was committed in permitting evidence to be given that the witness Ferguson had, on a certain occasion, made statements inconsistent with his evidence, without first calling the attention of the witness to the statements intended to be proved. The notes of the trial do not show such an error; and, if it was committed, it was cured when the defence afterwards called the witness Ferguson, and he denied entirely the statements attempted to be proved against him.

The next point taken arises upon the charge to the jury. It is insisted that it was error to charge the jury that they might consider the circumstance, that it was not until some months after the time at which the prisoner said he saw a bribe given to Harland, that he made his criminal complaint against Harland for the taking of the bribe. This objection is untenable. In the absence of any circumstances to indicate the existence of any reason for the failure of a revenue officer to make instant complaint of such an extraordinary transaction as the prisoner says he saw, so long a delay would be a circumstance to be considerd, with the other facts proved, as affording ground for a reasonable inference that the complaint was an invention, arising out of malicious motives, and not based upon facts. Evidence of this nature has often been admitted in criminal cases.

The next point taken arises, also, out of the charge to the jury. It is claimed that it was error to say to the jury, that, if they found against the prisoner on the first count, a verdict would almost certainly follow on the second count. The first count charged the prisoner with having sworn to a certain false story, in an affidavit presented to Commissioner Gutman. The second count charged him with having again sworn to the same story, when called as a witness upon the examination held by Mr. Gutman on the complaint. There was no dispute as to the fact that he was sworn before Mr. Gutman on such examination, and that he then testified to the same story which he had before sworn to in his affidavit. Therefore, a finding that the story in the affidavit was willfully false, was decisive of the falsity of the story told on the examination. I am unable, therefore, to see how it was error to say this to the jury. The jury were carefully instructed that a verdict against the prisoner on the second count would not be inconsistent with a finding in his favor on the first count, because the second count contained other matters charged to have been falsely sworn to on the same examination, which were not included in the first count. But, as proof of any one of the assignments in the second count would sus-

tain that count (2 Russ. Crimes, 668), a verdict against the prisoner on the first count left no room for doubt as to the verdict on the second count. Had there been any contradictory evidence, or any failure of full proof of the taking of the oath, on the examination as to the facts before Mr. Gutman, the remark to the jury would not have been made.

I have now disposed of all the points which have been argued in behalf of the prisoner upon these motions, except one, and that arises on the indictment itself. The indictment, it is insisted, is bad, because of defective averments of materiality. The averment of materiality in the first count is, "that, at the time the said McHenry so deposed, swore and made affidavit, as aforesaid, it became and was a material question," etc., etc. In the second count, the averment is, that "it then and there became and was a material question." These averments are said to be insufficient, because they do not state that the evidence given by the prisoner was material upon the proceeding alleged to have been pending before the commissioner. Other proceedings, it is said, may have been at the same time pending before the commissioner, to which these averments would equally apply. But, if it be conceded that these averments are thus defective, still the indictment must, I think, be sustained, upon the ground that the materiality sufficiently appears upon its face. An examination of the averments will make this appear.

The first count avers a complaint made by John M. Binckley, before Commissioner Gutman, that Rollins, Harland, Smith, Murray, Haggerty, and divers other persons had conspired together to defraud the United States, and had committed acts in furtherance of that conspiracy. It then avers, that the prisoner was produced by Binckley to support said complaint, and then swore to a certain written affidavit, the substance and effect of which are set out in detail. Here, then, is stated a proceeding before a committing magistrate of the United States, which made it incumbent on him to inquire as to the existence of the conspiracy complained of. The offence was charged by Binckley in the words of the statute, and the jurisdiction of the officer to institute such inquiry has not been called in question here. Among the parties embraced in this accusation were Thomas Harland and S. N. Pike, for, the affidavit of the prisoner identifies Pike as one of the persons referred to by the words "divers others," used by Binckley. The question, therefore, which the commissioner was to consider was, whether Harland, the deputy commissioner of internal revenue, and S. N. Pike, a rectifier, had been engaged in a conspiracy to defraud the United States. Now, the facts spread out in the indictment, as sworn to by the prisoner, tended directly to prove to the commissioner that the prisoner had seen Pike give Harland a bribe; for, these circumstances are of such a character as to show affirmatively a secret and collusive delivery by Pike, of his own check, for a large sum of money, to the deputy commissioner of internal revenue. Unexplained, these circumstances, as detailed in the indictment, would, of themselves, go far towards proving the existence of an unlawful combination between Pike and Harland. Manifestly, they were material facts tending to show the commission of an offence by the parties charged. It is not necessary that the facts sworn to should constitute full proof of the matter at issue. They are material if it can be seen that they would necessarily tend to prove it, which is this case. 2 Russ. Crimes, 643. The first count of the indictment must, therefore, be held to be within the settled rule, that an indictment for perjury is good without any averment of materiality, when it appears upon its face that the fact alleged to have been falsely sworn to, was a material one. 2 Russ. Crimes, 639.

One count of the indictment having been thus found to be good, it is unnecessary to consider the remaining counts. But, although I base my decision of this branch of the motion upon the ground that materiality appears upon the face of the indictment, I do not feel justified in dismissing the case, without remarking, in regard to the averments of materiality, that I incline strongly to the opinion, that they should be deemed sufficient. There seems to me to be much force in the argument, that the facts set out in this indictment leave no room for any fair supposition of the pendency of any other criminal charge than the one described, in which the facts sworn to by the prisoner could have been material. Furthermore, the words "it then and there became and was a material question," as they are used, are intended to, and do, convey the idea of a connection between the question and the proceeding previously mentioned as pending. It is, moreover, manifest, that there is no such uncertainty in these averments as could mislead the accused, nor is it pretended that he was misled. In point of fact, it has appeared upon two different trials, that the prisoner has distinctly understood, from this indictment, the exact facts which were intended to be proved against him. It is apparent, also, that the alleged uncertainty can occasion no detriment in the future, inasmuch as, if the accused should be again called to account for the same false statements proved upon this trial, it will be entirely competent to show, by testimony, that they formed the subject of this prosecution. Indeed, the indictment itself, without the aid of testimony, shows that these, and no other statements, could have been here proved under it. The indictment seems, therefore, to answer all the purposes of a valid indictment. It identifies the charge, and enables the defendant to prepare his defence thereto. It will protect the

defendant, should he be again questioned on the same grounds; and it enables the court to know what judgment is to be pronounced according to law. Two or three English authorities were cited in behalf of the defendant, where judgment was arrested by reason of averments of materiality similar to those contained in this indictment. I do not find that these authorities have been followed in any American case, while, in State v. Sleeper, 37 Vt. 122, 126, they were disregarded, and an indictment more defective than the present one was upheld. If the decision of the present case depended upon the effect to be given to the averments of materiality, it might be the more prudent course to follow the English cases; but I should greatly apprehend that, if such a decision were made upon the present indictment, it might well give occasion to apply the words of Lord Hale, where he says (2 Hale, P. C. 193): "More offenders escape by the over-easy ear given to exceptions in indictments, than by their own innocence; and, many times, gross murders, burglaries, robberies, and other heinous and crying offences escape punishment, by these unseemly niceties, to the reproach of the law, to the shame of the government, and to the encouragement of villainy, and to the dishonor of God."

Motion denied.

Case No. 15,681a.

UNITED STATES v. McKEAN et al.

[New York Times, Dec. 22, 1857.]

District Court, S. D. New York. Dec. 21, 1857.

CUSTOMS DUTIES—SUFFICIENCY OF APPRAISEMENT—MARKET VALUE.

[1. An appraisement of a cargo of sugar, based solely upon samples taken from a part of the cargo after most of it had been sold and delivered to purchasers, *held* insufficient.]

[2. An appraisement of a cargo of sugar should be based upon the market value at the date of the actual loading of the cargo, and not at the date of the sailing of the ship.]

This was an action [against McKean, Borie & Co.] to recover $12,586, with interest, for additional duties and penalty on an invoice of Manilla sugar imported in the ship Young America, which sailed from Manilla on September 21, 1855, and arrived here December 31, 1855. The sugars were entered at the custom house, and duties charged and paid on the invoice value, and thereupon the usual permit to land the sugar was given. The cargo had been sold to arrive, and was delivered to the purchasers as fast as landed. Before the whole was landed, the collector claimed that the duties, instead of being calculated upon the invoice at the time of purchase, which was before the date of actual lading in July and August, should be calculated as of the date of sailing, and he ordered an appraisement of the sugars on the wharf. The samplers took one or more samples from that part of the sugar which had not yet been delivered to the buyers. These samples were taken to the appraiser's office, and on them an appraisement was made, and the value was raised 40 per cent. above the invoice, upon which an additional duty was charged of $3,571.80, and a penalty of $9,014.69 imposed, making together the amount claimed in this action.

Mr. Joachimssen, for the United States.

Mr. Cutting, for defendant.

BETTS, District Judge, held: (1) That there was no evidence of a sufficient or valid appraisement, and the United States were not, therefore, entitled to recover any part of their claim, which depended upon the appraisement alone. (2) That, independently of the invalidity of the appraisement, the date of the actual loading of the cargo, and not of the sailing of the ship, was the period at which the market value should have been estimated and duties charged.

The government then claimed that they were at all events entitled to recover additional duties to be charged upon the value at the time of actual shipment, amounting to $1,356.55, and it was agreed that a verdict should be taken for the plaintiffs for that sum, subject to the opinion of court.

Case No. 15,682.

UNITED STATES v. McKECHNIE.

[15 Int. Rev. Rec. 8.]

District Court, N. D. New York. 1871.

INTERNAL REVENUE—FERMENTED LIQUORS—SPIGOT HOLES.

At the November term of this court, held at Auburn, N. Y., the United States district attorney, Hon. Richard Crowley, moved the indictment against J. and A. McKechnie, brewers of Canandaigua, who were charged with violations of section 53, Act July 13, 1866, as amended, prohibiting more than one spigot hole in any package of fermented liquors. This provision of the law has been enforced in this district upon all local brewers, some of whom have expended considerable sums in replacing perforated staves and heads, or applying extra iron hoops to cover holes made in casks of ale by their customers. The Messrs. McKechnie have neglected to comply with this requirement of the law altogether, and their ale has several times been detained by officers in consequence, but in all cases has been released without penalty. An instance occurring at Rochester when a cask was returned empty, with a perfect stamp, the liquor having been withdrawn through another spigot hole than that upon which the stamp was affixed, complaint was made and a case made up, in order to test the question whether the law in respect to more than one spigot hole could be enforced. The honorable

commissioner of internal revenue held that it could and must be enforced, reasoning that the law prescribes the manner in which the stamp shall be affixed, viz.: to cover the one spigot hole; and if there were two openings for withdrawing the ale, the stamp could not be affixed in accordance with the law's requirements. District Attorney Crowley held the same view, and having proved his case the decision of the court was asked.

HALL, District Judge, said that he was in doubt as to the true construction of the section (53) in respect of the spigot hole prohibition, and were this a civil action which might be reheard upon appeal from his decision, he would give a judgment for the government; this being a criminal action, admitting of no appeal, he would order a verdict for the defendant, admitting at the same time that his doubts preponderated against the views taken by the commissioner and district attorney as to the prohibitive force of the section. It would seem that some action should now be taken to clear up the verbiage of section 53.

Case No. 15,683.

UNITED STATES v. McKEE.

[3 Cent. Law J. 258;[1] 22 Int. Rev. Rec. 135; 1 Cin. Law Bul. 107.]

Circuit Court, E. D. Missouri. April 8, 1876.

CRIMINAL PROCEDURE—NEW TRIAL—BIAS OF JUROR—EVIDENCE—NEWSPAPER REPORT OF TRIAL.

1. On a motion for a new trial in this case, one of the grounds was that a juror had, previous to the trial, uttered sentiments which showed a bias against the prisoner, whereas he had stated on his voir dire that he had not formed or expresed an opinion with reference to the defendant's guilt or innocence. To enable the court to pass upon this question, the court not only received affidavits, but required the principal witnesses to be examined orally before it.

2. In this case it was shown by the testimony of a witness that some days before the trial, a person, who afterwards sat as a juror in the case, had said, "McKee has got his foot in it—is guilty—is the biggest toad in the puddle." The juror in question denied on oath that he made this statement. The juror had testified on his voir dire that he had not formed or expressed an opinion relative to the defendant's guilt or innocence. *Held*, on comparison of the testimony and of the supporting and rebutting affidavits and other testimony adduced, that it was not sufficient to overcome the statement of the witness made on his voir dire, and to show the juror to be disqualified.

3. The rulings upon this trial as to the testimony of Megrue, a conspirator, that he gave to Lancaster, a co-conspirator, certain moneys to be paid to the defendant, and as to the effect of the subsequent declarations of Lancaster, that he did give the money to the defendant [Cases Nos. 15,685 and 15,686], reaffirmed.

4. On Sunday morning, January 30, after all the testimony on this case had been heard by the court, a "leader" appeared in the Saint Louis Republican, evidently intended to be read by the jury, entitled "What the Jury will Read." This article exhibited a decided bias against the prisoner. Two copies of the paper which contained the article were purchased by members of the jury; but there was no proof that the article was read by any of them. The jury were under instructions which permitted them to read reports of the trial, but not editorial comments upon the case. *Held*, no ground for a new trial.

5. The court animadverted upon attempts of newspapers to influence the minds of jurors pending a trial.

Indictment [against William McKee] for conspiring to defraud the government out of revenue on distilled spirits. [For prior proceedings see Cases Nos. 15,685 and 15,686.] Motion for new trial. The motion was heard in part on oral testimony as stated in the first paragraph of the head note. The other facts sufficiently appear in the opinion of the court.

W. H. Hatch, Henry A. Clover, and Chester H. Krum, for the motion.

David P. Dyer, U. S. Dist. Atty., with whom were James O. Broadhead and Lucien Eaton, contra.

Before DILLON, Circuit Judge, and TREAT, District Judge.

DILLON, Circuit Judge (orally). In the case of the United States against William McKee, the indictment is under section 5440 of the Revised Statutes [14 Stat. 484], which is in these words: "If two or more persons conspire together," that is, necessarily persons not occupying an official position, "to commit any offence against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of such conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than $1,000 and not more than $10,000, and to imprisonment for not more than two years." In the case under consideration, there was a trial extending through several days, resulting in a verdict of "guilty." A motion is made by the defendant for a new trial upon three grounds. One of these grounds is for misconduct, or rather disqualification on the part of one of the jurors, viz.: Mr. Hugh F. Summers. The second ground is the reception in evidence of certain declarations of Leavenworth made to Megrue. The third ground is misconduct—it comes under that general name—on the part of the jurors, in reading a certain article published on the Sunday after the arguments had been concluded, and prior to the charge of the court; that article being published in the Missouri Republican, and headed, "What the Jurors will Read."

I will briefly state the views which the court entertains after argument and consulta-

[1] [Reprinted from 3 Cent. Law J. 258, by permission.]

tion in respect to these three points; and first, as to the question whether Mr. Summers was a qualified juror. The disqualification is alleged to consist in the fact that before he went upon that jury panel he had formed, or, at all events, had expressed, an opinion relative to the guilt of the defendant, to the effect that he was guilty. If this is true, that is, if it were judicially established that that was so—it was admitted at the bar and undoubtedly is the law—it would be good ground for a new trial. There being no difference as to the law, the result depends on a question of fact. And how stands the proof in that regard? When this motion was made and the affidavits filed, stating that this declaration on the part of Mr. Summers had been made to one Foster, we said, knowing the advantage in investigating disputed questions, of having the witnesses before us, "If this question turns on the respective credibility of these two men—Mr. Summers, the juror, on the one hand, and Mr. Foster on the other—we must have them before us, so that they may be examined orally, and subjected to cross examination," and we have taken every means within our power, appreciating the magnitude of this case, and the interest which it involves to the government, and possibly the still greater interest which it involves to the defendant, of getting all the facts bearing on this question; we have subjected the statements of all these witnesses to repeated examinations and to severe scrutiny. Mr. Foster stated in his affidavit that about eight days before the trial, at Lansdowne's store, or near there, he met Summers, and Summers stated in substance: "McKee has got his foot in it; is guilty; is the biggest toad in the puddle," and that he (Foster) made no reply to that. He also stated in his affidavit, and repeated the statement on the trial, that after the trial was over, he met Summers, and he names the place, and that thereupon, when they crossed over the street together, he remarked to Summers that they must have had jolly discussions, as they had been out eleven hours before they had agreed upon a verdict; to which Summers replied that he was very well posted, as he had taken pains to read up after he was summoned to serve on the jury. That is the substance of what Mr. Foster said, both in his affidavit and in his oral statement. Mr. Summers was summoned as a juror on the sixth day of January, requiring his presence here on the 20th. The officer who summoned him very prudently said to him, "You will avoid a good deal of embarrassment if you keep this thing to yourself." It was very well known to everybody that there was a great excitement concerning these trials, and he gave him very prudent advice, which Mr. Summers stated he observed. He also states that he did not even tell his partners that he was summoned on the jury till a very short time before he came here, so sedulously did he follow that instruction. Mr. Summers, when he was called into the jury-box, was sworn on his voir dire, and the question being put to him, he said he had formed or expressed no opinion concerning the guilt of McKee, but in his cross-examination admitted that he had a conversation about it. The way this matter has turned out, it is, perhaps, to be regretted that the counsel for the defendant did not pursue that a little more fully, but he pursued it as far as he chose. Mr. Summers said he had a conversation about this matter, but nevertheless he had formed or expressed no opinion as to the guilt of the defendant. When he made that statement, he was under oath, and it was a statement made under oath at a time when, so far as we can know, he had no motive, such as may possibly be ascribed to him afterwards, when he is attacked, to misstate the facts.

To serve on a jury is a duty that I suppose men in general would rather avoid than discharge, unless there is some latent, some undiscoverable motive. Most men—and perhaps, Mr. Summers—would have been very glad to have avoided that duty. If he did not, we do not know any reason why he should desire, for any sinister or improper purpose, to have served on that jury. So that, in determining this question of fact, we have the oath of Mr. Summers at the time when he was sworn, and when, so far as we know, there was no motive for him to misrepresent, that he had not formed or expressed an opinion concerning the guilt of the defendant; and on the examination, after his qualifications were attacked by the affidavit filed here by Mr. Foster, he states the same thing, and says: "I never had that conversation with Foster; it is not true." He denies it in toto, and denies the subsequent conversation which Mr. Foster imputes to him. It is a plain, unqualified contradiction between these men in respect to these conversations. Now in determining where the truth lies, we are forced to resort to other circumstances, and unfortunately these are by no means conclusive. Against Mr. Foster certain affidavits have been produced, the affidavits stating that his reputation for truth and veracity is not good, neither in the county where he now lives, nor in another county from which he came. Certain of these affiants, who thus depose as to character, are shown to have been connected with his family, and may be supposed to have had a family grudge or feud. We attach little or no importance to such evidence, but there are several affidavits of men, the sheriff and other men of character, who are not shown to have any personal pique or bias against Mr. Foster, who made a similar affidavit. On the other hand, Mr. Foster has brought in a large number of affidavits from the county where he now lives, and from that in which he formerly lived, from men of various occupations, and in various stations, to the effect that his character is good for truth and veracity; that is where that stands. There is no attack by any

affidavit on the character of Mr. Summers for truth and veracity. Mr. Foster, when interrogated in regard to the details of these conversations, while he seemed to have a very distinct recollection that Mr. Summers used these words, was not able to state how the conversation originated, how it came up, or what further was said. His mind seemed to rest on those words, and that was all he could recall concerning it. The occasion of the conversation, what else was stated in it, who, if anybody, else was present, he has not been able to recall; and the time in which he locates it seems to show that it is indefinite in his recollection or that he must be mistaken, in view of other circumstances. In his affidavit, he says that this conversation with Summers was about eight days before the trial. That would make it six days, or about that, after Summers was summoned. In his letter in which he communicated this to Mr. McKee, or the paper from which Mr. McKee got it, which was not read, but which counsel produced and showed to us, this time was stated to be several days before the trial, and in the conversation with Mr. Purse, the postmaster, he, Foster, located it at about two weeks before Summers went down to attend the trial. In his oral statements before the court, he said it was one or two weeks. Finally, on cross-examination, he really could not tell definitely whether it was before the 1st of January or afterwards, but he thought it was afterwards; so it stands in relation to the first conversation. In reference to the second conversation about having a jolly time at the discussion, and Summers saying that he had read up, that he had taken the pains to do so after he was summoned, and that he was well posted, which Mr. Foster imputes to Mr. Summers, Mr. Summers says is untrue; he says that he read nothing concerning this after he was summoned, and that, of course, when Foster says he admitted he had posted himself up, he must be mistaken about it, that it was not the fact, and he would not be likely to admit that it was a fact; and certain affidavits are relied on here as rather confirming Mr. Summers in that regard; for example, the affidavit of Mr. Pugh, the ex-sheriff of that county, who says that Foster, Summers and himself were there, and Foster came up, and it was asked "what all this meant?" and some one replied, in substance, "Why, here is Summers just back from the trials," and Foster, according to Pugh, then inquired, "What, has McKee been tried? I didn't know that the trial had taken place." That is Mr. Pugh's statement of what Foster said. Foster, on the stand as a witness here, contradicts that, and says: "I could not have said that, because I did know the trial was going on, and did know that it had taken place." Nevertheless, there is the statement of this witness that Mr. Foster did say this.

Now in looking over all this, we have been unable to discover one circumstance of moment which really corroborates Mr. Foster in the matter; so far as there are any corroborating circumstances, they are the other way. If you look at the character of the two men, without pronouncing any judgment on the matter, certainly the preference cannot be given to Mr. Foster. That is enough to say. I attach very little importance to an affidavit to the effect that some man has the opinion of another that he is not a man of truth and veracity. I do not intend to reflect on Mr. Foster in anything. I may say—I simply say—in summing up this matter, it cannot be said that in that respect Mr. Foster has any advantage of Mr. Summers; if there is any difference, looking at it in the light of these affidavits for what they are worth, it is the other way. Then the other circumstances, as to want of definiteness, as to how this conversation arose, what was the occasion of it, what further was said, want of certainty as to the time, or, if he locates it after this man was summoned, the improbability that he would disobey the injunction given to him and read this testimony, when he says he did not read it, the outside probabilities would rather be in favor of Mr. Summers; and, at best here is, after a trial, the oath of one man against the oath of the juror. Now, in a trial attended with as much excitement as this one was, when there are so many chances for mistake and misunderstanding of what a man stated, and there is a deliberate verdict of the jury, we cannot—and so the courts have frequently decided—set aside a verdict unless we are satisfied that the showing made against a juror's qualifications, raises at least a presumption in favor of guilt; and this ground for a motion for a new trial, in our judgment, fails to show by a preponderance of evidence that that allegation against Mr. Summers is true in point of fact. Mr. Summers admits that he had a conversation at some time on the street with Mr. Foster. Mr. Foster might have imputed to Mr. Summers what some one else stated to him, and he might have misconstrued it. I am the last person in the world to impute any wilful wrong on the part of Mr. Foster; certainly his manner impressed me not unfavorably on the stand. He seemed to believe this, and I am satisfied in my own mind that he has not undertaken here to impose or perpetrate a wilful fraud by any means. His letter, in which he communicated this information, shows that he has a good deal of feeling on the subject, and perhaps it tends to show that a man, in time of excitement on a subject in which he seems to have felt a good deal of interest, might have formed and intensified an impression by perpetually thinking on the subject; and Mr. Foster seems to have thought a good deal about it. It is enough to say that the showing is not sufficient to overcome the oath of the juror that he entered the box without having formed any opinion.

In regard to the other ground, as to the

charge of the court on the subject of the declarations of Leavenworth, I do not think it necessary to go at length into that. It was argued for several days; all the authorities were produced, and we took time to consider it. The opinion is in writing [Cases Nos. 15,685 and 15,686], and, considering the arguments addressed to us, we see no reason to change that ruling. Several witnesses had testified as to the existence of this conspiracy between the distillers, Joyce and McDonald, and the revenue officers. Megrue testified that he was the collector for the ring, and that every week they made their collections, and every week they distributed the money; that he was the collector and distributor; that Leavenworth, a gauger, now deceased, was made use of by him to distribute the money; that he put it in packages; that one-fifth was set apart every week for the defendant, and that he gave it to Leavenworth, with directions to deliver this part to him. It was objected to at first that what Megrue said to Leavenworth at the time he gave him the money to deliver, could not be received in evidence for any purpose, but on the argument that was abandoned by defendant's counsel; but they did insist that Megrue could not testify as to subsequent declarations of Leavenworth to him as to whether he had delivered the money, and we admit no other declarations—no other declarations of Leavenworth to anybody but Megrue, nor made at any other time—at least that was our ruling, and no exception was taken on the trial that the declaration offered to be produced in evidence was given at any other time; that those declarations were made at any other time than to Megrue when he came back for the weekly amount. Now, then, we said: "We admit this as part of the res gestæ of the transaction of setting apart and receiving the money; it is necessary to explain why he went back." Megrue said week after week he delivered the money, and we said, this cannot be used by the jury as independent evidence to convict Mr. McKee with fraud; that must be proved by other evidence; and we endeavor to make that very emphatic, and are surprised that in the way we limited it, counsel think there is any objection to it. We said in our charge: "Leavenworth reported to Megrue, as the latter swears, when subsequently receiving packages, that he had distributed or delivered to McKee and Ford the packages previously received for them. But, as we instructed you on the trial, and now repeat, such declarations, that is, the declarations of Leavenworth to Megrue when he went back for money, from week to week; such declarations, while they are competent evidence to show the relations of Megrue and Leavenworth to each other and to the transaction, and to explain the act of receiving the money from week to week, they are not competent to establish the fact that the defendant McKee did receive the money; but such fact which, under the circumstances of this case, is equivalent to connecting him with the conspiracy, must be shown by evidence other than the mere declarations and statements of a confessed conspirator, not made to or in the presence of the defendant." Now, then, suppose we had this case to try over again, and Mr. Megrue goes on the stand and testifies that he set apart those packages, and that he gave one of them to Mr. Leavenworth, with instructions to deliver it. Now, he comes back the week after for another package; is it not part of the transaction what he says, and did we not lay down the law as favorably for the defendant, no more favorably indeed, than he was entitled to, but as favorably as the principles of law would justify; that it was receivable only to explain that transaction, and we told the jury that that could not be received as any evidence to establish the fact that the defendant received it, so that they could not have mistaken their duty and were not, as we think, misled. Some suggestion was made on the argument here, that certain declarations on the subsequent trial against Babcock were excluded, and certain declarations were excluded for the purpose for which they were offered. But the two cases bore no resemblance to each other; no witness testified, "I gave a certain amount to Joyce in money, set it apart, and directed him to pay it to Babcock." Aside from that, when that evidence was offered, we asked the district attorneys, and the record will so show, "Do you offer these declarations for the purpose of implicating the defendant?" They said, "Yes." We said to them, as we said in this charge to the jury, "You can not implicate another by the declarations of a conspirator until the conspiracy is otherwise established," and refused to receive declarations of that sort. Then, again, in the case against Mr. McKee, there were several witnesses who testified directly to the conspiracy, and to the facts, from which the jury might infer the defendant's connection with it. There was no such evidence in the Babcock case; whether he was connected with it depended entirely upon telegrams, and to the credibility which would be given to the witnesses, Everest and McGill. In their legal aspect, the circumstances in which these two questions arose were not at all similar, and in looking over it, we both concluded the law was laid down in entire accord in both cases, though, for certain purposes, declarations were received in the one case, whereas under the circumstances and for the purposes for which they were offered, we held they could not be received in the other.

The third ground of the motion for a new trial is in respect to the newspaper article, and in the judgment of both of us, that was an improper article to be published when the jury was about to take the case under

consideration, if it was intended it should be read by them. The courts, before they were disabled by act of congress, treated all articles, calculated to influence the result of a pending case, as contempts of their authority, and punished the writers of such articles accordingly. Now, that article can not be read without showing that there was a bias, at all events, against the defendant. That is undeniable, and if there is good reason to believe that that article had been read by the jury, and had influenced their verdict, if it was shown here conclusively that it had been read by them, we might be obliged, though we would be otherwise satisfied with the verdict, on legal principles, and following established precedents in this regard, to give the defendant a new trial. I make these remarks, because it ought to be understood that all attempts to influence the public mind, and particularly to influence jurors when they have a case, civil or criminal, before them, are improper; and, I think, when journalists, respectable journalists, understand this, they will act accordingly. But it is to be remembered in this case that we said to the jury, after having first prohibited the reading of papers: "You may read papers containing a report of this trial, but you must not read any editorial comments or articles criticising the trial one way or the other." It is in evidence that this article was published, but there is the affidavit of no juror or other person that it was ever read. Mr. Stevens, the bailiff, testifies that two copies of the paper were bought by the jury, but no witness stated that this article was ever read by a juror. Now, in view of the fact that we had cautioned the jury against reading such articles, and this article disclosed that it was an improper one by the very heading of it, shall we suppose that the jury disregarded their duty without any showing, or must we suppose that they did not? That is a matter that, if it were true, could have been shown by the affidavit of jurors, but there is no such affidavit; and on that ground we think that the motion for a new trial must fail, the same as the others.

[NOTE. The defendant then moved in arrest of judgment and to dismiss, on these grounds: (1) That there was no indictment against the defendant pending in the circuit court. (2) That the circuit court has no jurisdiction of the case. (3) That the defendant was not tried on the original indictment, but on an alleged copy thereof. The court overruled both of these motions. Susequently the president granted the defendant an unconditional pardon, which he exhibited with his plea. See Case No. 15,687. To this plea the plaintiff demurred, which demurrer was overruled. Id. 15,688.]

Case No. 15,684.

UNITED STATES v. McKEE.

[See Case No. 15,683.]

Case No. 15,685.

UNITED STATES v. McKEE.

[3 Dill. 546;[1] 3 Cent. Law J. 100; 23 Pittsb. Leg. J. 107.]

Circuit Court, E. D. Missouri. Jan. 25, 1876.

CRIMINAL EVIDENCE—DECLARATIONS OF CO-CONSPIRATORS—UNCORROBORATED TESTIMONY OF ACCOMPLICES.

1. On the trial of an indictment for a conspiracy to defraud the government out of internal revenue taxes, where a conspiracy has been proven, and there is evidence connecting the defendant therewith, and one of the conspirators has testified to the fact that, at the end of every week, he gave to a co-conspirator certain moneys, the gains of the conspiracy, it is competent to show by the witness what directions he gave to such co-conspirator as to paying or delivering the money to the defendant.

2. In such case, the subsequent declarations of such co-conspirator, as to what he did with the moneys so paid to him, are admissible as a part of the res gestæ, but not for the purpose of connecting the defendant with the conspiracy, and the jury should disregard it, unless they should be of opinion that the defendant has been connected with the conspiracy by evidence aliunde.

3. In determining whether there has been sufficient evidence of a conspiracy to warrant, as against the defendant, the admission of evidence of the acts and declarations of the alleged conspirators, the court is not at liberty to reject the uncorroborated testimony of self-confessed accomplices and members of the conspiracy. Nor can the court declare, as matter of law, that such testimony is unworthy of belief, unless corroborated. The credibility of such testimony is a question for the jury, under the advice and direction of the court, and is not a question of law for the court.

Indictment [against William M'Kee] for conspiring to defraud the government out of taxes on distilled spirits. Megrue, a conspirator, who had previously pleaded guilty, being on the witness stand, and having testified that, at the end of each week, he turned over a portion of the gains of the conspiracy to Leavenworth, a co-conspirator, since deceased, was asked by the attorney for the government whether he paid the money to Leavenworth, with directions to pay it to the defendant. The question was objected to, and the objection was argued at great length by

Chester H. Krum and Henry A. Clover, in support of the objection.

James O. Broadhead, Lucien Eaton, and D. P. Dyer, contra.

Before DILLON, Circuit Judge, and TREAT, District Judge.

DILLON, Circuit Judge. Evidence by several witnesses has been given, tending to show a conspiracy between certain distillers in the city of St. Louis and the revenue officials, to defraud the government, from week to week, of the tax on distilled spirits produced at their distilleries.

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

The statements of the witnesses are that the government was to be defrauded out of its tax in this way, viz: One-half of the tax on each gallon was to be retained by the distillers for their share of the fraudulent gains, and the other half was to go to the revenue officers and the other conspirators. The scheme did not contemplate a single fraudulent act, confined to one distillery, but extended to nearly every distillery in the city, and was to continue for an indefinite period. This scheme is testified to by Megrue, Fitzroy, Engelke, and Thorpe, all of whom confess themselves to have been members of the conspiracy, and to be under indictment for these frauds. All of these witnesses have given evidence, which, if true, tends to implicate the defendant as being in the conspiracy, which commenced in 1871, and continued until May, 1875, when the distilleries were seized and criminal prosecutions soon afterwards set on foot. Megrue testifies that he took charge of the illegal organization about September, 1871, and that he received weekly, every Saturday, from the distillers in the organization, the amount of "stolen tax," as he styles it, and disbursed the half of it, received by the witness, to certain parties as follows: "The money left after paying gaugers, store-keepers, etc., was divided by the witness into five packages; one-fifth was given by the witness to McDonald (supervisor of internal revenue); one-fifth was kept by the witness, and two-fifths was given by the witness to one John Leavenworth, a gauger, since deceased." The share of the witness, between September, 1871, and November, 1872, he states to have been about $50,000 or $60,000.

It is now proposed by the government to ask the witness, Megrue, what directions he gave to Leavenworth as to the disposition of the packages containing the two-fifths; that is, it is proposed to show that he was directed at the time by Megrue to pay it to the defendant and the collector of internal revenue, and to show, furthermore, the subsequent declarations of Leavenworth to the witness, that the money intended for McKee (the defendant) had, in fact, been paid McKee by Leavenworth. This testimony is objected to by the counsel for the defendant.

1. It is objected that the government cannot show by the witness what directions he gave to Leavenworth at the time, as to paying or delivering money to the defendant. This was during the conspiracy—was the act of two of the conspirators in the carrying out of the conspiracy, and is, in our judgment, clearly competent. Indeed, this objection was practically abandoned on the argument; at least, not insisted on.

2. But it is stoutly objected that the subsequent declarations of Leavenworth to Megrue, as to what he had done with the money received from Megrue, is incompetent for any purpose against the defendant. We have had the benefit of a discussion at the bar rarely surpassed in the ability and learning displayed on either side, and the authorities have been extensively reviewed. We content ourselves with stating our conclusions, which rest largely upon the circumstances of this case as it now stands upon the evidence, particularly with respect to the continuous nature of the conspiracy. The general rule of law is undisputed, that, when a conspiracy is shown to exist, all acts done, and all declarations made to advance the common cause, or made in connection with acts done in furtherance of the conspiracy, by any one of the conspirators, are admissible against all. Megrue and Leavenworth were conspirators; and the conspiracy was not at an end. If the testimony of the witnesses, all of whom are accomplices, is to be credited, it tends to show that McKee was in the conspiracy. What took place between Megrue and Leavenworth, in reference to the distribution of this money, from week to week at the different times when the money was delivered by the one to the other, seems to us part of the res gestæ of the transaction, and admissible as such, to show and explain the acts of two of the conspirators. It does not seem to us to be the same as if the declarations of Leavenworth had been made to third persons, or had been made after the conspiracy had ended. We think the declarations of Leavenworth made to Megrue, as to what he did with the illicit money previously received, are competent to explain the act of receiving other like funds continuously, from week to week, and to show the relations of these persons to the transaction, and to each other. But, unless the defendant is otherwise connected with the conspiracy, such declarations on the part of Leavenworth, to the effect tha: he had paid money to the defendant, canno be used to establish the fact that the defend ant did receive money. In other words, tha must be proven by evidence aliunde the declarations; that is, the fact of the conspiracy, and the defendant's connection therewith, as a guilty participator therein, must be proved, by independent evidence, before declarations of the alleged conspirator can be considered as evidence against another not present when the declarations were made. If the jury shall find the proof of the defendant's alleged connection with the conspiracy fails, it will be their duty not to consider any declarations of Leavenworth not made in defendant's presence, for the purpose of showing his complicity with the conspiracy. The mere declarations of an agent cannot prove his agency or authority to bind another.

3. It is also objected that there is no evidence sufficient to be submitted to the jury to show the connection of the defendant with the alleged conspiracy. It is not denied that the evidence of Megrue, Fitzroy, Engelke, and Thorpe (these being the only witnesses examined so far), if true, would establish this sufficiently to be laid before the jury for their consideration. But, it is insisted, that, as

they are all confessed accomplices, and under indictment as such, that their uncorroborated testimony will not justify a conviction, and, hence, should not be considered by the court as a sufficient evidence of a conspiracy to warrant, as against the defendant, proof of the acts and declarations of the alleged conspirators.

We recognize the danger of a conviction resting alone on the unsupported evidence of confessed accomplices, and if, when the testimony is closed, those accomplices are not corroborated, we shall state the law, in this regard, to the jury, as we understand it. It were premature to decide it now. But the position taken that the court can pronounce, as a matter of law, that the evidence of an accomplice is not worthy of any belief or credence, except so far as corroborated, cannot be maintained, especially in view of the legislation of congress which compels accomplices to testify. Accomplices are competent witnesses; and, in our system of jurisprudence, the credibility of all witnesses, accomplices as well as others, is for the jury, and not the court—for the jury under the advice and direction of the court. The proposition maintained, in this respect, by the counsel for the defendant, would substitute the court for the jury, and would be an invasion of the province of the latter, which is without any well-established precedent. Testimony admitted.

[NOTE. Judge DILLON, with Judge TREAT concurring, afterwards delivered the charge to the jury, which rendered a verdict of guilty, and the defendant was sentenced to pay a fine of $10,000 and to two years' imprisonment.. Case No. 15,686. Subsequently a motion was made by the defendant for a new trial, which motion was denied. See Id. 15,683. The defendant then moved in arrest of judgment and to dismiss on three grounds, viz.: (1) That there is no indictment against the defendant pending in the circuit court. (2) That the circuit court has no jurisdiction of the case. (3) That the defendant was not tried on the original indictment, but on an alleged copy thereof. These motions were overruled. Subsequently the defendant was granted an unconditional pardon by the president, a copy of which, with his plea, he exhibited. See Id. 15,687. The plaintiff then entered a demurrer. The defendant's plea was held to be good, and accordingly the demurrer was overruled. Id. 15,688.]

Case No. 15,686.

UNITED STATES v. McKEE.

[3 Dill. 551;[1] 3 Cent. Law J. 95.]

Circuit Court, E. D. Missouri. Jan. 31, 1876.

INTERNAL REVENUE—CONSPIRACY TO DEFRAUD THE GOVERNMENT.

1. The extent and nature of the conspiracy formed in 1871 and continuing until 1875, in the city of St. Louis, to defraud the government out of the tax levied upon the production of distilled spirits, stated.

2. When and for what purpose the declarations of a conspirator can be admitted in evidence against the defendant, on an indictment charging him with complicity in the conspiracy.

3. The substance of the testimony relied on by the government to show the defendant's connection with the conspiracy, stated.

4. The weight due in the law to the testimony of confessed conspirators and accomplices, stated; and the rules of law laid down in respect to the power of juries to convict on such testimony when not corroborated.

5. The defendant's previous good character; for what purpose it is to be considered by the jury, and to what extent available to the defendant.

6. What constitutes a reasonable doubt in a criminal case defined.

[This was an indictment against William M'Kee upon the charge of conspiring to defraud the government, under section 5440 of the Revised Statutes. See Case No. 15,685.]

Before DILLON, Circuit Judge, and TREAT, District Judge.

DILLON, Circuit Judge (charging jury). The unwearied attention you have given to the testimony, throughout this protracted trial, gives the court such assurance that you thoroughly appreciate the solemn public duty which, as citizens, you have been involuntarily required to discharge, that we feel it to be wholly unnecessary to impress you with the importance, alike to the government and to the defendant, of the issues committed to your decision. We proceed at once, therefore, to lay before you the legal principles applicable to the ultimate question that you are to decide, which is, whether the defendant at the bar of the court is guilty or not guilty of the offence charged against him in the indictment.

In legal investigations precision is necessary, and hence it is essential that you should first understand what is the exact offense which the government charges upon the defendant. It is, in substance, that the defendant entered into a conspiracy with certain distillers and internal revenue officers in the city of St. Louis to defraud the government out of the taxes which the law imposes, for the purpose of revenue, upon the production of distilled spirits. A large portion of the internal revenues of the government is derived from this source, and experience has shown, gentlemen, how general are the attempts made to evade this tax and to defeat the equal and full operation of the laws which impose it.

Revenue laws, though absolutely necessary, are often unpopular; but it is, perhaps, true, that in no other way can so much revenue be derived with so little general pressure from the burden, as from a duty laid on the manufacture of distilled spirits. Taught by the experience of other countries, as well as by our own experience in this regard, the congress of the United States, in order to insure the full collection of this

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tax, and to prevent fraudulent evasions of it, has found it necessary to provide a complicated system of checks and safe-guards. The circumstances of the present case do not make it necessary to point out in detail these checks or to describe their operations. It is sufficient to say that the law does not trust to the distiller, but appoints its own agents or officers to watch every material step in the production of distilled spirits, from the purchase of the grain to the final payment of the tax. Confidence and power must from necessity be reposed somewhere; and the law confides in the officers of its own appointment to see that its requirements are not evaded. It also requires regular reports, under oath, from the distiller and rectifier. The checks provided by the law are so complete and perfect that frauds cannot be committed if the revenue officers are faithful and honest. It hence results that any general scheme to defraud the government of this tax, to be successful, must involve a combination, or, in legal language, a conspiracy between the distiller and the rectifier on the one hand, and the government store-keeper, gauger and other internal revenue officers on the other.

Such a conspiracy is substantially charged in the indictment, and it is not a disputed fact in the case, upon the concessions of counsel, that such a conspiracy has been proved to exist. The defendant's counsel concede it and have vied with the counsel for the government in portraying to you its magnitude, and in condemning its actors and operations, the only point in dispute in this respect being, whether the defendant was a member of the conspiracy.

As affecting the application of certain legal principles, hereafter to be mentioned, touching the effect to be given, as respects the defendant, to the acts and declarations of those who are admitted and proved to be conspirators, it is pertinent in this place to call your attention, in a general way, to the nature of the conspiracy shown in this case.

According to the testimony, this conspiracy originated in September, 1871, and with a brief interval in the fall of 1872, and the early part of 1873, continued until May, 1875, when the distilleries were seized and afterwards many of the conspirators arrested and indicted. Some of the conspirators have been convicted, and others have pleaded guilty, and the property of some of the distillers and rectifiers has since been condemned as forfeited to the United States. A shameful feature in the conspiracy is that it seems to have originated not with the distillers and rectifiers but with the revenue agents of the government. Mr. Megrue testifies that he came here in September, 1871, at the instance of John A. Joyce, a revenue agent, to take charge of the illegal organization; that the distillers who first went into it were Bevis & Fraser, Macklot Thompson, and Peter Curran. In 1872 Ulrici, who had first refused to enter it, and who continued to refuse until he saw his business being ruined by his inability to make "straight" compete with "crooked" whiskey, joined the conspiracy. Afterwards other distillers—Teuscher, Busby, and the Bingham Bros.—became members of the illegal organization.

The tax on proof spirits was then 70 cents per gallon, and the agreement was that this tax should, as far as possible, be systematically evaded by removing the spirits from the government warehouse without the payment of the tax, by undermarking the real proof and by the removal and re-use of stamps once used before. One-half of these illicit gains, about 35 cents per gallon, was to be retained by the distiller for his share, and the other 35 cents per gallon was to be received and retained by the revenue officers or other conspirators for their share of the unlawful profits.

These collections from the distillers were made with systematic and business like regularity, every Saturday, when the distilleries were in operation. The ring had its collector and its disburser. The first collector was Megrue; he had an office for the transaction of that business; he remained with the organization until the fall of 1872, collecting for himself and for his confederates from the four distilleries named, on an average, as he states, of about $2,500 per week. Some idea of the magnitude of the fraud may be formed from the fact that Megrue admits that his one-fifth of less than one-half, amounted, in about fourteen months, to the sum of $50,000 or $60,000, showing that during that period the government was defrauded at these four distilleries of from $600,000 to $800,000. Peter Curran states that he, on his own account, paid to the different collectors of the ring from the first to the last about $60,000 or $70,000. From June, 1873, to August, 1874, Fitzroy was the collector for the ring; then Everest, and others. There can be no doubt that from 1871 to 1875 the government was defrauded by this conspiracy in the single city of St. Louis of revenues to the extent of millions of dollars. No honest distiller who paid the tax upon his productions could continue in business in competition with the dishonest who were systematically evading the tax.

It seems astonishing that a conspiracy so enormous in its proportions, and which was depleting the revenue of such vast sums, should so long remain undiscovered by the uncorrupted officers of the government. Some explanation of this is found, however, in the testimony in this case. At different times revenue agents were sent here or visited here; and it is painful to see that the large resources of the conspirators were sufficient to corrupt many of these in their turn. In 1872, Brashear, a revenue agent, visited this place; $5,000 were raised by

Megrue and paid to him, and that came all from Bevis. In 1873, $10,000 were raised from the distillers and paid to the same agent with the knowledge and consent of McDonald, the supervisor of internal revenue, and of Joyce, the revenue agent, for a false report as to the condition of the distilleries in this city. In 1874, $10,000 were raised and paid to Hogue, another revenue agent, for a like purpose.

In the spring of 1875, $10,000 were raised by the distillers and given to McDonald to be used as a corruption fund in Washington, to stop threatened proceedings. But this was unavailing, and the apprehended seizures and arrests were made. In every instance knowledge of the visits of the government agents and detectives seems in some way to have been discovered by the conspirators, in time to enable the distillers to "straighten up" before the official visitation was made. There is every reason to believe, without going beyond the testimony in this case, that the conspiracy here was not an isolated one, but only a link in a chain of frauds of like character in many states, thus enabling the leading conspirators in different places to co-operate with each other in ways and means to avoid detection and escape punishment.

These considerations serve to explain why it was that the conspiracy here in St. Louis continued so long in existence unknown to the government and the officers who were incorruptible, or high enough in place to strike at it with effect. The extent of this conspiracy and its continuous character and operations has an influence in determining the legal principles which we shall hereafter state, as those which belong to this case, and should not be overlooked by the jury in considering the evidence. It is for this purpose that allusion is made to it, and not for the purpose, gentlemen, of exciting your just indignation and shame that such things could be.

Of course, the government on discovering the conspiracy, was bound to lay its strong arm upon it, to arrest and bring the guilty to justice, and this is the work and the duty of courts and juries.

But the government sustains a relation and owes a duty to its citizens as well as to its revenues, and its interests do not demand, and will not be promoted by the conviction of any one who is not proved, in the manner required by the rules of law, to be guilty of the offence imputed to him. And so, gentlemen, you must come to a dispassionate consideration of this case, recollecting that the court, and the jury as a part of the court, have but one duty to discharge, but one object to attain, and that is to ascertain the truth, and to do justice with absolute impartiality and fearless independence.

It is well known that the attention of the country has been drawn to these frauds, and the occurrences which have taken place under your eyes during the trial show the warm public interest in these cases.

We feel it to be our duty to say, that while the indignation of every right-minded citizen is justly excited against the real perpetrators of these frauds, the jury should be especially on their guard that this should not over-master, or in any way, or in the least degree, influence their judgment, in deciding the only issue before them, and that is whether the defendant was, and is fully proved to have been, a member of the conspiracy. But in proportion to the extent of the indignation, may be the danger, if the jury are not sedulously on their guard, of including in the list of the guilty, persons named in connection with these frauds, but whose connection remains to be established in the manner and to the extent required by the law in all criminal cases.

It is just as much the duty of the jury to acquit the innocent, as to convict those proved to be guilty.

The existence of a conspiracy in St. Louis being admitted by defendant's counsel, this narrows your enquiry to a single question of fact, and that is, was the defendant one of the conspirators?

Megrue, McDonald, Joyce, Fitzroy, Thorpe, Engelke, Barton, Cancannon, Findlay Robb, Leavenworth, Bevis & Fraser, Curran, Ulrici, and others here not named, are admitted to have been in the conspiracy; the question recurs whether the defendant was a member of this conspiracy? The government affirms it, and must prove it by legal evidence, in order to ask a verdict in its favor. The case of the defendant is peculiar. He was not engaged in the manufacture of distilled spirits. He was not in any manner connected with the revenue service as an officer or agent. The theory of the government is that he was sought out by the originators of the conspiracy by reason of his controlling power in a newspaper of extensive circulation and influence, and his ability to assist, and if need be, to protect the conspirators in case of trouble.

The government seeks to connect the defendant with the conspiracy by reason of his alleged receipt from week to week of a share of the illicit gains of the conspirators; no other motive is shown for his alleged membership in the conspiracy, and it is quite impossible to suppose he was a member unless he was such for the purpose of pecuniary gain. Accordingly the government has assumed the burden of showing the defendant's connection with the conspiracy by undertaking to prove that he did receive a share of the stolen tax, and really the material question upon the evidence is whether the government has shown this to the satisfaction of the jury, with the degree of positiveness required in criminal cases.

Megrue testified that when he received each Saturday from the distillers his half of

the illicit gains for the week, that after setting apart a certain portion for the storekeeper, for the deputy collector, and for the assessor, and some for the others, the rest of the money was divided each week into five equal parts, one-fifth for McDonald, one-fifth for Joyce, one-fifth for the witness Megrue, and two-fifths, by direction of Joyce, he put into a package or packages, and delivered to John Leavenworth, a gauger (since deceased), each week, with directions to deliver to Ford, the collector, and to McKee.

Megrue says this was done invariably while he was the ring collector, from September, 1871, to the fall of 1872.

Whether Leavenworth ever delivered the packages to Ford or to McKee, the witness Megrue has no personal knowledge, and does not testify.

Fitzroy testifies that when he became collector for the ring he set apart each week a portion for McKee and Ford, until the death of the latter, when the division was in four equal parts instead of five. Bevis, one of the fraudulent distillers, testified that when he paid money to Megrue, he understood from him that it was to go to Joyce, McDonald, McKee and Ford, but he does not know of his own knowledge how it was distributed, or whether any of it came to the hands of McKee and Ford. The other distillers gave no testimony on the point for whom they paid the money or whether it was delivered or not.

Leavenworth reported to Megrue, as the latter swears, when subsequently receiving packages, that he had distributed or delivered to McKee and Ford the packages previously received for them.

But, as we instructed you on the trial, and now repeat, such declarations, that is, the declarations of Leavenworth to Megrue, when he went back for money, from week to week, such declarations, while they are competent evidence to show the relations of Megrue and Leavenworth to each other, and to the transaction, and to explain the act of receiving money from week to week, they are not competent to establish the fact that the defendant, McKee, did receive the money, but such fact (which, under the circumstances of this case, is equivalent to connecting him with the conspiracy) must be shown by evidence other than the mere declarations and statements of a confessed conspirator, not made to or in the presence of the defendant.

This is a rule of universal application, and the law on this subject may be here appropriately stated. When a conspiracy is shown to exist, the rule of law is that all acts done in furtherance of the conspiracy by any of the conspirators, though not in the presence of the others, and all declarations made by any of the conspirators to advance the common cause, or in connection with acts done in promotion of the conspiracy, though not made in the presence of the other conspirators, are evidence against all the conspirators. One conspirator in such cases is bound by all the acts and declarations of his fellow conspirators done and made to promote the common object; but mere declarations, that is, statements of real conspirators, that some one else is a member of the conspiracy, is not evidence to establish that fact; it must be established by independent evidence of the acts, conduct or admissions of the person himself, who is sought to be implicated; but if it is, by such other independent evidence, once established to the satisfaction of the jury that a person is a member of a conspiracy, then the rule above stated applies, and he is bound by the acts and declarations of his co-conspirators, done and made in furtherance of the illegal scheme, though not done or made in his presence. This distinction is plain enough, and when once clearly apprehended by the jury, not difficult of application. I think, gentlemen, that after what I said to you on the trial, and what I have said now, you appreciate that distinction. It is important to bear that in mind, and I hope I have made it perfectly clear.

To establish the defendant's connection with the conspiracy the government relies chiefly upon the testimony of the following witnesses: First, Megrue, as to an alleged interview with McKee in 1875, at the Lindell Hotel, the circumstances of which need not be here stated, as they have been fully rehearsed by the counsel on both sides, and are doubtless fresh in your minds. That an interview of some character took place at the Lindell Hotel does not seem to be denied; but the circumstances under which it occurred and what was said and done are matters in dispute, and for you to determine upon the evidence after settling the credit to be given to the witnesses who speak upon the point. Second, upon the testimony of Fitzroy, particularly that portion of it in which he testifies to the payment of the sum of $480 to McKee by Joyce and McDonald, in the presence of the witness, in October or November, 1873, and his subsequently making a memorandum of the amount.

This is important testimony, because, if true, in the breadth of the statement of the witness, it tends directly to connect the defendant with the conspiracy. It is claimed by the defendant that this testimony is utterly unworthy of credit by the jury, because Fitzroy is a confessed conspirator, because it is improbable that McKee would have made the remark in the manner imputed to him by the witness. because the witness has been shown by Walsh to have a spite against the defendant, because he is a confessed conspirator, under indictment for alleged perjuries in connection with these frauds, and because of his statements, claimed to be contradictory, in his testimony delivered before you. We shall hereafter speak of the credit due to the evidence of an accomplice, but in this

connection will observe generally that really, ultimately, it is solely a question for you to determine, whether, under the circumstances, you can safely place reliance upon such testimony. Reliance is also placed, by the government, to connect the defendant with the conspiracy, upon the testimony of Bernard H. Engelke, one of the conspirators, particularly upon that portion of his testimony in which he details an interview held, as he says, at the instance of one Hardaway (also one of the conspirators) with McKee, in or about October, 1873. If that conversation occurred substantially as Engelke testifies, it would tend to inculpate the defendant in the conspiracy charged against him.

It is claimed by the defendant that this testimony also is unworthy of credence, not only because Engelke is an accomplice, but especially because he has been contradicted on this point by the evidence of Louis Bohle, and by the evidence of Hardaway, and by an official letter of Megrue's, dated August 20, 1874, in reference to the seizure of spirits in Colorado. On the other hand, the government claims that Engelke is corroborated on this point by Barton, one of the conspirators, and what afterwards took place in connection with the Busby distillery; and that Hardaway is contradicted, to some extent, by the book-keeper of Engelke. That is what the government claims. There is much conflict in the evidence upon this subject. The only thing that seems to be agreed on is that for some reason, for some object, Engelke went once, and but once, to see McKee. When, for what purpose, and what was said then —these are matters of fact for you to decide, bearing in mind that Engelke states that he went to see McKee but once in connection with these matters. Reliance is also placed by the government on the testimony of Sehon D. Thorpe, one of the conspirators, to connect the defendant with the conspiracy.

Without detailing them, it is sufficient to remark that Thorpe testifies to conversations with McKee, and as to arranging an interview between McKee and Megrue, which if true, as Thorpe states them, might imply (that will be for you to decide) on the defendant's part a connection with the conspiracy.

And here, again, the main question is one which exclusively belongs to the jury, viz.: The credit to be given to the evidence of Thorpe, who is not only a conspirator under the indictment, but who admitted on the witness stand that he had prevaricated, if not indeed sworn falsely, before the grand jury when he was first before it, and was asked if he knew of any whiskey being removed from the distilleries without the tax being paid on it, and that he replied "No;" whereas, he knew the contrary, at least in the sense of the enquiry, as he knew it was meant to be made. Reliance is also placed by the government to connect the defendant with the conspiracy upon the testimony of Bevis, in which he claims to have had an interview with McKee touching the danger from the removal of the Hardaways from office and also a conversation with McKee during the session of the grand jury, as to the benefit that might enure to those who were or might be indicted if he, the defendant, were not indicted.

Reliance is further placed by the government upon the testimony of Peter Curran touching an alleged interview with McKee, and the exhibition to him of so-called ring checks, wherein he stated that, unless certain revenue suits pending against him were arranged, he would make trouble, and to which, he alleges, McKee replied: "These" (referring to the checks), "are dangerous documents," and left him (Curran) to infer that he would aid him in the said suits as desired.

To connect the defendant with the conspiracy, reliance is placed by the government upon the testimony of Cancannon, a confessed conspirator; particularly in relation to the letter said by Cancannon to have been written by the defendant to Findlay Robb—gauger at Bevis & Fraser's distillery—during the visit of Gen. Sewell, a revenue agent, and to the testimony of the young men Bucher and Bevis, in connection therewith.

Such, gentlemen, is the volume of the testimony on the part of the United States, except the brief and casual conversation with Merrill, adduced to prove the defendant's guilty participation in the conspiracy. It will be observed that, with the exception of Merrill and young Bucher, the witnesses of the government were all members of the conspiracy. As to the testimony of conspirators, the rule of law is that they are competent witnesses. That means that either party has the right to compel them to be sworn. It also implies that when sworn you shall consider their testimony. They are competent witnesses, and under the legislation of congress they are compelled to testify. The testimony of conspirators is always to be received with extreme caution, and weighed and scrutinized with great care by the jury, who should not convict upon it unsupported, unless it produces in their minds the fullest and most positive conviction of its truth. It is just and proper in such cases for the jury to seek for corroborating facts in material respects. It is just and proper to do it. It is not absolutely necessary. To establish a conspiracy, or a person's connection therewith, it is competent to do so not only by direct testimony, but by facts and circumstances which produce a clear and positive conviction.

If any of the witnesses are shown knowingly to have testified falsely—knowingly to have testified falsely on this trial or before the grand jury touching matters here involved—this jury are at liberty to reject the whole of their testimony on the trial of this case. To the jury exclusively belongs the duty of weighing the evidence, and ultimately this case comes down to that, gentlemen of the jury. The question for you,

under these rules of law, to decide upon this testimony, is peculiarly, exclusively, and emphatically a question for the jury, and the most delicate duty which you have to perform in this case will be to settle the credit to be given, if any, to the testimony of these witnesses. That the law commits to your judgment and conscience.

To the jury exclusively belongs the duty of weighing the evidence and determining the credibility of the witnesses. With that the court has absolutely nothing to do. The degree of credit due to a witness should be determined by his character and conduct, by his manner upon the stand, his relations to the controversy and to the parties—his hopes and his fears, his bias or impartiality, the reasonableness or otherwise of the statements he makes—the strength or weakness of his recollections, viewed in the light of all the other testimony, facts and circumstances in the case.

The defendant has produced an impressive array of witnesses of the highest character, who have testified to his previous uniform and general good reputation as a man of unquestioned integrity. This is competent evidence, and the good character of the defendant in this respect is a fact to be weighed and considered by the jury, in the light of which they should view all the evidence and determine the question of his innocence or guilt of the crime charged against him in the indictment.

The defendant, by the policy of our law, can neither be compelled nor permitted to testify. As a substitute for this deprivation, the burden to establish guilt is upon the government, and the law clothes the defendant with a presumption of innocence which attends and protects him until it is overcome by testimony which proves his guilt beyond a reasonable doubt—beyond a reasonable doubt; which means that the evidence of his guilt as charged must be clear, positive and abiding, fully satisfying the minds and consciences of the jury. It is not sufficient, in a criminal case, to justify a verdict of guilty, that there may be strong suspicions; or even strong probabilities of guilt; nor, as in civil cases, a preponderance of evidence in favor of the truth of the charges against the defendant; but what the law requires is proof, by legal and credible evidence of such a nature that, when it is all considered by the jury, giving to it its natural effect, they feel, when they have weighed and considered it all, a clear, undoubting and entirely satisfactory conviction of the defendant's guilt. This, and this only, is required; but this much is required. If the case is thus proved, the jury should convict; but if not, they should acquit.

The sense of duty faithfully and conscientiously discharged goes with us through life, and one of the recollections which never fails to give a deep and tranquil satisfaction, is the recollection of duty thus performed.

Gentlemen, our duty is at an end. Your most important duty here begins. The case is submitted to you.

The jury returned a verdict of guilty, and the defendant was sentenced to pay a fine of $10,000 and to two years' imprisonment.

[NOTE. The defendant moved for a new trial upon these grounds, viz.: (1) For disqualification on the part of one of the jurors. (2) The reception in evidence of certain declarations made by Leavenworth to Megrue. (3) Misconduct on the part of the jurors in reading certain newspaper articles concerning the trial. The court, after much consideration, denied the motion. Case No. 15,683. Subsequently the defendant moved in arrest of judgment, and to dismiss, which motions were overruled. Afterwards defendant was granted an unconditional pardon by the president, a copy of which he exhibited with his plea. See Id. 15,687. To these pleas the government demurred, which demurrer was finally overruled. Id. 15,688.

Case No. 15,687.

UNITED STATES v. McKEE.

[4 Dill. 1;[1] 3 Cent. Law J. 292.]

Circuit Court, E. D. Missouri. April 26, 1876.

REMISSION OF INDICTMENT FROM DISTRICT TO CIRCUIT COURT—RECORD—COPY OF INDICTMENT—ARREST OF JUDGMENT—ERRORS OF FORM.

1. The legislation of congress (Rev. St. § 1037 [9 Stat. 72]), authorizing the district court, by order entered on its minutes, to remit any indictment pending therein to the circuit court, does not require that the clerk of the district court shall transmit the original indictment, but an exemplification of the record, including a certified copy of the indictment.

[Cited in Burke v. Bunker Hill & S. Mining & Concentrating Co., 46 Fed. 650.]

[Cited in Stone v. Sargent, 129 Mass. 507.]

2. Where a record copy of the indictment was transmitted to the circuit court, to which no objection was made by the defendant, who pleaded thereto, and went to trial thereon, and was convicted, the original indictment remaining on the files of the district court, it was held that even if the original indictment, instead of a copy, should have been sent, this was waived by the defendant, and under the remedial provisions of the statute (Rev. St. § 1025 [17 Stat. 198]), the defendant, not having been prejudiced, was not entitled to have the judgment arrested.

[Cited in U. S. v. Molloy, 31 Fed. 24.]

From the transcript which has been remitted to the circuit court by the district court of the United States for the Eastern district of Missouri, it appears that at the November term, 1875, of the said district court, a grand jury found and returned an indictment against the defendant, which charged him with having conspired with certain individuals to defraud the United States of the tax on certain distilled spirits thereafter to be manufactured at designated distilleries, situated in the city of St. Louis. [See Cases Nos. 15,685 and 15,686.] On this indictment—having been arrested upon capias—the defendant was arraigned in the district court, entered his plea of not guilty, and was ad-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

mitted to bail under recognizance taken in open court.

At the same term of the district court, on motion of the attorney of the United States, it was ordered, by a proper entry upon the minutes, that the indictment be remitted to the adjourned September term of the circuit court, which was to convene on the 4th day of January, 1876, and that the defendant appear at said adjourned term, on said day, and answer said indictment and all orders touching the same which might be made by said circuit court. The order, as entered of record in the district court and duly certified to the circuit court, is in the following words: "This day comes the United States, by the district attorney, and on the motion of said attorney, it is ordered that the indictment in this cause be and hereby is remitted to the next adjourned term and session of the circuit court of the United States in and for the Eastern district of Missouri, to be begun and holden at the city of St. Louis, in said Eastern district of Missouri, on the first Tuesday, the 4th day, of January next, A. D. 1876, for proceedings thereon according to law. And it is further ordered that the said defendant, William McKee, be and appear at and before said circuit court on the said 4th day of January next, to answer to the charges as contained in the said indictment herein against him, and obey any and all the orders that may be made by said circuit court in relation to said indictment during the pending of the same, in obedience to the recognizance heretofore entered into by him herein."

In obedience to this order, the clerk of the district court certified under seal and remitted to the circuit court, a true transcript of the record and proceedings in this case, to which was appended the following certificate: "I, Joseph H. Clark, clerk of the district court of the United States in and for the Eastern district of Missouri, do hereby certify the writings hereto annexed to be a true transcript of the indictment, capias, and return on same, and of the proceedings had in case No. 919, A. D. 1875, of the United States, plaintiff, against William McKee, defendant, as fully as the same remain on file and of record in said case, in my office." This transcript of the record was duly filed in the circuit court. At the adjourned term (January, 1876), the defendant appeared in the circuit court and withdrew the plea of not guilty, and by leave of court demurred to the indictment, and the demurrer having been overruled, he thereupon again pleaded not guilty; was tried by a jury, which returned a verdict of guilty. A motion for a new trial was made and overruled [see Case No. 15,683], and now the defendant moves in arrest of judgment and to dismiss on the ground: (1) That there is no indictment against the defendant pending in the circuit court. (2) That the circuit court has no jurisdiction of the case. (3) That the defendant was not tried on the original indictment, but on an alleged copy thereof. The original indictment was not transmitted by the clerk of the district court to this court, but a certified copy thereof; the original indictment and original papers all the time remaining in the district court. The objection that the original indictment, and not a copy thereof, should have been remitted to the circuit court, was not made or suggested until after the trial and verdict. The order of remission was made under Rev. St. § 1037, which provides that "whenever the district attorney deems it necessary, any circuit court may, by order entered on its minutes, remit any indictment pending therein to the next session of the district court of the same district, where the offense charged in the indictment is cognizable by the said district court; and, in like manner, any district court may remit to the next session of the circuit court of the same district any indictment pending in said district court, and such remission shall carry with it all recognizances, processes, and proceedings pending in the case in the court from which the remission is made; and the court to which such remission is made shall, after the order of remission is filed therein, act in the case as if the indictment and all other proceedings in the same had been originated in said court."

David P. Dyer, U. S. Atty., and James O. Broadhead and Lucien Eaton, Special U. S. Asst. Attys.

Krum & Madill, Henry A. Clover, D. W. Voorhees, and Wm. M. Hatch, for defendant.

Before DILLON, Circuit Judge, and TREAT, District Judge.

DILLON, Circuit Judge. The objection relied on is that the circuit court acquired no jurisdiction over the defendant and the case, because under the order of the district court remitting the indictment, the original indictment was never transmitted to this court, but only a certified copy thereof. It is also contended by the defendant, that if the presence of the original indictment is not a jurisdictional requisite, yet, inasmuch as the statute contemplates that the defendant shall be tried upon the original, and not upon a copy, he has not been legally convicted, and judgment should be arrested. Both of these objections fail if the statute does not require the original indictment to be transmitted with the rest of the record and the order of remission.

When this question, which is new, and has never been decided, was first started, it occurred to us that the language of the statute (Rev. St. § 1037), viewed in connection with other statutes as to the removal of causes from state to federal courts, contemplated that the indictment, that is, the original indictment, and all recognizances, processes, and papers—in a word, the original files—should be transmitted to the court to which

the case is sent. Subsequent reflection and examination have satisfied us that the language of the section, taken altogether, shows that it was the purpose of congress to authorize the transfer from the one court to the other of a criminal case—of the whole case, and all the proceedings in the same—and this is the burden and object of the statute, and not the particular form in which the record of the one court should be sent to the other.

The case originated in the district court. The indictment and other proceedings therein were part of the records of that court. An indictment, when found by a grand jury, and presented to and received by the court, passes into and becomes a part of the records of the court. 1 Bish. Cr. Proc. (2d Ed.) § 36; State v. Gibbons, 4 N. J. Law, 40. The indictment being the original accusation of the grand jury, and a part the records of the court to which it is presented, is always before the court, and in that court it is, perhaps (under the practice in this country), the best evidence of its existence and contents. But in other courts the practice and law are settled that the existence of an indictment and its contents may be shown by exemplification of the record of the court in which it is found, and it is not necessary, if, indeed, competent, to produce the original indictment. Porter v. Cooper, 6 Car. & P. 354; Rex v. Smith, 8 Barn. & C. 341; Bishop v. State, 30 Ala. 34; Rosc. Cr. Ev. (7th Am. Ed.) 165; Harrall v. State, 26 Ala. 52; Major v. State, 2 Sneed, 11; Vail v. Smith, 4 Cow. 71; 1 Greenl. Ev. § 502. And in England it is settled that the finding of an indictment in another court cannot be proved by the production of the original by the clerk of the court in which it is found, but it must be proved by a record regularly drawn up containing a copy of it. Rex v. Smith, 8 Barn. & C. 341; Rosc. Cr. Ev. (7th Am. Ed.) 165. In England indictments found in inferior jurisdictions may be removed, with all the proceedings thereon, at any time before trial, into the king's bench, to have their validity determined and to prevent a partial and insufficient trial in the court below. 4 Bl. Comm. 320, 321; 1 Chit. Cr. Law, 371 et seq. The English books always speak of the "removal of the indictment" and the "delivery of the indictment" to the higher court, but in point of fact the original indictment remains in the court in which it is found, and only the record of it and the proceedings of record touching it are sent to the higher court. The removal is effected by the writ of certiorari, which issues out of the king's bench, directed to the judges or officers of the inferior court in which the indictment is pending, and commands them to certify "all and singular the said indictment," etc. 1 Chit. Cr. Law, 387. Notwithstanding the command of the writ is to certify the indictment, the writ is executed by transmitting "the record of the indictment" and the other proceedings of record thereon—and not the original indictment (1 Chit. Cr. Law, 394; Id. 334), where it is expressly said that the "copy of the indictment" is transmitted to the superior court. In State v. Gibbons, 4 N. J. Law, 40, 44, the original indictment was sent to the supreme court, and it was held to be improper and insufficient. The chief justice observed: "When the grand jury return into court and present an indictment, an entry is made in the minutes of such presentment, stating against whom the same is, and for what crime; and then the indictment itself passes to the files of the court, there to remain until it becomes necessary to make up the record, * * * and then to be affiled among the rolls. * * * In all cases where a certiorari is presented, whether before or after plea pleaded, it is essential that the proceedings, so far as they have gone, be enrolled, and that that roll, and nothing else, be certified to the upper court."

The removal of a criminal case in England after bill of indictment found, by certiorari, from an inferior to a superior jurisdiction, for trial by jury and judgment, is quite analogous to the remission provided for by the statutes of the United States from one of its courts to the other. The English books invariably speak of the "removal of indictments" by certiorari (see Chit. Cr. Law, c. 10, p. 371), when, in fact, the removal is not of the original, but of the record duly certified, which includes a copy of the indictment. The command of the writ is to "send the indictment," which is obeyed by sending the record of the indictment. The trial is had upon the copy or record thus returned. So, when our statute provides for the remission of the indictment, it may well be construed to mean an exemplified copy or record of the indictment, to be sent with the other records pertaining to the case. It is just as important or as little important that the original bill of indictment found at the sessions should be in the king's bench for the trial of the defendant thereon by a jury as that it be in the federal court to which a criminal case has been sent by the court to which the indictment was originally presented. It is essential to the jurisdiction of the district court that the indictment should have been presented to it by a grand jury impaneled in that court, and these facts ought to appear of record therein. If that court acquired no jurisdiction before the order remitting the indictment, the circuit court could acquire none in consequence of the filing of the order of remission. Undoubtedly, all the record relating to the case remitted, including recognizances taken in open court and entered of record, and all the proceedings of record, should be transmitted to the court to which the remission is ordered, as well as the indictment. All these other facts of record must go by exemplification or certified copy, and, if so, why not in the same manner the indict-

ment and process? This is the usual way of transmitting or sending the record in a case from one court to another; and the practice contended for by the defendant of sending away the originals would compel the court in which the indictment was found to part with its records and leave them incomplete. And the books show that unless the statute requires the original papers to be sent, the practice is to send exemplifications or certified copies.

Very little aid is to be had from the decisions of the state courts construing special statutes on the subject of changes of venue in criminal cases. They all concur in holding that when the statute authorizes the trial to be had upon the record copy of the indictment instead of the original, this may be done. Harrall v. State, 26 Ala. 52; Major v. State, 2 Sneed, 11; Bishop v. State, 30 Ala. 34; Reynolds v. State, 11 Tex. 120; Ruby v. State, 7 Mo. 206; Bramlett v. State, 31 Ala. 376.

Whether the defendant may be tried or sentenced upon a copy of a lost indictment, is not a question before us, and in respect of which there may be doubt under the decisions, unless it is a copy of record. Ganaway v. State, 22 Ala. 772; Bradshaw's Case, 16 Grat. 507; Mount v. State, 14 Ohio, 295; Ruby v. State, 7 Mo. 206; 1 Bish. Cr. Proc. (2d Ed.) § 1215, and cases cited. In the case of Browning v. State, 30 Miss. 656, it was urged that the court erred in forcing the prisoner to trial on a copy of the indictment instead of the original. He was indicted in one county, and the venue was changed to another county. In a change of venue in civil cases the statute directed that the original papers be transmitted, but the statute in criminal cases made no provision on the subject. The clerk transmitted a certified copy of all the orders, etc., including a copy of the indictment, and it was held that the defendant was properly tried thereon. The court remarked that unless authority to transmit the original papers "is conferred by the legislature, it would be clearly illegal for the clerks of the circuit courts to part with the original papers or records pertaining to a prosecution therein pending. All that a clerk could do in such cases—and we must infer that it was all the legislature intended to be done—is to transmit a perfect transcript of all the original papers in the cause, the minutes or records of the court containing the orders, and proceedings of the court in relation to the same, properly certified." In Shoemaker v. State, 12 Ohio, 43, 51, the statute in terms required the "original indictment" to be transmitted when the prisoner elected to be tried in the supreme court.

Our judgment is that there is no positive requirement in the statute (Rev. St. § 1037) that the original indictment should be sent; that, like the other proceedings in the case, the indictment is part of the record of the cause, and that it was properly certified as such to the circuit court, and that on the filing of the same, with the order of remission, that court had jurisdiction to try the defendant on the indictment and record thus certified and filed.

But suppose we are mistaken in the view that the statute authorizes or requires the copy instead of the original indictment to be sent, does it follow that the court acquired no jurisdiction? A certified copy was sent. It is not suggested that it was not a faithful copy, word for word. The defendant treated the exemplified or record copy as the indictment. He demurred to it, and afterwards went to trial upon it. He made no objection to it. If he had been acquitted, it would certainly have been severe to have applied to him the doctrine his counsel now maintain to be correct, namely: that the whole proceeding was coram non judice and void, because the court had no jurisdiction, and hence he would be liable to be again tried. It is indisputable that the defendant has suffered no prejudice in fact because he was tried upon the certified copy instead of the original. Having treated the record copy throughout as equivalent to the original, the defendant must be taken to have waived the right, if it exists, to a trial upon the original indictment, when he fails to make the objection until after verdict. The cases are numerous, particularly in modern times, and where the offense is a misdemeanor, in which rights, technical in their character, and where no prejudice has resulted, have been considered as waived. Ruby v. State, 7 Mo. 206; Major v. State, 2 Sneed, 11; Shaw v. State, 18 Ala. 547; Patterson v. U. S., 2 Wheat. [15 U. S.] 221; 1 Bish. Cr. Proc. §§ 117, 118, 125.

Inasmuch as it is not claimed that the exemplification of the indictment on which the defendant was tried is in any respect variant from the original on file in the district court, we have the means of a positive assurance that there has been, and could be, no prejudice to the defendant because the trial was upon the one instead of the other. Thus the case, in any view which can be taken of it, comes within the remedial provisions of section 1025 of the Revised Statutes: "No indictment found and presented by a grand jury in any district or circuit or other court of the United States, shall be deemed insufficient, nor shall the trial, judgment, or other proceedings thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

The motion in arrest and to dismiss are overruled. Motions overruled.

NOTE [from 3 Cent. Law J. 292]. After the reading of this opinion, Judge DILLON proceeded to pronounce sentence as follows: The defendant has been indicted under this section (§ 5440) of the Revised Statutes [14 Stat. 484]:

If two or more persons conspire either to commit any offence against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than $1,000 and not more than $10,000, and to imprisonment not more than two years." If the circumstances connected with this trial were not so fresh in the public mind, it would be a fitting occasion to review them briefly, in order that the views which guide the court in the punishment, which, in the exercise of its duty, it becomes necessary to pronounce as ministers of the law, might be the more fully seen. It will be observed that within certain limits the statute gives to the court a discretion as to the amount of punishment. It would have relieved both of us of a great deal of responsibility if the statute itself had fixed, and in unvarying terms defined, the amount of punishment; but the statute, doubtless for wise reasons, has fixed limits within which the discretion of the court may range and adjust, according to its own judgment and view, as best it may, the punishment which seems, under all the circumstances, the best fitted to a particular case. We have discretion to fix a pecuniary penalty to be paid in the sum of $10,000. There is a discretion also as to the place of imprisonment, the language of the statute being—"and to imprisonment not more than two years"; this particular statute not stating where—whether in the county jail or in the penitentiary of the state—that imprisonment shall be had. If we should consider only the magnitude of the alleged fraud in these cases, if we should consider that only,—for we must assume, in pronouncing judgment, that the verdict of the jury is true,—it would lead the court to pronounce the highest penalty, and the severest punishment; but when we consider that certainty, rather than severity of punishment has been shown by the history of the criminal laws and jurisprudence in all countries to conduce to the most efficient administration of criminal law; that the object of judicial sentence is not primarily, if at all, to punish the offender, except as far as this is necessary to the protection of society; that there is also a civil liability for these frauds in actions on bonds, or in an action, as at common law, to the full extent, or to the full extent of the parties' ability to respond to them as a criminal responsibility, and that these penal provisions are largely intended to aid this civil responsibility and to prevent these frauds, and become the instrument of reimbursing the government; that there is a distinction taken in the statute—and one which I may remark, also exists in reason and in the nature of things—between official offenders, and those who have occupied no official positions, broken no official oaths, and betrayed no official trusts,—these are circumstances, on the other hand, to be considered in mitigation in affixing the amount of punishment, and they have been considered. When these cases on demurrer were before Mr. Justice Miller and Judge Treat at the last September term, in the course of his judgment in overruling the demurrer to the indictment, Justice Miller said: "All the world over, those who have a trust reposed in them, are held to a more rigid accountability than others, and the violation of a trust is punished more severely when committed by them than where no such also special trust is imposed." In this connection it is also, but just to remember the previous good character of the defendant. In a great strait, and extremely like this, a long lifetime of usefulness and upright conduct should come largely to his aid, and with us has been a very controlling element in guiding our discretion as to the place of punishment.

I confess to another consideration which has had great weight with me, perhaps greater weight than it should have; that is, the indelible stain and stigma which attaches to imprisonment in the penitentiary, not upon the man alone, but upon his wife and children, and upon the latter after he has gone from them. It is a terrible consequence of crime that its dark shadow covers the offended, as well as the offender, and it is a terrible thought that one's children are likely to be taunted with it in after years, that their father has been in the penitentiary of the state. In felonies, among confirmed offenders, in crimes involving great turpitude, such punishment is absolutely necessary often, but in mere misdemeanors, particularly when committed for the first time, it is to be avoided where it can be consistently with a sense of duty. I would rather have the reflection, when I lie down at night, that I had erred, if err I must, on the side of mercy, than on the side of undue severity; it will give sweeter sleep, and leave behind it better memories. Now, considering all the circumstances of this case, without further enlarging upon them, our judgment is that the defendant pay the maximum fine of $10,000, and that he be imprisoned in the county jail for the space of two years.

[The defendant exhibited a copy of his pardon with his plea. To this plea the plaintiff demurred, which demurrer was overruled by the court. See Case No. 15,688.]

Case No. 15,688.

UNITED STATES v. McKEE.

[4 Dill. 128;[1] 5 Reporter, 7; 10 Chi. Leg. News, 18; 6 Am. Law Rec. 196; 23 Int. Rev. Rec. 338; 25 Pittsb. Leg. J. 39.]

Circuit Court, E. D. Missouri. Sept. 28, 1877.

INTERNAL REVENUE—JUDGMENT IN CRIMINAL CASE—SUBSEQUENT CIVIL SUIT FOR PENALTY—EFFECT OF PARDON.

1. The defendant was indicted, convicted, and punished under section 5440 of the Revised Statutes for conspiring with certain distillers to defraud the United States, by the unlawful removal of distilled spirits from their distilleries, without the payment of taxes. U. S. v. McKee [Cases Nos. 15,685, 16,686, and 15,687]. In the present suit he was sued civilly, under section 3296 of the Revised Statutes [15 Stat. 140], to recover the penalty of double the amount of the taxes of which the government had been defrauded by means of the said conspiracy, the two transactions being the same. It was held that the present suit for the penalty was barred by the judgment in the criminal case.

[Distinguished in Re Leszynsky, Case No. 8,279. Cited in U. S. v. De Grieff, Id. 14,936; Coffey v. U. S., 116 U. S. 445, 6 Sup. Ct. 440. Followed in U. S. v. One Distillery, 43 Fed. 852. Distinguished in U. S. v. 3 Copper Stills, 47 Fed. 499. Cited in U. S. v. Shapleigh, 4 C. C. A. 237, 54 Fed. 133. Distinguished in U. S. v. Olsen, 57 Fed. 582.]

[Distinguished in Rollins v. Breed (Sup.) 8 N. Y. Supp. 49.]

2. The unconditional pardon by the president, of the offence charged in the indictment, is a bar to the present suit.

[Distinguished in Re Leszynsky, Case No. 8,279.]

[Cited in Knapp v. Thomas, 39 Ohio St. 381.]

This is a civil action by the United States against William McKee, based upon section 3296 of the Revised Statutes of the United

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

States, to recover the penalty of double the amount of taxes on distilled spirits, out of which the government alleges it was defrauded, by means of a conspiracy entered into for that purpose by the defendant and certain named distillers, for the unlawful removal by the distillers of said spirits without the payment of taxes. In these removals it is alleged that the defendant, McKee, aided and abetted. To this petition the defendant pleaded: First. That he had been indicted in this court, and convicted and punished for the same offence, and the plea sets forth the substance of the indictment, and the judgment of the court, by which he was sentenced to pay a fine of $10,000, and to imprisonment in the county jail for two years. This record showed that the defendant was indicted under Rev. St. § 5440, and the overt acts charged in the indictment are alleged to be the unlawful removal of the same distilled spirits, without the payment of taxes, for which the penalty here sought to be recovered is denounced by section 3296 of the Revised Statutes. [See Cases Nos. 15,685, 15,686, 15,683, and 15,687.] Second. The defendant pleaded a full and unconditional pardon by the president, and he exhibits a copy of the pardon with his plea. To these pleas the government demurred, on the ground that they constituted no bar to the present action.

Mr. Bliss, Dist. Atty., for the United States.

C. H. Krum and H. A. Clover, for defendant.

Before MILLER, Circuit Justice, and DILLON, Circuit Judge.

MILLER, Circuit Justice. This is a civil action brought by the government against William McKee, to recover the liability which section 3296 of the Revised Statutes denounces, of double the amount of taxes of which the United States has been defrauded by the unlawful removal of whiskey from the distilleries of divers persons, at different times, within this district.

The petition charges that in all these removals the defendant, in the language of the statute, aided and abetted.

To each and all of these charges defendant makes two defences.

1. That he has been indicted in this court, convicted, and punished for the same offences.

2. That for these offences he has been pardoned by the president, and he exhibits a copy of the pardon with his plea.

To this answer the plaintiff demurs.

In determining the sufficiency of both these defences, it is necessary to ascertain clearly the nature of the offence charged in the indictment for which the defendant has been punished; for if it is the same offence, as defined by law, for which he is now prosecuted, and is also for the same transactions, our laws forbid that he or any one else shall be twice punished for the same crime or misdemeanor.

In the former trial he was indicted for a conspiracy to defraud the government of the United States out of taxes due on whiskey distilled by the several parties mentioned, and that in pursuit of that conspiracy other parties than defendant—who were his co-conspirators—did unlawfully remove said whiskey.

It thus appears that the whiskey was actually removed; that by this removal the government was defrauded of its taxes; that defendant was one of the several persons who conspired together to do this act, though it was not charged that he personally took part in the acts of removal.

In the present case, while he is not charged with a conspiracy by that name, he is charged with aiding and abetting this same removal, and, if convicted, will be punished for the same removals.

We are all of opinion that his joining the conspiracy, of which the purpose was to remove the whiskey, was aiding and abetting the removal which was effected by means of that conspiracy.

How can a man more effectually aid an unlawful act than by counseling and advising its execution, and giving his influence to its support, and the best energies of his mind to devise the safest and surest means of its accomplishment? If three men agree to compass the death of another, and one of them puts their joint purpose into effect, do not the other two aid and abet the murder? and is not such an agreement also a conspiracy to murder the victim?

We are, therefore, of opinion that if the specific acts of removal on which this suit is brought are the same which were proved in the indictment, the former judgment and conviction is a bar to the present action; and we are also of opinion that the allegations of the answer are sufficient averments that they are the same. If the counsel for the United States thinks they are not the same, he can take issue on that plea, and have the issue tried.

Little need be said about the plea of pardon, because if the indictment and sentence of McKee were for the same offences, both in law and in fact, for which this action is brought, it is conceded that the pardon is also a bar to the civil suit. If it is not conceded, we have no doubt that it is so. As it stands in connection with the averments of the answer, we hold it to be a good plea. Whether it would be a good bar to an action for acts not included in that prosecution, but of the same character, we need not now decide, though I have, personally, a strong opinion that it would.

The demurrer is overruled.

Demurrer overruled.

See U. S. v. McKee [Cases Nos. 15,687, 15,685, and 15,686.]

Case No. 15,689.

UNITED STATES v. McKEE.

[Rev. Cas. 70.]

Circuit Court, S. D. Illinois.

REBELLION — LICENSE TO TRADE IN INSURGENT TERRITORY — CONFISCATION LAWS.

[One having a license to trade in insurgent territory, under the act of July 13, 1861 (12 Stat. 255), could not, in virtue thereof, acquire, by purchase or otherwise, any valid title to merchandise which was the individual property of an agent of the so-called Confederate States; for by the act of July 17, 1862, § 5 (12 Stat. 589), all the property of officers and agents of that government were made confiscable to the United States, and all sales or transfers thereof by them declared null and void.]

TREAT, District Judge. On the 16th of March, 1864, the United States navy seized 137 bales of cotton and a lot of rope, bagging and leather on the bank of the Red river, in Louisiana. The proceeds of this property are now claimed by John H. McKee. The proof shows this state of the case: The claimant has been a resident of New Orleans since the commencement of the Rebellion. The cotton, rope, bagging and leather were the individual property of A. W. McKee, a resident of upper Louisiana and from October, 1862, to the fall of 1864 the general agent of the treasury department of the Confederate States to purchase and dispose of cotton in the state of Texas and that part of Louisiana lying west of the Mississippi river. The claimant purchased the property in question of A. W. McKee on the 4th of March, 1864. The proof tends to show that he had a license to trade in insurgent territory issued under the provisions of the act of July 13, 1861. And he had permission from the commander of the United States forces in the department of the Gulf to pass through the United States lines into Upper Louisiana and bring away any property that he might there purchase. Section 5 of the act of congress of July 17, 1862, provides "that to insure the speedy termination of the present Rebellion, it shall be the duty of the president of the United States to cause the seizure of all the estate and property, money, stocks, credits and effects of the persons hereinafter named in this section, and to apply and use the same and the proceeds thereof, for the support of the army of the United States." The enumeration of persons includes "any person hereafter holding an office or agency under the government of the so-called Confederate States of America." And the section thus concludes, "and all sales, transfers or conveyances of any such property shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or use of such property, or any of it, to allege and prove that he is one of the persons described in this section." A. W. McKee accepted and held an important official position from the government of the Confederate States after the passage of this statute. And he continued to hold that position when he transferred the property in question. The statute was therefore strictly applicable to him and the property. It deprived him of the power of making any valid disposition of the property. It expressly declared any sale or transfer to be void. In this state of the case it is very clear that the claimant acquired no title. His purchase was simply void, because A. W. McKee had no capacity to dispose of the property. The claimant's license gave him no right to deal in this property. A statute subsequent in date to the one under which his license issued, prohibited any sale or transfer of the property. The provisions of the act of July 13, 1861, so far as they are in conflict with those of the act of July 17, 1862, must give way. It is a familiar principle of law, that where two statutes are inconsistent with each other the later statute must prevail. To the extent of the repugnance between them, the later statute is a modification or repeal of the former. If, therefore, the license issued under the act of July 13, 1861, in terms authorized the claimant to trade generally within insurgent territory, the act of July 17, 1862, must be considered as restricting that authority to the property of those holding no official relation to the government of the Confederate States The claim must be dismissed.

UNITED STATES (McKEE v.). See Case No. 8,850.

Case No. 15,690.

UNITED STATES v. MACKENZIE et al.

[1 N. Y. Leg. Obs. 227.]

District Court, S. D. New York. Jan. 10, 1843.

MURDER ON HIGH SEAS — MOTION FOR WARRANT OF ARREST — NAVAL COURT MARTIAL.

Where parties are charged with having committed the crime of murder on the high seas, and an investigation, in a regularly organized court of inquiry, is instituted by the secretary of the navy, the United States district court will not grant a warrant to arrest the parties so charged, pending such proceedings.

This was an application by Mr. J. B. Scholes, on behalf of Margaret E. Cromwell, widow of Samuel Cromwell, for a warrant to apprehend Commander [Alexander S.] Mackenzie and Lieutenant [Guert] Gansevoort, charged with the wilful murder of the said Samuel Cromwell. The learned counsel made this application on affidavits.

BETTS, District Judge. Two affidavits were presented me yesterday afternoon, and an application founded on them was made by counsel, for a warrant to arrest Alexander Slidell Mackenzie and Guert Gansevoort, for murder committed on the high seas. The affidavit of Margaret E. Cromwell states, that she is the widow of Samuel Cromwell, and charges, that she is informed and believes her husband was put to death the

first day of December last, at sea, on board the United States brig Somers, by order of Mackenzie, and that Gansevoort aided, abetted, and assisted in the said killing; that he was put to death without the form or semblance of a trial, and without the least legal evidence of the guilt or misconduct of said Cromwell. She further states, that she is informed and believes, that said Cromwell was put in irons on board the said brig the 27th day of November, and remained thus confined until the first day of December, and when within two or three days' sail of the Island of St. Thomas, he was, by order of the accused, deliberately put to death by hanging at the yard-arm of said brig. The other deposition, made by Charles Cleveland, alleges, that he was present on board the U. S. ship North Carolina, and on or about the 29th day of December last, heard a report or written statement read, and also heard Mackenzie, the accused, admit it was made by him; and in that statement Mackenzie admitted, he did deliberately put to death Samuel Cromwell, by hanging him at the yard-arm on board the U. S. brig Somers, on the high seas, on the first day of December last; and also, that the deponent heard Gansevoort, the other party accused, acknowledge, that he aided and abetted Mackenzie in the said act. The counsel also submitted a published report of the statement of Mackenzie, and the proceedings thereupon, referring to that as evidence of his admission and the manner in which it was made.

It is first to be remarked, in respect to this proceeding, that it is not conducted in the method usually employed in criminal accusations in this district. The district attorney is the official representative of the government in criminal prosecutions. [Levy Court of Washington v. Ringgold] 5 Pet. [30 U. S.] 451. And it can rarely happen that a magistrate will feel bound to investigate charges which have been made known to the district attorney, and which he then declines to prosecute or countenance. It by no means follows, that the unwillingness or refusal of that officer to institute a criminal prosecution, will debar a judge or magistrate investigating charges which come before them properly authenticated, or will control them in the exercise of a full discretion in the matter; but it is found most conducive to the orderly administration of justice, to the protection of the citizen, and the vindication of the laws, in the discovery and punishment of public offenders, to leave to the officer of the law, charged with this duty, to collect proofs, inquire whether there is a probable case of any offence against the laws, and prepare the charges to be presented before the examining magistrate. It is not concealed, that in this case, the district attorney, or the gentleman conducting the business of his office, in his absence on other official duties, both declines to act in this accusation, and discountenances its prosecution at the present time, and in this form.

We are, then, brought to consider the case as it now stands and decide, whether the facts stated, are of a nature to demand the arrest of those parties on this capital charge. It is to be premised, that it is not the duty of a magistrate, upon the mere assertion, upon oath, that a crime has been committed, to issue a warrant or take cognizance of the subject. There must be first laid before him a statement of facts, verified by oath, which, if true, either proves that an offence has been committed, or raises a strong presumption that it is so. 1 Chit. Cr. Law, 12; 1 Hale, P. C. 580; 2 Hale, P. C. 107, 110. If he may be protected in acting on a well-founded suspicion, it is clear, upon the principle of the authorities, that he is not bound to proceed on such evidence at common law, unless, perhaps, in the case of a suspicion founded on his personal knowledge of facts. 1 Chit. Cr. Law, 10, 11. And under the 6th amendment of the United States constitution it is at least doubtful, whether he can act until a probable cause is first established to his satisfaction by oath. The witnesses, who have given their depositions in this case, know no fact or circumstances implicating these parties, and claim to support the proceedings asked for upon the open and notorious declarations and averments of the accused. I am, accordingly, bound to regard these declarations and the concomitant circumstances, as the sole evidence offered to support the accusation, and justify the award of a warrant of arrest.

It appears upon this proof, that the accused, being officers in command of the U. S. brig Somers, arrested Cromwell on a charge of a mutinous conspiracy with others of the crew, to murder the officers, and piratically possess themselves of the vessel, her armament and stores; that after detaining him in confinement from the 27th of November to the 1st of December, they ordered him put to death under apprehension of his rescue by his confederates, and in the belief that there was no other means of saving the ship and the lives of the officers. Setting up an accusation of this character against the deceased, under whatever solemnity of asseveration, most certainly can be received as a justification for employing the last extreme of power by the accused. The watchful solicitude of the law over life and personal security, cannot be so quieted or satisfied. The necessity of the case must be made apparent beyond any fair ground to doubt, before any functionary, under whatever plenitude of power, can, on his own mandate, take the life of a citizen. Public sensibility is in no respect in advance of the activity and vigor of the law in vindicating and protecting life and personal liberty from injuries not well warranted and excused by the exigencies under which they were inflicted. Yet, it by no means follows,

that the investigation of this grave and exciting subject, devolves upon the civil authorities, or that the commission of an offence at places or by persons within the jurisdiction of courts of law, necessarily imposes on them the duty of inquiry or punishment. It is not intended, however, to go into this topic farther than to consider whether the facts and circumstances now laid before me, impose a necessity on me, as a civil magistrate, to cause the accused to be arrested, and then to proceed and investigate the charges. The act of Sept. 24th, 1789, § 33 [1 Stat. 91], empowers the arrest of offenders for any crime against the United States, agreeably to the usual mode of process in the state where the offender may be found, and authorizes the proceedings to be had before any justice or judge of the United States, or justice of the peace, or other magistrate of the state, and a recent act extends the authority to commissioners appointed by the circuit court to take affidavit and bail. Act Aug. 23, 1842 [5 Stat. 516]. But, though the mode of proceeding be the same as under the state laws, the United States courts can take no cognizance of any matter not specifically declared to be a crime or offence by act of congress, and accordingly cannot inquire into violations of the common law, or law of nations, committed on land or at sea, without the act is prohibited and punished by express statutory provisions. U. S. v. Hudson, 7 Cranch [11 U. S.] 32; U. S. v. Wiltberger, 5 Wheat. [18 U. S.] 76; U. S. v. Bevans, 3 Wheat. [16 U. S.] 336. The crimes act of 1790, § 8 [1 Stat. 114], renders it a capital offence for any person upon the high seas to commit murder, and declares that the trial of crimes committed on the high seas, &c., shall be in the district where the offender is apprehended, or into which he may be first brought. The act of 1825 (chapter 276, § 4) declares, that if any person upon the high seas, &c., shall commit wilful murder, he shall, upon conviction thereof, suffer death. The language of these enactments is sufficiently comprehensive to embrace offences committed on board the armed vessels of the United States, and the argument upon which the interposition of the civil courts is invoked in this instance, assumes that congress designed to have the criminal jurisprudence of the country, exercised in all cases in conformity to the provisions of the 5th and 6th amendments to the constitution, by presentment and jury trial. But it is to be observed, that the 5th amendment confers full power on congress to legislate over offences in the navy, and army, and militia, in actual service, without such restriction. The 5th article is, "no person shall be held to answer for a capital or otherwise infamous crime, unless or presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." Without pausing to consider whether any one other than the party accused or to be tried can take advantage of this constitutional limitation, and compel the trial to be had in courts of law, when the party proceeded against, does not claim it or object to a different tribunal, it is sufficient to say, that this clause of the constitution distinctly separates offences, on land or at sea; committed in the army or navy, from crimes in general, and in connection with the express power to make rules for the government of land and naval forces, leaves to congress power to legislate with broader discretion over that portion of the public, subject to its authority. It is in this sense the provision is understood by our ablest commentators (3 Story, Cr. Law, 79, 656), and by the supreme court ([U. S. v. Bevans] 3 Wheat. [16 U. S.] 336; [U. S. v. Crosby] 7 Cranch [11 U. S.] 116). Congress has exercised this power distinctly, and by the act for the better government of the navy, passed April 23, 1800, art. 21 [1 Stat. 48], has declared, "that the crime of murder, committed by any officer, &c., belonging to any public vessel of the United States, without the territorial jurisdiction of the United States, may be punished with death by the sentence of a court martial." A very eminent attorney general of the United States gave it as his opinion, in 1812, that a naval court martial ought not to try and punish a murder committed on board a United States frigate at Norfolk, but that jurisdiction in the case belongs to the ordinary civil tribunal. (Attorney General Pinckney.) Op. Attys. Gen. p. 114. So far as that opinion might indicate that jurisdiction in this case belonged to the United States courts of judicature, it is contravened by the judgment of the supreme court in 1818, that court intimating a strong opinion that the crimes act of 1790, § 8, did not embrace offences committed on board the public ships of the United States. [U. S. v. Bevans] 3 Wheat. [16 U. S.] 391.

The crimes act of 1825, § 4 [4 Stat. 115], reiterates the language of that of 1790 in this respect, and it is accordingly a point of great doubt, under the construction given by the supreme court, whether it would interfere with the legislation then in force by the act of 1800 in respect to the navy. This doubt is rather strengthened than removed by an after enactment in the act of 1825. Section 11 renders it a capital offence wilfully to burn, or to set fire with intent to burn, any public vessel of the United States, afloat, &c., and then adds the proviso, "that nothing herein contained shall be construed to take away or impair the right of any court martial to punish any offence which, by the law of the United States, may be punishable by such court." If the act of 1825 may be regarded as giving the civil courts concurrent jurisdiction with courts martial over offences committed on board ships of war,

this proviso very distinctly indicates the intent of congress, that the power then existing in courts martial was not to be abrogated or suspended; and it would result that it did not impose on the civil courts the necessity of exercising the jurisdiction as the only means of enforcing the law and securing or punishing offenders.

But supposing all reasonable grounds of doubt are removed, and it is demonstrated that the courts of civil jurisdiction are to take cognizance of this matter, the question yet remains, whether the subject is now brought before me in such posture, and under such a state of facts, as would render it a judicious exercise of discretion to interpose and arrest the parties. Looking at the papers laid before me as the basis of this proceeding, I find a regularly organized court of inquiry, instituted by the secretary of the navy, now sitting and investigating this very matter. The United States law officer of this district is assigned as the judge advocate of that tribunal, and the declaration of Lieutenant Gansevoort, on which his arrest is demanded, was made in the testimony given by him before that court. The report, or written statement of Commander Mackenzie, employed as evidence on this proceeding, was a paper submitted to that court for its examination and action. That court is still diligently engaged in the examination of witnesses upon this very subject matter, and it is most manifest from these papers, that a rightful and full understanding of the charges preferred by these depositions against Mackenzie and Gansevoort, cannot be had by me, without calling the same witnesses before me, and going over the same ground of examination now pursued by the court of inquiry. Nor can a step be taken by the civil authority in this behalf, without at once arresting and suspending the action of the naval court of inquiry. The second section of the act of congress, April 23, 1800, art. 1 [2 Stat. 51], expressly empowers the secretary of the navy to convene such court of inquiry, and prescribes to the members and judge advocate a solemn oath of office. It should therefore be a case of most imperious exigency that would induce any single magistrate to take from such tribunal the subject matter submitted to its investigation, and assume to himself the entire cognizance and disposition of it. There is no fact, submitted to me, indicating any necessity for such procedure. It is not proved that there is the slightest suspicion, that the officers accused will flee a full and searching investigation of their conduct, nor but that they are now under competent control by authority of the president of the United States, to be brought to answer before the proper tribunals, for any violation of the law, committed by them in this most solemn and melancholy transaction. It would be most unusual, if not indiscreet, while the head of the government is pursuing this investigation in respect to the conduct of the officers of the navy in the exercise of their command, for a single magistrate to intervene, and by his warrant to change the whole course of procedure, and attempt to establish a paramount jurisdiction in himself over a case where at least there is color of authority to support the method pursued by the government. These considerations satisfy my judgment, that the proofs submitted to me do not establish a case, in which a judicial necessity is imposed on me to take cognizance of the complaint, and I therefore decline granting the warrant prayed for, to arrest Alexander Slidell Mackenzie and Guert Gansevoort, for the crime of murder.

[See U. S. v. Mackenzie, Append. Fed. Cas.]

Case No. 15,691.

UNITED STATES v. MACKENZIE.

[See Append. Fed. Cas.]

Case No. 15,692.

UNITED STATES v. McKEWAN et al.

[4 Blatchf. 383.] [1]

Circuit Court, S. D. New York. Oct. 14, 1859.

CUSTOMS DUTIES—BOND GIVEN FOR OLD DEBT.

Where, in an action of debt brought by the United States against two defendants, on a bond, it was set up, in defence, that the bond was given for an antecedent debt, consisting of duties due at the custom-house, the payment of which was secured by a bond executed by one of the defendants and another person, that more than twenty years had elapsed, after the giving of the first bond, before the execution of the second, that no demand of payment had been made in the meantime, that the defendants executed the second bond without a knowledge of this defence to the claim, and that they were advised by the agent of the plaintiffs that there was no defence to the demand. *Held*, that this was no defence to the action.

This was an action of debt, upon a bond executed by the defendants [John McKewan and William Hall] to the plaintiffs, December 14th, 1855, in the penalty of $2,300, conditioned for the payment of $1,137.15, in several instalments.

Charles H. Hunt, Asst. U. S. Dist. Atty.
Archibald G. Rogers, for defendants.

NELSON, Circuit Justice. The defence set up in this case is, that the bond was given for an antecedent debt, consisting of duties due at the custom-house, the payment of which was secured by three several bonds, dated in the year 1832 (the month not given), executed by McKewan, one of the defendants, and one William G. Marshall; that more than twenty years had elapsed, after the giving of the first three

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

bonds, before the execution of the bond sued on; that no demand of payment had been made in the meantime; that the defendants executed the new bond without a knowledge of this defence to the claim, and in ignorance of their rights; and that they were advised by the agent of the plaintiffs that there was no defence to the demand. The judge at the circuit overruled this defence, and directed a verdict for the plaintiffs, and it requires no argument or authority to show that this ruling was correct. New trial denied.

Case No. 15,693.

UNITED STATES v. McKIM et al.

[10 Int. Rev. Rec. 74; 3 Pittsb. Rep. 155; 16 Pittsb. Leg. J. 133; 2 Am. Law T. Rep. U. S. Cts. 153.]

District Court, W. D. Pennsylvania. 1869.

INTERNAL REVENUE — DISTILLERY APPARATUS — FAILURE TO CONSTRUCT ACCORDING TO LAW —PENALTY—INTENT TO DEFRAUD.

1. A distiller failed to construct and arrange his distillery apparatus in accordance with the provisions of section 16 of the act of July 20, 1868 [15 Stat. 131], and action was brought to recover the penalty of $1,000, alleged to have been thereby incurred under section 96 of said act [Id. 164]. *Held*, a person who engages in the manufacture of distilled spirits must comply with all of the requirements of the United States revenue laws, and unless he does so has no authority to manufacture the same.

2. The distiller incurred the penalty in question by omitting to do what the law commanded, and this without any fraudulent or criminal intent.

3. To incur the penalty denounced by section 96 of the act of July 20, 1868, it is not necessary that the offender should act with intent to defraud the revenue.

This was an action of debt brought for a penalty of $1000, alleged to have been incurred by the defendants [William McKim & Co.] in failing to construct and arrange their distillery apparatus in accordance with the requirements of section 16, of the act of July 20, 1868. It was put in evidence that the apparatus was so constructed that access could be had to the spirits between the outlet of the worm and the cistern room, and that spirits might have been abstracted in fraud of the revenue, though it was not alleged that any were so abstracted.

Mr. Carnahan, U. S. Dist. Atty.

A. M. Brown, and David Reed, for defendants.

McCANDLESS, District Judge (charging jury). I cannot agree with the learned counsel for the defendants, in the points submitted by them. This is not a case parallel to those before my Brothers Drummond and Leavitt, at Chicago and Cincinnati. It is not a case of forfeiture, dependent upon an intent to defraud the government, or of fraud actually perpetrated. The government does not claim that the revenue has been defrauded, or that even such was the design of the parties in failing to comply with the requisitions of the law. The minute details enumerated in the statute, necessary for the construction of a distillery, almost equal to those required for the erection of King Solomon's temple, where each cubit was particularized, were for the purpose of preventing fraud, which former laws seemed inadequate to meet.

This is an action for the recovery of a penalty imposed for not doing that which the law commands, or doing that which the law forbids. It is averred that the cisterns were not so constructed as to prevent the abstraction of spirits while passing from the outlet of the worm and forward to the receiving cistern. And that the apparatus was so arranged that free access was had to the spirits between the outlet of the worm and the cistern room, and that while the spirits were so passing, they might be abstracted, to the prejudice of the public revenue. If you believe the witnesses on the part of the government, such was the case in this distillery. But it is contended that under the ninety-sixth section this must be "willfully and knowingly" done. So it must. And Mr. McKim with the candor which becomes his character, admits it was done by him for the reason that if the opening in the receiving tub [1] had not been made, he could not see whether what was passing from the worm was high or low wines, that the pressure from the stills forced up the undistilled mash, and that he could not manufacture whisky without it. No man is compelled to manufacture whisky, and no person is authorized to make it unless he complies with all the requirements of the act of congress. These are enjoined to prevent the possibility of frauds, and courts and juries will be derelict in duty when these salutary provisions are permitted to be frittered away by judicial legislation. The interpretation given to the words "knowingly and willfully" is constrained, and does not fit the argument for the defense, without an interpolation of the statute, by adding "with intent to defraud the revenue." Under the act no such intent is necessary. The penalty is incurred, the offense complete, when the defendants "have left undone those things which they ought to have done" ("and done things which they ought not to have done"), and this without any fraudulent or criminal intent.

The jury then retired, and after a brief absence returned a verdict for the United States in the sum of $1,000, the amount of the penalty imposed by the law.

[1] The learned judge, if he is correctly reported, probably here intended "separator" instead of "receiving tub," as it is at the separator that the indication is given, as to the strength of the spirits.

Case No. 15,694.

UNITED STATES v. McKINLEY.

[The case reported under above title in 18 Pittsb. Leg. J. 61, and 4 Brewst. 246, is the same as Case No. 14,965.]

Case No. 15,695.

UNITED STATES v. McKNIGHT.

[1 Cranch, C. C. 84.] [1]

Circuit Court, District of Columbia. April Term, 1802.

JUDGMENT—MISTAKE OF CLERK.

Judgment entered by mistake of the clerk, may be set aside at the next term, and the execution quashed.

[Cited in Re College Street, 11 R. I. 475.]

Indictment for gaming. The court at last term had ordered this and the other gaming cases (of which there were about forty on the docket depending on the same question of law) to stand over and be continued to this term for further argument; but the clerk, by mistake, had entered judgments upon the verdicts, and issued executions.

Mr. Simms, for defendant, moved the court to set aside the judgments and quash the executions; and cited Fox v. Glass, 2 Strange, 823, and 2 W. Bl. 943, 1097.

THE COURT assented to the motion; the error being a mistake of the clerk.

Case No. 15,696.

UNITED STATES v. MACKOY et al.

[2 Dill. 299.] [2]

Circuit Court, D. Nebraska. 1872.

INTERNAL REVENUE—FORFEITURE OF DISTILLERY PROPERTY—RELEASE ON BOND—RIGHT TO RE-SEIZURE—SALE UNDER RE-SEIZURE—PURCHASER'S TITLE—JURISDICTION OF DISTRICT AND CIRCUIT COURTS.

1. Nature of the lien of the government, under the act of July 20, 1868 (15 Stat. 167), for taxes due it from distillers, and the remedy for enforcing such taxes considered.

2. Where property is seized, its subsequent release on bond does not divest the court of jurisdiction to go on with the condemnation proceedings.

3. The effect of such release is that the property may be sold by the owner bona fide, and give the purchaser a good title; but, excepting where it will interfere with the rights of third persons, acquired after the release, and upon the faith of it, the court may re-seize the property, and order it to be sold.

[Distinguished in Alkan v. Bean, Case No. 202.]

4. A sale made to a purchaser under such a re-seizure sustained; and, under the circumstances stated, the sale was held to pass to the purchaser all the interest of the United States, and the United States was held estopped to set up against him any lien thereon in existence and known to it when the order of sale was made.

[Distinguished in Alkan v. Bean, Case No. 202.]

5. The jurisdiction of the district court, as a revenue court, of condemnation proceedings against a distillery, is not defeated by the subsequent bankruptcy of the owners of the distillery.

6. Where the fund, arising from the sale of distillery property under condemnation proceedings, is in the district court, and the proceedings are there still pending, the circuit court, on an original bill in chancery, cannot withdraw that fund from the district court, or direct how it shall be distributed. Whether, under the internal revenue act of July 20, 1868 (15 Stat. 167), the lien of mechanics and of judgment creditors, which attached before the acts were done or suffered for which the property was forfeited, has priority over the claims of the government under the forfeiture, quære.

[Cited in Heidritter v. Elizabeth Oil-Cloth Co., 6 Fed. 142.]

This is a bill filed in this court under section 106 of "An act imposing taxes on distilled spirits," etc., approved July 20, 1868 (15 Stat. 167). It is shown by the testimony that the property upon which the distillery of Mackoy & Co. was erected, was purchased by James C. Mackoy August 12, 1868; that he immediately commenced the erection of the distillery thereon; that, on the 3d day of October, 1868, Mackoy & Co. gave the bond required by section 7 of the act cited, and on the 28th day of October, 1868, they commenced distilling; that they continued distilling until the 22d day of December, 1868, at which time their distillery was seized by the collector for violation of the revenue laws; that an information was filed in the district court December 28, 1868; and that, on the 14th day of January, 1869, the property was released to the claimants, Mackoy & Co., by order of the district judge, upon a satisfactory bond being given, as required by law, in the sum of $15,410, the appraised value of the property seized. On the 1st of February, 1869, they resumed distilling, but did not continue to exceed four weeks. Their operations in rectifying were of brief continuance, commencing about December 10, 1868, and continuing only to the time of seizure (December 22, 1868), and never resumed afterwards. The total amount of taxes assessed against the distillery was $7,980, and against the rectifier, $540, and of this the amount assessed subsequent to January 14, 1869 (when the property was released from seizure), was $4,888.50. On April 30, 1869, a petition in bankruptcy was filed against Mackoy & Co., and May 29, 1869, they were adjudged bankrupts. Patrick was elected assignee in bankruptcy, July 6, 1869, and, on the 13th of July, a deed of assignment was made to him by the register in bankruptcy. On September 2, 1869,

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

a trial was had in the district court, under the proceedings instituted for violation of the revenue laws, and a judgment of forfeiture and condemnation entered, and, on the 8th of February, 1870, a judgment was rendered against the sureties on the bond which had been given for the release of the property. A motion was then made on behalf of the sureties, that the property be ordered to be sold under the judgment of condemnation, and the proceeds applied to the satisfaction of the judgment rendered against the sureties. On the 15th of January, 1870, a petition was filed in the United States district court by Patrick, as assignee, for an injunction to restrain the sale of the property by the sheriff of Douglas county under certain executions which he held against Mackoy & Co., and in favor of certain judgment creditors, and praying for an order authorizing him to sell the property, under section 25 of the bankrupt act. Pending this petition, and the motion on behalf of the sureties above named, an order was made by the district court, on the 14th of February, 1870, overruling the motion of the sureties, but directing the marshal to sell the property, and return the proceeds into court for future order. The property was sold accordingly by the marshal to the defendant, Mageath, and an order confirming the sale entered May 21, 1870, and a deed executed to the purchaser, May 31, 1870. On December 16, 1870, an action was commenced by the district attorney on the distiller's bond, to recover the taxes assessed and unpaid, which is still pending in the district court. The present bill was filed in this court January 15, 1870, and recites the afore-mentioned proceedings in the district court, and makes defendants thereto the assignee in bankruptcy, various lien creditors of Mackoy & Co., the sureties on the bond given January 14, 1869, for the release of the distillery, the purchaser of said distillery property at the sale by the marshal, and also certain persons claiming to be entitled to the rights of informers. The bill sets forth that there is due the United States from Mackoy & Co, as taxes due from October, 1868, to March, 1869, inclusive (which covers the whole period during which the distillery was operated by them), the sum of $11,264.85, and it asks to have the property subjected to the payment thereof, or if this be not done, that the proceeds of the sale of the property by the marshal be appropriated to the payment of such taxes, and to have the rights and equities of the various defendants settled. Answers have been filed by the several defendants, and the cause has been submitted upon the pleadings and proofs.

Jas. Neville, U. S. Dist. Atty.

John I. Redick, J. M. Woolworth, Geo. W. Doane, G. W. Ambrose, B. E. B. Kennedy, and E. Wakeley, for defendants.

Before DILLON, Circuit Judge, and DUNDY, District Judge.

DILLON, Circuit Judge. This bill is brought in this court under section 106 of the act of July 20, 1868 (15 Stat. 167), to enforce the lien of the United States upon the distillery property which belonged to Mackoy & Co., for taxes which were assessed against them from October, 1868, to March, 1869, inclusive, covering the whole period during which the firm operated the distillery. A portion of these taxes accrued prior to the seizure of the property, on the 22d day of December, 1868, and a portion after the property was released on bond (which was on the 14th day of January, 1869), and placed again in the hands of Mackoy & Co. Pending the proceedings in the district court to have the property declared forfeited, Mackoy & Co. were adjudicated bankrupts. Afterwards, viz. September 2, 1869, judgment of forfeiture was entered against the distillery property. The bond which had been given for the release of the property (January 14, 1869), was conditioned to the effect that if the property shall be condemned as forfeited, the obligors will thereupon pay into court the appraised value thereof, viz: $15,410.06. On the 8th day of February, 1870, judgment was rendered against the sureties on this bond for the amount of the appraised value of the property. On the 14th day of February, 1870, the court overruled the motion of the sureties to have the property sold and the proceeds applied towards the satisfaction of the judgment against them, but at the same time caused to be entered of record an order "that the marshal do proceed to sell, after giving thirty days notice, the property heretofore seized in this proceeding, and return the proceeds arising therefrom into the registry of this court, to abide the further order of the court."

Pursuant to this order, the marshal sold the distillery property May 3, 1870, to S. D. Mageath, for $12,100, and the rectifying establishment to the same person for $2,800, and the proceeds of such sales are still in the registry of the district court. This sale was confirmed by the district court, and the purchaser, after the confirmation, and before this bill was filed, had made improvements upon the property to the amount of $24,000. Respecting this sale, the present bill contains the following averment: "That the order for said sale was made by the district court, at the request, and by the consent of all parties interested in the said property." When the United States asked for or consented to the sale of the property, the present bill subsequently amended, had been filed in this court, asking to have the taxes declared to be a lien upon the distillery property. When the sale was ordered the property was lying idle, and becoming dilapidated. After the sale was made it was

repaired and improved, and has since paid revenues to the government to an amount stated to exceed $200,000. These circumstances vindicate the propriety of ordering the sale, but the question is now made that the sale is void on the ground that the district court had no jurisdiction to order it, because the property had been released upon bond, and was not then in its custody.

It ought to be mentioned that, subsequent to its release on bond, it had again, May 11, 1869, been seized by the collector for nonpayment of taxes, and advertised for sale, July 2, 1869, but that, before that date, to-wit: June 30, 1869, the proceedings under this seizure were abandoned, and the district attorney instructed to commence proceedings upon the bond, given under section 7 of the act of July 20, 1868.

I am of the opinion that the district court had jurisdiction to order the sale of property, and that the sale which was made to the purchaser, who has acted in good faith upon it, must be upheld. By the act of July 20, 1868, the government has a bond for the security of taxes which may accrue to it (section 7), and taxes due it are made a lien upon the property from the "time the spirits are distilled until the said tax shall be paid" (section 1), and the lien for taxes may be enforced by a bill in chancery, filed in a district or circuit court of the United States (section 106). Such taxes are made a lien or incumbrance on the property. Other provisions of the statute, however, denounce an absolute forfeiture, by the owner, of all his interest in the property, to the United States for certain acts and omissions of the distiller, and it was for such acts and omissions that it was seized, on the 22d day of December, 1868, and subsequently judicially declared to be forfeited by the government. The release of the property on bond does not divest the court of its jurisdiction to go on with the condemnation proceedings. The Little Charles [Case No. 13,612]. The effect of a release of the property on bond is, that it may be sold bona fide, and give the purchaser a good title, or liens or rights may be acquired after such release, which will be protected; but, saving the rights of purchasers and third persons, lawfully acquired after the release, I think the court may, if it sees proper, as where the bond is worthless and the property is accessible, or where it has been deceived into taking inadequate security, or where justice will be promoted by such a course, re-seize the property, and order the same to be sold. See The Gran Para, 10 Wheat. [23 U. S.] 497; The Little Charles [supra]; The Empire [Case No. 4,472]; Livingston v. The Jewess [Id. 8,412], per Betts, J. Compare The Union [Id. 14,346], and The Hero, Brown & L. 447. And this was, in substance, the nature of the order upon which the property was sold. As that proceeding was pending when the bankruptcy of Mackoy & Co. (the claimants) occurred, it is evident that the jurisdiction of the district court, as a revenue court, was not divested by that event. The title to the property passed, therefore, to Mageath, under the sale and deed to him by the marshal, and this sale was one made for the benefit of the United States, as the owner of the property, by reason of the forfeiture of the same to it. At the time of the sale the United States was the owner of the property, under a forfeiture judicially ascertained, and had been such owner from the time of the violation of the law, for which it was seized. Gilson v. Hoyt, 3 Wheat. [16 U. S.] 246, 311; U. S. v. 1,960 Bags of Coffee, 8 Cranch [12 U. S.] 398. Perhaps an order might have been made to sell the property subject to the lien of the United States for taxes, but no such reservation was made. There is no evidence to show that the United States intended to keep alive a tax lien upon the property. On the contrary, there is evidence that it abandoned the proceedings by which the property had been seized to secure the taxes now sought to be enforced, and the district attorney was instructed to commence suit on the bond.

Under the circumstances my judgment is, that the marshal's sale and deed passed and conveyed to the purchaser all of the interest of the United States in the property sold, and that the United States is estopped to set up as against the purchaser any lien thereon for taxes in existence, and known to it at the time the order for the sale was made. Mills v. Comstock, 5 Johns. Ch. 214; Star. v. Ellis, 6 Johns. Ch. 393.

It is distinctly admitted on the face of the present bill that the government consented to the order of sale, and it is quite plain upon the evidence that it was the intention to sell, to whomsoever should purchase, a clear and perfect title, and that the parties interested should litigate thereafter over the proceeds of such sale. As against the government, which, if it did not procure the order of sale, consented to it, the purchaser takes all its interest. Frische v. Kramer's Lessee, 16 Ohio, 125; Jackson v. Bowen, 7 Cow. 13.

If the foregoing views are correct, the bill, so far as it seeks to enforce a lien upon the property purchased by Mageath, must fail. Can it be retained for the purpose of settling the rights and equities of the different parties with respect to the fund produced by the sale? That fund is in the district court, and not in this court. It was returned there to abide its further order. That court is entitled to retain the fund, and itself to make orders disposing of it, and its action in this respect is subject to revision here in the usual mode. But this court cannot lay its hands upon that fund, and withdraw it from the district court, nor can it enter a decree directing how that fund shall be disposed of. The jurisdiction of that court continues until the proceedings out of which the fund arose are ended, and the final order for distribution made. Among those asserting an interest in the fund are two persons who claim as in-

formers, and whose rights have never been determined. The express provision of the law is that those rights shall "be ascertained by the court which decrees the forfeiture" (Act June 30, 1864, § 179), which is the district court, and not this court. Among those, also, who make a claim upon the fund, are certain mechanics, who furnished the material for, and did work upon the distillery prior to its seizure, and certain judgment creditors of Mackoy & Co. and also the assignee in bankruptcy. These lienors did not intervene in the condemnation proceedings, and hence are bound by the decree therein, and cut off thereby from all resort to the property sold. The Mary, 9 Cranch [13 U. S.] 126. But they may, notwithstanding the decree of condemnation, and while the fund is still in court, apply in proper manner to establish their alleged rights and equities in respect to it. The Siren, 7 Wall. [74 U. S.] 152, 159; Mutual Safety Ins. Co. v. Cargo of The George [Case No. 9,981]; Andrews v. Wall, 3 How. [44 U. S.] 568; The Sibyl, 4 Wheat. [17 U. S.] 98; Keen v. Gloucester, 2 Dall. [2 U. S.] 36. But this application must be made to, and in the first instance decided by, the court in which the fund remains.

Whether, under the peculiar provisions of the act of July 20, 1868 (see sections 1, 7, 8, 44, 106), the liens of mechanics and judgment creditors, which, under the laws of the state, fully attached before the acts were done or suffered for which the property was forfeited to the United States, have priority over claims of the government under the forfeiture, is a question upon which I do not find it necessary or deem it proper to give any opinion at this time. In any event, all interest of Mackoy & Co. in the property was forfeited to the government, and this forfeiture has been judicially ascertained and decided, and, therefore, it is not perceived what interest the bankrupt's estate has in the fund. The argument that the sale was void because not made by the order of the bankruptcy court, and that the bankruptcy court alone has jurisdiction to settle the equities of all parties to the fund, and to distribute it, has no foundation upon which to rest, for the reason that the decree of condemnation conclusively settles that the bankrupts had forfeited all their rights in the property before the petition in bankruptcy was filed, and it is certain that such forfeiture is not subject to the rights of general creditors.

The bill filed in this court must, therefore, be dismissed; but since all parties have taken proofs to sustain their respective claims, I recommend that by agreement all the pleadings and proofs be filed in the district court, and the cause submitted thereon to it, reserving, if desired, the right of all parties to appeal. This will save time and expense, and facilitate the closing of this complicated and already long protracted litigation. No costs will be allowed to any of the parties. Bill dismissed.

NOTE. Lien for tax as against innocent purchaser. Section 32 of the act of July 13, 1866 (14 Stat. 157), was construed by Mr. Justice Swayne in the United States circuit court for the Southern district of Ohio, in the case of U. S. v. Turner [Case No. 16,548]. The case was heard upon bill brought to subject a distillery to payment of tax upon whiskey, claimed to be a lien thereon. The tax accrued in February, 1867, while the Turners were owning and operating the distillery. It was, in the same month, removed upon transportation bonds, but was, without the payment of tax, sold in the markets. Suits were begun in September, 1867, upon the bonds, and judgment recovered thereon in March and April, 1871, for the aggregate sum of $31,533.26. In June, 1867, the Turners sold their distillery, and in April, 1868, Stoltz became the innocent owner for value. In his answer Stoltz claimed: First, that being an innocent purchaser, without notice of the alleged lien of the government, he took the premises discharged therefrom. Second, that the lien of the United States upon the distillery for tax is upon the whiskey, and was discharged by the taking of the transportation bond. Justice Swayne held that the provisions of section 32 of the act of July 13, 1866, upon which the claim of the plaintiff is founded, providing that the tax in question should be a lien on the interest of said distiller in the tract of land whereon the said distillery is situated from the time said spirits are distilled until said tax should be paid, is absolute and unconditional, and secures to the government a lien upon the distillery premises as against innocent purchasers without notice. The learned justice alluded to a case he had decided some years previously, in which he had held, after consideration, that the lien of the government for unpaid taxes, under the same section, upon spirits fraudulently recovered from the distillery, was good as against innocent purchasers. Decree was passed in favor of the government for sale of the property.

Case No. 15,697.

UNITED STATES v. McLAUGHLIN.

[1 Cranch, C. C. 444.] [1]

Circuit Court, District of Columbia. Nov. Term, 1807.

CRIMINAL PROCEDURE—PEREMPTORY CHALLENGE—MANSLAUGHTER—JUDGMENT.

1. In manslaughter, a peremptory challenge is allowed under the Virginia law.

2. Upon an indictment at common law for manslaughter, the court will give judgment of fine and imprisonment under the act of congress of April 30, 1790, § 7 [1 Stat. 113].

Indictment against the defendant [Elizabeth McLaughlin] at common law for manslaughter, in killing her daughter. The prisoner was allowed a peremptory challenge, on the authority of the case of U. S. v. Browning [Case No. 14,673].

Verdict, guilty. The sentence was imprisonment for twelve calendar months from, and including the third day of November last (the day of her commitment,) and one dollar fine. This sentence was imposed under the act of congress of 30th of April (1 Stat. 113).

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,698.

UNITED STATES v. McLELLAN et al.

[3 Sumn. 345.] [1]

Circuit Court, D. Maine. Oct. Term, 1838.

CLAIM BY UNITED STATES—PRIORITY—VOLUNTARY ASSIGNMENT.

1. A conveyance, by a debtor known to be insolvent, of all his property to one or more creditors, in discharge of their own debts and liabilities, not exceeding the amount due to and payable by them, and not for the benefit of the creditors at large, or of any other creditors than the immediate grantees, is not a "voluntary assignment" to creditors, within the purview of the act of 1799, c. 128, § 65 [1 Stat. 676], so as to be affected by the priority of the United States, unless it appear, that it was made with the intent to evade the priority given by the act to the United States.

[Cited in U. S. v. Griswold, 8 Fed. 501; Bush v. U. S., 14 Fed. 323.]

[Cited in Jackson v. Davis, 4 Mackey, 198; Weber v. Mick, 23 N. E. 650. Cited in brief in Keiler v. Tutt, 31 Mo. 302; Mussey v. Noyes, 26 Vt. 466. Cited in Peck v. Merrill, Id. 696.]

2. The construction of the act of 1799, c. 128, cannot depend upon the provisions of any particular statute of a state, which does not fall within its very terms.

Bill in equity, brought by the United States against the defendants [Thomas McLellan and others] to enforce the right of priority of payment out of the property of Henry Gooding, an insolvent debtor of the United States. There was, in reality, no dispute as to the facts of this case. On the 22d of June, 1837, Henry Gooding was indebted to the defendant, McLellan, in the sum of $28,609.28, for debts due to McLellan, and liabilities incurred by him for Gooding by indorsing the notes and acceptances of the latter. On that day Gooding executed certain conveyances to McLellan of several parcels of real estate, and certain vessels and parts of vessels and merchandise, estimated at the sum of $27,854.90. McLellan, by a written agreement, then entered into with Gooding, undertook to pay all the notes and acceptances, as they became due, and also to surrender and discharge all the debts then due to him by Gooding. The conveyances were absolute and unconditional. McLellan has since paid all the notes and acceptances, and has faithfully performed the agreement. On the same day Gooding conveyed to the defendant, Moody, certain other real estate, on account of the liabilities of Moody, as indorser for Gooding, to the amount of $10,850; the estimated value of the property so conveyed, being short of that sum by $950, for which Gooding gave his own note to Moody. The latter, by a written agreement of the same date, undertook to pay all the notes, upon which he was so indorser; and he has since punctually discharged them. This conveyance was also absolute and unconditional. McLellan and Moody have since sold the property, so conveyed to them, to other persons. These conveyances were charged by the bill as being all the property which Gooding possessed. The answer did not meet this charge in the bill; and there was no direct, positive proof of the fact. But there was no doubt of the fact; and indeed it was silently assumed in the argument of the defendant's counsel. At the time of these conveyances Gooding was deeply insolvent, owing to other creditors more than fifteen thousand dollars, which yet remained unpaid and unsecured. Gooding was also, at the same time, indebted to the United States on certain custom-house bonds for duties, to the amount of $7822.35; which were payable afterwards in the same year; and upon which judgments have been since recovered, and executions issued, and returned unsatisfied, the judgment debtor, Gooding, being committed to gaol thereon; and having since petitioned the secretary of the treasury for the benefit of the insolvent debtors' acts. The defendants denied, that at the time of the conveyances to them, or at any time until August, 1837, they had any knowledge, information, or belief of Gooding's indebtment to the United States, upon duty bonds, or otherwise.

Mr. Howard, Dist. Atty., for United States.

The statutes of the United States, which secure to them the right of priority, were founded on motives of public policy, to enable the sovereign, or government, to meet and sustain the public burthens. They are therefore entitled to a reasonable and fair construction. That the sovereign should be first paid was a maxim of the common law, a prerogative of the crown. The policy of the common law was intended to be preserved in our own statutes, securing the right of priority to the government, for the public or general welfare. U. S. v. Bank of North Carolina, 6 Pet. [31 U. S.] 29.

The statute of 1799, c. 128, § 65, embraces three classes of cases, in which the right of priority is secured to the United States. 1. Where the debtor, not having sufficient property to pay all of his debts, shall have made a voluntary assignment of his property for the benefit of his creditors; or, 2. Where the estate or effects of an absconding, concealed, or absent debtor shall have been attached by process of law; and, 3. Where an act of legal bankruptcy shall have been committed. In the same statute there is also a provision for cases of deceased debtors, which is not material to the consideration of this case. Conard v. Nicholl, 4 Pet. [29 U. S.] 291.

The present case falls within the first or third class of cases contemplated by the statute, and the inquiries are:

I. Had Henry Gooding, the debtor, "sufficient property to pay all his debts," June 22, 1836? Was he insolvent within the meaning of the statute? He then owed, as the case finds, $72,000, and possessed property to the amount of $42,000 only. On that day (June 22, 1836) he transferred all his property to the defendants, McLellan and Moody. He

[1] [Reported by Charles Sumner, Esq.]

"had not property sufficient to pay all his debts." This transfer, or assignment, was for the "benefit of his creditors," of certain preferred creditors. The case falls within the meaning of the statute, although not for the benefit of "all" of his creditors. U. S. v. Mott [Case No. 15,826]. Here was a general divestment of all the debtor's property. And "insolvency, in the sense of the statute," say the court, in Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 438, "relates to such a general divestment of property as would in fact be equivalent to insolvency, in its technical sense." "It supposes all the debtor's property has passed from him." U. S. v. Hooe, 3 Cranch [7 U. S.] 73, and in Prince v. Bartlett, 8 Cranch [12 U. S.] 431, the court consider the words "insolvency" and "bankruptcy" as synonymous terms. Gooding, at the time he conveyed all of his property to the defendants, McLellan and Moody, became insolvent within the meaning of the statutes of 1797, c. 74, § 5, and of 1799, c. 128, § 65. And the case finds that the amount, as alleged in the bill, $7,822.35, was due from him to the United States, "on bonds for the payment of duties," at that time.

II. Does the right of priority attach? Is the debt due to the United States to be first paid? The defendants have received all of the insolvent's property, and by the very act by which property, to more than five times the amount of the plaintiff's debt, was passed from him to them, the debtor has been totally divested of property. When the debtor is divested of his property in one of the modes mentioned in the statute, the person who becomes invested with it is thereby made by law a trustee for the United States, and is bound to pay their debt out of the proceeds of the debtor's property. Beaston v. Farmers' Bank of Delaware, 12 Pet. [37 U. S.] 102. The transfer from Gooding to the defendants, in this case, was not an ordinary sale of a portion of the debtor's property, to pay his debts, in the ordinary course of business, as contemplated in the cases: U. S. v. Hooe, 3 Cranch [7 U. S.] 91; U. S. v. Fisher, 2 Cranch [6 U. S.] 358; and Brent v. Bank of Washington, 10 Pet. [35 U. S.] 596. Here the very act of transfer, the assignment, or sale, was in itself an act of insolvency, a divestment of all property, amounting to "insolvency in a technical sense." It may be contended by the defendants, that the bonds in this case were not due, at the time of the alleged insolvency of Gooding. The right of priority extends to bonds due after, as well as before, or at the period of the insolvency. "'Due' is sometimes equivalent to owed or owing;" and duties are due when the importations are made. A debt, debitum in presenti, solvendum in futuro, is revoked by the statute. U. S. v. State Bank of North Carolina, 6 Pet. [31 U. S.] 29.

Mr. Haines, for defendants, argued, that the present was not a case of insolvency and bankruptcy, on the part of Gooding, the debtor, that gave the United States priority. For a construction of the statute of 1799, c. 128, § 65, he referred to Prince v. Bartlett, 8 Cranch [12 U. S.] 431; Conard v. Nicholl, 4 Pet. [29 U. S.] 291; in the latter case, Washington, J., points out what constitutes a case of insolvency and bankruptcy within the statute. Gooding did not make "a voluntary assignment of his property for the benefit of his creditors;" for such an assignment must be the placing all the property of the debtor in the hands of assignees in trust to pay the creditors of the debtor. U. S. v. Mott [Case No. 15,826.] Under the statute of congress 1799, c. 128, § 65, an assignment, which shall let in the United States to priority of payment, must be according to the laws of the state where the assignment is made. But the conveyances of Gooding do not amount to an assignment according to the statute of Maine, of April, 1836. McLellan and Moody were his bonâ fide grantees and vendees. U. S. v. Clark [Id. 14,807]; U. S. v. King [Id. 15,536]. A bonâ fide conveyance, by a debtor, of his estate to a third person divests him of the property, so that it cannot be made liable to the United States. Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 386; Thelluson v. Smith, 2 Wheat. [15 U. S.] 29; U. S. v. Fisher, 2 Cranch [6 U. S.] 358; 1 Kent, Comm. 229, 234. The preference given by law to the United States would be, in the language of Chancellor Kent, "a latent and a dangerous preference," if it were allowed to interpose between an honest purchaser and a vendor who is indebted to the United States. The United States has in no instance a lien upon the debtor's goods and estate for the payment of their debt. The only operation of the statute, giving them priority, is to secure the priority of payment of the debt due the United States out of the assets of the debtor, in the assignees' or trustees' hands. The defendants are not assignees or trustees; but purchasers for a valuable consideration; and if no specific lien attaches to the property conveyed to them, then they are not holden to the United States out of their own estate. Prince v. Bartlett, 8 Cranch [12 U. S.] 431. They did not become invested with the property in either of the modes pointed out by the statute of 1799, c. 128, § 65.

Before STORY, Circuit Justice, and WARE, District Judge.

STORY, Circuit Justice. Taking the case to be, as the parties at the argument have assumed it to be, that the conveyances made to McLellan and Moody respectively were, what they purport to be, bonâ fide conveyances, for a valuable consideration, without any knowledge or belief of the existence of any debts due to the United States, or any intention to defeat the priority of the United States; and that they embraced all the property of Gooding, except what is exempted by

law from attachment and execution, the question arises, whether the priority given to the United States by the act of 1797, c. 74, § 5, or (what in legal effect on this point is the same) by the act of 1799, c. 128, § 65, attaches to the property so conveyed to them. If it does, then the present bill is maintained; if it does not, then the bill must be dismissed. It is unnecessary, after the various decisions, which have been made by the supreme court of the United States upon this subject, to enter at large upon the construction of these sections. By the act of 1799, c. 125, § 65, it is provided, that, "in all cases of insolvency, or where any estate in the hand of the executors, administrators, or assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States on any such bond or bonds (for duties), shall be first satisfied." If the clause had stopped here, it would have been open to consideration, whether the insolvency here mentioned was not a mere inability of the debtor to pay all his debts, without any open, notorious act, pointed out by law, to establish such insolvency. But the section goes on to declare—"And the cases of insolvency, mentioned in this section, shall be deemed to extend, as well to cases, in which a debtor not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof for the benefit of his or her creditors; or in which the estate or effects of an absconding, concealed, or absent debtor shall have been attached by process of law, as to cases, in which an act of legal bankruptcy shall have been committed." Now, upon the original interpretation of this act, it might well have been a question, whether the three cases thus put were any thing more than mere illustrations of the general insolvency spoken of in the preceding clauses of the act. But that question has long since been put at rest by the supreme court of the United States in a variety of cases, and especially in Prince v. Bartlett, 8 Cranch [12 U. S.] 431; Thelluson v. Smith, 2 Pet. [27 U. S.] 396; Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 387; Conard v. Nicholl, 4 Pet. [29 U. S.] 291; and Beaston v. Farmers' Bank of Delaware, 12 Pet. [37 U. S.] 102,—in which it has been held, that mere inability of the debtor to pay is not an insolvency within the statute; but that it must be such as is manifested in one of the three modes pointed out in this last explanatory clause. The only mode, applicable to the circumstances of the present case, is, that of "a voluntary assignment thereof for the benefit of his or her creditors." And the question is, whether such an assignment exists in this case. It appears to me, that, consistently with the construction, which has been always put upon this part of the clause, it is not. In the first place, the voluntary assignment, here spoken of, must be, not of a part, but of the whole property of the debtor; unless, indeed, a part is accidentally and unintentionally omitted, by mistake, or is purposely omitted with a fraudulent design. A debtor may, notwithstanding this clause, bonâ fide convey to a creditor a part of his estate for payment of the debts due to him, or as security for his liabilities; and it will be good and valid against the priority of the United States. This was expressly held by the supreme court of the United States in U. S. v. Hooe, 3 Cranch [7 U. S.] 73; U. S. v. Howland, 4 Wheat. [17 U. S.] 108; and Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 386. Now, it is to be considered, that, in the present case, each of these conveyances was made to a single creditor for his own debts or liabilities; and each took, distinctly and severally, for himself alone, the property conveyed to him. Nor is it stated in the bill, or shown in the case, that McLellan and Moody acted in concert together at the time, or that both conveyances were made with a mutual understanding between the parties, that both should be given, or neither; or that the debtor should divest himself of all his property in their favor, or of none. For aught that appears in the case, although the transactions took place on the same day, they may have been perfectly independent and separate transactions, and neither of the creditors may have had any knowledge of the acts of the other. Each of the conveyances embraces a part only of the property of the debtor; and of course, if they are to be treated as separate and distinct transactions, not produced in concert, or uno flatu, with both creditors, for a common purpose, they are clearly good within the authority of U. S. v. Hooe, 3 Cranch [7 U. S.] 73. Mr. Chief Justice Marshall, in delivering the opinion of the court, on that occasion, said: "If a debtor of the United States, who makes a bonâ fide conveyance of part of his property for the security of a creditor, is within the act, which gives a preference to the government, then would that preference be in the nature of a lien from the instant he became indebted, the inconvenience of which, where the debtor continued to transact business with the world, would certainly be great. The words of the act extend the meaning of the word 'insolvency' to cases, where a debtor, not having sufficient property to pay all his debts, shall have made a voluntary assignment thereof for the benefit of his or her creditors. The word 'property' is unquestionably all the property, which the debtor possesses; and the word 'thereof,' refers to the word 'property,' as used, and can only be satisfied by an assignment of all the property of the debtor. Had the legislature contemplated a partial assignment, the words 'or a part thereof,' or others of a similar import, would have been used. If a trivial portion of an estate should be left out, for the purpose of evading the act, it would be considered as a fraud upon the law; and the parties would not be enabled to avail themselves of such a contrivance. But, where a bonâ fide conveyance

of a part is made, not to avoid the law, but to secure a fair creditor, the case is not within the letter or the intention of the act." Now, this language is directly in point to the present case, if we are to take these conveyances as independent transactions; for each embraces a part only of the property of the debtor, and neither of them contains any general assignment. If, therefore, they were not contemporaneous acts, but one was posterior in point of time, and execution to the other, without any intentional connection, the first would at all events be valid, if made bonâ fide, even if the other were invalid, as against the United States, because it conveyed the whole remaining property of the debtor. If they were contemporaneous, concerted acts, then the same question would arise, as if the whole property were conveyed to a single creditor in discharge of his debts and liabilities for the debtor. The bill and answers do not seem framed precisely with a view to this aspect of the case, and therefore there are scarcely facts enough before the court to present it fully.

But let us take the case as if so presented; and the question then comes to this; whether the assignment contemplated by the act is an assignment to one creditor for the payment of his own debts, or as a security or discharge of his own liabilities, or whether it must be an assignment for creditors in general. It appears to me, that the latter is the true and natural, if not the necessary, purport of the words of the act. The assignment is to be a voluntary assignment of all his property "for the benefit of his or her creditors." Now it seems to me that the word "creditors" here is used in contradistinction to a single creditor. If it does not mean all his or her creditors, it at least means a conveyance for more persons than the creditor or creditors, who are the immediate assignees, for their own debts. The language seems to indicate an assignment made to some person or persons as trustees for the benefit of the creditors of the assignor, and not for the sole benefit of the assignees It would be unusual language to speak of an assignment made for the benefit of the grantees only, as an assignment "for the benefit of creditors." If the conveyance were absolute to them, they would take, not as creditors, but as purchasers not for the benefit of creditors, but for the benefit of themselves, as grantees. It would be still more unusual language to speak of an assignment to the assignees, as a security for the liabilities for the debtor, to be an assignment "for the benefit of creditors." It would be rather an indemnity against the claims of the creditors, and in opposition to them. Indeed, if one were disposed to refine upon the present case, the conveyances were not assignments "for the benefit of creditors," strictly so called; but, to a large extent, they must be deemed to be purchases by indorsers, and securities, upon a collateral contract by them, to pay the debts, for which they were under liability to the creditors out of their own funds. In Thelluson v. Smith, 2 Wheat. [15 U. S.] 426, the supreme court said: "If, therefore, before the right of preference has accrued to the United States, the debtor has made a bonâ fide conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been seized under a fieri facias, the property is divested out of the debtor, and cannot be made liable to the United States." Now, it is observable, that this language was used in a case, where there was a prior lien by judgment upon all the debtor's property. And in that case, as well as in Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 386, 441, the supreme court held, that the priority of the United States would not, even where there had been a general assignment for the benefit of creditors, divest an antecedent mortgage or lien for a debt; and that the priority was not itself in the nature of a lien on the debtor's property. He might still convey it bonâ fide to any creditor or purchaser for a valuable consideration, although he should happen at the time to be, in the general sense of the term, insolvent. In this view of the construction of the language and intent of the section of 1799, now in question, I confess myself to be of opinion, that the conveyances in the present case are not voluntary assignments for the benefit of creditors in the sense of that section.

The only doubt, which has occurred to my mind, has arisen from the language used by my brother, Mr. Justice Washington, in his charge to the jury, in the case of Conard v. Nicholl, 4 Pet. [29 U. S.] 291, which was brought under the review of the supreme court, and so far as it was necessary to be considered by that court, that is, so far as it was or might be prejudicial to the plaintiff in error, was affirmed by the court. So far as it laid down the law favorably to the rights of the United States, it was not strictly within the cognizance of the supreme court, and could be reëxamined only upon a writ of error brought by the other party. In the course of his charge Mr. Justice Washington put these questions to the jury, (1.) "Was Edward Thompson (the debtor) insolvent, and unable to pay all his debts at the time when these securities were given to the plaintiff? (2.) Did they divest him of all his property, or, if not, was the part reserved trivial, with the intent to defeat the rights of preference of the United States? If these facts are proved to your satisfaction, then the transfers are to be considered as constructively divesting Edward Thompson of all his property, so as to let in the priority of the United States against the plaintiff." Now, it is observable, that here the learned judge does not put the case upon the mere fact, that the debtor was insolvent at the time of the transfer of the property, and that they covered all the debtor's estate; but he adds the fact, that the

transfers were "with intent to defeat the right of preference of the United States." This latter ingredient is not pretended to exist in the present case; for the debts of the United States were, at the time of these conveyances, unknown and unsuspected by the grantees. So that it is by no means clear, that the learned judge would have deemed an absolute conveyance of all the debtor's property to one or more creditors for the payment of their existing debts and liabilities, to have been, per se, a voluntary assignment within the act, without this ingredient, if the conveyance was not for the benefit of other creditors also. It is also to be observed, that this part of the charge was highly favorable to the United States, and there is no evidence, that it was complained of on the appeal. I have not the slightest doubt, that this part of the charge of the learned judge, as given, was perfectly correct. And if it were shown, or admitted, in the present case, that these conveyances were made with intent to defeat the priority of the United States, I should not hesitate to say, that, as to the United States, they were subject to that priority. But, as has been already remarked, no such intent is set forth in the bill, or established in the evidence. And in the consideration of the case it is not unimportant, that there is a large class of other creditors unprovided for, as well as the United States.

I take the naked question, then, stripped of all unimportant circumstances, to be, whether a conveyance by a debtor, known to be insolvent, of all his property, to one or more creditors, in discharge of their own debts and liabilities, not exceeding the amount due to and payable by them, and not for the benefit of the creditors at large, or of any other creditors than the immediate grantees, is such a voluntary assignment, as is within the purview of the section of the act of 1799? That it is a case within the same mischief, as that against which the act meant to provide, I admit. That if the case had been wholly untouched by authority, there might have been strong ground to contend, that the three cases put in the act were rather illustrations of the meaning of the word insolvency, as used in the act, than exclusive limitations of its meaning, I also admit. But, looking to the decisions which have been made, I do not feel warranted in saying that such conveyances as the present are voluntary assignments for the benefit of creditors within the meaning of the act, unless, indeed, it could be shown that they were made with the intent to evade the priority given by the act. I have not thought it necessary to rely on the act of the state of Maine, of April, 1836, respecting general assignments; because, after all, the construction of the act of 1799, c. 128, cannot depend upon the provisions of any particular statute of a state, which does not fall within its very terms. But this state act does in its provisions point to classes of cases, which seem to me to be the very cases, which the act of 1799, principally, if not exclusively, contemplated in the clause which has been under our consideration. Upon the whole, my opinion is that the bill ought to be dismissed.

UNITED STATES (McLELLAN v.). See Case No. 8,895.

Case No. 15,699.

UNITED STATES v. McMAHON.

[4 Cranch, C. C. 573.] [1]

Circuit Court, District of Columbia. March Term, 1835.

ALIENS—JURY DE MEDIETATE—MURDER—JUROR.

1. A foreigner is not entitled to a jury de medietate, in Washington county, D. C.

2. Upon a trial for murder, evidence will not be admitted that another person confessed himself to be the murderer.

3. A person conscientiously opposed to capital punishment was found "not indifferent," by the triors.

Indictment [against Owen McMahon] for the murder of Henry Howard.

Mr. Brent for the prisoner, asked for a jury de medietate linguæ.

THE COURT (THRUSTON, Circuit Judge, absent) refused. See the Maryland act of 1789, c. 22, § 5.

Upon the trial Mr. Brent, for the prisoner, offered to prove that another person confessed that he killed the deceased; and that person had fled.

THE COURT (THRUSTON, Circuit Judge, absent) rejected the evidence.

Upon calling the jurors to the book to be sworn, Mr. James Friend, one of the panel, said that he was conscientiously opposed to punishment by death, and could not conscientiously find a man guilty of a capital offence.

Whereupon, Mr. Key, the attorney for the United States, challenged him for favor. The two first sworn jurors were sworn as triors, "well and truly to try whether James Friend stands indifferent between the United States and the prisoner at the bar;" and they found that he did not; having heard the declaration which he had just made to the court; and thereupon he was set aside.

At ten o'clock p. m., the jury found the prisoner "guilty of manslaughter in a most aggravated case; and not guilty of murder." The sentence of THE COURT was eight years' labor in the penitentiary.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,700.

UNITED STATES v. McNEAL.

[1 Gall. 387.] [1]

Circuit Court, D. New Hampshire. May Term, 1813.

CRIMINAL LAW—INDICTMENT—VARIANCE.

If an indictment charge the perjury to be committed at the circuit court, held on the 19th day of May, and the record show the court to have been held on the 20th day of May, the variance is fatal.

[Cited in U. S. v. Bornemann, 35 Fed. 826.]

[Cited in Dill v. People, 19 Colo. 469, 36 Pac. 231. Cited in brief in State v. Conley, 39 Me. 85. Cited in Rhodes v. Commonwealth, 78 Va. 696. Cited in brief in Wead v. Marsh, 14 Vt. 82.]

Indictment for perjury [against John McNeal]. The perjury was assigned in swearing at a trial, before the circuit court of the United States, holden at Portsmouth, on the 19th day of May, A. D. 1811, that one Thomas Wilson was not a man of truth, but was reputed and considered as a man of bad character, as to speaking truth, and was not believed; and that his word was not taken nor believed among his neighbors. On producing the record of the trial, it appeared that the circuit court was first holden, in that year, on the 20th day of May, the 19th day of May being Sunday.

Mr. Humphreys, for the United States.

Mason & Webster, for defendant.

Before STORY, Circuit Justice, and SHERBURNE, District Judge.

THE COURT held the variance fatal, and the defendant was acquitted.

Case No. 15,701.

UNITED STATES v. McNEMARA.

[2 Cranch, C. C. 45.] [2]

Circuit Court, District of Columbia. June Term, 1812.

INDICTMENT—AVERMENT OF PROPERTY.

An indictment for forcibly taking bank-notes from another, must state whose property they were.

Indictment, that the defendant [Mary McNemara], with force and arms, unlawfully, injuriously, violently, and fraudulently did seize and take from one John Lyon fourteen bank-notes of the value of seventy-five dollars lawful money of the United States and him the said John Lyon, of the said bank-notes did fraudulently, violently, and by open force and violence strip and deprive, to the great loss and damage of the said John Lyon, and against the peace and government of the United States.

THE COURT (FITZHUGH, Circuit Judge, absent) on motion arrested the judgment because it was not stated in the indictment, whose property the bank-notes were.

[1] [Reported by John Gallison, Esq.]

[2] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,702.

UNITED STATES v. MACOMB.

[5 McLean, 286.] [1]

Circuit Court, D. Illinois. July Term, 1851.

NEW TRIAL—CRIMINAL EVIDENCE—TESTIMONY OF DECEASED—WITNESS.

1. The circuit courts of the United States may grant new trials in criminal cases, on the application of the defendant, after a conviction by a jury.

[Cited in Sparf v. U. S., 156 U. S. 65, 15 Sup. Ct. 321.]

2. A person was arrested and taken before the proper officer, charged with robbing the mail. At the preliminary examination, a witness, since deceased, testified in relation to the offense. The accused was present, and his counsel cross-examined the witness. Witnesses were permitted to prove, on a trial before a jury, under an indictment found for the same offense, what the deceased witness testified at the preliminary examination.

[Cited in U. S. v. Penn, Case No. 16,024; U. S. v. Angell, 11 Fed. 42; Mattox v. U. S., 15 Sup. Ct. 339.]

[Cited in Brown v. Com., 73 Pa. St. 326; Joy v. State, 14 Ind. 153; State v. Able, 65 Mo. 371; State v. Wilson, 24 Kan. 142.]

3. The rules of evidence in civil and criminal cases, in this particular, are the same.

4. It is sufficient, in such case, to prove substantially all that the deceased witness testified upon the particular subject of inquiry.

[Cited in Brown v. Com., 73 Pa. St. 326.]

[This was an indictment against Benjamin A. Macomb.]

Mr. Williams, U. S. Dist. Atty.

Mr. Ferguson, for defendant.

DRUMMOND, District Judge. The defendant was indicted under the 21st and 22d sections of the post office act of March 3, 1825 (4 Stat. 107–109), for stealing from the mail a packet containing a land warrant, and fifty dollars in bank notes. It appeared that the offense was committed near Dixon, on the 1st of August, 1850. The packet was mailed at Freeport on the 30th of July, addressed to Dixon. On the day the offense was committed, the defendant was arrested at the latter place, and a few days afterwards, a preliminary examination took place there before an officer. The defendant was present with his counsel, at the examination, during which one Hurlbut, since deceased, who had enclosed the land warrant and bank notes, and directed and posted the letter, testified as a witness for the United States. Hurlbut was subjected—to use the language of the witnesses introduced here—to a long and tedious cross-examination by the counsel of the defendant. An objection was taken by the counsel of the defendant at the trial in this court because witnesses were permitted to state to the jury what Hurlbut had sworn to on the preliminary examination. This objection having been overruled, and the defendant convicted by the jury, his

[1] [Reported by Hon. John McLean, Circuit Justice.]

counsel has made a motion for a new trial, and it having been argued before me, I have examined the objection with more attention than I was able to bestow upon it at the trial. No question has been made of the power of the court to grant a new trial on the application of the defendant. Indeed, notwithstanding the doubts which have been thrown on that point heretofore, and the opinion expressed by Judge Story in U. S. v. Gibert [Case No. 15,204], I should have no hesitation in granting a new trial to a party who, I thought, was wrongfully convicted, more especially if it were caused, in any degree, by the erroneous ruling of the judge at the trial. See U. S. v. Harding [Id. 15,301]. In this case there was other evidence, independent of the testimony of Hurlbut before the committing officer, which might have authorized the jury in finding their verdict; but there can be no doubt that his testimony may have had much influence upon the jury, and, under the circumstances of this case, I should grant a new trial if I thought the testimony should have been excluded. After reflection, however, and all the examination I have been able to give to the subject, I am of the opinion that the ruling at the trial was correct.

The objection resolves itself into the two following propositions: First. The declarations of a deceased witness made at a former trial between the same parties, upon the same subject matter, can never be given in evidence in criminal cases. Secondly. If they can be, it is only when the persons who are called on to give the declarations of a deceased witness, can repeat the precise words of the witness, and it being admitted that that was not done here, the testimony ought to have been rejected. It is well known that there has long been a difference of opinion upon both these points. It is not controverted that the testimony of a deceased witness given at a former trial between the same parties, in the same issue, is admissible in civil cases. There seems no difference of opinion as to that. But some of the authorities &c., deny the application of the rule to criminal cases. A case which is generally cited as deciding that it does not apply to criminal proceedings, is that of Sir John Fenwick in 1696. He was charged with being concerned in treasonable projects, but the witnesses who were expected to prove his guilt having left the country, there was no sufficient legal evidence to convict him of treason before the courts of law. The government resorted to a bill of attainder in parliament. A question arose whether the deposition of a person named Goodman, who was absent, taken before a justice of the peace when neither the defendant nor his counsel was present, should be read as evidence? It was decided in the affirmative on the ground that the commons were not obliged to adhere to the rules established in Westminster Hall. During the discussions which took place in that case, it was said that such evidence could not be admitted in criminal cases in a court of law. Of course it is clear that such testimony could not be admitted in a court of law; for, first, the witness was living; and, secondly, the defendant had no opportunity of cross-examining him; and however the authorities may differ as to the first, they all agree as to the second point, that being an indispensable prerequisite to the introduction of the testimony. Mr. Parke relies upon this case for his assertion that there is a distinction between civil and criminal cases in this particular. The same opinion is expressed in Finn v. Com., 5 Rand. (Va.) 701, though the question there was, whether the testimony was admissible where the witness was absent. In Crary v. Sprague, 12 Wend. 41, Judge Nelson, who delivered the opinion of the court, while he admits it is questioned by high authority, and cites Hawkins and Parke, states his own opinion, that the testimony is admissible in criminal cases. In People v. Newman, 5 Hill, 295, while deciding that nothing but the death of the witness would authorize the admission of such testimony under the law of New York, the court say, if the rule were otherwise in civil cases, they thought it ought not to be applied to criminal proceedings. And they distinctly waive the question whether it would be allowed at all in criminal cases, if the witness were dead. Com. v. Richards, 18 Pick. 434, was a case very much like this. A witness who had testified against the defendant at a preliminary examination before a magistrate, having died, witnesses were called to state what the deceased witness had sworn at the examination. They were permitted to testify, and the case went to the supreme court of Massachusetts on this and another point. It was like this a case of an offence which was investigated in the first place before an officer, and the party was afterwards indicted for the same offense. The case was reversed, as we shall presently see, on another ground, but the court examined at some length the authorities for the purpose of ascertaining whether there is any distinction in this particular between civil and criminal proceedings, and came to the conclusion that there is none. In U. S. v. Wood [Case No. 15,756], which, like this, was a case of robbing the mail, though the testimony was rejected because the precise words could not be given, no allusion whatever is made to any difference between civil and criminal cases. Rex v. Joliffe, 4 Term R. 290, in which Lord Kenyon used these words in relation to the rule which has been since so often quoted, was a criminal information, and he speaks of no distinction.

Most of the modern elementary writers, Phillips, Starkie, Roscoe, and Greenleaf advert to the rule as one of general applica-

tion in all cases. And Russell, particularly, in his valuable little treatise of the Law of Evidence, which he has added to his work on Crimes, says expressly, the rule applies to criminal prosecutions. 2 Russ. Ev. 683. By the statutes of Philip and Mary, magistrates were directed and required to take the depositions of witnesses in certain criminal cases, and it has always been held, under these English statutes, that if the defendant were present at the taking of the deposition, and the witness were dead, it might be read on the trial as evidence. And yet there was nothing in the statutes from which it could be inferred that depositions were to be received as evidence. But the law having sanctioned them, it seems they became admissible upon general principles, provided the defendant was present, had the liberty to cross-examine, and the witness was dead. See note to the case of Rex v. Smith, 2 Starkie, 208; 3 Eng. C. L. 316, § 6. These statutes require the magistrate to take the examination, as well of the prisoner as of the witnesses, in writing; still, if this was not done, it seems to have been the practice to admit the statements of the defendant and witnesses; though if the examination were reduced to writing, that must be produced. Rex v. Fearshire, 1 Leach, 240; Rex v. Jacobs, 1 Leach, 347; Rex v. Lasube, 2 Leach, 625. By the acts of congress, the officers before whom the persons charged with the commission of offense, are taken, have the right to allow bail. This implies the power to examine the facts of the case to ascertain whether the party shall be discharged, committed, or admitted to bail. The law does not require that the examination shall be reduced to writing. It was not done in this case. As a matter of practice, however, it is frequently done, and generally it is desirable that it should be. See the authorities collected in 2 Cow. & H. Notes to Phil. Ev. 571, or note 437, where the opinion is expressed that the statements of a deceased witness are admissible in a criminal the same as in a civil proceeding.

Without going into a further examination of the authorities in this branch of the case, it might, with some force, be argued that the weight of authority sustained the view of the court at the trial, but, however this may be, it seems plain that amidst so great a conflict of authorities, the court is at liberty to decide the question upon principle. Why should not the rule in civil and criminal proceedings be the same in this respect? The great object of all judicial investigation is to ascertain facts, and to do justice between the parties. In criminal cases, to shield the innocent, and punish the guilty. In accomplishing this, however, courts must act in conformity with some general rules founded in reason and experience. But after all our efforts we only make an approximation to this object. Many an innocent man has been and will be punished,—many a guilty one go free. If it be, on the whole, a sound rule to admit the declarations of a deceased witness, made on a former trial, in a case involving property or reputation, it is equally so in cases involving life and liberty. The ground upon which we proceed in each case is the presumption of the truth of the declarations, they being subjected to the tests which the law recognizes,—the presence of the accused, and the right of cross-examination. The admissibility of this species of evidence depends upon the necessity of the case, and upon a well established exception to the rule which excludes hearsay, if, indeed, we may not in one sense, regard it as original testimony. We receive it because it comes up to one of the demands of the law; it is the best evidence which can be produced. Though the witness has been once confronted with the defendant, and, in his presence, been sworn and cross-examined, it may be admitted, it is more satisfactory to have him again produced before a jury at a second trial, but being dead, it is impossible, and we resort to the next best source of truth,—his sworn statements already made. I think the law of evidence, as now administered, is quite stringent enough in excluding testimony, and I confess I feel a strong disposition to admit it in all cases where it can be done without violating any principle, or controverting any settled rule of law. It seems to me that to reject this kind of evidence, either in a civil or criminal case, is shutting out, without sufficient reason, one of the lights that should guide us in our judicial investigations.

The tendency of the courts in modern times in criminal cases is to afford the jury every opportunity that is consistent with the rules of law to determine the guilt or innocence of the accused, and I think they are peculiarly entitled to this sort of testimony, giving to it such weight as is proper under all the circumstances of the case. If the rule operates so as to expose guilt, it may protect innocence. There are anomalies enough in the law of evidence now without increasing them unnecessarily. In a criminal case involving life itself we admit, as testimony, declarations made by a person not under oath, and where the accused was not present. And why? From the supposed necessity of the case, and because declarations made by a person under the danger of impending death, are regarded as if made upon oath in a court of justice. We confine this rule of evidence to cases of homicide. But in the instance we are now considering, we have the sanction of the oath itself, administered by competent authority,—and the cross-examination of the witness,—the great test of truth, by the party; and there is thus every reasonable safeguard thrown around the claims of the public on the one hand, and the rights of the accused on the other.

Assuming, then, that the rule in civil and criminal cases ought to be, and is the same

in this particular, we come next to the other part of the subject, and one not less controverted. I might, perhaps, put this portion of the case upon the ground that no objection was taken at the trial that the witness did not repeat the identical words of Hurlbut; but I do not choose to rest it there, having formed a decided opinion on this point. I am disposed to treat it as if the objection on that ground had been actually made at the time.

The question is, whether a witness, when he is called upon to give the testimony of a deceased witness at a former trial between the same parties, in order to render it admissible, must repeat the precise words used by the witness? or whether it is sufficient if he state the substance of what was sworn? Those who contend for the more narrow doctrine that the very words used must be repeated, refer to Lord Kenyon's language in Rex v. Joliffe, already mentioned. He says, in referring to the instance of Lord Palmerston, in which, on all hands, it was agreed that this kind of testimony was admissible, "but as the person who wished to give Lord Palmerston's evidence, could not undertake to give his words, but merely to swear to the effect of them, he was rejected." "He ought," said the same judge, in the case of Ennis v. Denisthorne, referred to in 1 Phil. Ev. 219, "to recollect the very words, for the jury alone can judge of the effect of words." Some judges have interpreted the language of Lord Kenyon, to mean that a person shall not state the effect, that is, give his own inferences as to what the deceased swore, but that he may state the very words substantially, that is, he must use the words of the witness, and not his own; and placing this construction on the rule, have agreed with him. Others, on the contrary, have denied his position altogether, and have insisted that the persons may give the substance or effect of what the witness swore; other judges, again, maintain that the meaning of Lord K. was, that the whole of the very words of the witness must be given. In restricting the rule within these limits, they admit that it is a virtual destruction of the rule itself.

In New York and Massachusetts, the decisions of whose courts we hold in high respect, it seems to be considered that the precise words must be used, and not the substance. This was the opinion expressed in Wilbur v. Selden, 6 Cow. 162, "The words must be given, and not what is supposed to be the substance of the testimony." The case of Com. v. Richards, 18 Pick. 434, already cited, is a fair illustration of the effect of restricting the rule as contended for. A person, since dead, testified as a witness before the magistrate at the preliminary examination of the defendant, charged with a criminal offense. On the trial before the jury, two witnesses were sworn, and were permitted to repeat what the deceased witness had said before the magistrate. These witnesses did not repeat the exact words used, but only the substance of them from recollection, aided by notes taken at the time. One of the witnesses said he was confident he stated the substantives and verbs correctly, but was not certain as to the prepositions and conjunctions. The supreme court reversed the case because these witnesses were permitted to state, under these circumstances, what the deceased witness had testified. The court, in giving its opinion, admits that such strictness will generally exclude that kind of evidence. They cite Rex v. Joliffe, U. S. v. Wood, and Wilbur v. Selden, authorities already mentioned. The question came up again in Massachusetts in Warren v. Nichols, 6 Metc. (Mass.) 261. In this case the witness said he could not give the words or precise language of the deceased witness, but he could give the substance of the testimony. The court differed in opinion, but a majority of the court adhered to the rule laid down in Richards' Case. I understand, however, the majority of the court to consider that the effect only of what the deceased witness said could be stated, and it was to be excluded on that ground. "As he could only give the substance and effect of the testimony, but not the language in which it was given," it should be rejected. And yet, in another part of the opinion, the majority of the court say. "The witness must be able to state the language in which the testimony was given, substantially and in all material particulars," that is, the witness must use the language of the deceased witness, and not his own; and it is to be inferred if they had supposed this had been done, they would have held it sufficient, though this principle is not easily reconciled with the decision in 18 Pick. 434, to enforce and strengthen which seems to have been the chief object of the opinion pronounced by the majority of the court in Warren v. Nichols. It would seem to be important in considering these two cases to bear in mind a distinction which many of the courts make, and which the court in Massachusetts seems not to have had in view, between the effect of testimony, and the substance of it, or of the words used. In Indiana the same course has been followed. In Ephraims v. Murdock, 7 Blackf. 10, the court admitted there were conflicting decisions, but thought the weight of authority was in favor of the more stringent doctrine. And yet that court resisted an effort of counsel to make the same principle applicable to declarations in extremis. Where a person was indicted for murder, the witness could only repeat the substance of what was said, and not the exact words of the party, in extremis, and the court held this sufficient. Ward v. State, 8 Blackf. 101. On the other hand in Pennsylvania the courts held that it is sufficient for the witness to state the substance of what was sworn on the former trial. Cornell v. Green, 10 Serg. & R. 14. The court, while not very clearly distinguishing between the sub-

stance and effect of evidence, enforces its view of the law in a very convincing manner. The judge says: "I cannot see why the same necessity which opens the way for secondary evidence of the very words of a deceased witness, should not open the way also for the substance of his testimony when his very words cannot be recollected; or discern the policy of a rule which should shut out the little light that is left, when it is all that is left, merely because it may not be sufficient to remove everything like obscurity." And this was followed in subsequent cases. Smith v. Lane, 12 Serg. & R. 80; Chess v. Chess, 17 Serg. & R. 409. This construction of the rule seems to be approved by the courts of Maryland and Virginia, and by other states. Gildersleeve v. Caraway, 10 Ala. 260.

The question arose in a very late case in Ohio. Wagers v Dickey, 17 Ohio, 439. And the case is important as showing the rule adopted by the supreme court of that state, out of conflicting decisions upon the subject throughout the state. In that case the witness was permitted to state in substance what had been the testimony of the deceased witness; and the court says: "That if the strict rule is to be adopted, it amounts to a total interdict of a most important branch of secondary evidence, a branch of evidence especially important under our system of new trials." And the judge who pronounced the opinion of the court in allusion to the strict construction of the rule uses this strong language: "The evils flowing from it would, in my judgment, were the law ever so well settled, justify a court in changing the law." In Illinois it seems to be held sufficient for the words of the witness to be given substantially, and not the result of the evidence. Marshal v. Adams, 11 Ill. 37. All of our most approved writers on the Law of Evidence, Phillips, Starkie, and Greenleaf, appear to prefer the most liberal construction of the rule. But it is needless to multiply authorities on the one or the other side of this vexed question. Most of the authorities (except the recent ones) can be found in 2 Cow. & H. Notes to Phil. Ev. 578, note 442. It might be matter of curiosity to examine how far the authorities could be reconciled by observing the distinction between the effect and the substance of the words used by the deceased witness,—a familiar illustration of which occurs in proving the words laid in a declaration in an action of slander. There it would not be sufficient to prove words to the effect of those used, nor even equivalent words, and yet it is enough to prove the words substantially as laid in the declaration. It is a singular practical commentary upon the rule that, in those cases where the courts maintain the strict doctrine, scarce an instance can be found where the evidence has come up to the demands of the court, while it not unfrequently has happened where the courts have been more liberal in their construction of the rule, they have shown a strong disposition to restrain it within reasonable bounds. Watson v. Gilday, 11 Serg. & R. 337; Wolf v. Wyeth, 11 Serg & R. 149.

In our country new trials are so common that it often happens the testimony of a deceased witness is offered to be proved on a second trial. It is, therefore, a question of considerable practical importance. I have no hesitation in saying that I regard the more liberal view of the rule as being most in accordance with sound reason, and with the principles of evidence. All the analogies of the law are against the strict rule. Take the very common case of proof of verbal admissions of a party to the record. Do we reject the testimony of the witness who proves these admissions because he cannot repeat the precise words of the party? It is matter of every day's practice to admit the evidence if he swears to the substance of what the party said. Another common case is that of lost writings. If evidence is in writing, it must, ordinarily, be produced, if in existence, and in the power of the party. If a written instrument is lost or destroyed, we resort to the next best evidence. Suppose that it is the memory of a witness who has seen and read the instrument. If he were introduced to a court, and should testify that he could state the substance of the words used in the instrument—that he was confident of the substantives and verbs, but not so certain of the prepositions and conjunctions (like the case in 18 Pick. 434), would his testimony be excluded because he could not repeat the exact words of the instrument? More especially, if, as he read it, he had taken notes of the contents, to assist his memory? I apprehend no court in this country would reject such testimony. In perjury we only require proof of the substance of the words upon which the perjury is assigned. We have already adverted to the case of slander, and to declarations, in extremis in cases of homicide. Take one of the few instances to which the majority of the court in Warren v. Nichols think the evidence must be confined,—a verbal notice of any fact given to a party. It is often necessary for us to prove such a notice. And would the fact that notice was given be rejected as evidence because the writer, who was present, and who testifies to it, cannot repeat every preposition and conjunction made use of by the party in giving the notice? Most certainly even that court would say it is enough to prove it substantially. Besides, to admit the rule, and restrict it, as is sometimes done, makes it operate most unfairly. If the examination of a deceased witness has been short, and his words few, very possibly a person might recollect the precise words, but in a long and tedious examination, it would be morally impossible for any one to recollect all that the witness said; more particularly as the authorities agree that the witness must be able to state all that was said on the particular subject by the deceased witness, as well on the direct as cross-examination.

Now we know that the examination of a witness generally consists of interrogatory and answer, and if the precise words are to be given, then, to be consistent, the question must be given as well as the reply. Take the case we are now considering as an illustration, and we will see the impracticability of this. In this case the witness, Hurlbut, was cross-examined at great length as to the identity of the bank notes, which he alleged were the same as those found on the defendant. Every variety of question which the ingenuity of counsel could devise, was employed. Now, the witness introduced here, could testify to the substance of all that Hurlbut said in this examination, but to repeat the whole of what he said was clearly impossible; and ever will be in such cases unless it is all reduced to writing at the moment. I cannot persuade myself that it is reasonable to reject the substance of what he said merely because we cannot have the very words. I understood the witness to say that he repeated substantially all that the deceased witness said, as well on the direct as on the cross-examination upon what was the subject of inquiry in this case, and therefore I think it was admissible. It seems as though the only safe course to pursue is to give this construction to the rule; or reject it altogether as some judges appear half inclined to do. To acknowledge the soundness of the rule one moment, and the next trammel it so as effectually to destroy it, seems like trifling. It is said that it is a dangerous kind of evidence which, if resorted to, may be the means of doing injury. But the same may be said of every species of secondary evidence, and even of primary evidence itself. It is the lot of humanity. The main point is, Does the rule stand upon well established principles of evidence? Will it, on the whole, tend to promote the great ends of justice? The reason of the thing, and the authorities in the law have answered these questions in the affirmative. Believing that the rule rests upon clear principles, I think it should receive such an interpretation as shall make it of some practical utility, and not a dead letter.

Case No. 15,703.

UNITED STATES v. McPHERSON.

[1 Cranch, C. C. 517.] [1]

Circuit Court, District of Columbia. Dec. Term, 1808.

JURY—PEREMPTORY CHALLENGE.

Peremptory challenge not allowed in cases of larceny.

Indictment [against Daniel M'Pherson] for stealing, under the act of congress of April 30, 1790, § 16 (1 Stat. 116).

It was conceded by Mr. Morsell, for the prisoner, that he had not a right to peremptory challenge.

CRANCH, Chief Judge, and DUCKETT, Circuit Judge, were of opinion, but did not deliver it, that the prisoner was not entitled to a peremptory challenge. In the case of U. S. v. Carrigo [Case No. 14,735], at Alexandria, in January, 1802, it was refused by the court. Upon examining W. Cranch's notes in Washington, he could find no case in which it had been allowed in Washington. It has been lately allowed in Alexandria, by the assent of the attorney for the United States. It was never allowed in Mr. Mason's time.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,704.

UNITED STATES v. McPHERSON.

[1 Hayw. & H. 105.] [1]

Circuit Court, District of Columbia. 1842.

CONSTABLE—COLLECTING ILLEGAL FEE.

A constable was ordered to be dismissed from his office for collecting an illegal fee, unless he returned the same, and pay the cost of the rule served on him.

On the petition of William Hughes.

P. R. Fendall, for the United States.
James Hoban, for defendant.

The petitioner testified that Daniel McPherson wrongfully demanded and received from him two dollars and forty cents, which the petitioner charges that in doing so he acted illegally, extorsively and oppressively, and prays the court to order a rule on said McPherson to show cause, if any he can, why he should not be removed from his said office of constable. A rule was served on him in accordance with the prayer.

The following was also submitted to the court: The officer had a right to receive one dollar and twenty-five cents for the distrain and seven per cent., which on twelve dollars (the amount of rent due) would be ninety cents, provided the rent was paid within five days from the time the distrain was laid, and the cart hire, which is said to have been twenty-five cents; making the amount, the bailiff (or constable) is entitled to receive, $14.40. The bailiff (or constable) is bound by law to give Hughes (the tenant) the account of said bailiff receipted, and a statement of all the proceedings.

THE COURT ordered that Daniel McPherson be discharged from the office of constable unless he return to William Hughes $2.76, and pay the cost of this rule, on or before the 22d of September, 1842.

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

Case No. 15,705.

UNITED STATES v. MADDEN.

[1 Cranch, C. C. 45.] [1]

Circuit Court, District of Columbia. Dec. Term, 1801.

CRIMINAL LAW—PRESENTMENT.

The court may order an indictment to be sent to the grand jury without a previous presentment for the same offence.

Indictment [against Dinah Madden, alias Hopewell] for stealing. Verdict for the prisoner. The testimony appearing to justify an indictment for receiving stolen goods, THE COURT ordered such an indictment to be sent to the grand jury.

KILTY, Chief Judge, contra, was of opinion that there ought to be a previous presentment by the grand jury upon which to found the indictment. The prisoner was remanded.

Case No. 15,706.

UNITED STATES v. MAGILL.

[See Case No. 15,676.]

Case No. 15,707.

UNITED STATES v. MAGOON.

[3 McLean, 171.] [2]

Circuit Court, D. Illinois. June Term, 1843.

PUBLIC LANDS—DIGGING ORE—TRESPASS—GIST OF ACTION.

1. In trespass for digging and carrying away lead ore from the lands of the United States, they are not entitled to recover, as damages, the value of the ore after it is dug.

[Cited in brief in Illinois & St. L. Railroad & Coal Co. v. Ogle, 92 Ill. 358; Waters v. Stevenson, 13 Nev. 157.]

2. The injury done the soil is the gist of the action; and ore extracted must be considered in aggravation of the damages.

[Cited in Barton Coal Co. v. Cox, 39 Md. 24; Foote v. Merrill, 54 N. H. 493; Waters v. Stevenson, 13 Nev. 157.]

3. A trespasser is not to be placed on the same footing with a lessee.

At law.

Mr. Butterfield, U. S. Dist. Atty.

Mr. Logan, for defendants.

OPINION OF THE COURT. This is an action of trespass, charging the defendant with digging and carrying away a large amount of lead from the lands of the United States. The defendant suffered a default, and the jury was sworn to assess the damages, &c. It was proved that defendant entered upon the lands of the United States, dug a large quantity of ore, and conveyed it away. The plaintiffs contended that they are entitled to the value of the ore, after it was dug; but the court instructed the jury, that that was not the measure of damages, but the injury done to the soil by the trespass. That the digging and carrying away by the same person, is presumed to be a continuous act, and the lead ore removed must be considered in aggravation of the trespass upon the soil. Neither is the rate at which leases are made for these mineral lands, a proper criterion of damages. A trespasser is not to be put upon the footing of a lessee.

The jury assessed the damages at —— dollars. Judgment.

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Hon. John McLean, Circuit Justice.]

Case No. 15,708.

UNITED STATES v. MAGUIRE.

[3 Cent. Law J. 273; [1] 22 Int. Rev. Rec. 146.]

Circuit Court, E. D. Missouri. April 8, 1876.

INTERNAL REVENUE—COLLECTOR—INDICTMENT FOR CONCEALING FRAUDS—CUMULATIVE JUDGMENTS.

The defendant pleaded guilty to five counts of an indictment charging him, respectively, with having knowledge and information of frauds upon the revenue, committed at different times by five different distillers. *Held*, that the defendant should be sentenced as for one offence; but the general question as to the power to render cumulative judgments was left open for further consideration.

[Distinguished in Ex parte Peters, Case No. 11,027.]

W. H. Hatch and A. J. P. Garesche, appeared for defendant, but under instructions from their client, did not argue the question of cumulative punishments.

Lucien Eaton, for the district attorney, contra, limited his argument to the reading of a section from Wharton's Criminal Law.

Before DILLON, Circuit Judge, and TREAT, District Judge.

DILLON, Circuit Judge (orally). In this case an indictment was found under section 3169 of the Revised Statutes, he being, at the time of the transactions set forth in the indictment, the collector of internal revenue for this collection district. Section 3169 provides that every officer or agent appointed and acting under the authority of any revenue laws of the United States,

(1) Who is guilty of any extortion. . . .

(9) (The section under which this indictment was framed.) Who having knowledge or information of the violation of any revenue law by any person, or of fraud by any person, against the United States, under any revenue law, fails to report in writing such knowledge or information to his next superior officer, and to the commissioner of internal revenue, . . . shall be dismissed from office, and shall be held to be guilty of a misdemeanor,

[1] [Reprinted from 3 Cent. Law J. 273, by permission.]

and shall be fined not less than $1,000, nor more than $5,000, and be imprisoned not less than six months nor more than three years.

In this indictment, as originally framed, there was a count for a conspiracy, but that was nolled, leaving five counts in the indictment under the ninth subdivision, for having knowledge or information of the violation of any revenue law by any person, or of fraud by any person against the United States, and failing to report in writing such knowledge or information to his next superior officer, and to the commissioner of internal revenue. The counts are alike in their general nature in charging the defendant with having knowledge and failing to report. The first charge that he had knowledge and information of frauds being committed by Bevis and Fraser, who were then distillers in this city, and that he failed to report those charges. The second charges that he had like knowledge of frauds being committed by Ulrici, a distiller here, and that he failed to report. The third, the same as to Jouett, the fourth, the same as to Busby, the fifth, the same as to Bingham, these men, Jouett, Busby, and Bingham, being distillers.

The defendant has entered a plea of guilty, and the question is whether there stand on the record five separate, independent, distinct offences, requiring five separate, distinct, independent cumulative judgments, or whether there is but one offence; or, if more than one, whether more than one judgment can be rendered. And that is a very important question, and we had desired that question to be fully argued at the bar. We have failed to get any considerable light by reason of the fact that Col. Maguire seems to have instructed his counsel that he did not care to have it argued, and that he wished to leave it to the court; and Col. Dyer, for the government, lacked the stimulus of an actual contestant here, and failed to give us but a very brief argument on the point, and referred us simply to Wharton's Criminal Law. There is one provision of the statute which has a material bearing on this question, or may be supposed to have. I will read it:

"Section 1024. When there are several charges against any person for the same act or transaction connected together, or for two or more acts or transactions of the same class of crimes or offences which may be properly joined, instead of having several indictments, the whole may be joined in one indictment, in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

Now, aside from that statute, and aside from some legislation on the subject, it would seem to be very clear that, under the provisions of the common law as respects pleading, it would not be competent to unite several distinct offences in one and the same indictment, and have separate and distinct judgments rendered upon each count in those indictments, the same as if they were separate offences; and, according to the principles of the common law, this cannot be done. Originally at common law, it was prohibited from using more than one count setting out a single or solitary offence, but to avoid questions of variance, it came to be the custom afterwards to set forth the same offence in different counts. Although language was used which, taking it literally, would import that each count was for a separate offence, it was for the same offence, stated in different terms to meet the proof. The question has been somewhat complicated by late legislation in England, and in some states in this country. We have no federal statute except section 1024, which I have just read which bears upon the subject. That being so, the question is whether on a general verdict of guilty, or a plea of guilty—whether, as I said, an indictment having these five distinct offences, calls for the rendering of five distinct judgments, or are we limited to pronouncing upon this record one judgment?

In the absence of any extended argument upon this point, and as we have been precluded by the pressure of other business from examining it originally, we concluded that it was our duty to rest it, for the present, upon a precedent that has been called to our attention in the federal courts. This whole question was brought very prominently before the country in the case of Wm. M. Tweed against Joseph L. Lipscomb, and decided by the court of appeals of New York. That case was an indictment for 275 misdemeanor counts, for separate misdemeanors in one indictment, and the court in which the trial was had treated these as separate and distinct offences and rendered a cumulative punishment. We had a similar case in the Western district of Missouri, where there were fifty counts against a man under the statute. So it becomes a very important question to determine whether each count is a separate offence and must receive at least the minimum of punishment prescribed by law. The question arising on that judgment was carried to the court of appeals in the state of New York. It was argued by lawyers of great ability and great eminence. At the bar, by Mr. Charles O'Connor, in support of that judgment; and the unanimous opinion of the court of appeals, which I have before me, is that that proceeding could not be sustained. All the authorities, English and American, all the learning on the subject that could be collected, were embodied in it. The court is one of very great respectability, and on the bench there are judges of eminence and learning. We have not had time to investigate, originally, to see whether we could come to the same conclusion. But among other cases cited in that opinion, is one which, in a federal court, is entitled to be respected, because it is an authoritative exposition of the statutes which are here involved by a federal court of high authority. "Congress"—I refer to the case which was decided by Mr. Justice Nel-

son, on the bench of the circuit court, with Judge Hall, of the Northern district of New York—"has thought it necessary," says Judge Allen, referring to that judgment, "to provide by statute for the joinder of several charges against the same person for the same act or transaction, or for two or more acts or transactions of the same class of crimes or offences in one indictment in several counts, but no provision is made for several judgments on one record. We have," says Allen, J., "an authoritative exposition of the subject from Judge Nelson, late associate justice of the supreme court of the United States, a judge of long authority and experience in the courts of New York and the United States. Upon the conviction of one Albro, in the circuit court of the United States for the Northern district of New York, for several distinct offences, united in a single indictment, under the act of congress referred to, the court was moved in behalf of the government for separate sentences and distinct punishments for the several offences of which the prisoner had been convicted." [Case unreported.] This is the same motion we have before us. "The court held the application under advisement until the succeeding term, denied the application, and gave a single judgment, as for one offence. It was held, Judge Nelson announcing the result of the deliberation of himself and his associate, Judge Hall, that the act had not changed the common law as it existed in New York, and was demonstrated by the United States courts sitting in that state, and that the government was not entitled to a judgment upon the conviction of the prisoner of several offences under one indictment containing distinct counts, except for a single offence." That is an authoritative exposition of the common law doctrine, and the judgment of that high court is, that that principle is not changed by this legislation. We rest for the present without making any original enquiry upon our part upon that precedent; therefore, instead of five judgments, we will only render one. More than this we do not feel called upon to say at this time, except to add that we do not wish this ruling to be considered as concluding the question, and that we still regard it as open to further consideration, after we shall have had the benefit of argument and a collection of the cases upon the subject decided in the federal courts. Under the federal statutes (section 1024) it may be true that for offences which are and "may be properly joined" there may be more than one judgment, or that one judgment may exceed the maximum punishment for a single offence. But it is doubtful how far, if at all, distinct offences not part of "the same act or transactions," or part of "two or more acts or transactions connected together" can be "properly joined." In this view, it may admit of doubt upon the face of the present indictment whether these five counts were properly joined, and if not, then there should be but one judgment. On all these questions, as well as on the right to pronounce several or cumulative judgments, in such cases or in any case, we do not feel ourselves concluded.

The defendant was then sentenced to pay a fine of $5,000 and to be imprisoned in the county jail six months.

UNITED STATES v. The MAHALA. See Case No. 15,607.

Case No. 15,709.

UNITED STATES v. MAILLARD et al.

[4 Ben. 459;[1] 13 Int. Rev. Rec. 27.]

District Court, S. D. New York. Jan., 1871.

FORFEITURE—REVENUE ACTS—CONCEALED FRAUD—STATUTE OF LIMITATIONS—PLEADING.

1. A personal action was brought in behalf of the United States, to recover the value of certain merchandise as forfeited, by reason of a violation of the 66th section of the revenue act of March 2, 1799 (1 Stat. 677). The defendants pleaded that the causes of action did not accrue within five years next before the beginning of the action. The plaintiffs demurred to the plea, as far as it related to three of the causes of action; and, as it related to the rest of them, they replied that the acts set forth in that respect in the declaration were fraudulently concealed by the defendants from the plaintiffs, until within five years before the suit, so that they could not, until within that period, elect whether to claim forfeiture of the goods, or of their value, or bring an action for such acts. To this replication the defendants demurred. *Held*, that the effect of the 14th section of the act of March 3, 1863 (12 Stat. 741), repealing so much of the 89th section of the act of March 2, 1799 (1 Stat. 696), and of the 3d section of the act of March 26, 1804 (2 Stat. 290), as impose a limitation upon the commencement of any action for the recovery of any forfeiture incurred by reason of the violation of any law relating to importations, is to leave in full force the limitation of the 4th section of the act of February 28, 1839 (5 Stat. 322), with its proviso.

[Cited in Amy v. City of Watertown, 22 Fed. 420.]

[Cited in Hughes v. Metropolitan El. Ry. Co., 130 N. Y. 14, 28 N. E. 765.]

2. The 4th section of the act of 1839 is applicable to suits in favor of the United States.

3. The plea, as to the first three causes of action, was, therefore, good, and the demurrer to it must be overruled.

4. As the statute made no exception to the limitation imposed by it, in the case of a concealed fraud, the court had no right or power to engraft such an exception on it.

[Cited in Andrews v. Dole, Case No. 373.]

[Cited in brief in Rogers v. Brown, 61 Mo. 188.]

5. The replication to the plea was, therefore, bad, and the demurrer to it must be sustained.

[This was a suit by the United States against Henry Maillard and Oscar Mussinan.]

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

Noah Davis, Dist. Atty., and William Stanley, for the United States.

Sidney Webster, for defendants.

BLATCHFORD, District Judge. This is a a suit brought to recover the value of certain merchandise, on the ground that such value became forfeited by the defendants to the United States, because of a violation of the 66th section of the act of March 2, 1799 (1 Stat. 677). The second plea to the declaration is, that the causes of action did not accrue to the plaintiffs at any time within five years next before the commencement of the suit. The plaintiffs demur to this plea, so far as it relates to three of the causes of action, and the defendants join in demurrer. The plaintiffs reply, among other things, to this plea, so far as it relates to all the other causes of action, that the acts set forth in that respect, in the declaration, were fraudulently concealed by the defendants from the plaintiffs, until within five years prior to the commencement of the suit, whereby the same were unknown to the plaintiffs until within a period of less than five years next prior to the commencement of the suit, whereby the plaintiffs could not, until within that period, elect whether to claim forfeiture of the goods, or of their value, or bring an action for such acts. To this replication the defendants demur, and the plaintiffs join in demurrer.

The first question raised, and to be determined, on these pleadings, is, whether the suit is barred, so far as respects the three causes of action specified in the demurrer to the second plea, by the limitation of five years that is set up. The provision of the 66th section of the act of 1799 is, that "if any goods, wares, or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof, at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, wares, or merchandise, or the value thereof, to be recovered of the person making the entry, shall be forfeited." The 89th section of the same act (1 Stat. 696) provided as follows: "No action or prosecution shall be maintained in any case under this act, unless the same shall have been commenced within three years next after the penalty or forfeiture was incurred." The 3d section of the act of March 26, 1804 (2 Stat. 290), provided as follows: "Any person or persons guilty of any crime arising under the revenue laws of the United States, or incurring any fine or forfeiture by breaches of the said laws, may be prosecuted, tried and punished, provided the indictment or information be found at any time within five years after committing the offence or incurring the fine or forfeiture, any law or provision to the contrary notwithstanding." The 4th section of the act of February 28, 1839 (5 Stat. 322), provides as follows: "No suit or prosecution shall be maintained for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, unless the same suit or prosecution shall be commenced within five years from the time when the penalty or forfeiture accrued: provided, the person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States, so that the proper process may be instituted and served against such person or property therefor." The 14th section of the act of March 3, 1863 (12 Stat. 741), repeals so much of the 89th section of the act of March 2, 1799, and so much of the 3d section of the act of March 26, 1804, "as impose any limitation upon the commencement of any action or proceeding for the recovery of any fine, penalty, or forfeiture incurred by reason of the violation of any law of the United States relating to the importation or entry of goods, wares, or merchandise." The 89th section of the act of 1799 was confined to prosecutions under that act, and imposed a limitation of three years after the incurring of the penalty or forfeiture. The 3d section of the act of 1804 embraced forfeitures under the revenue laws generally, and extended the limitation to five years after the incurring of the forfeiture. The 4th section of the act of 1839 embraces, by the scope of its terms, suits for forfeitures accruing under the laws of the United States generally, (not merely the revenue laws,) and fixes the limitation at five years after the forfeiture accrued, with the proviso, that the person of the offender, or the property liable for the forfeiture, shall, within that period, be found within the United States, so that process may be served. This act of 1839 is not one relating specially to the revenue system, but is an act respecting the judicial system of the United States. There were, when this act of 1839 was passed, and there are now, forfeitures provided for by the laws of the United States, which are not forfeitures accruing under any revenue law, and also forfeitures which are not forfeitures to the United States. Forfeitures other than those under the revenue laws were not provided for, in respect to a limitation of the time of bringing the suit, by the act of 1804. Hence, the 4th section of the act of 1839 was passed. But that section, while retaining the term of five years, specified in the act of 1804, and covering by its language forfeitures accruing under any law of the United States, as well revenue laws as other laws, and as well forfeitures accruing to the United States as forfeitures accruing to individuals, restricts the limitation of five years by the proviso, which had not before been applied thereto, even in respect to suits for forfeitures under the revenue laws, that the limitation shall not be operative unless the state of things named in the proviso shall exist, as to finding the person of the offender, or the property, within the United States, within the five years, so as to serve process. Then

comes the 14th section of the act of 1863, which repeals specifically so much of the 89th section of the act of 1799, and so much of the 3d section of the act of 1804, as impose any limitation upon the commencement of any action or proceeding for the recovery of any fine, penalty, or forfeiture incurred by reason of the violation of any law of the United States relating to the importation or entry of goods, wares, or merchandise, leaving unrepealed the rest of those sections, and not specifically repealing the 4th section of the act of 1839. The act of 1863 is one relating almost entirely to the prevention and punishment of frauds upon the revenue, and to provision for the more certain and speedy collection of claims in favor of the United States.

Prior to the passage of the 14th section of the act of 1863, it was claimed that the provisions of the 89th section of the act of 1799, and of the 3d section of the act of 1804, had, so far as regarded a limitation on suits or prosecutions for penalties or forfeitures accruing under the laws of the United States, been superseded, and, by implication, repealed, by the 4th section of the act of 1839. Conk. Prac. (4th Ed.) p. 506, note 1. But the question was not free from doubt. The limitation in the act of 1799 related to customs only, and that in the act of 1804 related to the revenue laws only, while that in the act of 1839 extended to matters outside of the customs laws and other revenue laws, and the earlier two of the provisions were not expressly repealed. It was, therefore, doubtful, at least, under the settled rules for the construction of statutes, whether the provisions of the acts of 1799 and 1804 were repealed, by implication, by the 4th section of the act of 1839, in respect to the matters covered by that section. In this state of things, and while the act of 1839 is in force, the provisions of the acts of 1799 and 1804 are expressly repealed by the act of 1863, so far as they relate to a limitation on the actions and proceedings mentioned in the 14th section of the act of 1863, and the act of 1839 is left in force.

It is contended, on the part of the United States, that, since the passage of the 14th section of the act of 1863, there has been no limitation as to suits for the recovery of forfeitures incurred under the customs laws, being the laws named in that section. But I think the object of the passage of the 14th section of the act of 1863 was, among other things, to make it clear that the limitation on the commencement of suits for the recovery of fines, penalties, and forfeitures incurred by reason of the violation of the customs laws should fall under the 4th section of the act of 1839, and be subject to the restrictive proviso to that section, and not be an unrestricted limitation, as in the acts of 1799 and 1804. Hence, the absolute limitations prescribed as to such suits by the acts of 1799 and 1804 were repealed, leaving in force, as to such suits, the restricted and qualified limitation provided for by the 4th section of the act of 1839. It results, therefore, that actions and proceedings for the recovery of fines, penalties, and forfeitures incurred by reason of the violation of any law of the United States relating to the importation or entry of goods, wares, or merchandise, are subject to the limitation prescribed by the 4th section of the act of 1839, under the conditions of the proviso to that section. I find my views on this question confirmed by the opinion of the district judge for the Eastern district of Michigan, in the case of In re Landsberg [Case No. 8,041], in May, 1870.

It is urged, that the United States are not embraced within the 4th section of the act of 1839, because not expressly named therein; that to bind them by the limitation of that section would bar them of a right, and would violate the principle of public policy, that the government is not to be prejudiced by the negligence of public officers to whose care the public interests are confided; and that it is a settled principle that the government is never barred by an act of limitation, unless named. U. S. v. Knight, 14 Pet. [39 U. S.] 301, 315. Without going into a detailed examination of the legislation of congress on the subject of fines, penalties and forfeitures, it is sufficient to say, that the course of it has been such as to show, that wherever fines, penalties and forfeitures generally, accruing under the laws of the United States, are spoken of, those accruing to the United States are intended to be included, unless they are specially excepted. This consideration, in connection with the language of the 4th section of the act of 1839, shows an intent to include the United States within that section, and no intent is shown to exclude them. The section speaks of prosecutions for penalties and forfeitures other than pecuniary, and also of the person of the "offender," language which would scarcely have been used if the United States were not intended to be embraced within the purview of the section. The three causes of action referred to in the demurrer to the second plea being for forfeitures incurred by the violation of a law of the United States, relating to the importation and entry of merchandise, the second plea is, therefore, a good plea to such three causes of action, and the demurrer to it must be overruled.

The replication to the plea of the statute of limitations, so far as it relates to all the causes of action except the three named in the demurrer to such plea, is based on the view, that a fraudulent concealment by the defendants, from the plaintiffs, of the acts set forth in such causes of action, until within five years prior to the commencement of the suit, whereby the same were unknown to the plaintiffs until within a period

of less than five years next prior to the commencement of the suit, bars the running of the statute. It is well settled, that, however strong the reason may be, a court cannot engraft on a statute of limitations an exception which the statute itself does not make. McIver v. Ragan, 2 Wheat. [15 U. S.] 25; Bank of State of Alabama v. Dalton, 9 How. [50 U. S.] 522; The Sam Slick [Case No. 12,282]. So, also, the clear weight of authority, at least in the state of New York, is, that where the statute does not make a fraudulent concealment of the existence of the cause of action an exception to the running of the statute, the court has no right or power to make such exception, either directly, or by the indirect method of saying that the cause of action does not accrue, in case of a fraudulent concealment, until the discovery of the fraud. Troup v. Smith's Ex'rs, 20 Johns. 33; Leonard v. Pitney, 5 Wend. 30; Allen v. Miller, 17 Wend. 202; Humbert v. Trinity Church, 24 Wend. 587. It is true, that Mr. Justice Story, in Sherwood v. Sutton [Case No. 12,782], dissents from the decision in 20 Johns., but I cannot but regard the making by the court of an exception, in a case of fraudulent concealment, when the statute does not make it, as violating the rule settled by the supreme court, as before stated. Especially must this be so where the statute has, as in the 4th section of the act of 1839, specified, in a proviso, declared exceptions.

But it is further urged, that, although, ordinarily, simple fraudulent concealment may not prevent the running of the statute, yet the statute did not begin to run in this case until the offence became known to the government, for the reason that, under the 66th section of the act of 1799, the government has the option to take a forfeiture of the goods or a forfeiture of their value, and that it cannot exercise such option or bring a suit until it knows of the violation of law. Another form of the argument is, that the forfeiture did not take place until the option was exercised; that the option was not exercised until the suit was brought; that, therefore, the forfeiture did not accrue till the suit was brought; and that, consequently, the statute did not begin to run till the suit was brought. The answer to these views is, that, if they were to prevail, they would require the court to admit fraudulent concealment as an exception to the running of the limitation, as well where there was no option to be exercised, as where there was the privilege of exercising an option. No suit can be brought in any case until the violation of law is known. Whether there is an option to be exercised or not, as to the kind of suit to be brought, can make no difference, if the right to bring the suit that is brought, that is, the cause of action, or, in the language of the 4th section of the act of 1839, the "forfeiture," accrued when the offence was committed. It did so accrue, as against the defendants in this case, when the offences alleged were committed. Ignorance of the right to exercise the option can be of no more avail to constitute an exception to the statute, than ignorance of the right to bring any suit at all, or ignorance of the existence of the offence. Such ignorance does not prevent the running of the statute or the accruing of the forfeiture sued for, as respects the thing or person sued, as between it or him and the United States. This view is not in conflict with the decision in the case of Caldwell v. U. S., 8 How. [49 U. S.] 366. The question there involved was, whether, in case of a violation of the 66th section of the act of 1799, goods undervalued in the entry, with design to evade the duties thereon, became forfeited to the United States, under that section, eo instanti, on the false entry, so as to avoid a sale of them between that time and the time of their seizure, to a bona fide purchaser or one altogether ignorant of the fraud, and in no way connected with the perpetrator of it, except in buying the goods from him at a fair price. The court held, that, as, under the 66th section, the forfeiture was of the goods or their value, the forfeiture of the goods did not, by the commission of the offence, become so fixed as to vest the title to them in the United States eo instanti, as against a bona fide purchaser of them, who acquired his title before the United States, by seizing the goods, exercised the privilege of election conferred on it by that section. The same doctrine had been previously held in U. S. v. Grundy, 3 Cranch [7 U. S.] 338. But that was a very different question from the one involved in this case. There is no question here of the vesting of the title to goods as against a bona fide purchaser, but a question of the fact of the commission of an offence, and of the creation thereby of a right to bring a suit therefor in one form or another.

I am entirely satisfied that the replication is bad in substance. The demurrer to it is, therefore, sustained.

Case No. 15,710.

UNITED STATES v. MAKINS.

[Hoff. Op. 500; 3 Am. Law Rev. 777.] [1]

District Court, D. California. Feb. 17, 1869.

CERTIFICATE OF CITIZENSHIP—ILLEGAL SALE—EMPLOYMENT OF SEAMAN.

[1. The certificate or evidence of citizenship, the sale of which is made criminal by Act March 3, 1813, is a certified copy of the act by which one was naturalized, and which authorizes his employment on an American vessel, and does not include a certificate signed by the clerk, and under the court seal, to the effect that one, on the day therein named, was admitted to be a United States citizen.]

[1] [3 Am. Law Rev. 777, contains only a partial report.]

[2. The clerk of a court has no right to certify the substance, purport, or effect of a judgment of record in his office.]

D. Lake, U. S. Atty.

J. H. Hardy, for defendant.

HOFFMAN, District Judge. The indictment in this case avers, in substance, that the defendant wilfully, feloniously and maliciously did make sale and dispose of a certain certificate of naturalization and citizenship, etc., and deliver the same to one James Burke, to whom the same was not originally issued, and did not rightfully belong, etc. The certificate of citizenship alleged to have been sold and disposed of, is set out in full in the indictment. The defendant demurs on the ground that the certificate alleged to have been sold is not the "certificate or evidence of citizenship" contemplated by the law; that it was issued without authority, and is wholly void, and that the sale and disposition of it constitute no offence under the statute. The law under which the indictment is framed is contained in the thirteenth section of the act of congress of March 3d, 1813 (2 Stat. 811). It is as follows: "That if any person shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged or counterfeited, any certificate or evidence of citizenship, referred to in this act, or shall pass, utter or use as true any false, forged or counterfeited certificate of citizenship, or shall make sale or dispose of certificate of citizenship to any person other than the person for whom it was originally issued or to whom it may of right belong, every such person shall be deemed guilty of felony," etc., etc. It is evident that to bring an offender within this statute it must appear that he has forged, or uttered and passed, or sold and disposed of, a "certificate of citizenship," within the meaning of that term as used in the statute. It will be observed that in the first clause of the section the words used are, "any certificate or evidence of citizenship referred to in this act." In the succeeding clauses the words italicized are omitted; but it is evident that but one kind of certificate is referred to throughout the section. The first clause contemplates the forging, the second the uttering of a forged certificate, and the third the unlawful sale or disposal of a certificate. It cannot be doubted that the intention of the law-giver was to denounce the forging and counterfeiting, and the passing and uttering of the same kind of certificate, to wit: "the certificate or evidence of citizenship referred to in this act," and there is no reason to suppose that the word "*certificate*" was used in any different sense in the third clause. What "the certificate or evidence of citizenship *referred to in this act*," is, is apparent from the second section. The act is entitled, "An act for the regulation of seamen on board the public and private vessels of the United States." Section 2 provides, that it "shall not be lawful to employ as aforesaid any naturalized citizen of the United States unless such citizen shall produce to the commander of the public vessel, if to be employed on board such vessel, or to a collector of customs, a *certified copy of the act by which he shall have been naturalized*, setting forth such naturalization and the time thereof." The certificate, set forth in the indictment, in no respect answers to these requirements. It does not purport to be a certified copy of the "act by which the party has been naturalized," or of any judicial record of naturalization. It is merely a certificate, signed by the clerk and under the seal of the court, to the effect that the party on the day therein named was by the judgment of the court admitted to be a citizen of the United States. It states a fact, but it does not pretend to be a copy of any judicial record whatever. Non constat, so far as appears from the certificate, that any record of the judgment of the court by which the alien was made a citizen exists. That the act of the court admitting an alien to citizenship is a judicial judgment, has been expressly decided by the supreme court. In Spratt v. Spratt, 4 Pet. [29 U. S.] 408, Mr. Ch. J. Marshall says: "The various acts upon the subject submit the decision on the rights of aliens to admission as citizens, to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. The judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form to close all inquiry, and like every other judgment, to be complete evidence of its own validity." This judgment, or the records of it, remains on file among the records of the court, and it can be proved only by the production of the original if required in the court by which it was rendered, or by a certified copy or exemplification of it if required elsewhere. The clerks of the United States courts have no power by statute to certify to matters of fact proveable by the records in their custody. "In regard to certificates," says Greenleaf, "given by persons in official station the general rule is, that the law never allows a certificate of a mere matter of fact, not coupled with matter of law, to be given in evidence. If the person was bound to record the fact then the proper evidence is a copy of the record duly authenticated." 1 Greenl. Ev. § 498. So it has been held, that though an officer having the legal custody of public records is ex-officio competent to certify copies of their contents (1 Greenl. Ev. 485-507), yet his certificate of the substance or purport of the record is inadmissible (McGuire v. Sayward, 9 Shep. [22 Me.] 230). The clerk of a court has therefore no more right to certify the substance, purport or effect of a judgment of record in his office, than the recorder of a county would have, to certify

that certain parties conveyed a certain piece of land on a certain day, instead of copying the deed in full and appending to it a certificate that the same is a true copy of the record in his office. Even then, if the description in the second section of the act of 1813, of the certificates "referred to in the act" were less explicit and unmistakable, or if it were possible to construe the word "certificate" in the 3d clause of the 13th section as referring to some other kind of certificate than those mentioned in the preceding clauses, the last clause would remain nugatory and inoperative—for there is no certificate of a judgment which the clerk can furnish other than a certified copy of the record, and therefore no other certificate of naturalization to which the statute could by possibility refer. It follows that the certificate of naturalization which the indictment charges the defendant with having feloniously sold and disposed, is not the certificate, the felonious sale or use of which is made a crime by the statute. The demurrer must, therefore, be sustained. It is proper to add that the irregularity of these certificates is not imputable to the present clerk of the circuit court, or to his predecessor. They both have adopted the forms found in the office, and which appear to have been long used, without being brought to the notice of either the former or present judge of the circuit court, or of the district judge. It is with reluctance that I reach the conclusion at which I have arrived, for I fear that through this informality many guilty persons will escape just punishment.

Case No. 15,711.

UNITED STATES v. MALEBRAN.

[1 Brunner, Col. Cas. 426;[1] 5 City H. Rec. 122.]

Circuit Court, D. New York. 1820.

SLAVE TRADE—WHAT INDICTABLE AS—STATUTORY OFFENSE.

1. It is an indictable offense, under the act of congress, to fit, equip, load, or otherwise prepare a vessel in the United States for the purpose of procuring and transporting slaves from a foreign place to any other place.

2. Where a punishment by imprisonment is provided by statute for a public offense, but no mode provided for securing such punishment, it is intended that an indictment will lie for such offense.

The defendant, a foreigner, and resident in this city, was indicted under the act of congress, of 1818 (1 Sess. 15th Cong. p. 81 [3 Stat. 450]), which act is, in effect, as follows: "That no citizen of the United States, or any other person, shall, as master, factor, or owner, build, fit, equip, load, or otherwise prepare, any ship or vessel, in any port or place within the jurisdiction of the United States, nor cause any such ship or vessel to sail from any port or place whatsoever, within the jurisdiction of the same, for the purpose of procuring any negro, mulatto, or person of color, from any foreign kingdom, place, or country, to be transported to any port or place whatsoever, to be held, sold, or otherwise disposed of as slaves, or to be held to service or labor," etc. By the residue of this section, such vessel, her tackle, etc., is declared to be forfeited, one half to the United States, and the other half to the person suing for such forfeiture. "That every person, etc., so building, fitting out, equipping, loading, or otherwise preparing, or sending away, or causing any of the acts aforesaid to be done, with intent to employ such ship or vessel, in such trade or business, after the passing of this act, contrary to the true intent and meaning thereof, or who shall, in any wise be aiding or abetting therein, shall severally, on conviction thereof, by due course of law, forfeit and pay a sum not exceeding five thousand dollars, nor less than one thousand dollars, one moiety to the use of the United States, and the other to the use of the person or persons who shall sue for such forfeiture, and prosecute the same to effect, and shall moreover be imprisoned for a term not exceeding seven years, nor less than three years." The indictment contained twenty-eight counts. The first count alleged that the defendant, being a resident within the United States, on, etc., at the port of New York, did fit, equip, and load a certain vessel, etc., with intent to employ said vessel, for the purpose of procuring negroes from a foreign country, to the jurors unknown, to be transported to a place, to the jurors unknown, to be held as slaves. The several other counts varied from the first, in relation to the description of persons to be transported, and in a variety of other particulars arising from the words of the act; but in all the counts, the foreign country from which the negroes were to be transported, and that to which they were to be transported, were alleged to be to the jurors unknown.

Tillotson & Bunner, for prosecution.
Hoffman, Emmet & Wells, for defendant.

Tillotson, in opening the case to the jury, stated that he expected to show the agency of the defendant in equipping and loading this vessel in this port, to be employed in the slave trade on the coast of Africa, by his own confession.

For this purpose Silas H. Stringham was introduced as a witness, on behalf of the prosecution, who testified that in April last, being a lieutenant on board the Cyane sloop of war, he boarded the schooner Science, at Cape Mount, on the coast of Africa, and found on board two several letters, written in French, by the defendant; the one dated in this city, on the 31st of December, 1819, directed to Francisco Mathieu; and the other,

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

on the 1st of January, 1820, to Capt. Adolphus La Cost. It appeared from the translation of this last mentioned letter which, with the other, was read in evidence, that it was a letter of instructions to the captain, in reference to an agreement previously made, directing him to proceed to Porto Rico, where the vessel was to be changed into Spanish; and after procuring shackles, handcuffs, etc., to proceed on the contemplated voyage. Another person, at Porto Rico, was to assume command of the vessel. He was to be the captain on paper; but La Cost, the real captain, who was to receive further directions from the brother of the defendant, Don Pedro Malebran, at Trinity De Cuba. To this place the merchandise, to be obtained on the voyage, was to be carried; and the letter states the agreement between the defendant and La Cost to be that the latter was to receive a specific sum per head; but the word "slaves" was not mentioned.

It was then proved by James B. Leonard and Joshua Phillips, clerks at the custom-house, that on the 31st of December, 1819, the Science cleared from this port for Porto Rico.

Stringham, on being again called, testified that he found on board the Science fifty pair of irons, some of which were shackles, and some handcuffs; and he also found muskets, tobacco, and calicoes, the usual cargo for the slave trade.

Tillotson having rested the prosecution, the counsel for the defendant raised two objections to the prosecution under this indictment: (1) This is not made an indictable offense by the statute upon which the indictment is founded. The remedy, by imprisonment, might have been effected on an information. (2) It is alleged in all the counts in this indictment that the place where the negroes were to be procured, and that to which they were to be transported, were to the jurors unknown. It appears from the proof that the place where they were to be procured was at Cape Mount, on the coast of Africa, and that to which they were to be transported was Trinity De Cuba. Both these places must, therefore, have been known to the grand jury; and therefore the indictment cannot be maintained. There is no principle in criminal law better settled than this, that if a person is indicted for stealing goods of a person to the jurors unknown, and it appears, in proof, that the person to whom the goods belonged was known, or, upon due inquiry, might have been known, that the indictment cannot be supported. 2 Hawk. P. C. 330; 1 Chit. Cr. Plead. p. 213; 2 East, P. C. p. 651; 1 Starkie, pp. 75, 175; Bac. Abr. tit. "Indictment," G; Rex v. Walker, 3 Camp. 264. In principle there is no difference between the cases. There is as much reason why the places from which, and to which, these slaves were to be transported, if known to the grand jury, should be alleged, as that the name of the person from whom goods are stolen, if known, should be stated. An indictment should state things known to a common certainty, that the party may be the better prepared for his defense.

The counsel for the prosecution argued, on the first objection raised, that as the act of 1794 [1 Stat. 347], prohibiting the equipment of any vessel within the jurisdiction of the United States, to be employed in the slave trade, gave no public remedy for the offense, and as the one upon which this indictment was founded gave a remedy to the public by imprisonment, in express terms, that it was intended that the means by which that remedy was to be effected, should be by indictment. The court would have no power, under a conviction in a qui tam action to imprison the party; and this is the only mode of proceeding prescribed in the act. With regard to the second objection it was argued that the gravamen of the offense, which the statute was enacted to prevent, was the equipment of a vessel for the purpose of procuring slaves; and neither the place where they were to be procured, nor that to which they were to be transported, entered into the essence of the offense. And it would have been sufficient, in relation to the places, to have used the precise words of the act. The cases, therefore, cited on the opposite side, do not apply. Stealing goods of A. is a specific offence; and the owner's name, if known, is essential.

Stringham, on being again called by the judge, was asked whether he stated before the grand jury, that he took the Science on the coast of Africa, and to this inquiry he answered in the affirmative.

The judge pronounced his decision on the first objection raised, that, as the act upon which the indictment was founded gave a public remedy by imprisonment, but prescribed no particular mode of proceeding, in express terms, by which the remedy was to be effected, the legislature must have intended it should be by indictment.

With regard to the other objection, he stated that there was nothing better settled than that an offense, both as regards time, person, and place, should be laid in an indictment with sufficient certainty. It was as important for the defendant to know both the place from which he was charged with having procured these slaves, and that where they were to be transported, as the place where the vessel was equipped. These things were known to the grand jury, and should not have been dispensed with on the record.

For this uncertainty in the indictment, the judge advised the jury to acquit the defendant, and he was acquitted.

Tillotson moved that the defendant be laid under a recognizance to appear at the next term, to answer for this offense.

His counsel opposed this motion, on the ground that if again indicted, he would be entitled to his plea of autrefois acquit; and to this point they cited 1 Starkie, 175.

The judge granted the motion, and the defendant was bound over for his appearance at the next term.

Case No. 15,712.

UNITED STATES v. MALL et al.

[5 Am. Law Rev. 752.]

Circuit Court, S. D. Alabama. 1871.

CONSTITUTIONAL LAW — THE ENFORCEMENT ACT.

[Indictment against John Mall, Jr., and others.]

In this case it was held on demurrer that the words "any right or privilege granted or secured to" any citizen in the act of May 31, 1870, § 6 [16 Stat. 141], include the rights of peaceably assembling and of free speech. on the ground that as congress is prohibited to abridge these rights by the first amendment, and as the states are by the fourteenth (no state shall abridge the privilege, &c., of citizens), they may fairly be said to be secured by the constitution. The constitutionality of the act is also affirmed by a somewhat obscure course of reasoning. One position is taken which, though doubtful, and often strenuously denied, we do think has something in it,—that a state may deny the equal protection of its laws not only by positive hostile legislation, but also by concerted judicial or executive inaction or discrimination when the laws upon the statute book are unobjectionable in form.

Case No. 15,713.

UNITED STATES v. MALONE et al.

[8 Ben. 574;[1] 22 Int. Rev. Rec. 403.]

District Court, S. D. New York. Dec., 1876.

INTERNAL REVENUE — WHOLESALE AND RETAIL LIQUOR DEALER—PENALTY FOR NOT ENTERING SPIRITS RECEIVED — INTENT.

M. Brothers were wholesale liquor dealers and also retail liquor dealers, at No. 406 Seventh avenue, in New York City. On the 8th of February, 1875, they received there fifteen barrels of distilled spirits. They entered in their wholesale liquor dealers' book the receipt of six of the fifteen, but made no entry of the remaining nine, which they proceeded to use in their business of retail liquor dealers: *Held*, that they were liable to a penalty of $100 for not making an entry of the receipt of the nine barrels, as required by section 3318 of the Revised Statutes, notwithstanding they intended, when they received them, to retail them.

Roger M. Sherman, Asst. U. S. Atty.

Thomas Harland, for defendants.

BLATCHFORD, District Judge (charging jury). This is an action brought by the United States against Joseph D. Malone and Peter D. Malone, co-partners in business under the firm name of Malone Brothers, to recover a penalty of $100 for having, as alleged in the declaration, on the 8th day of February, 1875, being wholesale liquor dealers, and having kept a book in the form prescribed by section 3318 of the Revised Statutes, and by the regulations of the commissioner of internal revenue made thereunder, received upon their premises, and into their stock and possession as such wholesale liquor dealers, 9 packages of distilled spirits from the J. M. O'Donnell Distillery Company, of Kentucky, and having neglected to make entry in such book of any of the spirits so received in said packages, as required by such section 3318.

The proof is, that the defendants were authorized wholesale liquor dealers, and authorized retail liquor dealers, at No. 406 Seventh avenue, in the city of New York, and that they were also authorized retail liquor dealers at No. 441 West 39th street, in the city of New York; that, on the 8th of February, 1875, they received from the J. M. O'Donnell Distillery Company, of Kentucky, 15 barrels of distilled spirits at their place, No. 406 Seventh avenue; that they made due and proper entry at the time in their wholesale liquor dealers' book, kept at their place, No. 406 Seventh avenue, of six of such 15 barrels of spirits, with the proper particulars; and that they made no entry whatever in said book or in any other book, of the remaining nine barrels of such spirits, but, being retail liquor dealers, as well as wholesale liquor dealers, at No. 406 Seventh avenue, they proceeded to use such nine barrels of spirits in their business as retail liquor dealers at that place, for the purpose of retailing it, and did retail it there. It is claimed by the defendants that they are not liable to the penalty of $100 for not having entered in their wholesale liquor dealers' book the nine barrels of spirits upon two grounds. The first ground is, that they had in their minds, at the time they received the fifteen barrels, the intent to dispose of nine of them in their capacity of retail liquor dealers, at 406 Seventh avenue, and not in their capacity of wholesale liquor dealers at that place, and that, therefore, they were under no obligation to enter in their book the receipt of the nine barrels, there being no requirement of law in respect to the entry in any book of any receipt of spirits by a retail liquor dealer, and that, therefore, they are not subject to any penalty for not having entered in their wholesale liquor dealers' book the receipt of the nine barrels. A construction of the statute which would admit of this view would render the statute entirely inoperative and nugatory. The proposition is, that the existence of an intent, at the moment of receiving the spirits, by a person who is a wholesale liquor dealer as well as a retail liquor dealer, authorized in both capacities, at a given place, relieves him from the obligation of entering the receipt of the spirits in his wholesale liquor dealers' book. If

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

the existence of that intent at the moment of receiving the spirits can relieve the party from the obligation of entering the receipt of them in his wholesale liquor dealers' book, he may have that intent as to all the spirits that he receives, and he may change that intent in regard to all of them the very next moment, and thus relieve himself from the obligation of entering any of the spirits which he receives at the place where he is both wholesale and retail liquor dealer, in the book required to be kept by law, although he may dispose as a wholesale liquor dealer of all the spirits which he there receives. This would throw the door wide open to frauds of every kind; and there might as well be no requirement of law for the keeping of any wholesale liquor dealers' book by a person who, at a given place, is authorized to carry on the business both of a wholesale liquor dealer and a retail liquor dealer.

In addition to this, if a person be a wholesale liquor dealer at a given place, and also a retail liquor dealer at the same place, and there be a requirement of law that every wholesale liquor dealer shall, when he receives any spirits, make certain entries in regard to them, it is not a proper construction of the statute to relieve him—he being a wholesale liquor dealer—from the requirement that he shall make the entry, because, being also a retail liquor dealer, he chooses to say that he receives the spirits in the capacity of a retail liquor dealer, and not in the capacity of a wholesale liquor dealer, for that would place the government entirely at the mercy of the concealed mental intent of the party. No construction of any statute ought to be admitted to that effect, unless it is very clear that congress, in enacting the statute, intended to place the government thus at the mercy of the concealed mental intent of the individual subject to the statute.

The other ground alleged is, that the entry of the six barrels was a false entry, because there was an entry of six barrels, and not an entry of fifteen, and that there is no allegation in the declaration that the entry was false, but merely an allegation of a failure to enter the 9 barrels. The answer is, that the entry as to the 6 barrels is true and correct, and that there is no entry whatever as to the 9 barrels. There is an entire omission to make any entry as to the 9, and, therefore, it seems to me that, in that particular, the allegation of the declaration is fully sustained by the evidence.

The suggestion is made, that the declaration states that the defendants received upon their premises and into their stock and possession, as such wholesale liquor dealers, certain distilled spirits; and it is claimed that the existence of an intent on their part, at the time they received the spirits, to retail them, disproves the allegation that they received them into their stock and possession as such wholesale liquor dealers. But the views I have stated show that the defendants must be regarded, when they received these packages upon their premises where they were wholesale liquor dealers, as having received them into their stock and possession as wholesale liquor dealers. And when they, being both wholesale liquor dealers and retail liquor dealers, at the same place, receive packages into their stock and possession as wholesale liquor dealers, and enter them on their book in the proper place, and then desire to retail some of such packages at such place, there is no difficulty in regarding them as transferring such packages from themselves, in their department of wholesale liquor dealers at such place, to themselves in their department of retail liquor dealers at such place, and no difficulty in their making the proper entry in their wholesale liquor dealers' book at such place, of the packages which they so desire to retail, as packages sent out of their stock and possession as wholesale liquor dealers, under section 3318, and sent to themselves as retail liquor dealers at the same place. Under section 3318, goods passing from their possession as wholesale liquor dealers into their possession as retail liquor dealers, are properly to be regarded as being sent out of their stock and possession as wholesale liquor dealers, and as being required to be so entered, and as being sent to themselves, by being sent into their department as retail liquor dealers. The regulation of the commissioner of internal revenue in that respect, which has been brought to my attention, seems to me to be an exceedingly proper one and to be the only one which can render this section of the statute operative. While it protects the government, it does no injustice to the party who is required to make the entries. So long as there was a regulation of that kind, which regulation certainly was not complied with in this case, no allegation can be made that the defendants were in doubt as to the proper construction of the law; and, if they had complied with the regulation, there could have been no foundation for this prosecution in the shape in which it is now brought. If they had entered the entire 15 packages as received by them as wholesale liquor dealers, and had then put down the fact that they had transferred 9 of those packages to their own department at the same place as retail liquor dealers, the whole story would have been told, and they would then have complied fully with the statute and with the regulation.

This is one of that numerous class of cases where the due administration of the law requires that the court should enforce the penalty prescribed. At the same time it is a case where, if there was no wilful negligence nor any intent to defraud the government in the transaction, the secretary of the treasury has power to remit the forfeiture, and undoubtedly will do so, on being satisfied that

there was no wilful negligence or intent to defraud the revenue, on the part of the defendants, in this matter.

I, therefore, must direct a verdict for the plaintiffs, for $100.

Case No. 15,713a.

UNITED STATES v. MALONEY et al.

[N. Y. Times, May 28, 1853.]

Circuit Court, D. New York. 1853.

CRIMINAL LAW—TWO INDICTMENTS FOR SAME CRIME.

[A prisoner who has been twice indicted for the same crime, but who has never been arraigned under the first indictment and has never pleaded to it, has no right to have it quashed before going to trial under the second indictment.]

The case of the captain and surgeon of the ship Roscius. The United States v. Daniel Maloney and John Christian, jointly indicted for the murder of a sailor, known as Emanuel and another as "Yankee Chap." The justice decided on the motion to dismiss the first indictments as follows:

NELSON, Circuit Justice. I have looked into the authorities on the question made by the prisoners' counsel, that the indictments first found, which have been remitted from the district court to this court, should be quashed before the prisoners are required to plead to the indictments since found in this court. I find that where a prisoner has been already arraigned and has pleaded, and a second indictment is found for the same offence, the court will adopt some measure to get rid of the first indictment by quashing it or requiring a nolle pros. to be entered before requiring a plea to the second. There is a good reason for this course. If the prisoner should be tried on the indictment secondly found, and acquitted or convicted, and the public prosecutor should then proceed to put him upon his trial upon the indictment first found, the prisoner, having already put in his plea of not guilty, might have some difficulty in availing himself of the former acquittal or conviction as a bar to the further prosecution of the indictment first found. This reason has no application to a case like the present. The prisoners have not been arraigned on the indictments first found. They have not pleaded. The attorney for the United States claims the right to proceed upon either indictment at his election, and to omit any present action in the others. The authorities sustain this position. After a trial upon the second indictment, if the prisoner should be arraigned on the first, they could plead the former acquittal or conviction in bar. So they can suffer no prejudice from the denial of their present motion.

The district attorney then moved that Daniel Maloney and John Christian be arraigned severally for the murder of Emanuel and Yankee Chap. The prisoners pleaded not guilty.

On motion of F. B. Cutting, Ogden Hoffman, and George F. Betts, counsel for the prisoners, separate trials were ordered of Captain Maloney and Dr. Christian, and the case of Daniel Maloney, the captain, for the murder of Emanuel, was set down for Wednesday, the 1st of June, 1853.

Case No. 15,714.

UNITED STATES v. The MANHATTAN.

[3 Blatchf. 270.] [1]

Circuit Court, S. D. New York. May 15, 1855.

SHIPPING—PUBLIC REGULATIONS—PENALTIES.

1. Where passengers are carried on board of a steam vessel which has not, placed and kept in a conspicuous part of it, as required by the 25th section of the act of August 30, 1852 (10 Stat. 71), a copy, certified by the collector, of the certificate provided for by the 9th section of that act, to be made by the board of inspectors, as to sea-worthiness, &c., the only penalty for such violation of the 25th section, is the one imposed by that section, namely, $100 for each offence, to be recovered by an action of debt.

2. Neither the vessel nor her owner are subject, for such violation of the 25th section, to the penalty of $500, imposed by the 1st section of the act, as a penalty for navigating a steam vessel, with passengers on board, without complying with the terms of the act.

[Appeal from the district court of the United States for the Southern district of New York.]

This was a libel of information, filed in the district court, to recover a penalty of $500, for non-compliance with one of the requisitions of the act of congress passed August 30, 1852 (10 Stat. 61), for the better security of the lives of passengers on board of vessels propelled by steam. The libel was dismissed by the district court [case unreported], and the United States appealed to this court.

NELSON, Circuit Justice. The first section of the act of 1852 provides, "that no license, register, or enrolment, under the provisions of this or the act to which this is an amendment, shall be granted, or other papers issued by any collector, to any vessel propelled in whole or in part by steam, and carrying passengers, until he shall have satisfactory evidence that all the provisions of this act have been fully complied with; and, if any such vessel shall be navigated, with passengers on board, without complying with the terms of this act, the owners thereof, and the vessel itself, shall be subject to the penalties contained in the second section of the act to which this is an amendment." The second section of the act referred to imposes a penalty of $500. Act July 7, 1838 (5 Stat.

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

304). The only terms of the act not complied with, as charged in the information in this case, is the neglect to obtain from the collector of the customs a certified copy of the certificate of the board of inspectors as to the sea-worthiness of the vessel, the proper condition of the steam machinery, suitable accommodations for passengers, &c., which they are required to deliver to that officer by the ninth section of the act. It is not charged that the proper certificate, as prescribed by the act, had not been given by the inspectors; and, if it had been so charged, I am not sure that that would have helped the case, as I have not been able to find any provision in the act making it the special duty of the owner to obtain the certificate. Unless the inspection has been made and the certificate given, the collector is required to withhold the license, registry, and enrolment, and the vessel is deprived of her American character, and of all the rights and privileges belonging to her. Congress may have thought this a sufficient security that the owner would see to the procuring of the certificate. But, be this as it may, the charge here is not for omitting to procure the certificate of the inspectors, but for omitting to obtain from the collector a certified copy of it. Now, the only provision on this subject is found in the 25th section of the act. That requires that the collector shall keep on file the original certificate delivered to him by the inspectors, and shall give to the master or owner two certified copies thereof, one of which shall be placed in some conspicuous part of the vessel, where it may be seen by the passengers, and be kept there at all times; the other to be retained by such master or owner, as evidence of the authority thereby conferred. It then provides as follows: "and, if any person shall receive or carry any passengers on board any such steamer, not having a certified copy of the certificate of approval, as required by this act, placed and kept as aforesaid, he shall forfeit and pay, for each offence, $100, to be recovered by action of debt in any court of competent jurisdiction."

Now, the argument on behalf of the government is, that the omission to obtain this certified copy of the certificate, as required, is a non-compliance with the terms of the act, within the words of the first section, and that the owner and the vessel itself are, therefore, subject to the penalty imposed by the second section of the act of July 7, 1838, which is $500. But the obvious answer is, that, as respects this particular non-compliance—the omission to obtain a certified copy of the certificate—the 25th section of the act of 1852, which imposes the duty, prescribes the penalty, and limits it to $100 for each offence, to be recovered in an action of debt; and that, having thus specifically prescribed the penalty and mode of recovery, it necessarily takes the case out of the general description given in the first section. The argument, if sound, would require the infliction of both penalties for the particular non-compliance complained of.

I have been more particular in stating the ground of my decision, as I understand that several cases are pending involving the same question. Decree affirmed.

Case No. 15,715.

UNITED STATES v. The MANHATTAN.

[8 Int. Rev. Rec. 114.]

Circuit Court, S. D. New York. 1868.[1]

SHIPPING—PASSENGER ACT.

The requirements of the second section of the passenger act of March 3, 1855 [10 Stat. 715], do not apply to steamships.

[Appeal from the district court of the United States for the Southern district of New York.]

This was an appeal on behalf of the United States from a decree made by Judge Blatchford, dismissing the libel. The Manhattan [Case No. 9,020]. Several cases brought against different steamers involving the same question, are disposed of by this opinion.

Mr. Courtney and Mr. Simons, for the United States.

Ewen, Nash & Gray, for appellees.

NELSON, Circuit Justice. The libel in this case is founded on the second section of the act of congress passed March 3, 1855, which provides the mode and manner of the construction of berths in passenger vessels, and inflicts a penalty of five dollars for each passenger on board such vessel on the voyage. The fifteenth section of the act makes the vessel liable for these penalties as liens on the same. Among the defences set up is an exception to the libel, that the second section of the act does not apply to steamships, and on this ground the libel was dismissed by the court below. We concur in this opinion. The tenth section provides that the "provisions, regulations, penalties and liens of this act, relating to the space in vessels appropriated to the use of passengers, are hereby extended, and made applicable to all spaces appropriated to the use of steerage passengers in vessels propelled in whole or in part by steam;" and the spaces so appropriated to the use of steerage passengers in vessels so propelled and navigated is made subject to the inspection of the collector of the port. It should be observed that the first section, which relates to the spaces to be appropriated to passengers, uses the term "any vessel," as does the second and other sections, without limiting the description to a sailing or steam vessel; and if this term "any vessels" embraces steam vessels, and which position the libellants must maintain in order to succeed, then the tenth section is superfluous and unmeaning. Why apply

[1] [Affirming Case No. 9,020.]

the penalties applicable to this first section to steamboats, by special provision, if the term "any vessel" already embraced them? It would be unjust to impute such an absurdity to congress. It is clear that the law-makers understood the act not to apply to steam vessels, unless where so expressed in terms. Decree below affirmed.

UNITED STATES v. The MANHATTAN. See Case No. 9,020.

Case No. 15,715a.

UNITED STATES v. MANK.

[21 Int. Rev. Rec, 235.]

Circuit Court, S. D. New York. 1875.

The defendant [William G. Mank] was tried and convicted on an indictment charging him with keeping in possession counterfeit money with intent to sell, under section 5431 of the Revised Statutes of the United States. On the trial the prosecution proved affirmatively that one Porter, a secret service detective, represented himself to the defendant as a friend of Thomas Congdon, a counterfeiter, who had been arrested and was awaiting trial; that as such he negotiated with the defendant for the purchase and destruction of certain counterfeit money in the possession of the defendant which had been taken from the said Congdon, and was to be used as evidence against said Congdon on his trial; Porter himself testifying that when the defendant gave him the said counterfeit money, in consideration of two hundred dollars, he told him (Porter) to destroy it, which Porter agreed to do.

On the conclusion of the trial, Judge Dittenhoefer, counsel for the defendant, requested the court to direct a verdict of acquittal, which was refused, and also requested the court to charge the jury that, as the "intent to defraud" was a necessary and essential ingredient, under the statute, of the crime, if the jury believed there was no intent to defraud they must acquit, which was also refused; the court reserving these questions for consideration and adjudication on a motion in arrest of judgment and for a new trial.

The motion was argued on the 6th of July, before BENEDICT, District Judge, and subsequently the learned judge stated that, as the questions presented in the brief of defendant's counsel were very important, he would not dispose of them without consultation with, and if necessary, a re-argument before, three judges, and for that purpose he requested Judge Dittenhoefer, defendant's counsel, and Mr. Purdy, the assistant district attorney, to agree upon and submit a written or printed case containing the evidence of Porter as to the facts testified to by him.

[Nowhere reported; opinion not now accessible.]

Case No. 15,716.

UNITED STATES v. MANN.

[2 Brock. 9.] [1]

Circuit Court, D. Virginia. May Term, 1822.

OFFICER—COLLECTIONS—FEES—SET-OFF—TREASURY RULES.

1. An officer of the United States, who has levied a sum of money on an execution in favour of the United States, to whom the United States are indebted for fees of office in a sum greater than the amount of the execution, has a right to retain it by way of set-off, and on a motion made on the part of the United States to commit the officer for failure to pay over the money so levied, he will be permitted to show that the United States are indebted to him, and if this be shown, it is sufficient cause why he should not be attached.

[Cited in Bagley v. Yates, Case No. 725; The Laurens, Id. 8,122.]

[Cited in Antoni v. Wright, 22 Grat. 883; Cartwright's Case, 114 Mass. 239; Taylor v. Mayor, etc., of New York, 82 N. Y. 24; Moore v. Tate, 11 S. W. 939.]

2. The rules prescribed by the treasury department for the adjustment of claims against the government, will, if reasonable, be respected; but if these rules go to a complete denial of justice, the court, if it have jurisdiction of the subject, cannot disregard the rights of the parties.

[Cited in Re Pitman, Case No. 11,184; U. S. v. Smith, Id. 16,346.]

At law.

MARSHALL, Circuit Justice. This is a motion on the part of the United States to commit William Mann, late deputy marshal of this district, on an attachment for not paying over a sum of money levied by him on an execution issued from this court, on a judgment obtained by the United States: and a motion on the part of the said Mann, to discharge the said attachment, because the United States are indebted to him in a larger sum, for fees due to him as deputy marshal, which fees the treasury department has refused to pay. The deputy marshal has exhibited a long account for fees against the United States, many items of which are substantiated beyond controversy. His counsel, contends that his account is clearly supported, to an amount exceeding the sum claimed by the United States. The court will not enter into a minute examination of the particulars of this account, because, if the principle should be established in favour of allowing the credits claimed, their amount may, in such a case as this, be the proper subject for a reference to a commissioner; and, should this principle be rejected, the examination will become useless. Nothing can be more clear than the right of the officer to receive his fees for services performed for the United States. In equity and justice, the claim is founded on service actually rendered. This just and equitable claim is recognised by the acts of congress, which regulate its amount. The law fixes the sum to which the marshal shall be entitled for those services which the law requires him to perform, and makes no distinction between the suits of the United States and those of an individual. The demand of the marshal, then, on the United States, for his fees of office, is as clear, both in law and equity, as his demand would be against any individual for whom the same services were performed. The United States have not sought to discriminate in this respect be-

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

tween themselves and other suitors. They have not required their officers to labour for the government gratuitously. The law acknowledges the obligation of the United States to pay for services rendered, in common with all others for whom the same services may be rendered. The United States are not, it is true, subject to those coercive measures which may be employed against an individual; but the duty is the same, and the theory of the law is, that this duty will be respected. Officers are appointed for the liquidation of these claims, and appropriations are made for their payment. The law is violated when these are disregarded. The treasury department may certainly prescribe its own rules for the adjustment of such claims, and those rules will, if reasonable, be respected. The dependent situation of the officers who claim, will in general secure their respect, and the desire for the preservation of that harmony which ought to exist between the departments, will secure that of the court. But when these rules go to a total denial of justice, to an absolute refusal to allow a just and legal claim, a court cannot, if it has jurisdiction of the subject, disregard the rights of the party.

It may be convenient, and may conduce to the regularity of these accounts, to the course established for them in the proper department of the treasury, to require that the officer, in suits against public debtors, should receive his fees out of the money made by an execution. In the ordinary course of things, this may be reasonable, and the officers of the court acquiesce in it. But if the United States do not proceed to judgment, or if they do not place the execution in the hands of the officer—if they receive the money through a different channel—or make any arrangement by which the officer is deprived of all means by which his claim can be satisfied, otherwise than by a direct resort to the treasury—on what principle can his application to the treasury be resisted? He has performed service for the government, for which the law entitles him to a certain remuneration, and gives the government the power to reimburse itself from the individual against whom a judgment for costs is rendered. The claim against the individual is in favour of the government, not of the officer. The government settles this claim, and either receives the fees of the officer, or relinquishes them. On what pretext can the claim of the officer on the government be rejected? The clearest principles of equity and law require that it should not be rejected, and if a court be permitted to take jurisdiction of the subject, it cannot be disregarded, without disregarding also the soundest principles of law.

In an action brought by an individual against an officer, for money made by an execution, the officer would, we think, be at liberty to show that the individual was indebted to him, and would be at liberty to set-off such debt. Were it doubtful whether such an offset would be allowable in every case, it cannot, we think, be doubted that it would be allowed in many cases. If, for example, an officer had earned fees to a large amount from an individual, and were to stop the whole of them out of a particular execution, no court would overrule his claim. If, instead of an action, an attachment be resorted to, the law is, we think, the same; the duty of the officer is to bring the money into court, and should he fail to perform this duty, it is a contempt for which the court will attach him. But this attachment will not be enforced if he shows sufficient cause against it. It will not be enforced if he shows that he has paid the money to the plaintiff; neither will it be enforced, we think, if he shows that he stands, in relation to the plaintiff, in the same situation as if he had paid to him the identical money made by the execution.

We will not now inquire into the course which ought to be pursued with an officer who speculates on the situation of the plaintiff, and procures the assignment of demands against him; but we think that a direct demand of the officer in his own right upon the plaintiff, for which he is entitled to an immediate satisfaction in money, clears the contempt, and ought to arrest the attachment. The argument is the stronger if the creditor, from any cause, cannot be coerced to pay this demand. These are principles which would govern in a case between individuals; their application to a case of the United States has been doubted; that doubt appears to us to be removed by the opinion of the supreme court in the case of U. S. v. Wilkins, reported in 6 Wheat. [19 U. S.] 135, 5 Cond. Rep. U. S. 38. See, also, U. S. v. M'Daniel, 7 Pet. [32 U. S.] 1. In that case, the court, speaking of the discounts allowed by the act of March 3, 1797, c. 74 [1 Story's Laws, 464; 1 Stat. 512, c. 20], in suits brought by the United States, says: "There being no limitation as to the nature and origin of the claim for a credit which may be set up in the suit, we think it a reasonable construction of the act that it intended to allow the defendant the full benefit at the trial of any credit, whether arising out of the particular transaction for which he was sued, or out of any distinct and independent transaction which would constitute a legal or equitable set-off, in whole or in part, of the debt sued for by the United States."

The attorney for the United States would withdraw the case at bar from this opinion, because it was given in a case of contract, and in a suit regulated in some manner by the act of congress which it expounds. But we think the opinion applies substantially to this case. By examining the act referred to, we perceive that it gives no right whatever to use any discount, but regulates and restrains a right recognised as already existing. The words of the law are not that in

such a suit the defendant shall be allowed to give equitable or legal discounts in evidence, but that the cause shall be tried unless the defendant shall make oath "that he is equitably entitled to credits, &c.," and that "no claim for a credit shall be admitted on trial but such as shall appear to have been presented to the accounting officers of the treasury," &c. These words apparently give no right whatever, but recognise a pre-existing right; and if it was a pre-existing right, it existed in other cases as well as in those contemplated by this act.

The opinion of the supreme court then in the case of U. S. v. Wilkins [supra], is, we think, expressly in point; and we are governed by it in the present case. We think that Mr. Mann is entitled to set-off the fees earned by himself, for which the United States are liable, and that so far an attachment ought not to go against him; if there be any doubt respecting the amount, a commissioner must report upon it to the court.

Case No. 15,717.

UNITED STATES v. MANN.

[1 Gall. 3.] [1]

Circuit Court, D. New Hampshire. May Term, 1812.

EMBARGO — HOW COGNIZABLE — IN WHAT COURT.

The exportation of goods to a foreign country, contrary to the act of 9th January, 1809, c. 72, § 1 [2 Story's Laws, 1101 (2 Stat. 506, c. 5)], is a misdemeanor, of which the circuit court has original cognizance; and it seems the prosecution may well be by information.

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867; U. S. v. Maxwell, Id. 15,750; Ex parte Wilson, 114 U. S. 425, 5 Sup. Ct. 939.]

Information for a misdemeanor [against John Mann] for loading five tons of pearl ashes, &c. in a sleigh, with intent to export the same to Canada, contrary to the first section of Act 9th Jan. 1809, c. 72 (9 Laws U. S. 185 [2 Stat. 506]). Two questions were made: 1. Whether the circuit court had original jurisdiction of the offence. 2. If so, whether an information lay.

Mr. Mason, for defendant, contended that this was substantially a suit for a penalty, and that by the judicial act of 24th of September, 1789, c. 20 [1 Stat. 73], exclusive jurisdiction was given to the district court of all suits for penalties and forfeitures. If the doctrine were held otherwise in the present case, the district court would be completely ousted of its exclusive jurisdiction. For if the United States chose to proceed by way of debt for the penalty, the district court would have jurisdiction: if by information, then the circuit court would have jurisdiction in the same case. It could not be correct to contend, that the jurisdiction of the court depended altogether on the mode of prosecution.

[1] [Reported by John Gallison, Esq.]

Mr. Humphreys, U. S. Dist. Atty., contended, that although it was true, that the judicial act of 1789 gave the district court exclusive jurisdiction of suits for penalties and forfeitures, yet it was also true, that the present was not a suit for a penalty or forfeiture, but a criminal proceeding. The act had declared it a high misdemeanor; and if so, it clearly came within the cognizance of the circuit court, as that court, by the judicial act of 1789, had "cognizance of all offences cognizable under the authority of the United States." As to the second point, the mode of prosecution is founded on the 12th section of the act of 9th January, 1809, c. 72 [2 Stat. 506], which provides, that all penalties and forfeitures under that act might be recovered by an action of debt, or by information or indictment; that this language was to be construed to apply distributively, and that an information properly lay in all cases of misdemeanors.

BY THE COURT. As the act has declared the transaction to be a high misdemeanor, punishable by fine and forfeiture of quadruple the value of the merchandizes attempted to be exported, it is clearly a crime against the United States, and not a suit for a penalty. It is therefore within the jurisdiction of this court. The fine is to be assessed by the court; not found as a penalty by a jury. In U. S. v. Tyler, 7 Cranch [11 U. S.] 285, in a prosecution on this same clause, the court held that the fine and quadruple value must be assessed and adjudged by the court, and not by the jury. We incline to think that the cause is rightfully prosecuted by information; and even if we doubted, we should reserve the question until after verdict for the United States, to be argued on a motion in arrest of judgment. Continued for trial.

NOTE. This first point was again moved and fully argued at the ensuing October term in the same cause, by the permission of the court, and overruled. See [Case No. 15,718].

Case No. 15,718.

UNITED STATES v. MANN.

[1 Gall. 177.] [1]

Circuit Court, D. New Hampshire. Oct. Term, 1812.

EMBARGO—REPEAL—CIRCUIT COURT.

1. An offence punishable by fine and imprisonment under Embargo Act Jan. 9, 1809, c. 72 [2 Story's Laws, 1101 (2 Stat. 506, c. 5)], was not saved from repeal by the saving clause of the 2d section of the act of June 28, 1809, c. 9 [2 Stat. 550].

[Cited in Ex parte Marquand, Case No. 9,100; U. S. v. Barr, Id. 14,527.]

[Cited in Trustees of Dartmouth College v. Woodward, 1 N. H. 133; Lewis v. Foster, Id. 62; Woart v. Winnick, 3 N. H. 481.]

2. The circuit court of the United States has jurisdiction over such an offence.

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867.]

[Cited in Dow v. Norris, 4 N. H. 20.]

[1] [Reported by John Gallison, Esq.]

[This was an information for a misdemeanor against John Mann. For the prior proceeding, see Case No. 15,717.]

The District Attorney and Jeremiah Smith, for the United States.

Jeremiah Mason, for defendant.

Before STORY, Circuit Justice, and SHERBURNE, District Judge.

STORY, Circuit Justice. This is an information filed by the United States against the defendant, for an alleged violation of the first section of the act of January 9, 1809, c. 72 [2 Story's Laws, 1101 (2 Stat. 506, c. 5)], commonly called the embargo enforcing act. The counsel for the defendant has moved the court to stay all further proceedings on the information upon two grounds: 1. That the circuit court has no jurisdiction over the offence. 2. That if the court has jurisdiction, yet the information can no longer be sustained, inasmuch as the act, on which it is founded, so far as it creates and punishes the supposed offence, has been repealed.

On the first point the learned counsel has contended: That the present is a suit for a penalty or forfeiture, and by the judicial act of September 24, 1789, § 9 [1 Stat. 76], the district court has "exclusive original jurisdiction of all suits for penalties and forfeitures incurred under the laws of the United States." If this argument be correct, the jurisdiction of this court is unquestionably ousted. But before we come to such a result, it will be necessary to examine with attention the various provisions of law on this subject. It may be conceded, without hesitation, that the words "penalty and forfeiture" are often used in a broad sense, as including every description of punishments applied to public crimes. In this sense they are often found in elementary jurists of approved reputation, and the authorities cited fully support the position. 4 Bl. Comm. p. 380, note 4; Id. 387; 2 Wood. Lect. 561. It may also be conceded, that the word "suit" is, in an equally enlarged sense, sometimes applied as well to criminal, as civil prosecutions. It is so applied in the close of the 9th section of the judicial act of 1789, c. 20, when speaking of suits against consuls, &c. it excepts suits for offences beyond the cognizance of the district court. But it must be admitted, that all these words are very often used both in statutes and in elementary treatises in a more restrained and narrow sense. The word "suit" is frequently, if not ordinarily, confined to civil proceedings, the word "penalty" to pecuniary mulcts, and the word "forfeiture" to forfeitures in rem. It cannot be necessary to cite examples. Sometimes indeed "penalties" and "forfeitures" are used as synonymous, and inasmuch as the same sentence had already provided for forfeitures in rem, or seizures, it would seem that such was their meaning in this clause. What then is the sense in which the words "suits for penalties and forfeitures" are used in the section under consideration? It is a sound rule in the construction of statutes, that they are to be construed according to the subject matter and context, and in such a manner, as that effect may be given to every part of the language employed; and especially are contradiction and absurdity to be avoided, if possible. In the preceding part of the 9th section, the criminal jurisdiction of the district court is declared to be limited to offences, "where no other punishment than whipping not exceeding thirty stripes, a fine not exceeding $100, or a term of imprisonment not exceeding six months, is to be inflicted." It is clear, that the legislature had no intention to include within the description of "suits for penalties and forfeitures," crimes punishable in the manner above stated; for it would be absurd to suppose, that it should give a jurisdiction over all offences to an unlimited extent, and yet in the same breath confine it to a very narrow and shallow boundary; that it should declare, that the court might entertain an exclusive cognizance of all suits for penalties, and yet should not touch a suit for penalty exceeding $100. The absurdity would be still more glaring, if we consider, that by the judicial act of 1789, § 11, the circuit court has exclusive cognizance of all crimes and offences cognizable under the authority of the United States, with few exceptions, and has concurrent cognizance of those, which are cognizable by the district court. It would be quite impossible to contend, that an exclusive and a concurrent jurisdiction should exist at the same time in different courts. It is then incontrovertible, that suits for penalties and forfeitures do not include crimes and offences punishable by the district court, and if so, neither can they include such as are punishable by the circuit court. The words then must be restrained to such penalties and forfeitures, as may be sued for in a civil action; as, for instance, an action of debt, or an information of debt. For I take it to be clear, that an information of debt in the exchequer for a penalty, is as much a civil proceeding, as an action of debt. Attorney General v. Bowman, 2 Bos. & P. 532, note. Nor would it be any objection to this construction, even admitting it to be true, that in this manner the jurisdiction of the court would depend, not upon the subject matter, but upon the mode of prosecution. For without question all infractions of public laws are offences; and it is the mode of prosecution, and not the nature of the prohibitions, which ordinarily distinguishes penal statutes from criminal statutes. It is laid down as law in Rex v. Malland, 2 Strange, 828, that where a pecuniary penalty is annexed to an offence, and no mode of prosecution is prescribed, an indictment does not lie thereon; but only an information of debt in the exchequer. Yet it seems admitted, that the court of exchequer has no criminal jurisdiction; and therefore, if the offence had been simply prohibited without

annexing a penalty, the king's bench, and not the exchequer, would have had jurisdiction to punish it. Nor it is very unusual, to let the jurisdiction of the court rest on the mode of prosecution, and not on the subject matter. Shipman v. Henbest, 4 Term R. 109.

The inquiry, then, in the present case, is narrowed to the consideration, whether the offence be a public crime, punishable on conviction by the court, or a penalty exclusively to be prosecuted in a civil action. The language of the first section of the act of 1809, c. 72, applicable to this point declares "that the offenders, their aiders and abettors, shall upon conviction be adjudged guilty of a high misdemeanor, and fined a sum by the court before which a conviction is had, equal to four times the value," &c. For my own part, I cannot perceive any ground, upon which a doubt can fairly rest, that the offence thus described was intended to be punished by the court in a criminal proceeding. It declares that the illegal act shall be "adjudged a high misdemeanor," the very language ordinarily employed by the legislature, to designate an offence punishable in a criminal form. It alludes to the "conviction" of the offenders, a mode of expression peculiarly adapted to designate a criminal judgment, and it states, that a "fine" is to be imposed by the court, which is almost invariably applied to the act of the court in pronouncing a criminal sentence for a pecuniary forfeiture. I am therefore perfectly satisfied, that the legislature intended to create an offence, which should be punished by a criminal prosecution. Nor does the 12th section of the act in any degree shake this construction. It declares, that all penalties and forfeitures incurred by force of the act, "unless therein before otherwise directed," &c. may be prosecuted, sued for, and recovered, by action of debt, or by indictment or information, &c. Now, admitting that this offence would be included within the general description of "a penalty or forfeiture," I am satisfied that it is within the exception. The defendant, therefore, can take nothing by this objection, even if the ground were open to the consideration of this court. But I consider this point as fully settled by the supreme court, in the case of U. S. v. Tyler [7 Cranch (11 U. S.) 285], at the last February term. That was an indictment upon the same clause of the act, on which the jury found the defendant guilty, and also found by their verdict the value of the goods exported, but by mistake stated them as pot ashes, whereas the goods charged in the indictment were pearl ashes. The court below were divided as to the question, whether the verdict was sufficiently certain, and the supreme court adjudged it sufficient, and that judgment ought to be for the United States. The court would not have given this direction, unless they were satisfied that an indictment lay, and that the fine was to be imposed by the court, and not found by the jury as a penalty.

The second point has presented more difficulty. By the 19th section of the act of March 1, 1809 [2 Stat. 533], it is enacted, "that the act laying an embargo on all ships and vessels in the ports and harbors of the United States, and the several acts supplementary thereto, shall be and the same are hereby repealed from and after the end of the next session of congress." By this clause (had it stood alone), the whole embargo acts, together with all their penalties, forfeitures, fines and punishments, would after the next session have been swept away, unless they had passed in rem judicatam. Of course, every prosecution therefor depending before any court would have been quashed. Miller's Case, 1 W. Bl. 451; Yeaton v. U. S., 5 Cranch [9 U. S.] 281. But at the then next session, the legislature saw fit to interpose, and in the 2d section, Act June 28, 1809, c. 9, inserted a saving clause, as follows: "Provided that all the penalties and forfeitures, which may have been incurred, or shall hereafter be incurred, on account of any infraction of the act laying an embargo, &c. or of any of the acts supplementary thereto, or of the act to enforce, &c. the act laying an embargo, &c. or of any of the provisions of the act to interdict the commercial intercourse between the United States and Great Britain and France, and their dependencies, and for other purposes, shall after the expiration of any of the said acts, or of any provision thereof, be recovered and distributed in like manner, as if the said acts and every provision thereof had continued in full force and virtue." It is contended, on the part of the defendant, that this proviso saves such penalties and forfeitures only, as are recoverable by civil process; and on the part of the United States it is contended, that it saves all offences of every name and nature created by the enumerated acts. This question, like the former, can be decided only by a careful attention to the language of the legislature.

In examining the various embargo and non-intercourse acts, three instances only are found, in which (technically speaking) a crime is created, and punished on conviction by the court. The first is in the section of the act of 9th January, 1809, on which this information is founded; the next is in the 7th section of the same act, where the false swearing stated therein, is declared to subject the party to the pains and penalties of perjury. The third is in the 2d section of the act of 1st March, 1809, where any illegal intercourse with any public ship of Great Britain or France is declared to subject the offender to a forfeiture, not exceeding ten thousand dollars, nor less than one hundred dollars; and to imprisonment, not less than one month, nor more than one year. In all other cases (and the acts are crowded with them) the offences are punishable by pecuniary penalties only. Each of the embargo and non-intercourse acts contains a provision for the mitigation and remission of the penalties and for-

feitures, according to Act March 3, 1797, c. 67 [1 Story's Laws, 458; 1 Stat. 506, c. 13], and also for the distribution of the same penalties and forfeitures (except in cases of seizure by the navy) according to the revenue act of March 2, 1799, c. 128 [1 Story's Laws 573 (1 Stat. 627, c. 22)]. See Act Jan. 9, 1808, § 6 [2 Stat. 454]; Act March 12, 1808, § 6 [Id. 475]; Act April 25, 1808, § 14 [Id. 502]; Act Jan. 9, 1809, § 14 [Id. 510]; Act March 1, 1809, § 18 [Id. 532]; Act June 28, 1809, § 4 [Id. 551]. By the former acts, the recovery of these penalties and forfeitures seems to be prescribed by an action or information of debt; and by the latter, by an action of debt, or by information or indictment. On recurring to the act of March 3, 1799, § 91, and the act of March 3, 1797, § 1, the mitigation or remission in the one case, and the distribution in the other, is applied to "fines, penalties and forfeitures," which indicates, at least in the mind of the legislature, a distinction between fines and penalties. This distinction is further apparent by the 89th section of the act of March 2, 1799, where it is enacted, that all penalties accruing by that act, should be sued for and recovered in the name of the United States, but fines are silently left to be imposed by the court in the exercise of its ordinary jurisdiction. The same distinction would seem to result from the language of the 14th section of the act of January 9, 1809, where a mode of recovery is expressly provided for "penalties and forfeitures," but is dropped apparently ex industria, as to "fines;" although in the close of the section the legislature have made a provision as to the testimony applicable to trials for "fines," as well as for "penalties and forfeitures." But I do not rely upon this distinction, because I think the true construction of the saving clause in question, must depend less upon the exact definition of a single word, than on the general scope of the language. In the first place, it will not I presume be contended, that the clause saves any crimes punishable by any other than pecuniary mulcts. For it could never be gravely presumed, that the legislature intended to distribute the punishment of imprisonment or of the pillory among those, whom it esteemed its own favorites. Such a distribution might gratify an offender, and perhaps alleviate his burthens, but could with no decorum or propriety be admitted to enter into legislative deliberations. It would be so absurd, that human ingenuity would be paralysed in attempting to support it. The crimes of illegal intercourse with foreign ships of war, and of false swearing within the acts, therefore, were without question repealed, and no prosecution could be sustained therefor. If this be true, I would ask, why not the crime of illegal exportation, upon which the present prosecution is founded? How can the case of a crime punishable by fine and partly by imprisonment be distinguished from that of a crime punishable wholly by fine? If the words "penalties and forfeitures" are used in an enlarged sense, they comprehend both; if in a restricted sense, they include neither. And indeed the learned counsel for the United States has very correctly argued the question upon this footing. He admitted, that the information could not be sustained, unless upon the construction, that all crimes were within the saving proviso. A fine is a punishment imposed by the court, as much as imprisonment, and in the same manner; and it would be difficult to contend, that when it constituted the whole punishment, it was saved and distributable; and when a part only, it was lost and repealed. On the best examination which I have been able to make, it has been difficult to resist the impression, that uniformly, through the whole acts in question, the words "penalties and forfeitures," are used in a restrained sense, and applied to such, as might be recovered in a civil prosecution, and of course such as would be within the cognizance of the district court. The 14th section of the very act, on which this information is founded, gives the election to prosecute by action of debt, or by information, or indictment. Now I think it would be difficult to argue, that the legislature could intend to overturn the ordinary distinctions in proceedings before its legal tribunals. It would certainly be a novelty, to attempt to bring an action of debt in order to convict an offender of a high misdemeanor, and to enable the court to impose a punishment by fine. In debt the jury would find the sum due; and yet by the act it is to be found and imposed by the court. In debt, the judgment is for a sum certain, and process of execution issues. But where a fine is imposed, imprisonment in case of non-payment, is a part of the judgment. The language too of the saving clause, is strictly applicable to civil proceedings. The penalties and forfeitures are to be "recovered and distributed." It is true, that these words may be, and sometimes are, applied to "fines," but usually they are confined to civil proceedings, where the party has a vested right, the recovery of which is sought and obtained in the suit. If then the language of the proviso be satisfied, if no intent to the contrary be apparent, why, let me ask, should these words be strained to embrace the only case, in which a criminal proceeding can be held to be reserved? There might be very good reason to reserve penalties and forfeitures, because informers or other persons might have a vested interest therein: but the same reason would not apply to a criminal proceeding, where no interest could vest until the fine was imposed, and where the legislature seemed to contemplate a bounty only to the informers after the whole was received; to their own use. It is of great consequence to preserve the distinction between penalties and forfeitures, and pains and punishments. The former may be remitted by the secretary of the treasury, or others who may be vested with the authority by law, because the claim

sounds civiliter. But the constitution of the United States has confided to the president the power of pardoning offences against the United States (article 2), and consequently the remission of pains and punishments, sounding criminaliter, belongs to the executive.

On the whole, I am of opinion, that it was not the intention of the legislature to save offences, which could be punishable by the court only in a criminal form; and that "penalties and forfeitures" must be restrained to such as might be recoverable by civil process in personam et in rem.

The chief difficulty, which has pressed on my mind, has been the case of U. S. v. Tyler [7 Cranch (11 U. S.) 285], where the indictment ought upon the principles of the present decision to have been quashed. But it will be recollected, that that case arose on a certificate of division of the circuit court, on a single point, and was submitted without argument. It is within my own recollection, that the present objection was not moved or considered; and I cannot think that a point, which was neither considered nor argued, and passed sub silentio, ought to outweigh the force of deliberate arguments. I regret, that the language of the legislature is not more comprehensive and definite; and above all, that it should leave a question of this nature to mere unassisted construction. But we cannot avoid the embarrassment. We cannot assume a jurisdiction to moderate the promulgated sentence of the legislature, neither ought we to increase its severity by enlarging doubtful expressions. The present act is highly penal, and affects the citizens with unusual forfeitures. It is a principle grown hoary in age and wisdom, that penal statutes are to be construed strictly, and criminal statutes to be examined with a favorable regard to the accused. I cannot feel at liberty, with this principle before me, to impose a forfeiture, where the legislature has not plainly spoken its will to that effect; and I will not be the first judge, sitting in this seat, to strain a proviso against the citizen, beyond the fair import of its expressions. As the district judge concurs in this opinion, the motion must prevail. Information dismissed.

UNITED STATES v. MANNING. See Case No. 14,672.

Case No. 15,719.

UNITED STATES v. MANTOR.

[2 Mason, 123.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1820.

CUSTOMS DUTIES — BREAKING CUSTOMS LOCKS — PENALTY.

The 54th section of the revenue collection act of 1799, c. 128 [1 Story's Laws, 620; 1 Stat. 668, c. 22] respecting the breaking of locks and fastenings put on vessels by inspectors, applies to vessels in the coasting trade, as well as vessels coming from foreign ports.

[Cited in Jackson v. U. S., Case No. 7,149.]

[Error to the district court of the United States for the district of Massachusetts.]

Debt for the penalty of 500 dollars against the defendant [Tristram Mantor], master of a coasting vessel, for suffering the locks and fastenings, put on the hatches of the vessel. by an inspector of the customs, to be broken, contrary to the 54th section of the revenue collection act of 2d March, 1799, c. 128 [1 Story's Laws, 620; 1 Stat. 668, c. 22]. The defendant pleaded nil debet, on which issue was joined. At the trial, the vessel was proved to be a coasting vessel, and at the time when the facts alleged in the declaration took place, had recently arrived from North-Carolina into Boston, having on board a cargo of coals, flour, and about 20 boxes of Havana sugar. The defence at the trial did not turn upon a denial of the facts; but upon the ground that the 54th section of the act applied only to vessels arriving from foreign ports, and not to vessels engaged in the coasting trade of the United States. The district judge at the trial, was of this opinion, and so directed the jury, who found a verdict accordingly for the defendant. [Case unreported.] The district attorney filed a bill of exceptions to this opinion of the judge, and the present writ of error was brought to revise it.

Mr. Blake, for the United States, argued that the 54th section was general in its terms, and was applicable to all vessels; and the security of the revenue required this interpretation; and so it had always in practice been construed. He agreed that some of the sections of the revenue act of 1799, c. 128 [1 Story's Laws, 620; 1 Stat. 668, c. 22], applied solely to vessels coming from foreign ports; but contended that others applied to all vessels. He instanced particularly, the 37th, 53d, 55th, 57th, 67th, 70th, and 71st sections of the act.

Mr. Barrell, for defendant, argued e contra that the 54th section was exclusively applicable to vessels coming from foreign ports. That all the sections of the act of 1799, c. 128, were confined to such vessels, except where coasting vessels were particularly specified. He cited, as particularly applicable to vessels of this description, the 26th, 27th, 28th, 29th, 31st, and 33d sections of the act. In the 18th section of the act, coasting vessels were expressly specified, and a provision made in the cases contemplated in that section for fastenings and locks to the hatches of coasting vessels. Why this particular provision, if the 54th section applied generally? The coasting act of February 18, 1793, c. 8 [1 Stat. 305], contained provisions applicable to coasting vessels in the predicament of that at the bar; and by the act of March 2, 1819, c. 48 [3

[1] [Reported by William P. Mason, Esq.]

Stat. 492], such vessels were liable to the same regulations as coasting vessels bound from one district to another in the same state, or from a district in one state to a district in the next adjoining state. These regulations govern the whole coasting trade, and are sufficient for the protection of the revenue. If not it belongs to the government, and not to courts of justice to enlarge them. No officer of the customs, under the coasting act of 1793, or any other act, has any right to put locks and fastenings on the hatches of coasting vessels, except in the special cases in the 18th section of the revenue act of 1799, c. 128. The 27th section of the coasting act of 1793, c. 8, as to the authority of officers of the customs to search and examine and seize vessels, is in pari materia with the 70th section of the revenue act of 1799, c. 128. So the 31st section of the same coasting act with part of the 71st section of the revenue act of 1799, as to obstruction of officers in their duty.

Mr. Blake, in reply. The revenue act of 1799, c. 128, contains many sections applicable to all vessels. It is posterior to the coasting act of 1799, c. 128, and in many cases the provisions of the former are cumulative upon the other. The letter of the 54th section is completely up to our case. Why should it not then be held to be within its spirit?

STORY, Circuit Justice. This is a case of no inconsiderable embarrassment and difficulty, and I have hesitated upon it after a good deal of reflection. The decision to which my mind has at last come, is not without some lurking doubts, but it is that to which my judgment persuades me. The judgment of the district court turned on the general proposition that coasting vessels were under no circumstances within the purview of the 54th section of the revenue act of 1799, c. 128. If that proposition be not true in its utmost generality (as no qualifications are specially stated) the judgment below cannot be maintained; if it be true, then it ought to be affirmed. The act of March 2, 1819, c. 48, having divided the sea coast and rivers of the United States into two great districts, has regulated the trade of coasting vessels bound from one port to another, within either of those districts (in which predicament the vessel, whose case is now before us, is) by those sections of the coasting act of 1793, c. 8, which apply to coasting vessels bound from a district in one state to a district in the same or an adjoining state on the sea coast.

The argument of the defendant's counsel in substance is, that the coasting act of 1793, c. 8, meant in all respects, to regulate the coasting trade, except in a few cases expressly provided for in the revenue act of 1799, c. 128; and that consequently all other provisions of the latter act ought to be applied exclusively to vessels coming from foreign ports; and that the generality of the language of the 54th section of the same act, ought to be restrained to vessels in the latter predicament. To this argument, to a certain extent, I readily accede. The act of 1799, c. 128, in its principal provisions, looks certainly to the foreign trade of the United States, and in many, perhaps in a majority, of its provisions, by express terms, or by necessary implication, applies exclusively to vessels coming from foreign ports. But the primary object of that act being the security of the revenue of the United States, and as auxiliary thereto, the prevention of illegal traffic and smuggling, there is no necessary conclusion that its provisions may not, when general, apply to all vessels whatsoever. There is no pretence to say, that illegal traffic and smuggling, and frauds upon the revenue, may not be committed by vessels engaged in the coasting trade; or that there is in the coasting act of 1793, c. 8, any provision in pari materia, with the 54th section of the act of 1799. And it would be still more difficult to affirm, that this section was not as useful and salutary in relation to the coasting as the foreign trade of the United States. If there had been in the coasting act an express provision upon the same subject matter, the argument would have been more cogent and satisfactory. In some of the early laws of the United States, provisions were inserted, equally applicable to vessels in the foreign and domestic trade. Gradually a separation in respect to many of the most important regulations, from the difference of their nature and requirements, has taken place between them. But it remains to be proved, that the separation has been entire. It is asked, why in the 18th section of the act of 1799, c. 128, a special provision is made as to coasting vessels, and to locks and fastenings on them, if the 54th section be also applicable to them? The answer is, that this provision is made for a special case, applicable to vessels in the foreign trade, coming into Ocracoke Inlet, and allowed to discharge their cargoes into lighters and coasting vessels, to be transported to any port of entry or delivery connected with the inlet, without previously paying or securing the duties due on their cargoes. But for this provision, the cargoes so unladen, would be forfeited; and but for the regulation as to the cargoes being under locks and fastenings, there would be great danger of frauds and smuggling. By the general coasting act no coasting vessel can regularly have on board any foreign dutiable goods, the duties on which have not been previously secured or paid.

It is worthy of notice, too, that the 54th section of the act of 1799, is almost a literal transcript of the 31st section of the revenue act of August 4, 1790, c. 35 [1 Stat. 145]. It was therefore, a regulation in existence at

the time of the passage of the coasting act of 1793, and is in no wise inconsistent with it, and has been re-inforced and re-enacted since that period. There is no pretence to say, that it was repealed by the act of 1793, or that its subsequent operation has been, or could be, restrained by it. It stands then, upon its own terms and connection for its reasonable exposition. The 54th section declares, that it shall be lawful for all "collectors, &c. to go on board of ships or vessels in any port of the United States, or within four leagues of the coast thereof, if bound to the United States, whether in or out of their respective districts, for the purpose of demanding the manifests aforesaid, and of examining and searching the said ships or vessels." It is said by the defendant's counsel, that the qualification, "if bound to the United States," plainly shews, that vessels from foreign ports only, are intended, and not coasting vessels. This is not admitted. These words are evidently a qualification of the preceding words, and restrain them to such vessels within four leagues of the coasts as are bound to the United States, in contradistinction to vessels bound to foreign ports. A provision in substance as broad, and applicable to all vessels, is inserted in the coasting act (coasting act of 1793, c. 8, § 27 [1 Stat. 315]), and authorizes revenue officers to go on board all vessels, to inspect, search, and examine the same, and if any breach of the laws of the United States (not merely of the coasting act) is committed, whereby the vessel, or goods on board, are forfeited, to seize the same. If the 54th section had stopped after the words, "for the purpose of demanding the manifests aforesaid," I should have been strongly inclined to think that these words would have restrained the meaning to manifests of vessels from foreign ports, and have excluded coasting vessels. But the supplementary words, "and of examining and searching the said ships or vessels," seem to me to enlarge the power so as to reach coasting vessels, which revenue officers are undoubtedly entitled to search and examine by the very terms of the coasting act. There are no other words in the section imposing any limitation upon the general phraseology. The court is therefore called upon to interpose one, where the sense does not require it, and where no public mischief or inconvenience justifies such a limitation. We know that by the terms of the coasting act, permits under some circumstances, are necessary before unlading the cargoes of coasting vessels; and a forfeiture takes place, for having smuggled goods on board; and sometimes for omitting to put goods into the manifests. In point of fact, the practice is proved to be, and always to have been, in conformity with the construction of the law, which is asserted by the district attorney. I see no evil in such a construction; and I perceive much public good and convenience in it. I am not therefore prepared to take a case out of the letter which seems fairly within the spirit of the section; or to deprive the language of its natural force, simply because it stands in a law pointing in its general direction, to vessels engaged in foreign trade. I am driven, therefore, to say, that in my judgment, the judgment of the district court ought to be reversed. Judgment reversed.

UNITED STATES v. MARCHANT. See Case No. 16,682.

Case No. 15,720.

UNITED STATES v. The MARGARET YATES.

[22 Vt. 663.]

District Court, D. Vermont. May Term, 1849.

FORFEITURE—FOREIGN TRADE—FALSE MANIFEST—FRAUDULENT INTENT.

1. A vessel not enrolled and licensed, but engaged exclusively in the foreign trade, does not become forfeit by having foreign goods on board.

2. An allegation, in an information against a vessel and cargo, that the master neither did nor would deliver a true manifest of the merchandize, but on the contrary delivered a false and fraudulent invoice of the merchandize, with a view to evade the revenue laws and defraud the United States, does not present a case within the act of congress of 1821 [3 Stat. 616].

3. Such an allegation presents a case within the 67th and 106th sections of the act of congress of 1799 [1 Stat. 677, 702], and when the offence proved, under such allegation, consists in the omission to insert in the manifest a part of the merchandize, and it appears, that this proceeded altogether from mistake, and was wholly unintentional, the alleged fraudulent intent is disproved and a sufficient defence established.

4. It would seem to be a principle of the revenue code, applicable at least to all importations in vessels, if not to importations in general, that a penalty or forfeiture is not to be incurred for a mere mistake in the manifest, report, or entry, either in the quantity or value of the goods imported, without fraud, misconduct, or culpable negligence.

This was an information against a vessel and cargo of lumber seized upon the waters of Lake Champlain. The information contained several counts, but all but two were abandoned. One of the counts relied upon charged a forfeiture of the vessel for having on board articles of merchandize of foreign growth and manufacture, without being enrolled and licensed. The other count, after stating that the merchandize, consisting of scantling, boards, and plank subject to duty, was brought and imported in the vessel, from Canada, an adjacent foreign territory, into the United States, alleged, that neither the master, nor any other person, did or would deliver a true manifest of the merchandize, but on the contrary, the master did deliver to the collector, with a view to evade the revenue laws and defraud the United States, a false and fraudulent invoice of the merchandize so on board the vessel, and there-

by fraudulently represented the quantity of the scantling, boards and plank less than their true and actual quantity, and their value less than their true and actual value, against the form of the statute, &c. It appeared in evidence, that the articles of merchandize on board the vessel were of the growth and manufacture of Canada, that the vessel was not enrolled and licensed, and was employed in transporting lumber directly from Phillipsburg in Canada to Whitehall in New York. It farther appeared, that the master of the vessel, on arriving in the United States from Canada, stopped at the custom house and delivered a manifest; but the officer finding, on going on board the vessel, more lumber than was specified in the manifest, immediately seized both lumber and vessel. The manifest specified 3652 pieces of scantling, 219 pieces of boards, and 100 pieces of two inch plank: but there were also on board 300 pieces of plank, called culled plank, not mentioned. The agent of the claimant testified, the objection to the testimony being overruled, that he made out the manifest from a book containing entries of all the lumber, and handed the manifest to the master of the vessel, to be delivered at the custom house; that he intended to include, and supposed he had included, all the lumber, but in transcribing from the book omitted, by mistake, the 300 pieces of culled plank. The jury were directed, that they could not find a forfeiture of the vessel under the first count; and that if they were satisfied from the evidence given, that the omission in the manifest of the 300 pieces of plank, which was the only cause of seizure proved under the other count, was accidental and unintentional, a mere clerical mistake in making out the manifest, they could not find a forfeiture either of the vessel, or the merchandize, under that count. A verdict being returned for the claimant on both counts, the district attorney, in behalf of the United States, moved for a new trial, on the ground of the admission of improper evidence and misdirection to the jury.

C. Linsley, U. S. Dist. Atty.

S. Foot, for claimant.

PRENTISS, District Judge. The case presents two principal questions, quite distinct in their nature, arising under the two different counts in the information. The question arising under the first count, and the one first in order, is, whether the facts proved would warrant the finding of a forfeiture of the vessel under that count. The sixth section of the act of February 18, 1793, provides that "vessels of twenty tons or upwards, other than such as are registered, trading between district and district, or between different places in the same district, or carrying on the fishery, without being enrolled and licensed, or if of less than twenty tons, and not less than five tons, without a license, if laden with goods the growth or manufacture of the United States only, shall pay at every port the same fees and tonnage as foreign vessels; and if she have on board any articles of foreign growth or manufacture, other than sea stores, she and her tackle, lading, &c., shall be forfeited." This provision applies to vessels employed in the domestic trade; that is, to vessels "trading between district and district, or between different places in the same district." Now, the proof was, that the vessel seized was engaged, not in the domestic, but in the foreign trade —in trading between Canada and the United States. Such trading is lawful, and every vessel employed in it, only stopping in the district first entered in the United States and complying with the revenue regulations thereof, may be unladen in the same or any other district. It is true, that by the act of March 2, 1831 [4 Stat. 487], it is provided, that any boat, sloop, or other vessel of the United States navigating the waters on the northern, northeastern, and northwestern frontiers, otherwise than by sea, shall be enrolled and licensed, and shall thereby be entitled to be employed either in the coasting or foreign trade. But this act does not profess otherwise to alter the navigation laws, but leaves them in all other respects as they were. It provides no penalty or forfeiture for their breach or violation, its object being simply to give to vessels enrolled and licensed, on these inland waters, the privileges as well of registered as of enrolled and licensed vessels, so that they may be employed as well in the foreign as in the domestic trade. The vessel in question, therefore, although not enrolled and licensed, did not become forfeited by having foreign goods on board, it being engaged exclusively in the foreign trade. The question arising under the other count in the information is, whether the evidence, showing the omission in the manifest of a part of the cargo of the vessel to have been by mistake, was properly admissible, and consequently whether the direction given to the jury, that, if the omission was accidental and unintentional, a mere clerical mistake in making out the manifest, no forfeiture had been incurred, was right. In considering this question, and as a preliminary step to a decision upon it, it becomes necessary to inquire, within what particular provision of the acts of congress, if within any, does the case stated in the count properly fall? Does it come within the act of March 2, 1821, as was insisted in the argument, or within the provision of some other of the revenue acts?

The act of 1821 provides that it shall be the duty of the master of any vessel, except registered vessels, and of any person having the charge of any boat, canoe, or raft, and of the conductor or driver of any carriage or sleigh, and of every other person, coming from any foreign territory adjacent to the United States, into the United States, with merchandize subject to duty, to deliver, immediately on arriving in the United States,

a manifest of the cargo or loading, of the vessel, &c., or of the merchandize, at the office of any collector or deputy collector nearest to the boundary line; which manifest shall be verified by oath, stating that the manifest contains a full, just and true account of the kinds, qualities, and values of all the merchandize, so brought from such foreign territory; and if the master or other person having charge of the vessel, &c., or bringing the merchandize, shall neglect or refuse to deliver the manifest herein required, or pass by, or avoid, such office, the merchandize subject to duty, and so imported, shall be forfeited, together with the vessel, &c.; and the master, &c., shall be subject to pay a penalty of four times the value of the merchandize imported. The forfeiture imposed by this act, which it will be perceived is a very heavy one, would seem, from the terms of the act, to be incurred only by neglecting or refusing to deliver a manifest, or passing by or avoiding the collector's office. Now, the information does not allege, that the master of the vessel neglected or refused to deliver a manifest, or that he passed by or avoided the collector's office. It impliedly admits, as the proof was, that a manifest was delivered, though not one containing a full account of all the cargo. It neither negatives the delivery of a manifest, nor does it so much as allege the delivery of a false and fraudulent manifest. The allegation is, that the master neither did nor would deliver a true manifest of the merchandize, but, on the contrary, delivered a false and fraudulent invoice of the merchandize, with a view to defraud, &c. The act requires, not an invoice, but a manifest to be delivered; and as these are treated in the revenue laws as different things, and cannot be regarded as synonymous or identical in legal meaning, the delivery of a false and fraudulent invoice, as alleged, whatever consequence might attach to the delivery of a false and fraudulent manifest, is no offence against the act. In any view, that can be taken, therefore, the case stated in the information does not appear to come within the act of 1821. If the charge in the information, instead of being in the form it has assumed, and applying generally to the whole cargo, had been confined to the part of which no account was given, and the allegation had been simply, that no manifest was delivered, it would have presented a question deserving consideration, whether the case might not be treated as within the act. Still, if it might be so treated, it would seem, that there could be no forfeiture of the merchandize, of which a manifest was delivered.

If the case stated in the information is not within the act of 1821, it must, if within any enactment, be within the one hundred and sixth section of the act of 1799, which provides, that all vessels, boats, rafts, and carriages, arriving in the districts on the northern and northwestern boundaries of the United States, containing goods subject to duty, shall be reported, and shall be accompanied with like manifests, and like entries shall be made, as in case of goods imported in vessels from the sea, and, generally, such importations shall be subject to like regulations, penalties, and forfeitures, as in other districts. Among the provisions of the act, thus extended to the districts on the northern and northwestern frontiers, are those of the sixty-sixth and sixty-seventh sections. These sections provide for cases where goods entered are not invoiced according to their actual cost and where packages of goods entered differ in their contents from the entry; and the forfeiture in the cases, differing greatly from that imposed by the act of 1821, is limited in the one to the goods so not invoiced according to their actual cost, and in the other to the goods contained in the package or packages so differing in their contents from the entry. Supposing the case to come within either of these provisions—and it would probably be considered within the sense and spirit of that of the sixty-seventh section if within either—there is no doubt whatever, that the matter allowed to be given in evidence on the part of the claimant was properly admitted, and the direction given to the jury upon it consequently right. The sixty-sixth section makes the forfeiture, where goods entered are not invoiced according to their actual cost, dependent on their being not so invoiced "with design to evade the whole or a part of the duties thereon." And the sixty-seventh section provides, that the forfeiture, where packages of goods entered differ in their contents from the entry, shall not be incurred, if it shall be made to appear, "that such difference proceeded from accident or mistake, and not from an intention to defraud the revenue." The same provision is contained in the twenty-fourth and fifty-seventh sections, which, among other things, impose a penalty, or forfeiture, on the master of a vessel, for importing goods not included or described in the manifest, or where goods found on board shall not agree with the report, or manifest. From these provisions of the general collection act, it would seem to be a principle of the revenue code, applicable at least to all importations in vessels, if not to importations in general, that a penalty, or forfeiture, is not to be incurred for a mere mistake in the manifest, report, or entry, either in the quantity or value of the goods imported, without fraud, misconduct, or culpable negligence. If the case, where a manifest omits a part of the goods imported in a vessel, or the case where a manifest undervalues the goods, can in any form of allegation be brought within the act of 1821, it would seem, that the act, in either case, the manifest being made by it a substitute for the reports and entry, must be construed in subserviency to the principle applicable to them.

But looking to the case in the form in which

it is presented in the information, and supposing it to be of such a nature as would subject the merchandize in whole or in part to forfeiture, and not merely the master of the vessel to a pecuniary penalty, the question in the case, independent of any special statute provision, would appear to be free from doubt. It is conceded, that where the commission or omission of an act is made per se an offence, or is of itself an actual violation of a law, of which there are numerous instances under the revenue and other laws, it is in general no defense, that the commission or omission of the act arose from accident or mistake and was unintentional. In such cases, arising under the revenue laws, relief from the penalty, or forfeiture, on the ground of accident or mistake, or of there beng no fraud or wilful negligence, can be obtained only by application to the secretary of the treasury for its remission. But the law is otherwise, where the intent constitutes an essential part of the offence, as it does in many cases under the revenue as well as other laws, and as it is plainly made to do by the form of allegation in the present case.

The information, as we have seen, does not charge a neglect or refusal to deliver a manifest. It alleges, that the master neither did nor would deliver a true manifest, but delivered a false and fraudulent invoice of the merchandize, with a design to evade the revenue laws and defraud the United States, and thereby fraudulently represented the quantity of merchandize less than its true and actual quantity, and its value less than its true and actual value. Here is a charge of actual fraud, which certainly could not be committed without an actual fraudulent intent. Indeed, an actual fraudulent intent is alleged in express and positive terms, and forms the very essence of the charge. If, then, the omission in the manifest, or in what is called the invoice, of a part of the merchandize, which was the fraud relied upon in proof, proceeded altogether from mistake, and was wholly unintentional, the fact, if established, disproved the alleged fraudulent intent, and, on common principles, aside from any positive enactment, was of course a good defence.

From the views which have been taken of the case, it follows, that a new trial must be denied, and that judgment must be entered upon the verdict.

Case No. 15,721.

UNITED STATES v. MARKS et al.

[2 Abb. U. S. 531;[1] 10 Int. Rev. Rec. 42; 2 Am. Law T. Rep. U. S. Cts. 124.]

Circuit Court, D. Kentucky. May Term, 1869.

CONSTITUTIONAL LAW — PENSION AGENTS — FEES.

1. Sections 12 and 13 of the pension act of July 4, 1864 (13 Stat. 387),—which prescribe the fees of agents employed to collect pensions, and impose a penalty for receiving a greater fee than such as is prescribed,—are not unconstitutional. The power to secure to the pensioner the receipt of the pension granted, free of unreasonable tolls or exactions, is incident to the undeniable power of congress to grant pensions.

[Cited in U. S. v. Hall, 98 U. S. 356.]

2. By the express terms of the pension act of July 4, 1864 (13 Stat. 387), the penalty imposed by section 13 upon a pension agent, for receiving greater fees than are prescribed by section 12 for services in collecting pensions, is incurred only where the fee is received for conducting a claim preferred under that act. It cannot be enforced against one who has received an excessive fee for services in collecting a pension given under another act of congress,—e. g., the act of July 4, 1862 (12 Stat. 566).

3. The pension acts of 1862 and 1864, considered in connection; and the effect of the latter upon the former, construed and explained.

Motions in arrest of judgment upon an indictment, and for a new trial.

The defendants, Bernet Marks and Nathan Bersinger, were tried and convicted upon an indictment for receiving excessive fees for services as pension agents; and these motions were now made in their behalf.

James Speed and O. F. Stirman, for the motions.

Benj. H. Bristow, U. S. Dist. Atty.

BALLARD, District Judge. The defendants having been found guilty by a jury, the case is now before me on a motion in arrest of judgment, and also on a motion for new trial. At common law these two motions could not be made at the same time; but it has been long the practice in this state to make and hear them together; and, as there has been no objection interposed here to this course being taken, I shall proceed to consider the motions as if they were entirely regular.

Two grounds are relied on in support of the motion in arrest of judgment: First. That the indictment is defective in not setting forth any offense under the statute on which it is founded. Second. That the statute itself is unconstitutional.

The indictment contains four counts. Some of them may be defective; but the rule is well settled that, if any one is sufficient, it will support the judgment of the court upon the verdict.

The counsel for the defendants have established to my entire satisfaction that the first and second counts are bad, but they concede that the third and fourth are substantially good. I shall, therefore, not examine these counts critically, but, for the purpose of this case, assume them to be sufficient in form and substance, and proceed to inquire into the constitutionality of the act on which they are founded.

These counts are founded on sections 12 and 13 of the act of congress, approved July 4, 1864, entitled "An act supplementary

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

to an act entitled 'An act to grant pensions,'" approved July 14, 1862 (13 Stat. 387). Section 12 prescribes "the fees of agents and attorneys for making out and causing to be executed the papers necessary to establish a claim for a pension, bounty," &c., and section 13 imposes a penalty on "any agent or attorney who demands or receives any greater compensation for said services" than is prescribed in section 12.

The power of congress to grant pensions and bounties is not denied by the learned counsel of the defendants, nor is it in my opinion deniable. But counsel insist that when the pension is granted, the sum which the claimant may agree to pay to his attorney for preparing the papers necessary to establish his claim, must rest entirely in contract, and that any attempt by congress to regulate it, not only intrenches upon the right of the states to regulate contracts between citizens, but is an unconstitutional invasion of the liberty of the citizen.

True, under our form of government, the power to regulate the obligation and the mode of enforcing contracts generally, belongs to the states. But it seems to me undeniable, that if congress may grant pensions they may secure to the pensioner the pension granted. The power to do the one necessarily implies power to do the other.

The powers of congress for the protection of both persons and things are coextensive with their powers of legislation. There is, therefore, no right which they may grant, nor any person they may commission, that may not be protected by such laws as congress may devise, provided they are such as are not expressly prohibited by the constitution. Without powers coextensive with these here assumed, it seems to me that the government of the United States is no government at all, for, certainly, that is not a sovereign government which is obliged to leave to some other government the protection of either rights granted by it or persons acting under its authority. The United States, then, are not obliged to leave their pensioners,—objects of their peculiar care,—to such protection only as the state laws may prescribe in the matter of procuring their pensions. If they may provide for the support of the meritorious soldiers and sailors, who, in consequence of wounds received in the service of the country, have lost all capacity to support themselves,—if they may provide for the maintenance of the widows and helpless children of those who have lost their lives in battle, surely it is their right and their duty to guard, by all suitable laws, the fund thus devoted from being diverted from its object, by either the craft or the extortion of unscrupulous agents.

I do not care to pursue the subject further, for it is now universally admitted that, when congress have power over any given subject, they have all the power over that subject which properly belongs to any sovereign government; that if the end be legitimate, all the means which are appropriate and adapted to the end are likewise legitimate, and may be applied and used by congress in their discretion.

The objection that the statute is unconstitutional, because it interferes with the liberty of the citizen, I do not comprehend. All laws, in a certain sense, restrain that liberty which the individual is supposed to possess in a state of nature. The very idea of government involves control—restraint. True, governments are not instituted for the purpose of restraining men in their liberty, but for their protection; but, as protection can generally be found only through restraint, the large mass of the laws of all governments do regulate and restrain the conduct of the citizen. The particular design of the statute now under consideration is not to restrict the citizen in disposing of what is his own, but, by guarding the ignorant against the craft of the cunning, and the needy against the extortions of the rapacious, to secure the bounty of the government to the real objects of its care. Upon the whole, as I have no doubt of the constitutionality of the statute in question, the motion in arrest of judgment must be overruled.

I am supported in this opinion, by the express decision of the learned district judge of the Western district of Michigan,—U. S. v. Fairchilds [Case No. 15,067], and by the reasoning of the supreme court in the case of McCulloch v. Maryland, 4 Wheat. [17 U. S.] 316.

I proceed to consider the motion for a new trial. There is but one ground assigned which need be noticed, and that is that the averments of this indictment were not sustained by the evidence. In considering this question, reference must be had to the provisions of the act of congress, to the allegation of the indictment, and to the evidence.

Section 12 of the act of July 4, 1864, provides: "That * * * the fees of agents and attorneys for making out and causing to be executed the papers necessary to establish a claim for a pension, bounty, and other allowance before the pension office, under this act, shall not exceed the following rates: For making out and causing to be duly executed a declaration by the applicant, with the necessary affidavits, and forwarding the same to the pension office, with the requisite correspondence, ten dollars; which sum shall be received by such agent or attorney in full, for all services in obtaining such pension, and shall not be demanded or received, in whole or in part, until such pension shall be obtained; and the sixth and seventh sections of an act entitled 'An act to grant pensions,' approved July 14, 1862, are hereby repealed."

Section 13 provides: "That any agent or attorney who shall, directly or indirectly, demand or receive any greater compensation

for his services under this act, than is prescribed in the preceding section of this act, or who shall contract or agree to prosecute any claim for a pension, bounty, or allowance under this act on the condition that he shall receive a per centum upon any portion of the amount of such claim, or who shall wrongfully withhold from a pensioner or other claimant, the whole or any part of the pension or claim allowed and due to such pensioner or claimant, shall be deemed guilty of a high misdemeanor, and upon conviction thereof, shall, for every such offense, be fined not exceeding three hundred dollars, or imprisoned at hard labor not exceeding two years, or both, according to the circumstances and aggravation of the offense."

The indictment charges, in substance, that Catharine Fitzgerald had a claim and was entitled to a pension under the act of congress of July 4, 1864; that she employed the defendants as her agents and attorneys, to make out and cause to be executed the papers necessary to establish her claim for a pension under said act; that they did make out the papers necessary to establish said claim; and that they unlawfully demanded and received for their services in making and causing the papers to be executed, a sum of money greater than the compensation prescribed in section 12 of the act of congress aforesaid, to wit, the sum of forty-one dollars and eighty-seven cents. The evidence showed that Catharine Fitzgerald is the widow of Thomas Fitzgerald, a private regularly enlisted and mustered into the army of the United States, and who died in 1863, of disease contracted while in the service of the United States, and in the line of duty. It thus appeared, that she was entitled to a pension under the second section of the act of July 4, 1862, entitled "An act to grant pensions" (12 Stat. 566), and the evidence showed that she claimed the pension allowed by this act and no other, except the increased pension, allowed by the act of July 25, 1866 (14 Stat. 230), on account of the pensioner having children under the age of sixteen years.

There was no evidence that she claimed any pension allowed by the act of July 4, 1864, or that she employed the defendants to assert any claim, or that they performed any services under that act, unless it can be maintained, as the district-attorney contends, that the acts of July 14, 1862, and of July 4, 1864, are one act, and that a pension granted by the act of 1862, is, in contemplation of the law, granted by the supplementary act of 1864, and, consequently, that services performed in making out the papers necessary to establish a claim for a pension allowed by the act of 1862, are, if performed after July 4, 1864, in contemplation of law performed under the act of that date, and subject to the restrictions contained in it.

It will be seen by reference to the act of 1862, that it grants pensions to various persons; that, in section 6, it prescribes the fees of agents and attorneys for making out and causing to be executed the papers necessary to establish a claim for a pension "* * * before the pension office under this act;" and that in section 7 it denounces a penalty against "any agent or attorney who shall directly or indirectly demand or receive any greater compensation for his services under this act, than is prescribed in the preceding sections of this act."

It will also be seen, by reference to the supplementary act of 1864, that it grants pensions to several persons or classes of persons not enumerated in the act of 1862; that, in section 12, it prescribes "the fees of agents and attorneys for making out and causing to be executed the papers necessary to establish a claim for a pension * * * before the pension office under this act," and that, in section 13, it denounces a penalty against "any agent or attorney who shall, directly or indirectly, demand or receive any greater compensation for his services under this act than is prescribed in the preceding section of this act."

There is nothing in the provisions of the act of 1864, as thus cited, at all inconsistent with those cited as part of the act of 1862, and there is no doubt that but for the express repeal of sections 6 and 7, found in the latter part of section 12 of the act of 1864, the fees prescribed by section 6 and the penalties for excessive fees prescribed by section 7 of the act of 1862 would apply to all pensions granted by that act, and that the fees prescribed by section 12 and the penalties for excessive fees prescribed by section 13 of the act of 1864 would apply only to pensions granted by the latter act.

The words "under this act," employed in both statutes, are extremely explicit, and leave no room for construction. They restrict, as plainly as language can, the operation of the provisions with which they are respectively connected to the particular act in which they are found. Nor can the fact that sections 6 and 7 of the act of 1862 are expressly repealed by the last clause of section 12 of the act of 1864 operate to enlarge the preceding provisions of the same section. These provisions, we have already seen, are unambiguous. By the plainest possible language they prescribe the fees of agents and attorneys making claim to or obtaining a pension granted by the act of 1864, and not by any other act. And it is impossible to conceive that the meaning is in the slightest degree modified or changed by the further provisions that sections 6 and 7 of an act entitled "An act to grant pensions," approved July 14, 1862, "are hereby repealed."

The effect of this repeal cannot be to extend the preceding provisions of the section in which it is found, or the provisions of the succeeding section, to matters to which they plainly do not relate; but its effect is

to strip the pensions enumerated in the act of 1862 of all the guards thrown around them by the provisions of sections 6 and 7 of that act. Henceforward there is not only no limit to the fee which an agent may demand for making out and causing to be executed the papers necessary to establish a claim for a pension under the act of 1862, and, consequently, no penalty for demanding an excessive fee, but all pending prosecutions for violations of the act of 1862—occurring even prior to July 4, 1864—must fail, because it is well settled that no prosecution can be supported by a repealed statute.

But, as already intimated, the district-attorney contends that the acts of 1862 and of 1864 are to be read as one act; that the act of 1864 is to be regarded as a re-enactment of the act of 1862, omitting only the repealed parts; and that, in fact, this is the legal effect of every amendatory or supplementary statute. In support of his position, he refers to the case of The Harriet [Case No. 6,099].

It is undoubtedly true, that where a statute is amended, the original statute is thenceforward to be read (striking out of it all of the repealed and incorporating into it all of the amended provisions) precisely as if the original statute was re-enacted, omitting the repealed and inserting in their appropriate places the amended provisions. But this rule will not allow the incorporating into or reading as part of the original act, a provision of the supplementary act, which, by its terms, plainly refers to the supplementary act only, and which has complete sense and operation without reference to the original act at all. Now, undoubtedly, the provisions of sections 12 and 13 of the act of 1864 are not without operation if they are confined, as their terms require, to the pensions granted by the act in which they are found, and, therefore, there is no rule of interpretation which requires or permits them to be incorporated into and read as part of the act of 1862. If the act of 1862 be now read, striking out of it all that is repealed by the act of 1864, and inserting into it all that is amendatory, still we cannot read as part of it sections 12 and 13 of the act of 1864, because they do not relate to it, except as they repeal some of its provisions. The whole effect of the provisions of sections 12 and 13 of the act of 1864 on the act of 1862, is to require that henceforward the act of 1862 be read with sections 6 and 7 omitted.

Again the district-attorney contends that in the construction of statutes, the intention of the legislature must prevail; that it is unreasonable to suppose congress, by the act of 1864, intended to prescribe the fees of the attorneys for making claim to only the very few pensions granted by that act, and to leave the fees of the same attorneys for making claim to the numerous pensions granted by the act of 1862 wholly unlimited. But I have no means of ascertaining the intention of congress, except from what they have said. I have no right, upon any conjectures of policy which I may entertain, to supply an intention which cannot be derived from the language employed. I am obliged to take the statute just as it is written, and to adopt that construction which its language plainly imports. I cannot stretch it to cases obviously not embraced by its terms, because such cases seem to me to be included in the policy.

Congress have plainly declared that it shall not be lawful for attorneys making claim to pensions under the act of 1864 to demand or receive more than a prescribed compensation; but should the court conjecture that some other act not expressly forbidden—that a demand of more than the compensation fixed by the act of 1864 for making claim to pensions under the act of 1862—ought to be punished, for the purpose of effecting a supposed legislative intention, "it would" (as Judge Marshall said, in the case of The Paulina's Cargo, 7 Cranch [11 U. S.] 61), "certainly transcend its own duties and powers, and would create a rule, instead of applying one already made. It is the province of the legislature to declare in explicit terms how far the citizen shall be restrained, * * * and it is the province of the court to apply the rule in the case thus explicitly described—not to some other cases which judges may conjecture to be equally dangerous."

Moreover, the district-attorney is obliged to concede, and does concede, that for all violations by agents or attorneys of the act of 1862, occurring prior to the act of July 4, 1864, there could be no punishment after the latter date; because, by the act of that date, the penal provisions of the former act were repealed. But no well grounded reason can be assigned why congress should intend to relieve these violators, that does not apply with equal force to all like offenders. Why should we presume that congress intended that an attorney who demanded, in August, 1864, a fee of twenty dollars for making claim to a pension, allowed by the act of 1862, should be punished, when they have, by explicit legislation, declared that an attorney who demanded and received such fee for similar service in August, 1862, shall not be punished?

Still, I can hardly doubt that congress did not in fact intend to deprive the beneficiaries under the act of 1862 of the protection sought to be given by sections 6 and 7. I cannot, however, sitting here as a judge, say they did not intend to do what they have plainly done. I may conjecture that they overlooked the effect of the language used in sections 12 and 13 of the act of 1864, but I can neither overlook nor disregard it. I cannot supply the omission of the legislature, for it is a fundamental rule "that a penalty cannot be raised by implication, but must be express-

ly created and imposed." Jones v. Estis, 2 Johns. 379.

It follows, that as the indictment describes the offense as committed in reference to a claim under the act of 1864, when the evidence shows it has reference to a pension claimed under the act of 1862, there is a variance between the allegation and the proof which entitles the accused to a new trial. But this right to a new trial may be rested upon the still broader ground, that the penal provisions of the act of 1862 having been repealed by the act of 1864, the evidence fails to show that they are guilty of any offense whatever.

A new trial must be granted.

Case No. 15,722.

UNITED STATES v. MARK'S SURETIES.

[See Case No. 11,990.]

Case No. 15,723.

UNITED STATES v. The MARS.

[1 Gall. 237.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1812.

NONINTERCOURSE—COASTING TRADE—FORFEITURE.

1. Goods of British growth, although not liable to duties, are prohibited from importation by Act March 1, 1809, c. 91 [2 Story's Laws, 1114; 2 Stat. 528, c. 24].

2. If a vessel, licensed for the coasting trade, be engaged in an illegal traffic, she loses the protection of her license, and is forfeited under the thirty-second section of the coasting act of February 8, 1793, c. 8 [1 Stat. 305].

[Cited in The Nymph, Case No. 10,389; U. S. v. The Paryntha Davis, Id. 16,004.]

[Appeal from the district court of the United States for the district of Massachusetts.]

This information contained two counts (1) For taking on board at a foreign port, with the knowledge of the owner and master, certain prohibited goods, to wit, 100 tons of plaister of Paris, with an intention to import the same into the United States, contrary to the act of March 1, 1809, c. 91 [2 Story's Laws, 1114; 2 Stat. 528, c. 24]. (2) For being engaged in a trade, other than that for which the schooner was licensed, contrary to the coasting act of February 18, 1793, c. 8 [1 Stat. 305].

G. Blake, for the United States.

B. Whitman, for claimants.

STORY, Circuit Justice. It appears by the evidence, that the Mars is a vessel duly enrolled and licensed for the coasting trade. That in the month of September, A. D. 1811, she proceeded from New Bedford to Passamaquoddy river, and while lying in the river, a little nearer the American than the British side, she received on board a cargo of plaister of Paris from a brig and schooner, which lay near her. No names were on the sterns of these vessels, and no colors were shown by them. The witnesses, who composed the crew of the Mars, say, that they supposed them to be American, but do not know. The cargo was laden wholly in the night, according to some of the testimony, and according to other testimony, partly by day and partly by night. Besides the plaister, three barrels of sugar and one barrel of coffee were taken on board, and, with an evident intention of concealment, were stowed away, and studiously covered up in the run. Some testimony has been introduced, to show that this was the unauthorized act of the mate, without the knowledge or consent of the master. I do not, however, think that it is quite satisfactory. It comes in a shape liable to great suspicion, and it does not comport with the subsequent conduct of the master. The Mars returned from her voyage to New Bedford, and was there seized by the collector of the port.

It has been argued, that the plaister is not an article of foreign produce liable to the payment of duties, and consequently not within the prohibitions of the act of March 1, 1809. But to bring an article within that act, it is not necessary that it should be liable to pay duties. The language is express, that it shall not be lawful to import into the United States, &c. from any foreign port or place whatsoever, any goods, wares or merchandize whatsoever, of the growth, produce or manufacture of Great Britain, or any of her colonies or dependencies. There is no qualification of the terms of the act to dutiable articles, nor have I any doubt, that plaister is merchandize. It is not used merely as ballast, but is bought and sold in the market, as a commodity for consumption. Can there be a doubt that coals are merchandize? I do not, however, think that the first count, considering the terms in which it is drawn, is supported by the evidence; I lay it therefore entirely out of consideration.

As to the second count, the principal difficulty is to decide, whether the circumstances of the case present a legal presumption of prohibited traffic. For I hold it a salutary doctrine, that if a coasting vessel be engaged in illegal trade, she is to be considered as employed in a trade, other than that for which she is licensed, and of course forfeits the protection of her license. It will be recollected, that plaister is not the known produce of the United States, but is the known produce of the British province of Nova Scotia. The vessel lay very near the dividing line, in waters accessible to, and in common use by vessels of Great Britain and of the United States. At the time of this transaction, it was illegal to import plaister from Nova Scotia into the United States, and there could be no pretence, on the part of our citizens, of ignorance of the prohibition. The vessels, from which the Mars

[1] [Reported by John Gallison, Esq.]

received her cargo, were evidently disguised. Their names were concealed, and their characters unacknowledged. These circumstances, prima facie, present a presumption unfavorable to the claimant. This presumption was acted upon in the district court [case unreported], yet the claimants have laid by. They know with whom they dealt; they can, if they choose, explain the transaction, and show that the plaister had been legally imported. They have not so done, but have silently acquiesced in every presumption against them. I feel myself bound to say, that the transaction therefore admits of no fair and satisfactory explanation.

I affirm the decree of the district court, with costs. Condemned.

[See Case No. 9,106.]

Case No. 15,724.

UNITED STATES v. MARSELIS.

[2 Blatchf. 108.] [1]

Circuit Court, S. D. New York. April, 1849.

POST OFFICE—WHAT IS—INDICTMENT FOR STEALING MAIL.

1. To constitute a post office, under section 22 of the post-office act of March 3, 1825 (4 Stat. 108), the place where the business of keeping, forwarding and distributing mailable matter is conducted need not be a building set apart for that use, or any apartment or room in a building; but, according to the extent of the business done, may be a desk, or a trunk or box carried about a house, or from one building to another.

2. The place of the deposit of the mailable matter would, in this sense, constitute the post office, and any thing taken out of that place of reception or keeping would be taken from or out of the post office, within section 22 of said act, without regard to the distance of removal, or to circumjacent enclosures or rooms.

3. If a person takes a letter containing money, in a post office building, from and out of that part of it appropriated to the deposit of the letter, with intent to convert its contents to his own use, he is guilty of stealing the letter from and out of the post office, within section 22 of said act, even though he only transfers the letter to his pocket, and does not remove it beyond the building containing the post office.

4. But, whether he is guilty of stealing the mail, under the same section, quære.

5. And he is liable to be convicted under section 22 of said act, although he was a clerk employed in the post office at the time of the larceny, and although he might, perhaps, be subject to indictment for the same offence under section 21 of said act.

[Cited in U. S. v. Falkenheiner, 21 Fed. 627; U. S. v. Rapp, 30 Fed. 820.]

The defendant was indicted under section 22 of the post-office act of March 3, 1825 (4 Stat. 108), which provides that any person who shall steal the mail, or shall steal or take from or out of any mail, or from or out of any post office, any letter or packet, shall be punished by imprisonment not less than two years and not exceeding ten. At the trial, a special verdict was found by the jury, that the defendant was a clerk employed in the post office in the city of New York, in distributing and forwarding one line of mails; that his general station was at what was called the "East Table," and his duty to put into the bags for the East, mailable matter, chiefly newspapers, destined for that direction; that his business was not at the city distribution table, on which letters received were placed, when taken out of the bags, to be arranged for distribution; that he was detected going from his own table to the city distribution table, taking from it two envelopes, each containing a letter, enclosing a twenty-five cent piece in silver, and putting the two letters into his pocket; that he was arrested, and the two letters were taken from his pocket; that the envelopes were addressed to the New York post office, and the two letters were each post-marked at interior towns, addressed to persons in the city of New York; and that a post-bill accompanied each letter.

[See Case No. 15,725.]

Lorenzo B. Shepard, U. S. Dist. Atty.

James T. Brady, for defendant.

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. The points raised on the special verdict in this case are, whether, within the meaning of the twenty-second section of the act of 1825, the defendant stole the mail, or the letters from or out of the post office. The terms "mail" and "post office" seem, each of them, to bear, in the acts of congress and in general acceptation, both a generic and a specific sense. Instances are presented in sections 2, 4, 11 and 22 of the act of 1825, of the employment of the term "mail" as embracing the whole body of mailable matter transmitted from office to office, and also the particular packets addressed from and received at different post offices. The instructions of the postmaster general under the act are to the same effect. So, also, the term "post office" is applied by section 1 to the department, which is not at all concerned in receiving and delivering letters. In its ordinary use, the term embraces the business of keeping, forwarding and distributing mailable matter, equally with the place where such business is conducted. And, manifestly, such place, to constitute a post office, need not be a building set apart for that use, or any apartment or room in a building; but, according to the extent of business done, may be a desk, or a trunk or box carried about a house, or from one building to another. The place of the deposit of the mailable matter would, in this sense, constitute the post office, and anything taken out of that place of reception or keeping would be taken from or out of the post office, without regard to the distance of removal, or to circumjacent enclosures or rooms.

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

We do not feel called upon to define the exact signification of the word "mail," or to determine whether the packets taken by the defendant are properly described under that denomination; for, in our opinion, judgment must, on the other point, be rendered against him upon the special verdict. He took the letters in the post office building, from and out of that part of it appropriated to their deposit, with intent to convert their contents to his own use. This was an asportation sufficient to constitute larceny at common law, and consummated the offence of stealing, denounced by the act of congress. Furtively and feloniously removing a letter from and out of the place where it is kept in a post office, is stealing it from and out of the post office, whether the removal be beyond the building containing the post office, or the abduction be no more than the transfer of the letter to the pocket of the person taking it.

We concur in the conclusion of the district court of this district, in a case heretofore pending in that court against this same defendant [U. S. v. Marselis, Case No. 15,725], that he is liable to conviction under the twenty-second section of the act, although he was employed in the post office, and might, perhaps, be subject to indictment under the twenty-first section of the act.

Judgment of conviction must be rendered against the defendant upon the special verdict.

Case No. 15,725.

UNITED STATES v. MARSELIS.

[2 Blatchf. 111, note.] [1]

District Court, S. D. New York. March, 1848.

LARCENY FROM MAIL—POST-OFFICE EMPLOYE.

[Act 1825, § 22, providing for the punishment of "any person" who "shall steal the mail," applies to a post-office clerk who steals a letter, or package containing a letter, from the post office, or takes away and embezzles such letter or package.]

[Indictment of Nelson C. Marselis, a post-office clerk, for taking from the post office a packet inclosing a letter.]

BETTS, District Judge. The United States attorney claims to sustain the indictment in this case solely under the twenty-second section of the act of 1825. It is, therefore, unnecessary to examine the provisions of the twenty-first section, to determine whether they comprehend the state of facts charged against the defendant. The cardinal objection urged against the indictment is, that congress, in sections 21 and 22 of the act, intended to range offenders against the post-office law into two classes,—one class consisting of persons employed in the post office, or entrusted with the custody or transportation of the mail; and the other of strangers, standing in no relation of trust or confidence to the mail or the post office. If this position is sound, the defendant cannot be prosecuted under the twenty-second section; and, even if his offence falls within the twenty-first section, yet, the indictment not being framed on that section, he must be acquitted. The words of the twenty-second section embrace all persons. The terms are the most ample that could be employed: "If any person shall steal the mail." Now, although, in the construction of statutes, language will be understood in relation to the subject-matter, and general terms may be restricted to a very limited signification, yet the rule is, to take words in their fair and natural import, unless there be something indicated by the legislature showing an intention to employ them in a qualified sense. That intention is inferred in this case, because the twenty-first section is supposed to have designated every offence for which those employed in the post office are subject to criminal punishment, and to have imposed on them special and aggravated penalties therefor. But, whatever force the argument might have under other circumstances, it cannot be received as of controlling weight here, because the particular offence of stealing a mail or a packet or letter from the post office, does not appear to be provided for in the twenty-first section. In that respect, therefore, the twenty-second section introduces a new crime, and then the legislature, in subjecting to punishment every person who commits it, must be understood to have used the language in its broadest sense. The offence is not one of a special nature, to be committed only by a particular class of persons, but it can be committed equally by every one who gains access to the mail or the letters, whether he is employed in the post office or is an intruder there. As the enacting clause in the twenty-second section plainly includes in terms the case of a clerk in a post office who steals a letter or packet, there must be clear ground shown for excepting him from its operation. This rule of interpretation is familiarly applied in the exposition of statutes, and has the solemn sanction of the supreme court of the United States. U. S. v. Fisher, 2 Cranch [6 U. S.] 358. The case of U. S. v. Pearce [Case No. 16,020], was an indictment under both of these sections against a person who held the appointment of assistant postmaster. The court, in delivering its opinion, examined with considerable minuteness the provisions of the law, and intimated no doubt that the defendant was subject to indictment under both sections, if proper facts were proved against him; but it held him not chargeable for stealing letters under the twenty-second section, because he had taken them away without a felonious intent, claiming a legal right to take them from the mail or post office on his appointment as deputy or assistant, al-

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though that authority had been revoked by the postmaster.

My opinion is, that the defendant is subject to indictment for an offence under the twenty-second section of the act, and that the offence is consummated by stealing a letter, or packet containing a letter, from the post office, or by taking away and embezzling such letter or packet. It is for the jury to determine whether the act is proved to have been done, and also the intent with which it was done, whether such intent be found on the proof of extraneous facts, or be implied and inferred from the act itself.

[See Case No. 15,724.]

UNITED STATES (MARSH v.). See Case No. 9,120.

Case No. 15,726.

UNITED STATES v. MARSHALL.

[1 Cin. Law Bul. 36.]

Circuit Court, S. D. Ohio. 1876.

INTERNAL REVENUE — RECTIFIER — NOTICE AND BOND—PRESUMPTIONS—REASONABLE DOUBT.

1. A rectifier may recover from fruits and berries spirits which may exist in them by reason of their former use by rectifiers or compounders; and where charcoal has been used in the rectification or purification of spirits, he may recover from it the spirits remaining in it. He may also recover from such saloon washings as do not contain fermented substances.

2. If a person, who has given notice as a rectifier, by any process manufactures spirits from fruits or berries, from saloon washings containing fermented substances, or from sour beer, he becomes a distiller, and must give notice and bond as such, and, failing to do so, is liable to the penalties prescribed in the 3259th and 3260th sections of the United States Revised Statutes.

3. Such violation of the law, however, is not to be presumed, but must be proven; it may be established by circumstantial as well as by direct and positive proof.

4. Rules of evidence in criminal cases. Presumption of evidence. Character.

5. Reasonable doubt defined.

The indictment in this case contains three counts. The first charges the defendant [W. T. Marshall] with carrying on the business of a distiller without giving bond as required by section 3260 of the United States Revised Statutes. The second charges him with carrying on the business of a distiller without registering his still, as required by section 3258, Rev. St. U. S.

W. M. Bateman, U. S. Dist. Atty., and C. Richards and O. Dyer, Asst. U. S. Dist. Attys.

I. B. Wright, I. M. Simon, and O. J. Dodds, for defendant.

SWING, District Judge (charging jury). The charge against the defendant is that he is carrying on the business of a distiller without having given the notice or the bond required of distillers, and without registering his still. The evidence in the case shows that defendant had registered his still, and the government has therefore abandoned the third count in the indictment. Your attention will therefore be directed to the evidence under the first and second counts only. The defendant admits that he did not give notice or bond, as a distiller, but denies that he is carrying on the business of a distiller, and claims that he is carrying on the business of a rectifier. The government admits that the defendant gave notice of his intention to carry on the business of a rectifier, and does not contend that he has failed in any respect to comply with all the requirements of law in relation to rectifiers; but it is asserted that instead of carrying on the business of a rectifier, he was engaged in carrying on the business of a distiller. If he was carrying on the business of a rectifier there could be no verdict against him; but if under his notice as a rectifier he was in fact carrying on the business of a distiller, he would be guilty, as it is not claimed that he gave notice or bond as a distiller. So that the question for your determination is: Was he, in fact, carrying on the business of a distiller?

The law defines a distiller to be: "Every person who produces distilled spirits, or who brews and makes mash, wort, or wash, fit for distillation or for the production of spirits, or who, by any process of evaporation, separates alcoholic spirit from any fermented substance, or who, making or keeping mash, wort, or wash, has also in his possession or use a still, shall be regarded as a distiller." And the law defines a rectifier to be: "Every person who rectifies, purifies, or refines distilled spirits by any process other than by original and continuous distillation from mash, wort, or wash, through continuous closed vessels, until the manufacture thereof is complete, and every wholesale or retail liquor dealer who has in his possession any still or leech tub, or who keeps any other apparatus for the purpose of refining in any manner distilled spirits, and every person who, without rectifying, purifying, or refining distilled spirits, shall by mixing such spirits, wine or other liquor with any materials, manufacture any spurious imitation, or compound liquors for sale under the name of whiskey, brandy, gin, rum, wine, spirits, cordials, or wine bitters, or any other name, shall be regarded as a rectifier, and as engaged in the business of rectifying." The rectifier may rectify, purify or refine distilled spirits or wines by any process other than original and continuous process, etc. He may mix or compound any kind of spirits; he may transform it from one spirit to another, by the addition of any substance which may change its character or impart to it a different flavor or taste; he may manufacture out of the same spirits a dozen different kinds of liquors by the use of as many different substances. All this he may do, and it is for you to determine whether this was

the business he was engaged in, or whether he was in fact carrying on the business of a distiller. That is the simple question for your determination. As bearing upon this, however, there are other questions for your examination.

The notice given by the defendant is as follows:

"United States Internal Revenue. Notice by Rectifiers. Cincinnati, O., May 1, 1875. Notice is hereby given that W. T. Marshall, of the city of Cincinnati, county of Hamilton, and state of Ohio, intend under the name of W. T. Marshall, to carry on or engage in the business of rectifying, on and after May 1, 1875, in the building owned by Moses Swasey, situate No. 29 Sycamore street, Cincinnati, Ohio, which said building is situated more than six hundred feet in a direct line from any authorized distillery. The following process of rectification will be used: Re-distilling. The following utensils will be used in said business, viz.: Number and kind of still, and cubic contents of each: Two (2). One (1) copper still, capacity 200 gallons. One (1) wooden still, capacity 640 gallons. Number of leech and mixing tubs, and capacity of each: Three (3). Two (2) receiving tubs, capacity 800 gallons each. One (1) receiving tub, capacity 160 gallons. Kind of liquors proposed to be used in rectification: Highwines, cologne spirits, and saloon washings, other than those containing fermented liquors, and rectified charcoal, upon which the spirit tax has been paid. Kind of liquors proposed to be produced by such rectification: Gin, neutral spirits, brandy and whiskey. Whether engaged in the business of distilling, or wholesale and retail liquor dealing: Re-distilling for other parties; wholesale liquor dealer. Estimated quantity of spirits which can be rectified every twenty-four hours in the establishment: 26 barrels. Name of every person interested, or to be interested in the business, and nature of interest, with residence: W. T. Marshall, residence, Butler county, Ohio. (Signed) W. T. Marshall. To Lewis Weitzel, Collector, 1st District, O.

"Received this 1st day of May, A. D. 1875. Lewis Weitzel, Collector."

This notice shows that he estimated the quantity of spirits to be produced by him every twenty-four hours at 26 barrels. It also gives the name of the person interested and his residence. It also shows that he proposed to use two stills, and three tubs; that he proposed to use highwines, cologne spirits, and saloon washings which did not contain fermented liquors, also charcoal. Under this notice he had a right to use both still and the three tubs, the highwines, the cologne spirits, and saloon washings, if they did not contain fermented liquors, the charcoal, and all the machinery and implements described, and it is a matter to be taken into consideration that he proposed to produce neutral spirits, and to re-distill for other parties, and it is claimed a large proportion was in fact re-distilled for others. He had no right to use any saloon washings which contained fermented liquors. He had no right to use any fermented liquors, whether contained in saloon washings or not. He had, however, the right to use highwines and cologne spirits, and he had a right to recover from any substance, no matter what, any spirits which existed in that substance, upon which tax had been paid. He had a right to take the charcoal used by rectifiers and recover, by any process, all the spirits which were in it. He had a right to take elderberries, peaches, prunes,—every article of that kind that contained spirits by reason of their former use by rectifiers, not out of which spirits might have been manufactured, but that contained those spirits in a spirit form; and he had a right to recover or separate it from the substance it had gone into and get it back free from any substance with which it was connected. But he had no right to create spirits—that is, he had no right to take prunes, and peaches, and elderberries, or beer, or any other fermented substances, and make spirits out of them. He had no right to put it through such a process as would convert the elements which existed in these several articles, and out of which by a process of distillation he could create spirits. He had a right to take all the saloon washings which he could find in the city of Cincinnati, if they contained no fermented liquors or substances, recover from these all the spirits that existed in them, separating it from the water or other substance with which it might be held in solution.

Now I think you understand from this presentation what he had a right to do, and what he had no right to do. The doing of one was entirely legitimate and within his license, and is a business authorized and protected by the law; the other is a business he had no right to engage in, and engaging in which he violated the law. If he was engaged in rectifying he had a perfect right to do so; but if, under that pretense, he was making spirits, he was violating the law; and whether he was doing so is for you to determine. I will not at length review the evidence in this case. In fact, I hardly conceive it the better plan for the judge to do so. It is, however, the duty of the judge to direct the attention of the jury to the claim of the parties as to what the evidence establishes, and in a general way direct their attention to the evidence bearing upon these respective claims. In this case, it is admitted that the defendant gave no notice or bond as a distiller; it is, therefore, only necessary for the government to establish the fact that the defendant was carrying on the business of a distiller, and this it must do beyond a reasonable doubt. It is competent for them to do this not only by direct and positive proof, but by circum-

stantial evidence, to bring before you all the facts and circumstances which tend to establish this proposition, and from them, as well as by direct and positive proof, establish its existence. Fraud is not to be presumed. As a man engaged in the commission of fraud is apt to attempt to cover it up and hide it, the law permits its existence to be established by circumstantial evidence, and where there are a number of facts and circumstances all tending and pointing to the commission of a fraud, the jury are authorized to infer its existence, but where it is to be established in this manner, the facts and circumstances must produce the same convincing effect upon the minds of the jury, as that required by direct and positive proof.

Your attention has been directed to the character and locality of the house, the condition of the cellar, etc. It is claimed on the one hand that the odors, which were inhaled by some of the officers and other parties about the establishment, indicated the existence of certain substances there; but on the other hand it is claimed that they have accounted for the existence of those odors by other facts shown by the evidence. From the evidence you must determine which is correct. Again, on the one hand it is contended that they have taken substances from certain vessels in the establishment, and submitted them to chemical tests, had them presented to gentlemen who were chemists, and they have determined their character. In their examination both these gentlemen testified that there are no chemical tests by which you can certainly determine the existence of certain substances, which, it is claimed by the government, do or did exist in the material used by the defendant. Both Professors Wayne and Fennell, learned chemists, say you can determine only by the smell and taste, whether the oil of hops existed in the substance used by the defendant; that there is no analysis to which it could be subjected that would determine that fact; and these two gentlemen entirely disagree in their testimony, one saying that the substance has both the smell and taste of hops, and the other that it has neither. Is it any wonder that jurors are sometimes troubled in arriving at conclusions from the evidence? I think this kind of evidence may be a little uncertain. For illustration, place two persons in a room where the gas may be escaping; one may detect it in a moment, the other may remain in the room for some length of time without being aware of the fact. Place them in a drug store, and one will detect the odor of certain perfumes or chemicals, and the other will not detect them, but will discover the presence of others.

I only present these illustrations for the purpose of showing you the necessity of a careful examination of the testimony. It is the duty of the jury to do so in all cases. The interests of both parties require that testimony of this character should be subjected to the severest scrutiny. By all the evidence in the cases, there were purchases by the defendant of articles which he had no right to use, to-wit, sour beer. It is not denied that purchases and shipments were made in his name, and it is claimed by the government that these in fact were used by him. On the other hand, it is claimed that they were taken to another establishment, and used there. In reply to this, the government claims, that, although taken to another establishment, it was one really in connection with that of the defendant, and that it was a mere device to cover up the illegality of the action, and it is for you to weigh the testimony, both for and against the government, and determine from all what was the true character of the transaction, whether it was of the character claimed by the government, or of that claimed by the defendant.

I don't know that there is any other particular point in the testimony to which I care to direct your attention. You will have in your mind the testimony given on all the points in the case, as well as upon the one I have spoken of, and I may say here that if a party should have it in his power to explain fully and make everything plain, and refuses to do so, that it is a circumstance to be taken into consideration by you; not that you are to presume that he is guilty from his failure to do so, because that is not the law. It is simply a fact to be taken into consideration with the rest of the testimony in determining his guilt or innocence. And so, if there were facts in the power of the government to produce, which would make the whole thing plain, and they failed to produce it, that is to be taken into consideration also.

I believe those are all the points I care to allude to, except to give you some rules to govern you in the examination of the evidence in the case. The law presumes the defendant to be innocent of the offence of which he stands charged until proven guilty. He enters upon the investigation of the case with that presumption of the law in his favor, and that goes with him through every step of the case, and continues with him until the testimony shall convince the minds of the jurors that he is guilty. When they are convinced of that, then the presumption of innocence must yield to the conviction of guilt. As to the degree of testimony necessary in a criminal case, I have laid down the rule several times during the term, and can but repeat what I have said, that the rules of evidence in civil and criminal cases are widely different. In civil cases a preponderance of evidence is sufficient to decide. You weigh it and ascertain on which side the balance is; if for the plaintiff, you render your verdict accordingly; if for the

defendant, you render a verdict for him; but in criminal cases it is not so. It is a wise rule of law, that before a citizen can be deprived of his life or liberty the jury must be satisfied of his guilt beyond a reasonable doubt—not all doubt—but a reasonable doubt; and no preponderance of evidence, no matter how great, so long as it fail to remove every reasonable doubt of guilt, will be sufficient to justify you in returning a verdict of guilty. As to what a reasonable doubt is, the higher courts have frequently reversed the judgment of lower courts because they have not defined it accurately; in fact they intimate that it is a very questionable proceeding to attempt to define it. It must be left as made by law, reasonable. But we may say it is not any doubt or all doubts, not a speculative or imaginary doubt, but a reasonable doubt, and it must be a doubt which grows out of all the facts in the case—it is one which you cannot get outside of the facts in the case. But if after looking at all the evidence in the case and examining it carefully, as candid and honest men, there still remains in your mind an honest uncertainty of the defendant's guilt, you must acquit. There is another element in criminal cases which does not arise in all civil cases, that is, character. It is always proper for the defendant in a criminal case to put his character in issue. If he has shown a good character, one for integrity and honesty, it must be taken into consideration by the jury as an item of interest. If from all the evidence, including the defendant's character, and the presumption of innocence, there still remains in your minds a reasonable doubt of his guilt, you must acquit; but if, taking into consideration the character of the man, the presumption of innocence, the evidence, and all the circumstances in the case, there is not a reasonable doubt in your minds of his guilt, then you are bound in duty to convict.

You will take the case, gentlemen, and if you find the defendant not guilty, your verdict will be a general verdict of "Not guilty." If guilty, it will be under the first or second count, or both, as you may find from the evidence.

Case No. 15,726a.

UNITED STATES ex rel. HERBERT v. MARSHAL OF THE DISTRICT OF COLUMBIA.

[2 Hayw. & H. 205.] [1]

Criminal Court, District of Columbia. May 12, 1856.

BAIL—WHEN ALLOWED—HABEAS CORPUS.

On testimony given in court on the return of a writ of habeas corpus, if it is clear to the mind of the judge that a conviction for murder should not take place, he will order the prisoner to give bail for his appearance.

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

United States on the relation of Philemon T. Herbert against the marshal of the District of Columbia.

CRAWFORD, Judge. The testimony adduced at the hearing on the writ of habeas corpus, directed to the marshal of the District of Columbia to bring the body of Philemon T. Herbert before me on Saturday last, has been the subject, in connection with the law arising thereon, of as full consideration as the intervening time would allow. I was strongly impressed by the evidence as it was detailed, and the reflection of which I have sought aid, instead of changing that impression, has strengthened the conviction entertained when the evidence was closed. I abstain from giving the reasons for the conviction arrived at. Why, must be obvious. In any view which a jury may take of the evidence under proper instructions from the court as to the law, it is quite clear to my mind that a conviction for murder should not take place. If the evidence had left room for debate whether the prisoner was guilty of murder or manslaughter, or was entitled to an acquittal, although the ground for such a debate might have been slight, I should have remanded him to prison. In relation to the two last branches of inquiry just stated, viz.: whether a charge of manslaughter can be maintained or the defendant be discharged, there is contradictory testimony; and it is not for the court but the jury to say what part of the testimony they will credit, and to what the weight of evidence which may be adduced on a trial shall point. When a matter of fact is involved, the court should bail or remand; to discharge would be for the court to try and decide the truth of the fact for which a person may be convicted, instead of the jury. Petersd. Bailm. 522, 523; 10 Law Lib. 294, &c. The order of the court is that the prisoner enter into recognizance with one or more good surety or sureties in the sum of $10,000, conditioned for his appearance at the next term of the criminal court of the District of Columbia, to be holden on the third Monday of June next, to answer to the charge of manslaughter of Thomas Keating, and not to depart the jurisdiction of the court without the leave thereof; and on his failure to do so, that he be remanded to the jail of Washington county, in the District of Columbia.

Case No. 15,726b.

UNITED STATES ex rel. KIEHLER v. MARSHAL OF THE DISTRICT OF COLUMBIA.

[2 Hayw. & H. 392.] [1]

Circuit Court, District of Columbia. Oct., 1861.

ILLEGAL SALE OF LIQUORS—HABEAS CORPUS.

Held: Upon a writ of habeas corpus hearing, that the act of congress approved August 5,

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

1861 [12 Stat. 291], as to the offence of selling intoxicating liquors, conferred the power only upon justices of the peace to examine into the charge made and discharge the accused or held him to bail

At law. Mrs. [Honora] Kiehler was arrested for violation of the act of congress of August 5, 1861, forbidding the sale of intoxicating liquors to soldiers.

Mr. Morgan contended that the act of congress gave the judge of the criminal court exclusive jurisdiction of the trial; that the magistrate's jurisdiction alone extended to the right to hold the accused parties to bail to appear at the criminal court, or to commit them to jail to appear before the court. That the act in declaring the offence to be a misdemeanor, thereby made it a criminal offence, for which the party must be indicted and tried as in any other criminal case. The magistrates have no criminal jurisdiction, and the court presided over by Judge Crawford, is the only court which in these cases has jurisdiction. The offence thus being declared by act of congress a crime, must be tried by jury according to the 6th article of the amendment to the constitution of the United States. That under this construction of the act all fines imposed on parties after conviction, in the criminal court, go into the treasury of the United States.

Mr. Morgan, for petitioner.

Mr. Ould, for marshal.

Before DUNLOP, Chief Judge, and MORSELL and MERRICK, Circuit Judges.

MERRICK, Circuit Judge, sustained the position taken by the counsel, Mr. Morgan, and decided that the magistrate in these cases had precisely the same power, and no more, than they had in any other criminal charge, to wit, the power to examine into the charge, and to release the party charged, or, in his discretion, to hold the party to bail to appear at the criminal court, or, in default of bail, to commit the party to jail for trial at the criminal court. The judge ordered the marshal to take the petitioner before the magistrate by whom she was committed, to be then discharged by him, or to give bail for her appearance at the criminal court, should the magistrate, on a further examination, think the case required it.

Case No. 15,727.

UNITED STATES v. MARSHAL OF THE DISTRICT OF NORTH CAROLINA.

[2 Brock. 488.] [1]

Circuit Court, D. North Carolina. Fall Term, 1833.

INSOLVENCY—GOVERNMENT PRIORITY—TRUST DEED—SUBSEQUENTLY ACQUIRED PROPERTY.

1. A deed executed by a debtor of the United States, conveying all the property in the possession of the debtor to trustees, for the payment of his debts, not including the debt to the United States, is an act of insolvency, both within the spirit and letter of the act of congress, giving priority, in such cases, to debts due to the United States over all others, and the priority attaches at the instant that the deed is executed.

2. If, subsequent to the execution of the deed, the debtor recovers property in right of his wife, in a regular course of legal proceeding, it seems, that the subsequent recovery cannot defeat the priority of the United States, which was created by the deed, however large the amount of the property recovered, compared with that conveyed by the deed.

3. But if the relative value of the after-acquired property be inconsiderable, it is clear, that it cannot affect the pre-existing priority of the United States. Where "a trivial portion of the estate of the debtor," in his possession when the deed is made, is not conveyed by the deed, this is still an act of insolvency within the act, and the reservation of such "trivial portion," will not prevent the consequent priority of the United States from attaching: a fortiori, where such "trivial portion" is reduced into the possession of the debtor, after the execution of the deed. And the priority of the United States extends to this after-acquired property.

4. Whether the property of a debtor of the United States, which is omitted in a deed, which otherwise would create a legal insolvency, be so inconsiderable as to evidence an intent to evade the act, is a question which must be referred in every case in which it arises, to the sound discretion of the court.

[Appeal from the district court of the United States for the district of Albemarle, North Carolina.]

MARSHALL, Circuit Justice. This is an appeal from a decree of the district court, for the district of Albemarle, on a motion to direct the marshal to pay to the United States the sum of $378.75, levied under an execution, sued out by the United States, against James Iredell Tredwell, and others. [Case unreported.]

The case was as follows: The United States obtained a judgment against Tredwell, in October, 1829, on a bond executed in February, 1828. An execution was issued and delivered to William D. Roscoe, deputy marshal, on the 24th of October, 1829, who, on the same day, levied it on a negro woman and three children. The State Bank of North Carolina obtained a judgment against Tredwell, in September, 1828, and issued executions thereon from term to term, the last of which was delivered to the said William D. Roscoe, who was also sheriff of the county, and who, as sheriff, levied the said execution on the said slaves, on the same day on which he had, as deputy marshal, levied the execution of the United States. On the 4th of November following, the slaves were sold under both executions, and the money brought into court. On the 7th day of June, 1828, the said James Iredell Tredwell, conveyed certain enumerated lands, slaves, and other personal property, in trust, for the payment of debts, specified in the deed, among which the debt due

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

to the United States was not included. The deed does not profess, in terms, to convey, but does in fact convey all the property in possession of the said Tredwell. The negro woman and her children are not comprehended in it, nor were they at the time in Tredwell's possession. They were recovered in October, 1829, by the judgment of the court, in a suit brought by Tredwell and wife, and were delivered on the 23d day of the same month, never having been previously in possession of himself or wife, but having remained until the rendition of the judgment, in the adverse possession of another, who claimed them as his own property. The district court overruled the motion, and directed the marshal to pay the money in his hands, both as marshal and sheriff, to the State Bank of North Carolina. The United States have appealed from this judgment.

The bond from Tredwell to the United States having been executed previous to the deed, by which he conveyed all the property then in his possession to trustees for the payment of other debts, the question arises, whether the omission of these slaves, his right to whom was then litigating in court, withdraws this deed from the operation of the act of congress, passed on the 3d of March, 1797 [1 Stat. 512], entitled, "An act to provide more effectually for the settlement of accounts between the United States and receivers of public money." The fifth section of that act declares, "that where any revenue officer or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent," "the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend as well to cases, in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed." 1 Story's Laws, pp. 464, 465, c. 74. The deed of the 7th of June, 1828, was "a voluntary assignment" of the property conveyed, and would be the very act contemplated by the fifth section of the act of 1797, as the foundation of the priority claimed by the United States, had the deed comprehended the four slaves afterwards recovered by Tredwell, in right of his wife. These slaves not having been reduced to possession, and even the right of the wife not having been established, could scarcely have been considered, at the date of the deed, as a part of his estate. The priority of the United States, if it exists, attached at the instant the deed was executed, and could not be defeated by the subsequent decision of the suit brought for these slaves. If the deed did not create this priority, then the property it conveyed passed immediately to the trustee for the benefit of the creditor, and no subsequent decision of the suit could retroact upon it, and subject it to the debt due to the United States. I am inclined to think, that as the deed conveyed all the property to which Tredwell was at the time entitled, that the unascertained claim of his wife, to the slaves afterwards recovered, cannot be considered as defeating the priority given by law to the United States, in all cases where their debtor shall make a voluntary assignment of his property. If I am mistaken in this, if the four slaves had been at the time, the acknowledged property, in the actual possession of Tredwell, I should feel much difficulty in saying, that withholding them from the deed would defeat the priority of the United States.

In U. S. v. Hooe, 3 Cranch [7 U. S.] 73, it was said, that a debtor of the United States did not, by a bona fide conveyance of part of his property for the security of a creditor, commit an act of insolvency, in the sense of the law. The words of the act could be satisfied only by an assignment of all his property. But the court added: "If a trivial portion of an estate should be left out, for the purpose of evading the act, it would be considered as a fraud upon the law, and the parties would not be enabled to avail themselves of such a contrivance. But where a bona fide conveyance of part is made, not to avoid the law, but to secure a fair creditor, the case is not within the letter or the intention of the act." Page 91. This opinion was delivered in a case, in which the debtor was in possession of a considerable estate, not half of which was conveyed by the deed in controversy. The court did not think this a case of insolvency, contemplated by the law. The conveyance was not equivalent to an act of insolvency, in its technical sense. But in Tredwell's Case, a very large property is conveyed by the deed, and only a woman with three children, worth between three and four hundred dollars, are reserved. This, in the words used by the court, in the case cited from Cranch, is but "a trivial portion of the estate," and had they been then in his possession, might have been supposed "to have been left out for the purpose of evading the act." Some difficulty would undoubtedly be often found in saying, whether property left out of a deed should be considered of such trivial amount as to evidence an intent to evade the act. But these difficulties are unavoidable, and when they occur, a court must exercise a sound discretion in deciding on them. In this case, the conveyance of the 7th of June, 1828, ought, I think, to be considered as an act of insolvency, within the true intent and meaning of the law, on which the priority of the United States attached. I at first doubted, whether this priority reached these slaves, the right of Tredwell to whom was not then fixed. On consideration, I am of opinion, that it does reach them. Had Tredwell

died after the judgment, so that they would have come to his executors as part of his estate, they would have been, by the express words of the act, subject to this priority. I cannot distinguish between the operation of the law on this property, in his own possession, and in that of his executor.

The decree of the district court is to be reversed, and the money in court paid to the United States.

Case No. 15,728.

UNITED STATES v. MARTIN et al.

[4 Cliff. 156.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1870.

CONSPIRACY—OFFENCE—PARTIES—INDICTMENT—COMMON-LAW CRIMES.

1. Conspiracy, as known at common law, not being defined by any act of congress as an offence against the authority of the United States, is not cognizable as such in the federal courts.

2. Two persons, one of whom was cashier of a national bank, and the other not an officer of any bank, were, under section 30 of the act of March 2, 1867 [14 Stat. 484], and section 55 of the act of June 3, 1864 [13 Stat. 116], indicted for conspiring together to abstract certain money from the bank. Demurrer to the indictment, upon the ground that, under the act of June 3, 1864, the two could not be properly indicted for a conspiracy to commit an offence which, under the act of March 2, 1867, could only be committed by one, to wit, the bank officer. *Held*, that under the act of March 2, 1867, it is an offence for an officer of such an association to conspire with another, not an officer, to abstract or embezzle the funds thereof, and that the indictment charging such two persons with a conspiracy to commit such offence was good.

[Cited in U. S. v. Milner, 36 Fed. 891; U. S. v. Stevens, 44 Fed. 141.]

Indictment against the defendants [James D. Martin and Alexander C. Felton] for conspiring together to abstract from the National Hide & Leather Bank, of Boston, funds belonging to the bank. The indictment was drawn on section 30 of the act of congress approved March 2, 1867 (14 Stat. 484), and on section 55 of the act of congress approved June 3, 1864 (13 Stat. 116). Martin was cashier of the bank: Felton was not an officer of any bank. Felton demurred to the indictment upon the ground that two persons could not be guilty of a conspiracy to commit an offence against the authority of the United States, under the act to "amend existing laws relating to internal revenue," unless each can be guilty of a violation of the law which they are charged with having agreed to violate.

A. A. Ranney, for defendants.

It is submitted that two persons cannot be guilty, under Act 1867, c. 169, § 30, of a conspiracy to commit an offence against a law of the United States, unless each can be guilty of a violation of that law which they are charged with having agreed to violate. The United States courts have no common-law criminal jurisdiction; all offences are the creation of statute. Prior to Act 1867, c. 169, § 30, there was no such crime as conspiracy known to the federal courts, as that offence exists at common law. That statute has not now enacted or adopted in any respect the common law; it simply makes a statute offence, all the elements of which are enumerated in the statute, and nothing is borrowed or left to be supplied by inference from the common law. The word "conspire" is not used in the statute in a technical sense; as there used it is strictly synonymous with the word "agree." "If two or more persons" agree "to commit any offence against the laws of the United States," "and one or more of" them "shall do any act to effect the object of the" agreement, they "shall be deemed guilty of a misdemeanor." But the bare agreement not only to do an illegal thing but to do a legal thing in an illegal manner, and wholly irrespective of the doing any act to effect the object of the agreement is a conspiracy at common law. The question then is, not whether the defendants have been guilty of an offence at common law, but whether they have been guilty of the offence made punishable by Act 1867, c. 169 (14 Stat. p. 484).

The charge in the indictment is that Martin, being a cashier of a banking association, and Felton, not being a cashier, agreed to commit an offence against Act 1864, c. 106, § 55, which makes it an offence for the cashier of a banking association to abstract the funds. Now this offence of abstracting the funds could be committed by Martin alone; it could not be committed by Felton alone; neither could it be committed by Felton in conjunction with Martin. This offence is a misdemeanor by the terms of the statute. In a misdemeanor there are no accessories. All aiders and abettors are principals. Suppose Martin and Felton go together and break through the walls of the bank and steal the funds. Then Martin is guilty, because he is the cashier. Whatever may be Felton's guilt, he is not guilty under this law, because he is not within the terms of it. He, unlike Martin, is not a cashier. Now suppose the plan is, instead of taking the funds by force, to withdraw them by fraud. Suppose Felton, at his place of business, draws fraudulent checks upon the bank, which are paid by Martin, and thus assists Martin in withdrawing the funds. If this were a common-law felony, Felton would be an accessory. If this statute made the offence a felony in Martin, Felton, might, perhaps, be an accessory. But the statute makes the offence a misdemeanor, and Felton cannot be an accessory, for in misdemeanors all are principals, and he cannot be a principal because he is not within the statute: the statute says cashiers, and he is not a cashier. Now the statute under which the indictment

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

was found says "if two or more persons agree to commit an offence." Agree to commit is equivalent to agree that they shall commit. That is if two or more persons shall agree that they shall commit an offence. That who shall commit an offence? That they, that is, two or more, shall commit an offence. The statute does not say that if two or more persons agree that one of them shall commit an offence they shall be punished. Such a construction of the statute would be a forced and a strained construction. But courts do not force and strain the language of statutes creating crimes, to make them cover offences not plainly embraced in the words of the statute. In criminal matters, courts, as guardians of the liberty of the subject, adopt the contrary construction. Therefore the defendants' offence does not come within the words of the statute, and they must necessarily be guiltless of the offence alleged in the indictment.

G. S. Hillard, U. S. Dist. Atty., and H. D. Hyde, for the United States.

If the president of the bank had conspired with the cashier to abstract the funds of the bank, there can be no question that the offence would be within the statute. The question is, can there be an offence if an officer of a bank conspires with another person, not an officer of a bank, to abstract the funds of the bank. The terms of the statute are "conspire to commit any offence against the laws of the United States, and one or more of said parties shall do any act to effect the object thereof." It was an offence for Martin to abstract the funds of the bank; it was likewise an offence for Martin and Felton to conspire together for Martin to abstract the funds. A boy under the age of puberty, or a woman, or a man in respect to his own wife, may be guilty as accessory, or as principal in the second degree, to the offence of rape. 1 Bish. Cr. Law, 629; 2 Bish. Cr. Law, § 1090; 1 Hale, P. C. 629; 1 East, P. C. 446; 1 Hawk. P. C. (7th Ed.) 308; 1 Russ. Crimes, 904; Lord Castlehaven, Audley's Case, 3 How. State Tr. 402. For the same reasons, a boy under the age of puberty, a woman, or a man in respect to his own wife, may conspire with a third party, being a man, to commit rape, although it would be impossible for the boy, woman or husband to commit the offence.

The conspiracy statute is not limited to the revenue laws, for, if it had been so intended, it should have said, to defraud the United States, or to commit any offence against the revenue laws of the United States. That it is found in a revenue act is no argument, for congress often incorporates into an act enactments foreign to the subject-matter of the same. The conspiracy is not merged. The conspiracy, a misdemeanor, is not merged in the offence which they conspired to commit, even if executed, it being also a misdemeanor. 1 Bish. Cr. Law, § 536; 2 Bish. Cr. Law, § 149; Reg. v. Maddens, 2 Cox, Cr. Cas. 355; Reg. v. Button, 3 Cox, Cr. Cas. 229, 11 Q. B. 948; State v. Murphy, 6 Ala. 765; State v. Noyes, 25 Vt. 415; People v. Richards, 1 Mich. 216; People v. Mather, 4 Wend. 265; Com. v. McGowan, 2 Pars. Eq. Cas. 341; State v. Mayberry, 48 Me. 218; Com. v. O'Brien, 12 Cush. 84; Com. v. Delany, 1 Grant, Cas. 224; Johnson v. State, 5 Dutch. [29 N. J. Law] 453; Elkin v. People, 28 N. Y. 177; Reg. v. Neale, 1 Car. & K. 591.

Before CLIFFORD, Circuit Justice, and Lowell, District Judge.

CLIFFORD, Circuit Justice. Authority to form associations for carrying on the business of banking, subject to certain conditions and regulations, is conferred by the act of congress entitled "An act to provide a national currency," and the same act provides to the effect that every officer or agent of any such association, who shall embezzle, abstract, or wilfully misapply any of the moneys, funds, or credits of the association, or do any other of the prohibited acts enumerated in the same section, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished as therein provided. 13 Stat. 116. Conspiracy, as known at common law, not being defined in any act of congress as an offence against the authority of the United States, is not cognizable as such in any federal court, but section 30 of the act of March 2, 1867, provides that if two or more persons conspire, either to commit any offence against the laws of the United States, or to defraud the United States in any manner, and one or more of said parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be liable, both to a certain penalty and to imprisonment. 14 Stat. 484.

Martin was the cashier of the Hide & Leather Bank, an association formed pursuant to the act entitled "An act to provide a national currency," and having its place of business in this city, and he is correctly described as such in the introductory allegations of the indictment, and in each of the four counts which the indictment contains. Special reference will only be made to the first two counts, as they all present the same questions, and before doing so it should be remarked that Felton was not an officer or agent of that bank, nor of any other association formed under the first-named act, nor is he described as such in any one of the counts. Instead of that, the conceded fact is that he was neither an officer nor an employee of the association, and the charge in the first count is, that the defendants, Martin being described as the cashier of the bank, did, on a certain day, and at a certain place in this district, unlawfully conspire together, to fraudulently and unlawfully abstract from said bank large sums of money, belonging to said bank, with intent to defraud said bank. Certain acts, alleged to have been

done by the respective defendants, to effect the object of the said conspiracy, are also set forth and described in the same count, as more fully exhibited in the record. Like the first count, the second alleges that the defendants on the same day, and at the same place, did unlawfully conspire together to commit an offence against the laws of the United States, to wit, that the said Martin, as cashier, should fraudulently and unlawfully misapply large sums of the money of said bank, as more fully set forth in the indictment. Appropriate allegations are also inserted in the same count, describing the acts performed by the respective defendants to effect the object of the conspiracy, as contemplated by the provision defining the offence, and prescribing the punishment for its commission. Set at the bar, and called upon to plead to the indictment the defendant Felton demurred to the same, upon the ground that two persons cannot be guilty of a conspiracy to commit an offense against the authority of the United States, under the act "to amend existing laws relating to internal revenue," unless each can be guilty of a violation of the law which they are charged with having agreed to violate. Both defendants could not be convicted of the offence defined in section 55 of the act to provide a national currency, as the defendant before the court was neither an officer nor an agent of the bank, and the proposition submitted is that, not being such, he cannot be guilty of the offence of conspiracy as defined in the act to amend existing laws relating to internal revenue. His counsel concede that if any officer or agent of any such association shall embezzle, abstract, or wilfully misapply any of the moneys, funds, or credits of the association, that such officer or agent may be indicted, tried, and convicted of a misdemeanor as defined in the act to provide a national currency, and that if two or more persons, being officers or agents of such an association, conspire to embezzle, abstract, or wilfully misapply any of the moneys, funds, or credits of the association, and any one of the number so conspiring shall "do any act to effect the object thereof," they may be indicted, tried, and convicted of the offence of conspiracy as defined in the act on which the indictment is founded.

Stated in other words, the position assumed by the defendant before the court is, that inasmuch as he could not commit the offence defined in the act to provide a national currency, because he is not an officer or agent of any such association, he cannot be convicted and punished for the offence set forth in the indictment, although the charge in the second count is, that the defendants did unlawfully conspire together that the other defendant, "as cashier, should fraudulently" and unlawfully misapply large sums of the money of said bank, but the correctness of the proposition submitted must depend upon the construction of the provision on which the indictment is founded, as it would clearly be competent for congress to provide that any person so conspiring with an officer or agent of such an association to embezzle, abstract, or wilfully misapply any of the moneys, funds, or credits of the association, should be deemed guilty of conspiracy, and be subject to the same punishment as the offending officer or agent of the association.

Whatever is well alleged in the indictment is admitted by the demurrer, and in view of that rule of pleading, the only question is whether, by the true construction of the act of congress, it is declared to be an offence, if an officer or agent of such an association conspires with another person not an officer or agent of the bank, to embezzle, abstract, or wilfully misapply any of the moneys, funds, or credits of the association, including of course the other element of the offence which need not be repeated in this connection. Omitting unimportant words, the terms of the act are, "shall conspire to commit any offence against the laws of the United States," and one or more of said parties to said conspiracy shall do any act to effect the object thereof. Beyond all controversy, it is an offence for the cashier to embezzle, abstract, or wilfully misapply any of the moneys, funds, or credits of the bank, and it seems equally clear to the court that if the cashier and the defendant before the court conspired together that the former should do those forbidden and unlawful acts, or any one of them, and that he the cashier, as one of said parties, did any act to effect the object of the conspiracy, that both are equally guilty within the meaning of that provision. Offences created by statute often differ from offences at common law, known by the same name, of which there are many examples in the acts of congress, besides the one under consideration, and in all such cases the pleader must conform to the requirements in the act of congress defining the offence, even though the allegations of the indictment may, in those respects, depart from the rules of the common law. Valid exception cannot be taken to an indictment for a conspiracy as known at common law, where the pleader sets forth a combination of two or more persons to accomplish, by some concerted action, some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by some criminal or unlawful means, even if the indictment does not allege that any act was done by any one of the parties in pursuance of the unlawful agreement, as the offence is complete when the unlawful combination is formed, though no act was done towards carrying the main design into effect. Com. v. Hunt, 4 Metc. [Mass.] 111; Rex v. Seward, 1 Adol. & El. 706; Reg. v. Vincent, 9 Car. & P. 91; Rosc. Cr. Ev. 406; 3 Greenl. Ev. 93. Such an indictment would obviously be bad, if drawn upon section 30 of the act to amend existing laws relating to internal revenue, as it would omit one of the essential ingredients of the offence as defined in that provi-

sion. Indictable offences, whether created by statute or recognized as arising at common law, usually contain more than one element or ingredient, and the rule is universal, that unless every material ingredient of the charge is set forth in the indictment, the defect may be reached by demurrer, or the judgment may be arrested. Where the indictment is for an offence defined by statute, it is, in general, sufficient if the pleader follows the words of the statute, unless the statute employs some technical term or phrase or contains some word or words of compound signification. Evidently the offence set forth in the indictment under consideration contains three essential ingredients as defined in the act of congress:· (1) That the persons named in the indictment did conspire together and enter into an unlawful agreement and combination, which is the legal signification of the word conspire as there employed. (2) That they so conspired together to commit an offence against the laws of the United States. (3) That one or more of said parties to said conspiracy did some act to effect the object of said unlawful combination and agreement.

Objection is made, in the first place, that the defendant before the court cannot be regarded as falling within that allegation, as he cannot be held to have conspired with another to commit an offence which he himself could not commit, but it should be borne in mind that the cashier of the bank is named in the indictment, as well as the defendant making the objection, and that the charge in the second count of the indictment is that they conspired together that the cashier of the bank should embezzle, abstract, and wilfully misapply the moneys, funds, and credits of the association. Examined in that point of view, as the case must be, it is quite evident that the circumstance that the defendant before the court is neither an officer nor an agent of the association, is no answer to the charge, as to adopt that theory would be to admit that it is not unlawful for the cashier of the bank and the objecting defendant, to conspire together that the former shall embezzle, abstract, and wilfully misapply the moneys, funds, and credits of the institution, which cannot be admitted, as the alleged conspiracy is to do an act, which, if committed by him or even by the parties jointly, would render the cashier liable to an indictment and imprisonment for a term not less than five nor more than ten years. Viewed in that light, it is quite clear that the first ingredient of the offence is well pleaded and that the defendant as a conspirator with the cashier of the bank falls within its terms. Suppose that is so, still the defendant contends that he does not fall within the second ingredient as pleaded, as he insists that there cannot be a conspiracy unless two or more combine together by concerted means, to accomplish the unlawful purpose, or to accomplish a purpose not in itself unlawful by criminal or unlawful means, and the argument is that, inasmuch as he could not commit the offence of embezzlement as defined in the act to provide a national currency, the two defendants cannot conspire together, in the legal sense, to commit that offence; but the allegation in the second count, as already explained, is that they conspired together that the cashier of the bank should embezzle, abstract, and wilfully misapply the moneys, funds, and credits of the bank, and it is clear to a demonstration that the cashier, as such officer, could commit the offence, and that if he did commit it, he could be indicted, tried, and convicted of a misdemeanor, and be punished as therein provided. Tested by these considerations, it is the opinion of the court that the objections to the allegations setting forth the second ingredient of the offence are not well founded.

Extended remarks in respect to the allegation setting forth the third ingredient are unnecessary, as some one or more of the assignments in each count allege that the act or acts to effect the object of the conspiracy were done by the cashier of the bank as one of the parties to the unlawful agreement and combination, and in pursuance of the said conspiracy. Reduced to propositions, the several objections taken to the indictment amount to the same thing, as they are all founded on the theory that two persons cannot in any legal sense conspire to commit an offence unless, if they effected the object of the conspiracy, each could be indicted, tried, and convicted of the offence, which is by no means correct as a universal rule. Examples to the contrary are put by the district attorney, and the authorities cited by him support his views. 1 Bish. Cr. Law (3d Ed.) § 629; 2 Bish. Cr. Law, § 1090; 1 Hale, P. C. 629; 1 East, P. C. 446; 1 Hawk. P. C. (7th Ed.) 308; 1 Russ. Crimes (Ed. 1853) 676; Audley's Case, 3 How. State Tr. 402. Other examples may be put of an equally apposite character. Two persons cannot be jointly indicted for perjury, as the offence is in its nature several, though the two persons may make the same false and corrupt statement in the same case and on the same day, so that it is incorrect to say that two persons cannot commit the same act of perjury. Provision is made by section 18 of the principal crimes act, for the trial, conviction, and punishment of persons committing wilful and corrupt perjury in any suit, controversy, matter, or cause depending in any of the courts of the United States. 1 Stat. 116. Clearly no two persons can commit the same act of perjury under that provision, as the act of the respective parties would be several and not joint, and yet it would not be difficult to suppose a case where they might be jointly indicted as having conspired together that one should swear falsely in a cause pending in a federal court, in which both were interested, if it also appeared that the party designated to commit the offence had entered the witness stand and taken the necessary oath in pursuance of

the unlawful agreement and combination, and was only prevented from testifying, as he had agreed with his confederate to do, by sudden sickness. His confederate could not commit the crime which he with his confederate had conspired to commit, because if his confederate in turn entered the witness stand and made the same false statement as that contemplated by the conspiracy, it would be a different crime, and one for which the party committing it would alone be responsible.

Stress is also laid, in the arguments for the defendant, upon the introductory words of the section, which are "that if two or more persons conspire to commit any offence," and the argument is that the meaning of the phrase is the same as it would be if it read "conspire or" agree that they shall commit the offence, but the court is not able to adopt that construction of the section, as it would allow every person not an officer or agent of such an association to conspire with any such officer or agent to embezzle, abstract, or wilfully misapply the entire moneys, funds, and credits of the association with perfect impunity.

Any argument to show that the offence of conspiring in this case is not merged in the completion of the object of the conspiracy is unnecessary, as the offence which the defendants conspired to commit is itself only a misdemeanor. Reg. v. Button, 3 Cox, Cr. Cas. 237, 11 Q. B. 948; State v. Noyes, 25 Vt. 415; People v. Mather, 4 Wend. 265; State v. Mayberry, 48 Me. 218; Com. v. O'Brien, 12 Cush. 84; Elkin v. People, 28 N. Y. 177; Reg. v. Neale, 1 Car. & K. 591.

Much consideration has been given to the very able argument for the defendant, but the court is of the opinion that the demurrer must be overruled.

[See Case No. 4,550.]

Case No. 15,729.

UNITED STATES v. MARTIN.

[1 Hask. 166.] [1]

District Court, D. Maine. June, 1868.

CUSTOMS DUTIES—SMUGGLING—AIDER—NEW TRIAL.

1. One aids in smuggling, who goes abroad with funds furnished by another to buy goods to be smuggled home, on buying the goods for the purpose and causing the same to be delivered to the carrier, who smuggles them into his country, even though such service be gratuitous.

2. A new trial will not be granted where substantial justice has been done, although some errors occurred at the trial.

Indictment, charging that the defendant [Alexander Martin] in violation of law did fraudulently and knowingly import and bring and assist in importing and bringing from a foreign port, St. Andrews, N. B., into Goulds-boro, Maine, 100 gallons of spirits without paying the duties thereon. The verdict was "Guilty," and the defendant moved for a new trial for misdirection and because the verdict was not supported by the evidence.

George F. Talbot, U. S. Dist. Atty.

Albert W. Bradbury and Bion Bradbury, for defendant.

FOX, District Judge. On the trial, the government offered evidence tending to prove that one Hardison, who owned a small boat, was hired at Gouldsboro by James McFarland to go in his boat to St. Andrews and smuggle into this country a quantity of liquors at a compensation of nine dollars per hundred dollars of value so smuggled; that Hardison went to St. Andrews, and there met the defendant, McFarland having agreed that he or the defendant would be at St. Andrews; that the defendant produced an order from McFarland for the liquors and obtained them from one Street, and afterwards returned to Gouldsboro with the bills, the liquors being smuggled into Gouldsboro.

The jury were instructed, "that if the defendant, as agent for McFarland and in his behalf, went from Gouldsboro to St. Andrews, carrying with him funds or credit for the purchase of the liquors of Street for McFarland, together with an order for the liquors from McFarland, and at St. Andrews met Hardison, who was without means or credit for the purchase, and depended therefor wholly on defendant, and the defendant there purchased the liquors and returned to Gouldsboro with the bills, knowing the liquors were to be smuggled, and they were so smuggled, they would be authorized to find the defendant guilty of assisting in bringing the liquors into this district in violation of law, and that it was not requisite that the defendant should receive any compensation or profit for so doing, or be in any way pecuniarily interested in the liquors; that he would be equally liable if these acts were done gratuitously and as mere neighborly kindness."

It is claimed that this instruction was erroneous; that such acts of the defendant did not constitute the offence of assisting McFarland in smuggling; that all the defendant did was in furtherance of a perfectly legitimate transaction in a sale of the liquors at St. Andrews by Street to McFarland, which there was valid and legal, the consideration for which the courts of the United States would aid Street to recover of McFarland, if the same was unpaid. Reliance is placed on Holman v. Johnson, 1 Cowp. 341, and other cases in which this authority is approved. Tracy v. Talmage, 14 N. Y. 162; 2 Kent, Comm. 467, and note. By that decision a foreign merchant was permitted to recover the price of goods sold in the foreign country, which the vendor knew were intended to be smuggled into England by the vendee.

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

In that case the plaintiff had not been guilty of any offence; he had done nothing in violation of the laws of England; he had made a complete and perfect sale of goods in good faith according to the lex loci; the title had passed, and the plaintiff had nothing further to do with them, had no further concern in the transaction, or in their disposition by the vendee. The contract being valid and obligatory where made, the court of king's bench enforced it, and compelled the vendee to perform his part by paying for the goods as he had agreed to do. The acts of the vendor were all consummated in the foreign country, and did not in any way or manner transcend or differ from a common and ordinary sale of goods, perfect and complete in itself, and having no bearing on the future conduct of the purchaser. The principle of that case has not always received the full sanction and approval of learned judges and authors who have examined it. Story, Confl. Law, §§ 249–255; Lightfoot v. Tenant, 1 Bos. & P. 551; Langton v. Hughes, 1 Maule & S. 593. It has however been acknowledged and fully recognized by Curtis, J., in Sortwell v. Hughes [Case No. 13,177], and is binding on this court; but without further comment, or doubting its correctness, it is sufficient to remark, that Holman v. Johnson, and all the other cases which adopt it, have recognized this plain and broad line of distinction, that if the vendor does anything himself to aid the vendee to violate the revenue laws, and this enters into the contract, it vitiates and avoids the bargain, and the courts of the country whose laws are so violated, will not aid in enforcing it. Biggs v. Lawrence, 3 Durn. & E. [Term R.] 454; Clugas v. Penaluna, 4 Durn. & E. [Term R.] 466; Waymell v. Reed, 5 Durn. & E. [Term R.] 599.

The present case, in my view, is wholly different from Holman v. Johnson, and the defendant does not, in any respect, stand on an equality with the vendor in that case; on the contrary, this defendant was an important, efficient, active participator in this transaction, aiding most effectually in accomplishing this smuggling operation; he is one of our own citizens, bound to know and obey our laws; he entered into an agreement with McFarland to go as his agent to St. Andrews, there to meet the carrier who was employed to smuggle the goods into this country; he takes with him the order for the liquors and the money or credit with which to procure them, and brings back the vouchers by which the cost of the goods can be ascertained and the profits determined; he, all the time, being fully aware that the goods were to be smuggled into this country.

If a compensation had been agreed upon for these services, and McFarland had afterwards declined to pay for them, could the defendant have maintained a suit in any court of justice in this country to recover for services rendered under such a contract? Would it not have been a complete answer, that the proceeding was in violation of the laws of the United States, and that the purpose and object were in fraud of our revenue laws? All the acts of the defendant were in aid and furtherance of the illegal purpose of McFarland, under an arrangement entered into in this state, were begun here, partially executed at St. Andrews, finally completed and consummated by the defendant on his return to Gouldsboro, and by the landing of the goods in accordance with their illegal designs, the defendant thus undertakes to act as agent for McFarland, and to assist him in accomplishing his purpose to violate the laws of this country, and commit a fraud on the revenue. This agent travels scores of miles into a foreign jurisdiction, carrying with him in discharge of his agency the orders of his principal as to the kinds of goods to be purchased for smuggling and the funds with which they were to be obtained; he is sent there to meet the carrier, who was instructed that the principal or the defendant as his agent would be there; the carrier does meet defendant according to the plan, and through his means and by his aid the goods are procured, put on board the boat, and eventually smuggled into this district, as the defendant well knew was the purpose and object of all concerned when the articles were thus obtained by him. In my view this defendant and Hardison were equally liable; the assistance thus rendered by the defendant was as direct and efficient, and in aid of the transaction as anything could well be; it was a most important part of the operation, and without his aid and the services so rendered to McFarland the law would not have been violated.

A supercargo of a ship, who should go in her to Europe with written directions, and funds from his employer wherewith to purchase, in his behalf, a quantity of goods to be smuggled home on board the vessel, and who should comply with his instructions, might, with as good reason as the defendant, claim that he was not accountable for assisting his employer in violating the revenue laws by the importation of such goods, because he did not return with them in the ship. In each case, the party has done something toward helping on and facilitating the smuggling; he has directly aided and assisted his employer in accomplishing the violation of the law; and although in the present case, the evidence may have been sufficient to convict the defendant of the principal offence of smuggling, it is not less sufficient to authorize his conviction for aiding his principal in the commission of a like crime. The fact that the services may have been altogether gratuitous, without fee or reward, performed as a neighborly kindness by defendant whilst journeying eastwards, as alleged, to visit his wife, and that defendant was not to share in the gain,

or be interested in the goods themselves, would not afford him protection and immunity, or the sanction of the law to conduct, otherwise criminal.

On the hearing of the motion for a new trial, which had been delayed for nearly four months, it was claimed by counsel for defendant, that in addition to the foregoing instructions, the jury were also told that if they found that the defendant committed any act, without the commission of which act Hardison could not have successfully carried into effect the purpose of illegally bringing into the United States the merchandise described in the indictment, they would be authorized to find him guilty under the statute. I do not find upon my minutes of the charge the above extract; but as the counsel states that he reduced the same to writing at the time of the charge, and produces his original memorandum, from the respect and confidence the court entertain for the counsel, I shall recognize the same as having been so given, although I have not a distinct recollection of the remark.

It is conceded that the previous instruction was given, and followed by the above remark of a general character, and in deciding upon its materiality and correctness, it must be considered in connection with the preceding instructions, as well as the testimony given in the trial, which all came from Hardison, who certainly was not a swift witness for the government. The uncontradicted facts bearing against the defendant were few, but quite important, and were briefly, that Hardison was engaged by McFarland to go to St. Andrews and smuggle into Gouldsboro a boat load of liquors; that the defendant at McFarland's request went to St. Andrews from Gouldsboro with an order on Street, a liquor dealer there, for the liquors wanted; that he there met Hardison by agreement, procured the liquors of Street, they were put on board Hardison's boat, who had no means, or credit, or order, with which to obtain the goods, and were smuggled into this district; that defendant, returned home by way of Robbinstown where his wife was staying, and to meet whom was the alleged excuse for his journey eastward, and brought back with him to McFarland, Street's bills of the liquors. It was these acts of defendant in aid of Hardison to which this instruction had reference, as the jury must have understood; acts performed by the defendant gratuitously or otherwise as agent for McFarland, and for his benefit, and to aid him in a violation of the revenue laws; and the commission of any one of such acts, if the jury were satisfied that without its performance Hardison could not have succeeded in violating the law, as it seems to me, amounts to a rendering of assistance to Hardison in committing a fraud on the revenue, by importing, or bringing in the goods contrary to the law. The materiality of such action, its necessary bearing upon the acts of Hardison, its importance, effect and moment in the accomplishing of the fraud by Hardison, are all made requisite by the instruction, if without it, Hardison had not the means and ability of doing the criminal act, and such means were procured by the defendant, so that thereby Hardison could and did commit the offence. It certainly seems as though the defendant had been of assistance to Hardison on this occasion, and had enabled him to violate the law. Hardison meets with an obstruction, an impediment which he cannot remove or surmount, at that moment, the defendant came to his relief, overcomes the difficulty and leaves the road open and free for Hardison to accomplish his designs. The instruction requires aid and assistance to such an extent, and of such a character, as to make that possible which otherwise was impossible.

By the rule of the supreme court as found in M'Lanahan v. Bogart, 1 Pet. [26 U. S.] 170, on motion for a new trial, if upon the whole case justice has been done, and the verdict is substantially right, no new trial should be granted though some mistake may have been made.

The mistakes are not apparent to me. I do not perceive anything erroneous in the instruction. The verdict was clearly right. Motion overruled.

Case No. 15,730.

UNITED STATES v. MARTIN.

[13 Int. Rev. Rec. 19.]

Circuit Court, D. Tennessee.[1] 1870.

INTERNAL REVENUE—TOBACCO PRESS—TESTIMONY OF GOVERNMENT OFFICER.

[One may be convicted of keeping a tobacco press without a legal bond on the sole testimony of a government officer that defendant told him that he had used an extra press in his factory, which he had just removed.]

[This was an indictment of J. W. Martin for keeping a tobacco press without the bond required by law.]

EMMONS, Circuit Judge (charging jury). The case of the government depends solely upon the testimony of Mr. Gavett, a government officer, who swears the defendant told him he had used in his factory another press besides the one then standing, and that he had just removed it to his other factory. If you believe this witness, and that the facts stated to him by the defendant are true—that he worked two presses, if it were only for a day or an hour—then you should find him guilty. This, within the statute, is keeping two presses for use. He has done the act which the law forbids, kept a press "for use" without giving the statutory bond. I do not

[1] [District not given.]

see how Gavett can be mistaken. It seems to me you must credit his testimony or convict him of perjury. It is true another government officer says two weeks before he was at the manufactory, and also at other times, and saw but one press. There is nothing in this evidence necessarily in conflict with the full admission of the defendant that he had used the second press. The employés of the defendant would know this fact positively, and could, if produced, readily contradict the admission, if made in misapprehension or error. There is before you no question of intent. If you believe the defendant did keep for use two presses you will find him guilty.

Although it may seem unusual, there are many precedents in justification of the liberty taken, when I express the hope that this is the last case where the government will ask a jury to convict a citizen of a crime upon the admissions of a defendant, sworn to by its own officer, in reference to facts which, if true, may be so readily proven by others. There are undoubtedly cases where, unless certain classes of laws go unadministered altogether, the testimony of officials as to facts within their observation must necessarily be used. From the secrecy of the crimes none but official detectives, save in rare instances, will ever discover the evidences of guilt. But these are exceptional, and when they occur so plainly involve their own justification as to prevent all hostile criticism. There is, too, a most manifest difference—one which will arrest the attention of all, whether familiar with judicial proceedings or not—between proving the occurrence of facts (which, if untrue, might be met by a counter proof) and a reliance upon the admissions of a defendant, in reference to such facts made to the officer while dealing with him in behalf of the government. In the case before us the resort to such evidence, it would seem, is wholly unnecessary. If the defendant used more than one press, as the government witness swears he confessed, it is a fact susceptible of proof by every employé in his factory and about his establishment. Perjury need not be feared about facts so readily established. And still we are left with the single oath of a government officer swearing to the admission, and the oath of his fellow officer swearing that although he had visited the factory twice a month for months before he never saw more than a single press set up for use. True, they are not in conflict. The latter has but little tendency to contradict the other. But why shall a great and wealthy government, whose agents should set a good example in the administration of the law, without necessity, abandon the legitimate and only politic mode of proof and resort to these admissions, against the effect of which all our elementary books without exception, and numerous judgments of learned judges from the earliest days warn the courts. It is difficult for those not conversant with the details of our legal history, and especially with that of criminal trials, to understand the hearty and universal repugnance of our people to this species of proof. To those who are so its explanation is easy. It springs from the struggle of the English race for liberty. Whenever you find an Englishman, or a descendant of an Englishman, who has read his forefathers' history, he will, without reasoning—without any discussion of the propriety of its particular employment—denounce all resort by the government to confessions of a defendant, when proved by its officers, to send him to prison. The community, in its hostility to this dangerous agency, overlooks the guilt of the offender, and esteems the departure from right rules of government as a greater crime than that it is sought to punish. The question forces itself to the surface: Why resort to it? Why uselessly, if not in fact, at least in the estimation of the community, degrade the agents of the law, until gentlemen of character, men of reliability and high repute, those who are unwilling to be traduced and vilified, can hardly be tempted to hold such places? You, gentlemen, did not, perhaps, notice the remark of this seemingly intelligent and gentlemanly young man, whose testimony calls for these remarks. When asked what were his duties he said his office was designated by the odious name of "detective." I trust his sensibility will not injure his credibility before you. And having said what I have, I may be pardoned if I add that had I perceived anything calculated to shake confidence in his statement I would have foreborne it wholly. I have the most unquestioning confidence in the truth of every word he uttered. But this, so far from excusing in this instance the testimony itself, adds to its pernicious influence as a precedent, and I the more earnestly protest against it.

And having gone thus far, I am forced, lest I do injustice, to enter a protest against it being interpreted as a rebuke in any the slightest degree, of our able, industrious, and over-worked district attorney. Had he three heads and six hands, and each as competent as the efficient ones he has, it would be impossible for him to prepare in detail the hundreds of cases in his care. And, gentlemen, they extend to several hundreds. He is forced, willingly or unwillingly, to do as in this case—accept the accidents of the official reports or not try the causes at all. He should have, during the vacation, such efficient assistants as would enable him to arrange and complete the testimony in every case. Without this it is impossible for him to meet successfully the labored preparation in books and proofs which the ability and better paid zeal and more ample time of the defendants' counsel almost always present. I find no fault with him. The error lies elsewhere. That commendable governmental economy which all of us so much desire is practised mainly in those departments distant from the public purse-strings, and whose

wants the public press and the politicians seldom discuss.

May I hope, gentlemen, that this somewhat severe denunciation of a resort to this mode of proof will not influence your estimate of its credibility in the case before you. The witness is not impeached; he swears to what is not inherently improbable, and if the press was not used, as the defendant admitted, the proof of this fact was easily made by the defendant. If you believe the testimony you cannot reject it, because you, as I do, consider its introduction grossly impolitic. You have no more right to disregard it for this reason when it is once before you, than I as a judge to exclude it entirely from your consideration for a like reason. I am sworn to decide impartially the legal questions on its admissibility, and against a prejudice as strong as any of you can possibly entertain I have suffered it, as is my undoubted duty, to be given. You are equally bound to find the defendant guilty if you believe that he told Mr. Gavett what he swears to, and that he told the truth when he said it irrespective of your opinion as to the impolicy of using such proof by the government. It is no light matter to disregard or trifle with a juror's oath. We do not half often enough consider what this much abused and too frequently used form really means. We say without much emphasis or seriousness, "In the presence of Almighty God." We seldom reflect upon it, as it is an invocation of His special presence—as a solemn declaration that we realize in a peculiar sense and with reverential feelings that we are before our Maker. "I do solemnly swear" is a promise in that presence which has been so directly invoked that you will echo the testimony as you believe it to be in your verdict. The clerk adds, "So help you God." It is nothing less than a prayer, in which all unite that you may be aided by God to keep the solemn promise you have made. Its rapid utterance and frequent repetition may oftentimes lessen its solemnity and immediate influence. But he who has taken it and assumed the duty of a juror, one of the most important which a citizen can perform, is wholly unworthy to fill the places you occupy if he does not, to the utmost of his ability, trample upon his prejudices, and accepting, as he swears he will do, the law from the court, deliver his verdict according to the testimony.

Case No. 15,731.

UNITED STATES v. MARTIN.

[2 McLean, 256.] [1]

Circuit Court, D. Indiana. Nov. Term, 1840.

OFFENCES AGAINST POSTAL LAWS — CIRCUMSTANTIAL EVIDENCE—NEW TRIAL.

1. An indictment, which charges the defendant with unlawfully abstracting a letter, containing bank notes, from the mail, is good, if it alledges that the letter, containing bank notes, was put into the postoffice to be conveyed by post, and was being conveyed by post, and came into the possession of defendant, as a driver of the mailstage.

[Cited in U. S. v. O'Sullivan, Case No. 15,974; U. S. v. Patterson, Id. 16,011; U. S. v. Jones, 31 Fed. 726.]

2. Circumstantial evidence sufficient to convict. It should, however, be received with caution.

[Cited in U. S. v. Randall, Case No. 16,118.]

3. A new trial will not be granted, unless in the view of the court, injustice has been done.

[Cited in Fearing v. De Wolf, Case No. 4,711; U. S. v. Randall, Id. 16,118.]

[Cited in Levy v. People, 80 N. Y. 337.]

Indictment [against William Martin] for abstracting a letter from the mail, containing bank notes. Motion to quash the indictment, because it does not alledge that the letter was mailed, or regularly put into the United States mail.

Mr. Pettit, U. S. Dist. Atty.

Howard & Judah, for defendant.

HOLMAN, District Judge. The indictment alledges that the letter, containing bank notes, was put into the postoffice to be conveyed by post, and was being conveyed by post, and came into the custody and possession of the defendant, as driver of the mailstage. This allegation is sufficient. The act of congress states that, "if any person employed in any department of the postoffice establishment, shall secrete, embezzle or destroy any letter, mail, or bag of letters, with which he shall be intrusted, or which shall have come to his possession, and are intended to be conveyed by post, containing any bank note," &c. From this language it appears evident that it was the intention of congress to provide for every possible way in which a letter, intended to be conveyed by post, could come into the possession of any person employed in the postoffice establishment. And, therefore, if this letter had come into the hands of the driver of the mailstage, without having been regularly mailed, it was his duty to have conveyed it safely; and he was liable to the penalties of the law if he embezzled it. If the postmaster neglected his duty, in putting the letter into the mailbags, and it came accidentally into the possession of the mail-carrier, and he embezzled it, the case is within the terms of the statute. The indictment is sufficient. Motion overruled.

The defendant was arraigned, and pleaded not guilty, and a jury impannelled and sworn. A number of witnesses were sworn, and gave evidence to the jury. Geo. W. Stewart, on the 5th of May, 1840, wrote a letter to Isaac Stewart, New Albany, in which he inclosed two $100 bills, on the State Bank of Illinois, and put it into the postoffice box in Carlisle, in this state. Robert Aiken testifies to the same facts, being

[1] [Reported by Hon. John McLean, Circuit Justice.]

with G. W. Stewart when the bills were inclosed, and the letter put in the box. Isaac Beecher, postmaster at Carlisle, states that on the said day, about 9 o'clock, he mailed a packet of letters for the distributing office at Vincennes, in which was a letter directed to Isaac Stewart, New Albany, and sent the packet by the mailstage. The defendant was the regular stage driver. When there were extra mails, another driver was sometimes on the route; but there was no extra mail on that day. Vincennes was twenty two miles distant, and the mail reached that place the same day. There was one postoffice between, and another driver on the other part of the line. Mr. Scott, postmaster at Vincennes, states that no packet, nor letters, were received from Carlisle that day. Isaac Stewart testifies that he never received the letter, nor the bank bills. Robert Curry states that defendant was driving on this route in the early part of May; that, on the 8th of May, he was sent by the mail contractor to take defendant's place in driving. As he drove the stage towards Carlisle, defendant went with him. He asked defendant why he gave up the business of driving; and the defendant replied, that he had money enough to do without, and that one was a fool to drive for $15 a month, when he had money enough to do better elsewhere; and, pulling out his pocket book, showed the witness several bank notes, among which, were two for $100 each; but the witness did not know on what bank they were. Defendant further said, he was going to Terre Haute, to settle with Benjamin Reeves, a mail contractor, who owed him money. Benjamin Reeves testified that he never had any business transaction, whatever, with defendant. Mr. Clark states that, being in company with defendant, on the 7th of May he saw the defendant with several bills in his hand—one of them was for $100—but had no opportunity of seeing the character of the others. Stephen Hale, sheriff of Washington county, on the 13th of June, 1840, arrested the defendant, in Salem, on a charge of embezzling this letter. Defendant requested leave to go to a privy, which witness permitted; but witness followed him, and, suddenly opening the door, saw defendant with his pocketbook open, and saw him hastily throw some small bright object into the vault. Took the defendant to the office of a justice of the peace, and went immediately, in company with Doctor Newland (who testifies to the same facts) and others, and, with a candle, reached the vault, and found a bright key in the place where he had seen defendant throw the small object from his pocketbook. Defendant was agitated when he was arrested, but was much more so when Doctor Newland brought in the key, and held it up before him, without saying a word. (This key was found, on trial, to open the mail-bags in several postoffices, and several postmasters testified that it was similar to the keys used to open all the waymails.) Mr. Zuel, postmaster on the route from Louisville to Columbus, states that, in July, 1839, the key of his office was lost, and another was sent for from the postmaster at Louisville; that defendant was then driving the mailstage to his office, and knew when the key was sent for; and, once or twice after this, the defendant brought the mail bags to his office unlocked. He inquired of the defendant the reason. The defendant replied, that he had requested the postmaster, at the office next below, to leave them open, as he (Zuel) had lost his key. He never received the key from Louisville.

THE COURT, after summing up the evidence, instructed the jury that they were to determine, on the guilt or innocence of the defendant, from the testimony they had thus heard in the trial; that, before they could find him guilty, they must be satisfied, beyond a reasonable doubt that, on the 5th of May, the defendant was the driver of the mailstage between Carlisle and Vincennes; that the letter containing the bank notes, as charged in the indictment, came into his possession as mailcarrier, and that he secreted, embezzled or destroyed that letter. Any, or all of these allegations, may be proved by circumstances. Circumstances may be sufficiently strong to justify a conviction for any crime; but all circumstantial evidence is to be received with caution. And circumstances, in order to produce conviction, must be established; they must be consistent with each other, and with the guilt of the defendant; and they must, to a moral certainty, exclude the idea of his innocence. The circumstance, that the letter failed to reach its destination, is not sufficient, of itself, to prove that the defendant embezzled it. The circumstance of his having large bank bills, without accounting for how he came by them, is not, by itself, any evidence that he took them from the mail. Nor is the circumstance of his having a mail key, evidence that he ever used it unlawfully. Every circumstance is to be fairly considered, as it bears upon the whole case and conduct, as to prove the allegations in the indictment. That they were to fairly weigh every circumstance, for and against the defendant, and if there was a firm conviction in their minds that he was guilty, as charged in the indictment, it was their duty to say so in their verdict; but if not, they were to find him not guilty.

The jury, after having retired until next day, brought in a verdict of guilty. A motion was made for a new trial, and fully argued.

PER CURIAM. In the argument of this motion it has been suggested, as a reason why a new trial should be granted, that the presiding judge of the court is absent. Be-

fore the commencement of the trial, the absence of the presiding judge was mentioned, and the defendant and his counsel were expressly informed by the court, that if they desired a continuance of the case on that account, it would be granted; but it was their wish to have the trial at this term. The absence of the presiding judge can not, therefore, form the remotest ground for a new trial.

It is also urged, in argument, that the jury left their box, to retire to their room, under improper impressions. It is not pretended that the court instructed the jury improperly, as all the instructions, required by the defendant's counsel, were given in the express terms required; nor were any instructions given to which they excepted. There was no contradictory testimony in the case—no litigated questions of law relative to evidence warmly argued in the hearing of the jury, and but very slight attempts to go beyond the evidence, in the argument to the jury. And, in summing up the evidence, and in the instructions of the court, no undue weight was given to any fact or circumstance that operated against the defendant; nor was any circumstance, however slight, that operated in his favor, omitted; nor is any objection to the substance or manner of the instructions suggested; the court, therefore, think there is not the slightest ground to suppose that the jury retired under erroneous impressions.

The principal ground for a new trial alone remains—that the verdict is contrary to evidence. In reviewing the verdict of a jury regularly given, the verdict must be presumed to be right until the contrary appears; and it should be sustained by the court, if the evidence, by any fair construction, will warrant such a finding. A court is not authorized to set aside a verdict simply because, if they had been on the jury, they would have found a different verdict. It is not sufficient that the verdict may possibly be wrong, but that, after giving a proper weight to all the evidence, it can not be right. This verdict was given on what is called circumstantial evidence, and the court feel disposed to give due weight to the arguments, which have been drawn from reported cases, where innocent individuals have been convicted and punished for supposed crimes, which were never committed, or committed by others. These arguments show the necessity of extreme caution in convicting on circumstantial evidence, but do not prove that circumstances may not be sufficiently strong to authorize a conviction, or, that circumstances are not to be relied on in proof of guilt. If a train of circumstances are not deemed sufficient to produce conviction, the penal laws in relation to many offences, especially most of those against the postoffice regulations, would be a dead letter.

In this case, the court think the circumstances, which were proved, strongly conduced to establish every fact that the jury were required to find, in order to make up their verdict of guilty. The circumstances themselves were established as fully as the nature of the transactions would admit of. As, for instance, without recapitulating the testimony, it was expressly proved that a letter, directed to Isaac Stewart, New Albany, was put into the postoffice box, at Carlisle, on the day named in the indictment, and that the postmaster at Carlisle, on that day, mailed all the letters that were in his office, and going in the direction towards New Albany, in a packet, among which was a letter directed to Isaac Stewart, and that he sent that packet by the mailstage, and that the defendant was the regular driver of the stage. We think this evidence warrants the finding, that this letter came into the possession of the defendant. Nor do we think there are any of the circumstances which are inconsistent with the idea of the defendant's guilt. The two circumstances which were urged, in argument, as being of this character, are perfectly reconcilable with the supposition, that the defendant was guilty, to wit:—his exhibition of the bank bills a few days after the offence was committed, and his continuing, for more than a month, in less than a hundred miles of the place where the offence was committed, and in a section of country where he was not entirely unknown.

Without adverting to the many cases, in the history of human conduct, where persons, guilty of crimes, have acted seemingly contrary to the dictates of common sense, and in such a manner as naturally lead to their detection and punishment, we do not think there is any thing inconsistent with the supposition of the defendant's guilt, in the fact that, a few days afterwards, he exhibited the bills which he is supposed to have embezzled. It cannot be accounted as passing strange that a young stage driver, having recently obtained the possession of what must have appeared to him as a large amount of money, though criminally obtained, when in company with a fellow stage driver younger than himself, and speaking of having plenty of money should, in the flush of self-important feeling likely to arise on such an occasion, exhibit the evidence of his wealth, as the defendant did. It may be termed imprudent—a moment's reflection might show its folly; yet it is by no means improbable. And, if he was in possession of a key that would open any of the waymails, and had been in possession of it for nearly a year, without detection, it is not at all strange that he should continue in a country where he had some acquaintances, and where he might be most likely to be employed in the transportation of the mail, to which, it seems, his attention was directed. A feeling of security might naturally have come over him, and he may have felt it of some consequence to continue in the circle of his former operations, as a stage driver, which, however, was nearly a hundred miles from the place where the crime is said to have been committed. Nor was he

stationary there, as he was said to have been in Louisville seeking an engagement, in the transportation of the mail. Not only are all the circumstances consistent with each other, and with the hypothesis of the defendant's guilt, but, when all taken together, they, to say the least, strongly conduce to exclude the idea of his innocence. Believing, therefore, that the evidence in the case warranted the finding of the jury, the motion for a new trial is overruled.

At a subsequent day of the term, the prisoner was brought before THE COURT, and, having nothing further to alledge why sentence should not be passed upon him, was addressed by THE COURT as follows:

"You have been indicted for the violation of an important trust; and, after a fair trial, in which you have had the aid of able and experienced counsel, you have been found guilty by a jury of your country. And, by a motion for a new trial, zealously and impressively made in your behalf, the court has been required to review the grounds on which this verdict has been given; and, after a careful examination of the facts and circumstances testified against you, are bound to approve of the verdict, and to hold you as guilty, and to pronounce the sentence of the law upon you. It is with no ordinary feelings they discharge this duty. In every view of your case it is painful. To see a young man, under no peculiar disadvantages, just entering into the ranks of men, in a country like ours, where an honest livelihood is every where presented—to see him commence his course in life by the commission of an aggravated crime, and, in one guilty moment, to blast all his future prospects, and incur the penalty of the violated law, whose lightest punishment is ten years' imprisonment in the penitentiary: It is indeed painful. By this fatal deed you have destroyed yourself; you have forfeited your liberty for a long series of years; you have clothed yourself with disgrace, and prostrated all your cherished expectations in life. But, although you have brought yourself into this lamentable condition, your case is not yet desperate. The prospect before you is truly dark and dreary; yet there is a distant ray of hope that may enlighten your path. You are very young, and may have a long life before you. You may do much by a patient submission to the law —by a reformation of life, and an upright line of conduct to enlist the sympathies of your fellow citizens; to reach the clemency of the executive of our government, and, to some extent, to regain a station among honest men. You may do more than this: By repentance and reformation, you may obtain the approbation of Him, whose favor is better than life or liberty, and far more valuable than an earthly reputation. Every thing, therefore, calls upon you, in the most impressive terms, to live every day of your life as an honest, upright man. The court have fixed your punishment to the shortest period allowed by the law you have violated, and sentence you to a confinement, at hard labor in the penitentiary of this state, for ten years from this time."

Case No. 15,732.

UNITED STATES v. MARTIN.

[2 Paine, 68.] [1]

Circuit Court, N. D. New York. Feb. Term, 1832.

SET-OFF—ACTION BY GOVERNMENT—HOW ALLOWED—DISALLOWED CLAIMS—AGENTS.

1. Under the 4th section of the act of congress,—2 [Bior. & D.] Laws 594 [1 Stat. 512],—declaring that in suits between the United States and individuals, no claim for a credit shall be admitted upon trial but such as shall appear to have been presented to the accounting officers of the treasury for their examination, and by them disallowed in whole or in part, except in certain cases specified; that credits have been presented to the treasury department and disallowed, are matters to be shown by the party claiming the credit; and if any objection is to be made to any charge against the defendant, that is matter to be shown by him, and he is bound to produce the evidence necessary to raise the inquiry.

2. The United States are not bound by the declarations and representations of their agent, unless it clearly appears that the agent was acting within the scope of his authority, and was empowered in his capacity as agent to make the declaration.

[Cited in Indiana Central Canal Co. v. State, 53 Ind. 593.]

3. The answer, in chancery, of an agent, is not evidence against his principal; neither are his admissions in pais; unless they are a part of the res gestæ.

4. The representations of an agent in doing an act within the scope of his authority, are evidence against the principal, and are as binding on the principal as the act itself; but the representations must accompany the act, and the principal is not bound by them at any other time.

Error to the district court of the [United States for the] Northern district of New York.

The suit in the court below [case unreported] was an action of debt [against Hugh R. Martin] on a bond dated September 1, 1813. On the trial, exception was taken to the introduction in evidence of a transcript from the treasury department; first, because not evidence under any count in the declaration; second, because all the items composing the account were not contained in the transcript. Exception was, also, taken to the introduction of a letter of one Hagner, an agent of the United States, signed by him in his official capacity, wherein he admitted that there was nothing due the United States.

PER CURIAM. As to the first objection, the counsel seems to be under a misapprehension with respect to the counts. There is a count upon an insimul computassent and the settlement and statement of the balance

[1] [Reported by Elijah Paine, Jr., Esq.]

were at all events admissible under that count. As to the second objection, I think it was not necessary that the transcript should contain all the items. The provision in the act of congress—2 [Bior. & D.] Laws, 594, § 2 [1 Stat. 512]—is that in every case of delinquency, where a suit is or has been instituted, a transcript from the books and proceedings of the treasury, certified by the register, and authenticated under the seal of the department, shall be admitted as evidence: and the court trying the cause, shall be thereupon authorized to grant judgment and award execution accordingly. And by the fourth section it is declared, that in suits between the United States and individuals, no claim for a credit shall be admitted upon trial but such as shall appear to have been presented to the accounting officers of the treasury for their examination, and by them disallowed in whole or in part, except in certain cases specified, not, however, covering the present case. Under these provisions in the statute, it is not perceived what possible benefit could result to the defendant from the transcript containing all the items. So far as any credits were involved, the court could enter into no examination unless they had been presented to the treasury department and disallowed; and that was matter to be shown on the part of the party claiming the credit; and if any objection was to be made to any charge against the defendant, that was matter to be shown on his part, and he was bound to produce the evidence necessary to raise that inquiry.

But a verdict having been given for the defendant, all this is immaterial if the court erred in admitting the letter from Peter Hagner to the defendant, of the 20th of September, 1816. By the 11th section of the act of 1817 [3 Stat. 368], the transcripts are to be certified by the auditors instead of the register; and the officers of accountant and additional accountant are abolished, and the appointment of auditors authorized, and the duties of accountants transferred to them. By the act 29th April, 1816 [3 Stat. 222], an additional accountant of the war department is required to be appointed, whose duty it shall be to adjust and settle all the accounts in that department existing at the conclusion of the late war and then unsettled. This act was limited to one year and the end of the next session of congress thereafter. The authority given to the assistant-accountant, under this act, is special, and it might be a sufficient answer to the admissibility of the letter of Hagner, that it did not appear to relate to accounts coming within the act. Its being addressed to Hugh R. Martin, late captain 13th infantry, may afford reasonable belief that such was the fact, if the letter was at all admissible; but it should appear clearly that it related to matters within the scope of his authority; and besides, the transcripts introduced in evidence show, that upon the settlement of the 19th September, 1816, a credit was claimed for enlisting twelve recruits which was at the time suspended, but afterwards admitted; and a further credit of thirty dollars is allowed him for advances made to a surgeon for medical services. These credits must have been allowed in consequence of claims set up by Martin, and show that the settlement referred to in Hagner's letter could not have been understood as closing all accounts. These, however, may be considered objections going to the weight of evidence, but not to its competency; but I think the evidence altogether inadmissible, and should have been rejected by the court. This letter bears date after the settlement of the account; and it would be a very dangerous principle to adopt, that the United States are bound by the declarations or confessions of their agents, made after the transaction was done. In the case of Lee v. Monroe, 7 Cranch [11 U. S.] 368, the question came under the consideration of the court, "How far the United States were bound by the declarations and representations made by their agents;" and the court seems to make a distinction between agents of the public and of private persons, and lays down the rule that the principal is not bound unless it most manifestly appears that the agent was acting within the scope of his authority, and was empowered, in his capacity as agent, to make the declaration or representation which is relied on as the ground of relief. But I apprehend this letter would not have been admissible even if Hagner be considered as standing on the same footing as the agent of a private person. Hagner himself would have been a competent witness, and should have been examined, and might have explained the incongruity between his letter and the subsequent statement of the account made by himself. 2 Caine, 106. In the case of Leeds v. Marine Ins. Co., 2 Wheat. [15 U. S.] 383, this general rule is laid down, that the answer in chancery of an agent is not evidence against his principal, nor are his admissions in pais unless when they are a part of the res gestæ.[2]

[2] We are, in the first place, after fixing upon him the character of an agent, to inquire whether his acts, statements or declarations proposed to be given in evidence, took place while he was making the agreement or otherwise proceeding within the scope or bounds of the authority which we find he possessed. If this be so, they are the acts, statements or declarations of the principal himself; and though the party insisting upon them as such, may call the agent and prove them by him, yet he may be passed by, and any third person having the requisite knowledge of such acts, statements or declarations, is equally admissible for that purpose. Rawson v. Adams, 17 Johns. 130, 131; Sherman v. Crosby, 11 Johns. 70, 71; Shelhamer v. Thomas, 7 Serg. & R. 109; Meredith v. Kennedy, Litt. Sel. Cas. 516–518; Hood v. Reeve, 3 Car. & P. 532; per Spencer, J., in Coleman v. Southwick, 9 Johns. 54 55; per Marcy, J., in Benjamin v. Smith, 4 Wend. 334; Thallhimer v. Brinckerhoff, 4 Wend. 396,

This rule was laid down by Phillipps, in his treatise on the Law of Evidence (volume 1, 77), that the representations of an agent in doing an act within the scope of his authority is evidence against the principal himself for what the agent says may be explanatory of or determine the quality of the act which it accompanies, and is as binding on the principal as the act itself. Thus, what an agent says at the time of a sale which he is employed to make, is evidence as part of the transaction of selling, but the principal is not bound by the representations of an agent at another time; and this is a sound distinction, and the only safe rule to be adopted. The declarations or representations must accompany the act, so as to be considered as forming a part of the res gestæ. 10 Johns. 479; 1 Camp. 389. The letter of Mr. Hagner does not come within this rule, and should have been rejected, even on this ground, without relying on any distinction between an agent of the government and of an individual. See U. S. v. Tillotson [Case No. 16,524].

The judgment of the court below must be reversed without costs, and a venire facias de novo awarded, returnable in this court.

397; Town of Burlington v. Town of Calais, 1 Vt. 385; Perkins v. Burnet, 2 Root, 30; Mather v. Phelps, Id. 150; Irving v. Motley, 7 Bing. 543; Webb v. Alexander, 7 Wend. 281, 283, 286. The contract of an agent, to be binding upon his principal, must be within the authority conferred. 26 Wend. 192. If the agent's acts vary substantially from his authority in nature, extent or degree, they do not bind the principal. Id. If the power of the agent be created by a written instrument, and that be known by the party with whom the contract is made, the nature and extent of the authority must be ascertained from the instrument itself, and cannot be varied or enlarged by evidence of usage. Id. Before an agent can insist that his principal has adopted, as his own, acts which the agent had no authority to do, it is necessary to show that the principal was fully apprized of all the facts and circumstances attending the transaction. Hines v. Butler, 3 Ired. Eq. 307. A recognition of the acts of an agent by his principal is equivalent to an original grant of authority. Conn v. Penn [Case No. 3,104]. The act of a public officer, exceeding the authority conferred on him by law, may be adopted by the party for whose benefit it is done—a subsequent satisfaction being equivalent to an original authority. Farmers' Loan & Trust Co. v. Walworth, 1 Comst. [1 N. Y.] 433, per Bronson, J. A ratification of part of an unauthorized transaction of an agent, or one who assumes to act as such, is a confirmation of the whole. Id. Where a person, without authority, assumes to act as the agent of another, the one for whom he assumes to act cannot claim the benefit of his agency in part, and reject it as to the residue of the same transaction. Benedict v. Smith, 10 Paige, 126. It is a general rule, that the principal is bound by the acts of his general agent, though the agent exceed his private instructions. But the rule does not apply to cases where the person dealing with the agent is apprized of the existence of the private instructions. Longworth v. Conwell, 2 Blackf. 469. An agent being dead, a written statement of an account made by him at the time of a settlement is evidence against the principal. Van Rensselaer v. Morris, 1 Paige, 13. The United States are not bound by the declarations of their agent, founded upon a mistake of fact, unless it clearly appears that the agent was acting within the scope of his authority, and was empowered, in his capacity of agent, to make such declaration. Lee v. Munroe, 7 Cranch [11 U. S.] 366. The principal is bound by the representations of his agent, when part of the res gestæ. Doggett v. Emerson [Case No. 3,960]; Hough v. Richardson [Id. 6,722]. Where the admissions of an agent are part of the res gestæ, they may be given in evidence against his principal; but in no other case. Reed v. Brooks, 3 Litt. 127; Leeds v. Marine Ins. Co., 2 Wheat. [15 U. S.] 380. The declarations of an agent, made at the time of doing an act within the scope of his authority, and relating to the subject-matter of the act, are evidence as a part of the res gestæ; but statements subsequently made by him are not, because the latter are made without authority, and for that reason stand on the same footing with the declarations of another person. Benedict v. Denton, Walk. Ch. 336.

UNITED STATES (MARTIN v.). See Case No. 9,168.

Case No. 15,733.

UNITED STATES v. The MARY MERRITT.

[2 Chi. Leg. News, 90.]

District Court, D. Wisconsin. Dec. 18, 1869.[1]

FORFEITURE—TRADE REGULATIONS.

Information charging forfeiture of vessel under act of congress.

Claimant filed an exception to the information that it is not alleged that neither the government of England nor of Canada have adopted a regulation similar to the above.

The exception was argued by the district attorney and Mr. Lynde for the United States, and by Emmons & Van Dyke for the claimant.

It being understood that no such regulation had been made by either the said governments of Great Britain or of the dominion of Canada, an amendment of the information in this respect was not proposed. It was thereupon ordered by THE COURT that the information be dismissed.

MILLER, District Judge. The information charged, as cause of forfeiture of this vessel, that, being the property of citizens of the United States, and built in Canada, she arrived at the port of Milwaukee from the port of Kingston, Canada, where she received her cargo of pig iron, the product and manufacture of Canada. The information was brought under section 1 of an act concerning the navigation of the United States, approved March 1, 1817 (3 Stat. 351): "That after the thirtieth day of September next no goods, wares or merchandise shall be imported into the United States from any foreign port or place, except in vessels of the

[1] [Reversed in Case No. 9,222. Decree of circuit court affirmed by supreme court in 17 Wall. (84 U. S.) 582.]

United States, or in such foreign vessels as truly and wholly belong to the citizens or subjects of that country of which the goods are the growth, production or manufacture, or from which such goods, wares or merchandise can only be, or most usually are, first reshipped for transportation; provided, nevertheless, that this regulation shall not extend to the vessels of any foreign nation which has not adopted, and which shall not adopt a similar regulation."

[NOTE. The decree in this case dismissing the libel was reversed, upon appeal, by the circuit court. Case No. 9,222. The decree of the circuit court forfeiting the vessel was affirmed by the supreme court. 17 Wall. (84 U. S.) 582.]

Case No. 15,734.

UNITED STATES v. MASON.

[Cited in Cully v. Baltimore & O. R. Co., Case No. 3,466. Nowhere reported; opinion not now accessible.]

Case No. 15,735.

UNITED STATES v. MASON et al.

[6 Biss. 350; [1] 21 Int. Rev. Rec. 245.]

District Court, N. D. Illinois. May, 1875.

INTERNAL REVENUE—DISTILLERIES—GOVERNMENT CONTROL—RIGHT TO EXAMINE BOOKS.

1. The government has, under the revenue laws, the right to control and regulate the manufacture of spirits, for the purpose of the collection of its revenue.

[Cited in U. S. v. Three Tons of Coal, Case No. 16,515.]

2. The government has the right to examine all books kept by a distiller or rectifier pertaining to his business—his private books as well as those required by law. Such examination should be made by order of the court, and in the presence of the party or his counsel.

[Cited in Place v. Norwich & N. Y. Transp. Co., 118 U. S. 503, 6 Sup. Ct. 1162. Disapproved in Boyd v. U. S., 116 U. S. 635, 6 Sup. Ct. 535; U. S. v. Shapleigh, 4 C. C. A. 237, 54 Fed. 132.]

3. If the private books show a different state of facts from that shown by the books kept for the government, they may be treated as government books also.

4. If the distiller refuses to produce his books, the court may order the vaults containing them to be opened by its officers.

5. It is not necessary to specify the books, but the officers may take all books found on the premises, the presumption being that they belong to the distilling business.

Motion to compel the defendants, distillers, to produce their books and papers for the inspection of the government officials.

J. D. Ward, U. S. Atty., and John E. Burke, Asst. U. S. Atty.

Matt. H. Carpenter and Edmund Jussen, for defendant.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

BLODGETT, District Judge. The questions before me are presented in two lights, or rather there are two proceedings before the court for decision, involving substantially the same points. Within a short time after the seizure of the rectifying establishment of Parker R. Mason & Co., and the distillery and rectifying establishment of Roelle, Junker & Co., an application was made to the court on behalf of the claimants of the property, setting up, in substance, that the officers of the government had possession of the establishments of the claimants, and that in the establishments, respectively, were safes or vaults which contained the private books, writings, and papers of the claimants and that the officers threatened to open the vaults or safes, and examine and carry away the books, etc. Upon the showing made by the petition an injunction order was entered by the court, restraining the officers of the government from opening the safes or vaults until the question could be argued and determined by the court as to the right to seize and examine books and papers

Shortly after the granting of this injunction, and before the time fixed for the argument, the district attorney came into court, and, under the provisions of the fifth section of the act of 1874, entitled, "An act to amend the customs-revenue laws and repeal moieties" (18 Stat. 186), asked for an order authorizing an examination of certain books belonging to the parties in question, stating in substance that those books would tend to prove the issue raised by the seizure proceedings.

The questions argued were practically whether the injunctional order which was granted in the first instance in favor of Parker R. Mason & Co., and Roelle, Junker & Co., should be made final, and also whether the respondents, the claimants of the property which had been seized, should be required to produce their books for the inspection of the officers of the government.

The property which has been seized in this instance is all the property used in the business of distilling and rectifying, which the claimants were carrying on. The property seized consists of the distillery, tools, apparatus, material, and distilled spirits on hand, found upon the distillery premises, and the liquors found in the rectifying establishments, with the apparatus and fixtures used in the rectifying business. The government claims to have seized this property under the various provisions of the internal revenue law, subjecting the property of distillers and rectifiers to seizure in cases of violation of the provisions of the revenue law.

An examination of the various provisions of the revenue law, which I will not go through in detail, shows that this law is framed substantially upon the theory that the government is, for the purpose of collecting the tax imposed, to exercise an exclusive surveillance over the manufacture and the rectifying or compounding of alcoholic spirits.

The first question presented is: Has the government the right to take charge of the private business of individuals of any character for the purpose of revenue, and exercise the control over that business, determine the manner in which the manufacturer shall manufacture, the time wherein he shall work, the manner in which he shall store or keep the article manufactured, and, in fact, oversee and regulate his entire business?

Revenue laws of this character are not new to this government. They were adopted at an early day, and have been rigidly enforced, and no question has been seriously raised as to the right of the government under the powers granted in the constitution, to exercise this kind of surveillance and control over certain classes of business. The same power had been assumed and exercised by other governments, from whom, to some extent, this government copied or derived its forms for raising revenue, and we find that the English government had assumed, long prior to the Revolution and to the Declaration of Independence by the American colonies, the control of the manufacture of spirits within its realm, as well as the manufacture and sale of various other commodities; and notwithstanding the high tax which was imposed in the early days of the late war upon distilled spirits, and the difficulty which the government had in enforcing the collection of that tax, the power of the government to exercise this surveillance over this class of business was never seriously questioned, or if questioned, it was never sustained in any court of competent jurisdiction, so far as I have been able to ascertain. I therefore assume that it is now an established proposition, that the government has the right to take the control of the manufacture of the alcoholic spirits for the purpose of managing the collection of its revenue assessed upon those spirits; that it has a right to exercise the surveillance which it assumes under the various laws now in force over the manufacture and sale, and compounding and rectifying of alcoholic spirits.

Assuming, then, that the government has the right to exercise this control, I find on examination that, under the laws now in force, the government practically runs the distilleries, that is, it superintends every department, from the fitting up of the distillery up to the sale and delivery of the spirits by the manufacturer. It requires its officers, in the first place, to take a survey of the distillery, to determine its capacity, to determine how long the mash shall set before it is distilled, and to determine the time of distillation. It takes the measure of the capacity of every vessel for holding the distilled spirits, and the material from which the distilled spirits are manufactured. It requires its officers to keep an account of all the material purchased,—of the grain, malt, yeast, fuel, and all material that goes into the manufacturing process.

In addition to all this, it requires the distiller to keep certain books in which he shall truthfully set down every article purchased, as it is purchased, which goes into his distillery, or is used therein for the purposes of the manufacture of alcoholic spirits. It requires the measurement of all the spirits run or manufactured, their gauging and proof to be ascertained, and a record to be kept thereof, by which such spirits can be identified in the market. They cannot be delivered from the distillery except under the inspection of the sworn officer of the government; and not only that, but the distiller must keep a record of all spirits which are delivered from his distillery. And an inspection or examination of the law shows or indicates very clearly that it is the intention of the law to provide for the keeping of these books in such manner as that they shall truthfully show all the material facts in regard to the spirits produced and removed from each licensed distillery.

It is claimed in these cases that the distillers and rectifiers have kept the books required by law,—that is, it is so claimed on the part of the distillers; and the only question in this case is: Shall the government have access to any other books which the distiller or rectifier has kept in the process of carrying on his business? And it seems to me very clear that when you accept the proposition that the government assumes this absolute control of the business of the distiller, and this surveillance over the manner in which the business is carried on, it follows almost as a necessary conclusion from the first proposition that the government has the right to examine any books which the distiller or rectifier may keep pertaining to his business as a distiller, or a rectifier, or a compounder, which will tend to establish either the verity or the want of verity of these books; that for the purposes of the government every book which a distiller keeps is to a certain extent a government book; that he cannot claim that any book in which he makes an entry pertaining to his distilling business is his private book. It belongs to the government.

True, if he made truthful entries in his government books they would tell the same story, and only the same story, which would be told in his private books, and the two would correspond—and the question is: Should any honest distiller be afraid of a comparison between the books which he has kept for his private information and the books which the law requires him to keep? The truth will not hurt him, and if he has been guilty of any malpractice, then the government, it seems to me, has the right to examine any of the books which he has kept in the progress of his business, for the purpose of determining the correctness of the books which the law requires him to keep. The law requires that he shall keep these books correctly. The question to be deter-

mined is: Has he kept them correctly? And for the purpose of determining that it seems to me that any book pertaining to his distilling business may be examined rightfully by the officers of the government. And this does not seem to me to infringe upon any of the rights which are guaranteed to the citizen by any of the provisions of the constitution, especially by the fourth and fifth amendments, which were invoked by counsel on the argument, which protect the citizen against unreasonable seizures and searches; also the amendment which protects the citizen against being compelled to give evidence against himself. Nor is the examination of these books, under the circumstances, it seems to me, an unreasonable claim on the part of the government. The distiller, by entering upon the business under the terms of the law, has in effect conceded to the government the right to the fullest and most thorough examination of all his affairs as a distiller. In this business he has no secrets from the government. Such examination is to be made under the order of the court, and in presence of the party or his counsel.

So, too, it seems to me there is no violation of the principle that no man shall be compelled to bear witness against himself. The law, as it has been administered in this country, from the organization of our government, has allowed the books of even a criminal to be used, and entries made by him upon his books were admissible in evidence against him for the purpose of convicting him of a criminal offense. But this is not a criminal offense. This is a proceeding against certain property in rem, which is inculpated for a violation of the revenue laws; and it would seem to me that the question whether a party should be compelled to bear witness against himself or not in a criminal case, is not raised by this proceeding. If these parties were indicted under the criminal clauses of the law, the objection might be well taken, but I do not think that question is raised here. Therefore it seems very clear to me that these books which pertain to the management of this property and the management of his business, whether the distiller calls them his private books or not, are the proper subjects of examination under the orders of the court, for the purpose of determining whether he has truthfully kept the books which the law requires him to keep, and has conducted his business as a distiller according to law.

The act of June 22, 1874, "amending the customs-revenue laws and repealing moieties," as it is called, provides in the fifth section, "that in all suits and proceedings, other than criminal, arising under any of the revenue laws of the United States, the attorney representing the government, whenever, in his belief, any business book, invoice or paper, belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending, may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal, by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper, in obedience to such notice, the allegations stated in said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced, the said attorney shall be permitted under the direction of the court, to make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice, or paper, as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid." 18 Stat. 186.

Now it is claimed that the provisions of this law give the distillers the control of their books; that is, that the government has no right to seize the books, but may simply require the distiller or rectifier to produce his books or take the consequences which the law imposes upon him; that is, the confession of the allegations which the district attorney says the books will tend to prove.

I do not construe this law as necessarily implying that the government may not examine these books for the purpose of determining whether there is anything in them which will tend to prove or disprove the charges made against these distillers. And I come to the conclusion that for the purpose of this case I shall require the books of these parties to be produced before one of the commissioners of this court at once, where the government officers may have an opportunity of examining them. After that, it will be for the court to say whether they will be treated as inculpated property or not. If these books, when examined, shall turn out to be another set, or may be properly understood to be another set of government books or another set of books pertaining to this business of distilling, showing a different statement of facts from what is shown in the government books, I should think it

would be the duty of the court to treat them as belonging to the government,—that is, they should be considered as the true distillery books.

The order of the court will be that the books in question, or rather the safes and vaults in question, shall be opened in the presence of the marshal and collectors of internal revenue; that the books and papers therein be taken before Mr. Hoyne, the commissioner, and there subjected to the examination of the district attorney and such officers of the government as he may desire to have examine them, the owners of the property, of course, having the right to be present, represented by counsel, during such examination.

[Mr. Ward: At the opening of the safes I desire also that the revenue officers be permitted to be present, as it may turn out that there is other property that is a proper subject of seizure in the ordinary sense for the purpose of perfecting that. I suppose, while they are not named by your honor, they will be included in the order.

[The Court: Very well, that will be proper.

[Mr. Smith: The court will see, by reference to the papers, that the motion of the district attorney does not specify the books as the law requires. It seems to me that the court ought to specify what books are to be produced.

[The Court: I think that is to be determined when we ascertain what books are in there. The fact is, here, these safes or vaults are a part of these premises which have not been explored. They are like a secret room belonging to these premises which has not been examined, and to which the officers of the government have been denied access. I think they ought to be opened for the purpose of exploring.

[Mr. Smith: That I do not dispute. The point is, what books shall be produced before Hoyne?

[The Court: All books that are found when these safes are opened are to be produced.

[Mr. Smith: Without reference to what they contain?

[The Court: Yes, sir; the presumption is that they belong to the business of the distillery. Of course, there may be books there that have no application to it. But who can determine that before they are examined? And the only place then, will be before the commissioner.

[Mr. Jussen: Do we understand your honor to hold that, under the law of 1874, the government has the right of seizure originally, aside from the request for the production of the books upon notice?

[The Court: I think so. I think I have examined the question sufficiently to satisfy myself that these books should be produced. I have not put my decision upon the ground that these books were inculpated property, because if they pertain to the business of distilling or rectifying, they are part of the government books. They are part of the books that pertain to that business, and the government has the right of access to all of them.

[Mr. Ward: This order will take effect immediately?

[The Court: Yes, sir.] [2]

Judge Dyer, in the Eastern district of Wisconsin, in U. S. v. Three Tons of Coal [Case No. 16, 515], approved the above decision and made substantially the same rulings.

Case No. 15,736.

UNITED STATES v. MASON.

[12 Blatchf. 497.] [1]

Circuit Court, S. D. New York. April 24, 1875.

COUNTERFEITING — INDICTMENT FOR UTTERING — DESCRIPTION—VARIANCE.

1. In an indictment for uttering a counterfeit bill, if the bill is incorrectly described in respect to its bill number, the variance is fatal.

2. Where such an indictment purports to set forth an exact copy of the bill, the description set forth, though needlessly particular, must conform to the instrument given in evidence. But, a mere literal variance will not be fatal. A variance is literal, when it does not make a word different in sense and grammar, but leaves the sound and sense, in substance, the same.

[Distinguished in U. S. v. Marcus, 53 Fed. 784.]

[Cited in People v. Phillips, 70 Cal. 65, 11 Pac. 495.]

3. An indictment for uttering a counterfeit United States note, gave incorrectly the abbreviations of certain Latin words which formed an inscription upon the seal of the treasury of the United States, as stamped on all genuine United States notes. The indictment contained letters upon what was intended to be a copy of such seal, but those letters did not form the abbreviations found in the note offered in evidence, nor did they form any word, Latin or English: *Held*, that, as the inscription on the seal on the note contained no complete word, and as the letters set forth in the indictment, as the description, did not form any word, either Latin or English, it was impossible to say that any word had been omitted or incorrectly given, and the variation was one in respect of letters, and was not fatal.

[Distinguished in U. S. v. Marcus, 53 Fed. 784.]

4. The indictment omitted the word "to" from the phrase "pay to the bearer:" *Held*, that the variance was not material.

[Cited in People v. Phillips, 70 Cal. 65, 11 Pac. 495.]

5. The indictment inserted the word "on" before the word "duties" in the phrase "all other dues to the United States, except duties:" *Held*, that the variance was unimportant.

6. The indictment used the words "counterfeited bill" while the note read "counterfeit bill:" *Held*, that this was merely a literal variance.

[This was an indictment against George A. Mason upon the charge of uttering a counterfeit bill.]

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[2] [From 21 Int. Rev. Rec. 245.]

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

Ambrose H. Purdy, Asst. U. S. Dist. Atty.
Benjamin B. Foster, for defendant.

BENEDICT, District Judge. The indictment in this case displays such extreme carelessness on the part of the draughtsman, that any attempt to try it would be expected to raise questions of variance. As found, the indictment contains eight counts, some charging the uttering, others the possession with intent to utter, counterfeit bills, particularly described in each count. Several of the counts were necessarily abandoned because the bills therein described, although set out with extreme detail, were incorrectly described in respect to the bill number, a variance in respect to the bill number which is placed upon all bills, for the purpose of identifying the bill, being held to be fatal. In consequence of this ruling, no evidence could be produced in support of the first, fifth and sixth counts. The fifth and sixth counts contained the additional defect, of charging the uttering of a national currency circulating note where the bill set out at length in the count was a United States note. The fourth count also fails, inasmuch as it charges the uttering of a bill purporting to be of the denomination of twenty dollars, while at the same time it describes a fifty dollar bill. The charges are, therefore, reduced to those contained in the second, third, seventh and eighth counts, and, in regard to each of these, the bill offered to support it presents a question of variance. The objections taken to these bills were overruled at the trial with leave to argue the question more deliberately, upon a motion for a new trial, in case of conviction. The jury having found the accused guilty of the offenses set forth in the second, third, seventh and eighth counts, a motion for a new trial has accordingly been made, upon the ground that the bills admitted in evidence do not conform to the descriptions given in the indictment.

In each of the counts under consideration, the accused is charged in respect to a particular bill which the count states to be "as follows," and then adds, with absurd particularity, what is intended for a copy of every word and figure both on the face and on the back of the bill. The words "which is as follows," in these counts, are equivalent to the words "words and figures following," and must be held to mean, that the tenor of the bill is given. Under such an indictment, the rule is, that the description set forth, although needlessly particular, must conform to the instrument given in evidence. By this, however, is not meant, that a mere literal variance will be fatal. Variances which may be fairly considered to be merely literal, which do not make a word different in sense and grammar, which leave the sound and sense, in substance, the same, are not considered material variances. within the rule. U. S. v. Hinman [Case No. 15,370]. The rule, of late, has been much relaxed. May v. State, 14 Ohio, 466. As respects the bill offered in support of the second count, it appears, that the abbreviations of certain Latin words which form an inscription upon the seal of the treasury, as stamped on all genuine bills, are incorrectly given in the indictment. In the indictment, letters appear upon what is intended to be a copy of the seal, but those letters do not form the abbreviations found in the bill offered, nor do they form any word, Latin or English. Another variance appears on the back of the bill. In the indictment, the phrase is "except on duties." In the bill, it reads "except duties." In another place, the words of the indictment are "counterfeited bill," while the bill reads "counterfeit bill." In the third count, similar discrepancies in respect to the inscription on the seal appear, while the words "hard labor," found on the back of the bill, do not appear in the indictment; also, the words "its full value" read, in the indictment, "is full value." In the fourth count, errors in respect to the inscription on the seal also appear, and, in addition, the word "counterfeited," found in the indictment, does not appear upon the bill offered in evidence. In the seventh and eighth counts, the inscription on the seal is not correctly set forth, and the word "other" is omitted, in setting forth the endorsements on the bill.

If these various discrepancies were all to be found in each count, it would be impossible to disregard them. But, they are distributed among several counts, and, inasmuch as each count contains a separate charge in respect to a different bill, it becomes necessary to consider each count by itself. If any one count be supported by the bill offered in evidence under it, the conviction upon that count can be sustained, whatever might be the result as to the other counts. I consider, then, the second count. Here, the variances are in the inscription on the seal; the omission of the word "to;" the insertion of the word "on;" and the addition of the letters "ed" to the word "counterfeit." As respects the defect in setting forth the abbreviations which form the inscription on the seal, I think they may be disregarded, as being a mere variation in letters. The inscription on the bill contains no complete word, and the letters set forth in the indictment, as the inscription, do not form any word, either Latin or English. It is impossible, therefore, to say that any word has been omitted or incorrectly given. The variation is in respect to letters. The next defect is the omission of the word "to" from the phrase "pay to the bearer." But, this defect is not such as changes the sense in any way. The contract stated remains the same. Such a variance is not deemed material. In Quigley v. People, 2 Scam. 301, the word "or" was omitted from the phrase

"B. Aymar or bearer." The variance was held unimportant. See, also, May v. State, 14 Ohio, 466. The next defect consists in inserting the word "on" before the word "duties," in the sentence "all other dues to the United States, except duties." Here, too, the insertion makes no change in the sense, and, if the word "or" could be omitted from the phrase "B. Aymar or bearer," the variance in question is, certainly, unimportant. The remaining defect is in the addition of the termination "ed" to the word "counterfeit." This is merely literal. No word different in sense and grammar is made. In Com. v. Parmenter, 5 Pick. 279, upon a question of variance, it is said: " 'I promised' would be construed to mean, 'I promise.' " See, also, Butler v. State, 22 Ala. 48. In respect to all these differences, I also remark, that no request was made to have them submitted to the jury—a course suggested by the court in U. S. v. Hinman [supra]. My conclusion, therefore, is, that, in admitting the bill offered to support the second count, I went no further than other courts have gone, and, as to this count, I hold that the conviction must stand.

As to the other counts, I do not feel called on to express an opinion, inasmuch as the requirements of justice will be satisfied if judgment be entered upon the second count alone. Sentence will, accordingly, be pronounced upon the second count alone.

Case No. 15,737.

UNITED STATES v. MASON et al.

[2 Bond, 183.] [1]

Circuit Court, S. D. Ohio. Oct. Term, 1868.

POST-OFFICE — POSTAGE STAMPS — DEPUTY POSTMASTER—SURETIES ON BOND.

1. Section 3 of the act of congress of March 3, 1851 [9 Stat. 589], authorizes the postmaster-general to deliver postage stamps to a deputy postmaster without prepayment.

2. The intention of congress by said section was to require prepayment for postage stamps of persons not deputy postmasters.

3. Under the said act, the sureties upon the official bond of a deputy postmaster are liable for postage stamps received by their principal.

4. The sureties upon the bond of a deputy postmaster, which stipulates that the principal shall faithfully account for postage stamps received by him, are liable as upon a valid contract at common law.

At law.

Durbin Ward, U. S. Dist. Atty.

H. H. Hunter, for defendant.

OPINION OF THE COURT. This is an action of debt against Columbus B. Mason, on his bond as a deputy postmaster at Circleville, Ohio, and against the other defendants, as the sureties of Mason. The declaration sets out at length the conditions of the bond, one of which is that the said Mason, as a deputy postmaster, "shall faithfully account with the United States, in the manner directed by the postmaster-general, for all moneys, postage stamps, stamped envelopes, bills, bonds, notes, drafts, receipts, vouchers, and other property and papers, which he, as postmaster, or as agent and depositary as aforesaid, shall receive for the use and benefit of the said post-office department." Various breaches of the bond are assigned; and, among others, it is averred that Mason and his sureties did not account for all the postage stamps, envelopes, etc., received by Mason from time to time, as deputy postmaster. For the purpose of a decision of the question now before the court, it is not necessary to notice the other breaches assigned. The sureties have filed several special pleas, setting up matters of defense to the action on the bond. Among others, there is an eighth plea, which is, in substance, that Mason, as deputy postmaster, faithfully accounted for and paid over all moneys for which he was accountable, and which is claimed as due from him, "except such part thereof as may have arisen as proceeds of sales of postage stamps and stamped envelopes, if any such were placed in his hands, or furnished to him by the postmaster-general;" as to which they aver that the plaintiff is not entitled to recover against them as sureties, "because they say the said Columbus B. Mason, in his said capacity of deputy postmaster, or otherwise, was not an assistant treasurer, or a designated depositary of the United States, and that it was not lawfully competent for the postmaster-general, or any other officer or agent of the plaintiff, to furnish to him, the said Columbus B. Mason, in his said capacity of deputy postmaster or otherwise, postage stamps or stamped envelopes, except upon payment thereof in advance."

To this plea there is a general demurrer, and upon that the question before the court arises. It presents the single inquiry, whether the sureties in the bond of an assistant postmaster are liable for postage stamps delivered by the postmaster-general to such assistant, for which he has failed to account. It is insisted, by the counsel for the sureties, that the postmaster-general had no authority, under any law of the United States, to deliver postage stamps or stamped envelopes to a deputy postmaster but upon prepayment for them, and that the sureties are not responsible for a failure by the assistant postmaster to account for them in his settlement with the post-office department. The decision of the question depends

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

on the construction to be given to a part of section 3 of the act of March 3, 1851 (9 Stat. 589), which was in force when the bond was executed. The first clause of that section provides, "that it shall be the duty of the postmaster-general to provide and furnish to all deputy postmasters, and to all other persons applying and paying therefor, suitable postage stamps, of the denomination of three cents, and of such other denominations as he may think expedient, to facilitate the prepayment of postages provided in this act." Thus the issue is presented, whether the sureties are liable for postage stamps delivered to a deputy postmaster, or to any other person, without prepayment on delivery; and whether the postmaster-general is authorized to deliver them to a deputy, except on such prepayment. And it is insisted, that as the stamps delivered to Mason, the deputy postmaster, were not thus paid for, but charged in his account at the post-office department, the sureties are not liable for any balance appearing to be due from him, accruing from his failure to pay or account for such stamps. It may be noticed, in the first place, that the bond given by the deputy postmaster, and executed by his sureties, provides that Mason, as deputy postmaster, "shall faithfully account with the United States, in the manner directed by the postmaster-general, for all moneys, postage stamps, * * * which he, as postmaster, or as agent and depositary, shall receive for the use and benefit of said post-office department." Such was the express undertaking of the parties to the bond, as prepared and furnished by the postmaster-general. That officer construed the section of the law referred to as authorizing him to deliver stamps to a deputy postmaster without requiring prepayment. He has, therefore, made special provision in the bond for the liability of the deputy to account for such stamps; and the sureties, by the express condition of the bond, undertake that he shall so account.

It seems to the court to be the plain construction of the section of the act of 1851 referred to, that the postmaster-general was authorized to deliver stamps to a deputy postmaster without prepayment, and that the requirement to prepay has reference to persons not deputy postmasters, who may apply for stamps. This is the grammatical construction of the words of the section; and there are strong reasons for the conclusion that such was the intention of congress. The provision referred to evidently presupposes that under the security afforded by the official bond of a deputy postmaster, he may be intrusted with stamps at the discretion of the postmaster-general without requiring payment upon delivery. But as to others, not officially connected with the post-office department, and who, for their interest or convenience, apply for stamps, they should be required to pay for them on delivery. It would be inconvenient and unsafe for the government to give credit to and open accounts with every individual to whom stamps were delivered; but this objection does not apply to those delivered to deputy postmasters, acting under the obligation of an official oath and an official bond, and with whom accounts were necessarily opened by the post-office department.

This view is fortified by reference to section 11 of the act of March 3, 1847 (9 Stat. 201). It authorized the postmaster-general to prepare stamps to be attached to letters in prepayment of postage, and provided as follows: "Which said stamps the postmaster-general may deliver to any deputy postmaster who may apply for the same, the deputy postmaster paying or becoming accountable for the amount of the stamps so received by him." Under this provision, no stamps could be delivered to any other person than a deputy postmaster, who might pay for the same, or give security for the payment therefor, as prescribed by the postmaster-general. It was doubtless found, as the operations of the department were enlarged, that it would be promotive of the public convenience, and increase the efficiency of the department, that persons not postmasters should be authorized, at the discretion of the postmaster-general, to receive stamps, but only on the condition of prepayment; and that as to postmasters, they should be relieved from any obligation to pay as delivered, and that stamps received by them should be charged in their account current. That this was the reason of the change in the law, as made by the act of 1851, seems most obvious. The court has, therefore, no hesitancy in holding, that under the last-named act the sureties of Mason are liable, as well for postage stamps received by him as for moneys received for postages. I am unable to perceive that there is any hardship on the sureties from this construction of the statute, as they expressly agreed in the bond to be liable for postage stamps received by their principal. But if this construction of the statute is erroneous, are not the parties to this bond liable upon it as an instrument at common law? They agree by the terms of the bond that the postmaster shall faithfully account for postage stamps received by him. Is it not an agreement or stipulation that may be enforced by the government irrespective of the statute? I am not aware that this precise point has been adjudicated by the supreme court. Yet it seems clear, that by analogy to the principle decided by the supreme court in the case of U. S. v. Linn, 15 Pet. [40 U. S.] 290, the doctrine indicated may be sustained. That was a suit against Linn and the sureties in his bond as a receiver of public moneys in Illinois, alleging a defalcation in not ac-

counting for moneys received by him as such. The sureties, among other matters of defense, filed a plea of non est factum. It was based on the fact that no seals were affixed to the signatures of the sureties to the bond when executed by them. It was insisted by the counsel for the sureties, that the bond, not being executed according to the requirement of the act of congress, was a nullity as to them. The statute required receivers of public moneys to give bond for the faithful discharge of their duties, with approved security. The question as to the validity of the bond was elaborately argued in the supreme court. It was admitted in the case, that as to the sureties, the bond being signed without their seals, was not technically a bond according to the common law definition of that instrument; and it was insisted, that not being a bond, as required by the statute, it did not bind the sureties. But the court held, that although the bond was not strictly a bond without the seals of the parties to it, and not therefore within the letter of the statute, yet as the statute did not declare a bond not executed in strict pursuance of the statute to be void, it created a legal obligation on the part of the sureties. The court very distinctly held, that though the statute required a bond with approved security, "a mortgage, or any other approved security, voluntarily given, would, no doubt, be valid, and it would be no very forced interpretation of this act to consider the instrument as such security." Without quoting further from the opinion of the court, the point under consideration is briefly stated in the syllabus of the report, as follows: "If the contract signed by the defendants was entered into for a lawful purpose, not prohibited by law, and is founded on a sufficient consideration, it is a valid contract at common law." And the court remark, in their opinion: "There ought to be some very strong grounds to authorize a court to declare a contract absolutely void, which has been voluntarily made, upon a good consideration, and delivered to the party for whose benefit it was intended." The court can perceive no reason why the bond of the postmaster Mason, signed by his sureties, is not valid as to all the parties, within the doctrine settled by the supreme court in the case referred to The sureties voluntarily undertook, by the very terms of the bond, that their principal should faithfully account for postage stamps received by him. Upon the theory that the statute did not authorize, in terms, the delivery of postage stamps to a deputy postmaster without prepayment, yet as this bond, stipulating for the liability of the sureties, was founded upon a good consideration, was executed in good faith, and was not prohibited by law, it is within the scope of the decision of the supreme court a valid bond. And the demurrer to the eighth plea must be sustained.

Case No. 15,738.

UNITED STATES v. MASON.

[2 Cranch, C. C. 410.] [1]

Circuit Court, District of Columbia. May Term, 1823.

LARCENY—OWNERSHIP OF GOODS—LOCUS OF CRIME.

1. If a man steals goods in North Carolina and brings them here, he is guilty of larceny here.

[Cited in U. S. v. Hankey, Case No. 15,328; U. S. v. Mortimer, Id. 15,821.]

[Cited in Worthington v. State, 58 Fed. 407.]

2. A dead man cannot be the owner of goods. It is not sufficient to state them to be the goods of one A. B. deceased.

Indictment [against John Mason] for stealing a pair of golden suspender buckles and a brass pistol "of the goods and chattels of one Edward Rumney, deceased." Edward Rumney was master of a vessel wrecked on the coast of North Carolina. The prisoner was one of the mariners. Rumney was drowned. There was evidence that the articles belonged to Rumney, and were found on the prisoner, who had offered them for sale, and had given contradictory accounts of the manner in which he obtained them, and claimed them as his own.

Mr. Hewitt, for the prisoner, contended that although he might have stolen them in North Carolina, it was not larceny here.

But THE COURT (THRUSTON, Circuit Judge, absent) stopped Mr. Hewitt in his argument, and said it had been often decided by this court, that if a larceny be committed in any of the states, and the thief bring the stolen goods into this district, he is guilty of larceny here. U. S. v. Tolson [Case No. 16,530], at December term, 1805.

Mr. Hewitt, in argument to the jury, contended that larceny cannot be committed unless of the property of some person in existence. The property, if taken by the prisoner, was taken after the death of Captain Rumney, and no administration has yet been granted upon his estate. The buckles and pistols were not the property of any person at the time they were taken; so that no larceny of them could have been committed, even if taken with a felonious intent. But he had a right to take possession of the goods. There is no evidence that he knew they belonged to Captain Rumney.

Mr. Swann, contra. The law here differs from that of England in relation to testamentary affairs. There the ordinary grants letters of administration, and until they are granted the goods are to be called the goods of the ordinary. Here the letters of administration are granted by the courts; and if this indictment should be adjudged bad, he should send up another, charging the goods as of the goods and chattels of the orphans' court.

[1] [Reported by Hon. William Cranch, Chief Judge.]

After the jury had retired, they came in and asked the court to instruct them, whether the indictment could be supported for larceny of the goods of a dead man.

THE COURT (THRUSTON, Circuit Judge, absent) answered, that a dead man could not have goods and chattels; and that, therefore, the indictment could not be supported.

Case No. 15,739.

UNITED STATES v. MASTERS.

[4 Cranch, C. C. 479.] [1]

Circuit Court, District of Columbia. Nov. Term, 1834.

WITNESS—EVIDENCE TO DISCREDIT.

Evidence will not be admitted that the witness is a common prostitute, to discredit her testimony. The question must be confined to her general reputation for veracity, and whether from his knowledge of that general reputation he would believe her upon oath.

[Cited in Fletcher v. State, 49 Fed. 133.]

Indictment [against William T. Masters] for assault and battery.

Mr. Brent, for the defendant, offered to prove that the witness for the prosecution was generally reputed to be a common prostitute, in order to discredit her testimony; and cited 2 Hayw. (N. C.) 300; Hume v. Scott, 3 A. K. Marsh. 261; Com. v. Murphy, 14 Mass. 387.

THE COURT (THRUSTON, Circuit Judge, absent) said that the rule which this court has adopted, is that laid down by Starkie, and the question must be confined to the general reputation of the witness as to veracity; and whether, from his knowledge of that general reputation, he would believe her upon oath.

Case No. 15,740.

UNITED STATES v. MATHOIT.

[1 Sawy. 142; [2] 11 Int. Rev. Rec. 158.]

District Court, D. Oregon. April 20, 1870.

INTERNAL REVENUE—DISTILLER—PROOF OF VIOLATION OF LAW—SETTING ASIDE VERDICT.

1. Section 44 of the act of July 20, 1868 (15 Stat. 142), is applicable to any person who distils spirits (15 Stat. 150) without having paid the special tax therefor, or given bond, as required by law, whether such person has registered his still or given notice of his intention to engage in the business or not.

2. Where unstamped spirits are found in the premises of the defendant which contain the machinery and appliances for distilling spirits, this fact unexplained is sufficient to justify the jury in finding that such spirits were distilled on the premises, and since the last inspection of them by the gauger.

3. Jury instructed that the evidence would justify them in finding that certain premises and still continued to be the property of the defendant, as before then stated by him in his act of registry and notice of intention to distill, and therefore were employed in the illegal distillation in question, with his consent and for his benefit.

4. When it is shown that certain property belongs to a particular person, the law presumes that the ownership remains unchanged, until the contrary appears.

5. A correct verdict should never be set aside on account of supposed or actual error in the process or means by which it was obtained.

This was an indictment [against Edward Mathoit] under section 44 of the act of July 20, 1868 (15 Stat. 142), for carrying on the business of a distiller, without having paid the special tax therefor, or given bond, as required by law. On March 18, the case was tried upon the plea of not guilty, when the jury found the defendant guilty as charged in the indictment, and recommended him to the mercy of the court. Afterwards, a motion for a new trial was argued by counsel, and taken under advisement.

J. C. Cartwright, for plaintiff.

David Logan, for defendant.

DEADY, District Judge. Section 44 of the act of July 20, 1868 (15 Stat. 142), provides: "That any person who shall carry on the business of a distiller * * * without having paid the special tax as required by law, or who shall carry on the business of a distiller without having given bonds, as required by law, * * * shall, for every such offense be fined not less than $1,000 nor more than $5,000, and imprisoned not less than six months nor more than two years."

On February 25, 1870, the grand jury of this district found an indictment against the defendant, Edward Mathoit, of Marion county, for violation of the above section. The indictment contains two counts. By the first, the defendant is accused of carrying on the business of a distiller, continuously between May 1, 1869, and February 14, 1870, without having paid the special tax therefor; and by the second with carrying on such business between the dates aforesaid, continuously, without having given the bond therefor, as required by law.

The defendant demurred to the indictment for that it did not state facts sufficient to constitute a crime. In support of the demurrer, counsel for the defendant argued that section 44 was not applicable to mere illicit distilling, but only where a party had registered his still and given notice of his intention to engage in the business, and then did so without paying the tax or giving the bond. Upon this construction of the act, and the fact, that the indictment did state that the defendant had registered and given notice of his intention to distill, it was claimed that the indictment was insufficient. The court overruled the demurrer, and the defendant plead ed "not guilty."

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

Section 59 of the act defines a distiller in these words: "Every person who produces distilled spirits, or who brews, or who makes mash, wort, or wash fit for distillation or the production of spirits, or who by any process of vaporization separates alcoholic spirit from any fermented substance, or who making or keeping mash, wort or wash, has also in his possession or use a still, shall be regarded as a distiller."

If a person who does any of these acts is to be regarded as a distiller, it is too plain for argument that for the time being he must be regarded as being engaged in the business of a distiller, and in violation of section 44, unless he has paid the special tax and given the bond. And this must be so whether he has registered and given notice of his intention to distill or not. The neglect to perform these mere preliminary precautionary conditions, does not secure immunity from the weightier matters of the law—the obligation to pay the tax and give the bond. To support the charge of violating section 44, it is not necessary to aver or prove that the accused had registered his still, or given notice of his intention to distill, but only that he was engaged in the business of a distiller in any of the ways or by any of the means specified in the foregoing definition of a distiller, without having paid the special tax or given bond, as required by law. The grounds of the motion for a new trial are substantially, that the verdict is contrary to law and the evidence, and not warranted by either, and that the court misdirected the jury.

It appears from the evidence that the defendant and his father, quite an aged man, lived together on a farm in the immediate vicinity of Butteville, in the county and district aforesaid upon which, among other things, they had planted and cultivated a vineyard. On the premises there was a small building, situate on the side of a hill. The lower room was partly underground, and opened out on the lower side of the hill, and at the date of the indictment and for nearly a year previous, was used as a wareroom for wines and spirits. The upper room was used as a distillery, and contained the still hereinafter mentioned, and some mash-tubs, and the like.

On December 5, 1868, the defendant (by form 26) registered the still in question, to be used, and set forth therein that it was set up near Butteville, and that Edward Mathoit was the owner of the same; that its cubic contents were fifteen gallons; and that it was to be used to make grape brandy; and on March 10, 1869, he gave notice (by form 27) of his intention to engage in the business of distilling brandy from apples and grapes in the building owned by himself, near the village of Butteville, with one copper still, twelve inches in diameter and twenty-eight inches high, containing 13.07 gallons, and also some tubs, containing in all 68.25 gallons of fermenting material—grapes and apple pumice; and that the premises on which the distillery were situate were owned by him. The defendant then paid the special tax and gave bond as a distiller for the remaining portion of the revenue year 1868, which expired on the last of April, 1869. No notice of change of ownership or intention to distill was given to the assessor after that, nor did any one pay any special tax, or give any bond on account of or in connection with this still or apparatus thereafter. About February 23, the collector seized the distillery and apparatus, and turned them over to the marshal to be proceeded against as forfeited, in this court. A judgment of condemnation has since been given against the property, no one appearing to claim it, together with 900 gallons of wine and 212 gallons of distilled spirits, seized on the premises at the same time. Among the packages of distilled spirits was one containing twenty-two wine gallons, which had been gauged and stamped for the defendant by Kilbourne, gauger of the district, in July, 1869, at which time the defendant told the gauger that he had no other spirits that needed stamping. The unstamped spirits were in five or six packages, and were 30 or 40 per cent. below proof, or about one third in volume of alcohol—proof spirits being one half in volume of alcohol.

On the argument of this motion, it was not contended that the proof was insufficient to justify the jury in coming to the conclusion that between the dates named in the indictment there had been spirits distilled on the premises, in violation of law. Upon this point the proof was ample and the jury could not have found otherwise than as they did. The simple fact of unstamped spirits being found on the premises, unexplained, was of itself sufficient to justify the verdict in this particular. But in addition to this there was the statement or admission of the defendant in July, 1869, that he had then no other unstamped spirits on hand, and the direct testimony of the three uncontradicted witnesses —Hugg, Higgins and Shipley—who at different times in the months of November and December, saw the defendant's father engaged in the room with the still in such a manner and under such circumstances that it was manifest and apparent to the dullest comprehension, that he was engaged in distilling spirits.

But no witness testifies that he ever saw the defendant personally engaged in operating the still or attending to it, and upon this point the argument for a new trial rests.

It is claimed that the proof was not sufficient to connect the defendant with the illegal distillation, and that the court erred and misled the jury in instructing them, that under the circumstances they were justified in finding that the premises and still continued to be the property of the defendant, as stated by him in his act of registry and notice of intention to distill, given March 10, 1869, and therefore were employed in the illegal dis-

tillation in question, with his consent and under his direction, and for his benefit exclusively or in conjunction with his father.

To show the propriety of this instruction and the action of the jury under it, it will be necessary to briefly state the circumstances referred to in it.

As late as March 10, 1869, the defendant over his own signature claimed to the assessor that he was the sole owner of the premises and still. He paid the special tax, and gave the bond and operated it as his own until May 1, of that year. We find him on the premises with the gauger in July, 1869, acting as proprietor and procuring the inspection and stamping of the spirits he had distilled in March and April before. No evidence of any change of ownership is produced, nor of any change of circumstances of the party with reference to the property, or his location or employment, from which such change of ownership could fairly, or at all, be inferred. The defendant and his father continue to reside together, and the former is always found in or about the premises, or at work upon the farm. He employs Higgins to grub upon the farm. He sells Shipley the grape cuttings, and is in the wine cellar with him. In short, he appears to be the active managing man of the place, while the old man remains in doors and runs the still. No notice of change of ownership of the still was given to the assessor by any one. True, the failure to give this notice, although a penalty is thereby incurred, should not preclude the defendant in this action from showing the fact of such change, and the jury from so finding, if the evidence is sufficient, and so the court held and instructed the jury.

Besides these general considerations, there are some special circumstances disclosed by the testimony of the gauger and deputy assessor which tend to show that no change had taken place in the ownership of the property, and that the defendant was really engaged in operating the still.

Mellen, the deputy assessor for the division wherein the distillery was situated, testified that in pursuance of instructions from the assessor for the district, Mr. Frazer, he visited the distillery in question on February 14, 1870. First went into the dwelling house near by, where the defendant and his father were living together. After taking defendant's income return, he and defendant walked out to the distillery together. Went to the lower room or cellar, and tapped on some casks, and asked defendant what was in them. Defendant answered wine. Mellen replied that he had come to look after the distillery, and must examine the casks, and then did so, and found six casks to contain distilled spirits—apple or grape brandy—the same that was afterward seized and condemned as above stated. Deputy then said to defendant, thought he had got into a bad scrape, and had better go to Mr. Frazer's office in Portland, and see what could be done. Defendant said he couldn't go for a day or two. Mellen said better go, and locked up the room, and they both came down to the assessor's office at Portland, then or the next day. While at the distillery, defendant said that he distilled these spirits under the old law. At Portland, after it was ascertained that the law must take its course, Mellen said to defendant that he ought to have had the spirits stamped when Kilbourne was up at the distillery, and then the defendant replied that they had been distilled within a month or six weeks. Upon cross-examination, this witness became embarrassed, and was unable to give, with any certainty, the time and place of the last statement attributed to defendant, and altogether his manner and conduct upon this point was such as justly to subject his testimony to criticism. But I am not prepared to admit by any means, what counsel so vehemently urged upon the jury, that on this account, the witness ought not to be believed. And whether he should be or not, and how far he was discredited in this respect, the jury were the judges. Yet I will take the liberty of suggesting that when a revenue officer is charged with as important matter as this, he ought to observe correctly, and be able to come upon the stand and testify concerning it distinctly—giving time and place to all material circumstances, and particularly to conversations with the parties accused or interested.

Kilbourne testified that in July, 1869, he inspected and stamped the spirits on the premises for the defendant, which were evidently those distilled by him in March and April, 1869. Kilbourne did not inspect or stamp any more spirits on or at these premises until the seizure above mentioned. In the fall of 1869, perhaps the last of October, the defendant met Kilbourne in Portland, when the latter asked the former about his distillery. Defendant said he had not commenced distilling, and asked witness if there had been any change of the law, to which Kilbourne replied that he did not know, and that defendant had better inquire at the assessor's office. Again, when defendant came to Portland with Mellen in February, Kilbourne met him and asked him if he was going to distill, or when he got through. Defendant answered that he had got through. K. replied: "I will have to go up then, soon" (meaning to distillery, to inspect and stamp spirits). Defendant said yes, and asked if law was same as last year. Kilbourne replied yes. Defendant then said he had got into trouble.

Thus, wherever we find the defendant, or with whomsoever conversing, he speaks and acts as if the distillery was his, and under his direction. The second conversation between him and Kilbourne, occurred the day after Mellen's visit to the distillery, when the defendant knew that he was in trouble and practically accused of the very crime of which he has been found guilty. It never occurred to him then, nor at any other time that we know of, until on this trial, to claim that he

was not the owner and operator of this still. On the other hand, if the property had been sold or transferred to his father, or his father was engaged in running the distillery without the defendant's authority or consent, and not for his benefit, there is evidence of the fact, and the defendant should produce it. It is a presumption of law, upon which the jury were bound to act, that when the ownership of property is shown to be in a particular person, it continues to be so until the contrary appears.

The father was present at the trial, and was referred to by counsel for defendant, as the party who had really done this illegal distilling. If so, why not call him as a witness. Under the act of congress of February 25, 1868 (15 Stat. 37), he could have been compelled to testify as to the matter, and his evidence could not have been used against him in any prosecution against himself. The omission to do this is itself sufficient to justify the jury in presuming that no change of ownership or management had taken place, and that the defendant was really engaged in the business of distilling, and employing his father to personally attend to the process for him. Upon this question, Mellen's testimony may be laid aside, and still upon the facts the jury could not have come to any other conclusion than they did.

Nor was this question withdrawn from the jury by the instructions of the court. For, while they were instructed that the ownership of the property was presumed to continue in the defendant until the contrary appeared, and that under the circumstances—the proof—they were justified in finding that the premises and still continued to be the property of the defendant, as stated by him to the assessor, they were also instructed that in subordination to the presumption of law just stated, they must determine that question for themselves.

But it is said that while the instruction did not profess to withdraw the question from the jury, as a matter of fact it was well calculated to, and possibly the jury may have mistaken the purport of it, and assumed without inquiry that the ownership of the property was in the defendant as a matter of law. I think this is a very improbable supposition, entirely too speculative to disturb the verdict of a jury upon. But if it were otherwise, as the verdict is undoubtedly correct, both as to law and evidence, it must stand. A correct verdict should never be set aside on account of error actual or supposed, in the process or means by which it has been obtained.

[Edward Mathoit indicted for distilling without having paid special tax and given bond; sentenced to imprisonment in county jail for one year, and to pay a fine of $2,000 and costs.] [2]

[2] [From 11 Int. Rev. Rec. 158.]

Case No. 15,741.

UNITED STATES v. The MATILDA.

[Brunner, Col. Cas. 258;[1] 5 Hughes, 44; 4 Hall, Law J. 478.]

Circuit Court, D. North Carolina. May Term, 1813.

EQUITY RULES IN ADMIRALTY COURTS.

The equity rule requiring two witnesses, or one witness and corroborating circumstances, to overcome the denial in the answer, is not recognized in admiralty courts.

[Cited in Hutson v. Jordan, Case No. 6,959.]

This was a libel in the admiralty, seeking the condemnation of the Matilda and her cargo as lawful prize; and was filed and heard in the district court at Wilmington, at May term, 1813. The libel charges among other things that the schooner Matilda, being a vessel of the United States and belonging to citizens thereof, did depart from the port of Newbern since the 11th of March last, with a cargo of shingles, scantling, and corn, bound for some British port in the West Indies, to wit, some port in Antigua, Montserat, St. Christophers, Nevis, or the Virgin Islands, with an intention on the part of the master and owners of disposing of the cargo to the inhabitants (being British subjects) of some of said islands. That on the 5th of April, 1813 (the day of capture), in lat. 26 deg. 39 min. north, long. 68 deg. 17 min. west, the Matilda was sailing under a British license which authorized the importation of said cargo from the United States into the said British islands. A claim and answer was put in by Thomas Jenkins, the master, and one third owner of the schooner and cargo, and by Moses Jarvis, for himself and his partner Sylvester Brown, owners of the other two thirds, all citizens of the United States. They state among other things, that the schooner and cargo were seized about the 5th of April, 1813, by the Gen. Armstrong, on the high seas, while said schooner was proceeding from the port of Newbern, North Carolina, to the Island of St. Bartholomews, in the West Indies; that she was regularly cleared for said voyage; that they, the claimants, had given bond, according to law, that she should not proceed to an enemy's port; that she was at the time of seizure, in the direct course to St. Bartholomews; that they, the claimants, had no intention of proceeding to an enemy's port; or of having any commercial intercourse with the enemies of their country; that said claimants had coffee lying at St. Bartholomews, which they were desirous to bring home, and which partly induced the prosecution of said voyage; that the schooner was boarded and taken by the crew of the ship, and the master, Thomas Jenkins, ordered on board the ship, the said crew being in possession at that time of no other papers from the Matilda, as claimants know of, than the regular documents of the vessel and a letter

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

from Jarvis and Brown to Jenkins; that on the 5th day after the capture, two men opened Jenkins's trunk, and having searched his pocket-book, found therein two papers, commonly known as British licenses, which were procured by Jarvis and Brown, from American citizens, and were intended to protect the Matilda from British cruisers on her said voyage to St. Bartholomews; that at the time of capture, the seamen of the General Armstrong were in a state of revolt, mutiny and rebellion, the captain of said ship being confined to his cabin and his authority usurped —and they submit whether a capture thus made can be good prize. To this claim and answer, is annexed the affidavit of the claimants Jarvis and Jenkins, declaring the facts to be true.

The evidence was in substance as follows: A license signed by H. Elliott, governor of the British leeward Charibee Islands, at Antigua, the 22d of January, 1813, to be in force from the date thereof to the 30th of June next. This license expresses to be issued by virtue of an order in council, of October 26th, 1812. It is granted to Daniel Multhrope, and permits a vessel being unarmed and not less than one hundred tons burthen, and bearing any flag except that of France, &c. to import into any of the ports of Antigua, Montserat, St. Christophers, Nevis, and the Virgin Islands, from any port of the United States, a cargo of staves and lumber, live stock etc., and every kind of provisions whatsoever, beef, pork, butter, salted, dried and pickled fish excepted, without molestation, on account of hostilities existing between his majesty and the United States, notwithstanding the said ship and cargo may be the property of any citizen or inhabitant of said states, etc., and that the master of said vessel shall be permitted to receive his freight and return with his vessel and crew to any port of the United States not blockaded, with a cargo consisting of rum and molasses, and of any other goods and commodities whatsoever, except sugar, indigo, cotton, wool, coffee and cocoa; upon condition that the name and tonnage of the vessel, and the name of the master shall be indorsed on the license at the time of the vessel's clearance from the port of landing. This license was indorsed in the following words by the claimant Jarvis, viz., "Thomas Jenkins, master of the schooner Matilda, burthen $114^{82}/_{95}$ tons, with a cargo of scantling, shingles, corn, and necessary stores, Newbern, North Carolina, March 11th, 1813." Another license, agreeing in all respects with the last mentioned, except that this gives permission, in addition to the former, to touch at St. Bartholomews on the outward and homeward voyage to and from the British Islands. This is not indorsed, but both bear No. 46, and are intended probably as a set of licenses. A letter from Jarvis and Brown, written at Newbern, March 11th, 1813, addressed to Thomas Jenkins at Wallace's Channel, states, that since writing the letter which covers the bills of lading, the mail brought the news of the adjournment of congress, and that the senate had put a death wound on the license bill, and the bill to prohibit the neutral trade was also killed by the same house, so that we are now in the same situation with respect to commerce as we were before the session commenced. As the non-importation law is still in force, should you think of returning with produce, you will guard against your own government. The Matilda had a regular clearance from Newbern, bound for St. Bartholomews, dated 11th March, 1813. The bill of lading at Newbern, written by said Jarvis, agrees with the cargo before stated, and bears even date with the clearance; but in the bill of lading the vessel is said to be "bound for the West Indies." The list of seamen was regular, and so was the register. The president's commission to the General Armstrong is in the usual form, and of date, the 23d November, 1812. The ship is therein stated to belong to John Everingham and John Sinclair; and authority is given to John Sinclair, captain, and David Pearce, lieutenant, of said ship, and the officers and crew thereof, to subdue and take any British vessels, etc., and the said John Sinclair is further authorized to detain, seize and take all vessels and effects, to whomsoever belonging, which shall be liable according to the law of nations and the rights of the United States as a power at war, and to bring the same into some port of the United States, in order that due proceedings may be had thereon.

William Livingston, a witness for the libellants, swore, that on the 5th of April last, the Matilda was brought to by the General Armstrong; that Jenkins was ordered on board the ship, and his papers demanded; upon which he delivered the register, clearance, bill of lading, and list of seamen aforesaid—that he, the witness, being then sailing master of the ship, declared he would send the schooner into port; to which Jenkins replied, that he had not seen all his papers, and pulling two more out of his pocket gave them to this witness, which proved to be the indorsed license, and the letter from Jarvis and Brown to Jenkins as aforesaid—that a few days after he searched Jenkins's trunk, and found therein the indorsed license aforesaid—and that he commanded the ship at the time of said seizure. Upon his cross-examination, he declared that Captain Sinclair was confined to his cabin by some part of the crew as he understood; that it is not common for the sailing-master to have command of the ship, when the captain is on board—that Sinclair, Everingham, and others, were owners of the ship—that Captain Sinclair authorized him to act as sailing-master—that Sinclair did not seize, or assent to the seizure of the Matilda. James Johnston, another witness for the libellants, deposed that the General Armstrong arrived at the port of Wilmington on the 16th of April, and the Matilda on the 19th—that

Captain Sinclair put him on board the Matilda, in the port of Wilmington, to take an inventory of the effects, and to dispossess the mutineers—that he was first lieutenant of the ship, and held possession of the schooner under the authority of Captain Sinclair—and upon his cross-examination said, at the time of the capture, Captain Sinclair was confined in his cabin, and that he, the witness, was confined in the ward-room with liberty to go on deck, but to have no communication with the crew—when Jenkins came on board, he, the witness, was ordered out of the ward-room on the forecastle, by William Livingston, sailing-master, and then commander, but was not to communicate to Jenkins the state the ship was then in—that on the 18th March, while the captain and he were together in the cabin, the doors were shut on them, and they confined by the master's mate and others of the crew—he saw Jenkins's trunk after it was open, heard that they had gotten another license, but did not see it. Charles A. Lewis, also sworn on behalf of the libellants, declares that at the time the Matilda was brought to, the General Armstrong was under British colors—he was in the ward-room of the ship when Jenkins came on board—heard Livingston ask him for his papers—saw Jenkins deliver some papers to Livingston—and upon the threat of the latter to send the schooner into port, Jenkins seemed confused, and said "I have more papers that you have not seen," and took out of his pocket and delivered to Livingston the indorsed license and the letter aforesaid. Captain John Sinclair, a witness for the claimants, deposed, that on the 18th March, he was dispossessed of the command of the ship by William Livingston and other officers and crew—that Livingston, who was then under arrest for misdemeanor, took the command of the ship the same night, without authority from him, and continued in command until after the capture—and that the capture was made without his privity or consent; he was the commander and part owner of the ship; he delegated power to Everingham to do in the subject of the capture as he might think proper, as agent for the owners, and the said agent has carried on the proceedings—that he would not from his knowledge of the general character of Livingston, believe him on oath—he appointed Livingston sailing-master when he first came on board, and continued him in that command until the 22d February, when he arrested him for disobedience of orders—that he put an officer on board the Matilda to divest those of the command who had captured her without his privity or consent, and to keep possession of her on account of the ship, until it should be determined to whom she might of right appertain. The two licenses and the letter were delivered to the collector of the port of Wilmington, previous to the arrival of the Matilda.

Upon this evidence it was argued for the libellants, that the overt act of sailing under a British license was evidence of trading with the enemy according to the tenor of the license; and that the trading with the enemy was an act, for which, by national law, the vessel and cargo so taken in delicto were confiscable, and Vattel was relied upon as furnishing the rule of decision in cases of such trading. It was further contended, that the law of nations, prohibiting intercourse and dealing with an enemy, is not abrogated by the act of congress on the subject of licenses, as was decided in Pennsylvania by Judge Peters, in the case of The Tulip [unreported].

For the claimants it was argued, that there has been no act committed; no trading with the enemy, nor any other act violating the rules of general public law: for at most, the evidence proves nothing more than an intention to proceed to an enemy's port; and it is contrary to every principle of law, and justice to punish a man for his imaginations. The Matilda was in the road to St. Bartholomews, and had not so much as deviated from her course, so as to lay the foundation for the inference that her real destination was an enemy's port. Term R. 85; Park, Ins. 114. But it was not, in fact, the intention of Jenkins to proceed to a British port—his real destination was St. Bartholomews, as declared by the claimants on oath. No evidence has been adduced to repel this positive declaration, except the feeble presumption arising from the mere possession of the license; which is completely answered by the rule, that every man is presumed to be innocent until the contrary appear. It was also contended, that the mutiny of the crew disabled them from making lawful capture, and rendered them obnoxious to a law which affixes the punishment of death to such an offense, and as the commissioned officers were divested of their command by force and wrong, their assent to the capture could not be presumed; nay the contrary was expressly proved.

The argument being closed, and the object of counsel having been stated to be that of obtaining an immediate decision of this court, and of taking the case thence by appeal to the circuit court, so as to have a hearing at the ensuing term, the judge proceeded to deliver his opinion. He remarked on the novelty and importance of the question—that it was important not only as to the amount of property at stake, but was of vast importance in principle and consequences. He glanced at the difficulties he felt in deciding some of the points in the cause without the aid of authorities or of time to reflect. For these reasons he approached the case not without some distrust of his own judgment; but he felt much relief from the assurance that the case would undergo an investigation in a superior tribunal; for this reason he thought it not very material how he should decide. He felt it his duty, however, as the case had been argued, to meet the question, and briefly to

state the reasons which occurred at the moment to influence his decision. As to the objection that the act of trading was not complete, he had no hesitation in saying that, according to the current of decisions, particularly in cases of blockade, where the principle is the same, the offense was complete, if the real destination was an enemy port; for this is not the case of a mere will or intention to proceed to such port, which, without some overt act would not be punishable; but there was an actual sailing and proceeding on the voyage, thereby carrying that intention into effect; and the point at which the vessel was arrested, affords no grounds unfavorable to the presumption that she was bound to one of the British licensed ports; because she was in the road as direct for one of those as for the neutral port. The question of fact then is this: Was the Matilda really bound to a British port with a cargo? The judge felt himself bound by the evidence to say that she was; according to the well known rules in the court of admiralty, that where a suspicion of guilt is created by the possession of documents, it is expected that the possessor will explain away such suspicion by proof; and where such suspicion is applicable to the charge in the libel, it is prima facie evidence of the facts contained in the allegation, and casts the burden of proof on the party charged. Now, he remarked, the possession of the licenses and the letter of advice, unexplained by evidence, is proof to my mind that the vessel was prosecuting the voyage she was permitted to do by the license. It is true the American papers were all regular, and so they must have been to obtain a clearance. Nothing should be inferred from thence, because every man, whether his designs be honest or otherwise, would use the same precaution; and no man would furnish evidence against himself in a way not at all necessary to the execution of his unlawful designs. The British cruisers know that vessels of the United States must conform to our municipal regulations ere they are permitted to depart. As to the letter, it bears evidence of some unlawful purpose—for if the real object was a lawful trade, it is difficult to assign a reason for the additional caution, "guard against your own government." The captain was already apprised of the failure of the license bill, and of the existence of the non-importation act. The object, indeed, might be to import British produce from a neutral port—which, though unlawful, does not fall under the present charge; or, it might be to import from a British port, and to touch at St. Bartholomews, and there obtain a neutral clearance, so as to guard against this government. The latter supposition very well accords with the licenses. Upon the question of law, whether the act of congress of the 6th of July last, upon the subject now under consideration, is cumulative on the prohibitions of international law, or whether it operates as a repeal or abrogation of those prohibitions; the judge expressed much doubt, but yielded to the opinion which had been given by Judge Peters in the case of The Tulip, that the act of congress is but cumulative.

The only remaining point to be noticed, said the judge, is one of great importance, and, to the court, of serious difficulty; because I entertain much doubt on it, and have not the aid of books in forming my opinion; it is the question which grows out of the mutiny of the crew of the privateer. From what has been said, it would seem that the schooner and her cargo are confiscable; but it does not necessarily follow that because the property is forfeitable to the United States, the libellants shall take the benefit of such forfeiture. The president's commission was the authority under which the capture was made; this commission authorizes John Sinclair the captain, to seize, etc., but the evidence is that the captain, at the time of capture, was, by the violence of the crew, put in close confinement and deprived of all command and authority over the ship. As, therefore, the authority was usurped by others, and the vessel navigated against the will of the captain, all acts done by the crew during such usurpation must be presumed to have been done against his will; or, at any rate, not with his assent either express or implied. The libel is filed in the name of the United States for the use of the owners, officers and crew of the ship. Had it been in the name of the crew only, according to the truth of the case, the objection then would have been, that you have departed from the commission, which was their authority to seize. And taking the case as it stands, it appears a little awkward for the United States to sanction an act that necessarily springs from another which they have said, by the legislature, shall be punished with death. The crew in a state of mutiny made the capture: mutiny is punished with death. And is it competent for the captain to contradict the fact, and now allege that he made the capture, or that it was made by his assent? Or shall he now give a right to himself by relation, and make valid that which was unlawful at the time? The court inclines to a negative answer. What vests the right in the captors? Surely the prize-act—and there it will be seen the right is vested in the owners, officers and crew of the vessel by whom the capture is made.

Upon this point, THE COURT adjudged that the evidence did not support the allegation, and therefore dismissed the libel; but did not decree the restoration of the property. An appeal was immediately obtained and the case brought up to the circuit court at this place, where it was argued at considerable length, at the last term, before the chief justice of the United States, and two points were made, 1st. Was the Matilda bound to an enemy port? 2d. Did the conduct of the crew of the ship affect the right of the

libellants in the present proceeding? It was conceded that if the Matilda was really bound to a British port, the offense was complete. But it was contended that there was no evidence of such fact, except a vague inference to be deduced from the mere possession of the license; for as to the witnesses, it was said, they were interested in the distribution of prize, and therefore incompetent. 4 C. Rob. Adm. 68; 5 C. Rob. Adm. 307. That the presumption such as it was, in favor of the libellants, was answered by the positive oath of Captain Jenkins, who was a competent witness; and that the licenses were intended as a fraud upon the enemy; a practice which is always permitted.

Upon the second point the counsel for the claimants relied upon 2 Ruth. Inst. 564; 3 C. Rob. Adm. 160–184; Marten's 2 Azunia, 354–362; and Browne, Civ. & Adm. Law, 461.

The counsel for the libellants took a survey of the evidence, and endeavored to show by fair inference the unlawful purpose of the claimants. He admitted that the claim and answer as sworn to by Captain Jenkins should be taken as though the captain had been examined on interrogatories. Upon the second point he introduced and relied upon as conclusive authorities, Browne, Civ. & Adm. Law, 281, 282, 453, and 8 Term R. 224.

The Chief Justice asked if Captain Jenkins was a competent witness, and being answered by the libellant's counsel that he was, he was clearly of opinion that the charge against the schooner had no foundation. He remarked upon the regularity of the ordinary papers —he thought the letter of advice contained no evidence of criminal intent, but rather the contrary. He stated the question to be, whether the claimants intended a voyage to an enemy port or not. But he saw no evidence of such intention, save that of the license: that it was common and not at all improper to carry papers to deceive the enemy; that the carrying of the license was to enable them to prosecute a voyage to a neutral port under the protection of the license; and that the evidence of Captain Jenkins cleared the case of all doubt by stating the real object, and positively denying the inference drawn from the license. Here the libellants' counsel called the attention of the Chief Justice to the fact, that Jenkins was part owner of the schooner and her cargo, a circumstance not recollected when the concession was made. The Chief Justice immediately replied that he was interested and of course incompetent. The counsel for the claimants then argued, that this answer should be received as an answer in chancery is; and if so, the answer is to be taken as true until it be disproved. The Chief Justice admitted the rule in the court of chancery, as to the negative matter of an answer, but not in a case where it asserts a right affirmatively in opposition to the complainant's demand; but he took this distinction between a case in chancery and a case in admiralty: in the former, the complainant calls upon the defendant to purge his conscience and disclose facts; and by this appeal to his conscience the complainant makes the answer evidence: in the latter case no such demand or appeal is made.

The Chief Justice then said that the case was very different from what he conceived of it under the evidence of Jenkins; and expressed a willingness to let it lie over for further proof if the libellants had a prospect of obtaining any; but being told they had not, he said he was still of the same opinion; and affirmed the decree of the district court. He also decreed the restoration of the property, but without damages. He gave no opinion upon the second point.

Effect of equity rules in admiralty courts. See Hutson v. Jordan [Case No. 6,959], approving case in text.

Case No. 15,741a.

UNITED STATES v. MATTHEWS.

[2 Betts, C. C. MS. 49.]

Circuit Court, S. D. New York. 1843.

IMPANELLING JURORS—DEFECTS AND MISTAKES IN NAMES—USE OF INITIALS.

[1. The full Christian name is an essential component in the name of a juror, and a ballot or panel giving only an initial letter is insufficient, and constitutes ground of challenge where the local law, as in New York, requires the jury ballots to contain the names, additions, and place of residence of the jurors.]

[2. The middle letter of a name is not regarded, in New York, as an essential part of the name, and a mistake therein is no ground of objection to the juror, where his residence and occupation have been correctly given, and there is no claim that the prisoner has been misled, or that there is any other person having the name on the ballot than the juror in court.]

On a new panel of jurors being returned in this case, Mr. Nash, of counsel for the prisoners, took exceptions to several jurors for defective descriptions of the persons on the panel: (1) That in two cases only the initial letter of the Christian name of the juror was given; (2) In two cases a wrong middle letter in the juror's name ("A." for "O." and "M." for "W.") was returned on the panel. He also claimed the right to 35 peremptory challenges, on the ground that the indictment was founded on the act of congress of 1820, and that, preparatory to challenges for cause, he had a right to question the jurors, whether they had read newspaper reports of this case, or of the trial of William Brown, and had any impression on their minds unfavorable to the prisoners.

BETTS, District Judge. Jurors for the United States courts in New York are to be impanelled according to the laws substantially existing in this state in that respect on the 23d of July, 1840 (act of congress of that date [5 Stat. 394]). The Revised Statutes of the state require the jury ballots to contain the names, additions, and place of residence

of the jurors (2 Rev. St. 412–414, 734]; and a copy of the panel in capital cases, mentioning the names and places of abode of the jurors, must be served on the prisoner two days before his trial (2 Bior. & D. Laws, p. 98, § 28 [1 Stat. 118]). The full Christian name is an essential component of the name of a juror, and the ballot or panel giving only an initial letter does not satisfy the requirement of the law in that behalf. The court has no more authority to dispense with the full Christian name than with the surname. The objection to those two jurors is allowed. The middle letter is not regarded by the local law as an essential part of the name (5 Johns. 84); and upon this exception the district attorney would be entitled, according to that rule, to prove the juror was as well known by the name without the intermediate letter as with it.

The circuit court in the Third circuit seems to have taken a different view of a similar objection, and to have held that the return or designation of the juror was defective. U. S. v. Wilson [Case No. 16,730]. It does not appear from the report of the case whether the decision was based on the local law of Pennsylvania or the general principles of the common law. I am of opinion that the name, residence, and occupation of the juror having been correctly given, and there being no intimation that the prisoner has been misled, or that any other person exists of the name on the ballot, other than the juror in court, that the objection ought not to be allowed; but I am willing to defer the definitive decision of this point for the present, to ascertain whether a jury can be found independent of these individuals.

The counsel for the prisoner is mistaken in supposing this indictment is founded on a statute posterior to the crimes act of 1790, and that the prisoner has the common law right of challenge. All the charges in the indictment are of offences embraced within the eighth section of the act of 1790, and accordingly the prisoner is only entitled to 20 peremptory challenges. 2 Bior. & D. Laws, p. 99, § 29 [1 Stat. 118].

The prisoner upon this peremptorily challenged the jurors suspended; and the panel being exhausted, the case, by consent of the United States attorney, was postponed to the February term, next.

Case No. 15,741b.

UNITED STATES v. MATTHEWS et al.

[2 Betts, C. C. MS. 49.]

Circuit Court, S. D. New York. Dec. 18, 1843.

CRIMINAL LAW — JOINT INDICTMENT — SEPARATE TRIALS—DRAWING JURIES—MURDER — DECLARATIONS AND ADMISSIONS — PROOF OF CORPUS DELICTI.

[1. Prisoners jointly indicted cannot claim separate trials as matter of right, but the matter rests in the sound legal discretion of the court, which cannot be governed by fixed rules. And in a capital case the court will be disposed to secure the prisoner against the influence of any testimony not strictly applicable to him, by allowing a separation.]

[2. The act of July 20, 1840 [5 Stat. 394], has changed the method of obtaining juries practiced in the federal courts under the act of 1789 [1 Stat. 73], and in case of a deficiency of jurors it is competent for the court, during the term to order a second venire.]

[3. It is not necessary that the marshal or clerk, or any state judge, should be present at the drawing; but when those officers properly certify, as their official act, the panel to the court, this constitutes it the jury for the term. The deputy marshal and deputy clerk are competent officers to superintend the drawing and certify the names drawn to the clerk and marshal.]

[4. The fact that declarations and admissions of the prisoner were made in answer to questions put by the witness does not render them inadmissible, it appearing that no means of persuasion or intimidation were used. Nor is it material that the admissions were made to an individual, and not in court, or to a magistrate conducting a judicial inquiry.]

[5. Declarations and admissions of one charged with participating in the crime, made in the presence of the accused, and without contradiction by him are inadmissible, under the more recent authorities.]

[6. The corpus delicti, in a case of murder, may be implied from circumstances naturally conducing to that conclusion; and when such circumstances are proved, whether they afford a violent or only a reasonable presumption of the death, the declarations of the accused in regard thereto are admissible in evidence.]

Indictment [against William Brown, David Baker, George Matthews, and William Webster] for murder of Nicoll, master of schooner Sarah Lavinia, on the high seas, 14th or 15th July, 1843. Webster not apprehended.

Mr. Hoffman moves the trial of the other two prisoners, who are placed at the bar.

Mr. Price reads the deposition of Brown, that he is informed and believes that the district attorney intends to offer against him no evidence other than circumstantial, and as against Matthews he intends to offer his admissions and confessions, and that those admissions implicate the deponent, and expressing his belief that he cannot have a fair and impartial trial unless tried separately from Matthews.

Price & Nash, move such separate trial.

Mr. Hoffman opposes the motion, and cites U. S. v. Marchant, 12 Wheat. [25 U. S.] 480; U. S. v. Gilbert [Case No. 15,204]; U. S. v. Wilson [Id. 16,730]; and Case of Braganza Pirates, tried in this court —— term, 18— [Case unreported].

O. Hoffman, U. S. Atty.

Haskett, Nash, & Price, for prisoners.

BETTS, District Judge. The cases cited by the district attorney prove that prisoners jointly indicted cannot claim it as a matter of right that their trial shall be separate. It rests in the sound legal discretion of the court to determine whether the indictment shall be traversed and tried in the form pre-

sented by the grand jury, or whether each party may be separated from those he is associated with by the grand jury and have his case disposed of by itself. This discretion cannot be governed by fixed rules. It must necessarily vary in its exercise according to the exigencies of the particular cases, and according to the individual impressions of the judges who administer it. It is to be borne in mind that, though the indictment is joint, the accused pleaded separately, and ought not to be committed or any way affected by the termination of either of the other issues. Neither should his case be prejudiced by testimony applicable solely to others indicted with him. The duty of the court and jury undoubtedly is to discriminate the evidence, and apply the parts where they justly belong, and in many cases this may be done with perfect security to the rights of all. One court may have higher confidence in its ability to impress this discrimination on juries and of their observance of the instructions than others could safely entertain, and accordingly would not regard the particulars that such diversity of testimony was to be presented, as seriously affecting the question. As a general principle, however, it cannot be doubted that serious danger may arise to a prisoner from a misapprehension of evidence given in the case, but which does not legally touch his issue.

A learned and judicious writer on evidence says it is morally impossible that the hearing of confessions of one prisoner implicating others should not operate to the prejudice of the parties implicated, notwithstanding the instructions of the court to the jury to the contrary. 4 Starkie, Ev. 54, note t. In a capital case, and in favor of life, I am disposed to secure every protection to the prisoner against the influence of testimony not strictly applicable to him, and shall therefore order the trial of the prisoner Brown, on his plea, to be separated from that of his associates. This decision is to be limited in its effect to the particular case as presented, and is not to seem as a rule in respect to the other indictment, much less in regard to ordinary felonies and misdemeanors.

The clerk therefore proceeding to empanel the jury, Mr. Price, in behalf of the prisoner, ore teneris challenged the array, because the jurors had not been drawn conformably to the act of congress of Sept. 24, 1789, § 29, and Rev. St. § 804, and also because not only the original panel of 36 jurors is served on this prisoner, but also a second panel of like number, drawn on a day subsequent.

Mr. Hoffman demurs to the challenge, and opposes the motion. The pleadings are admitted to be of the same effect as if in writing and full form.

BETTS, District Judge. The court, during the term ordered a second venire because of deficiency of jurors and the clerk regularly entered the order on the minutes. The act of congress of July 20, 1840, has changed the method of obtaining juries, practised in the United States courts under the act of 1789; and the rules adopted by this court under the authority of the act of 1840 point out the course that has been pursued by the officers in drawing those juries. It is not necessary that the marshal or clerk or any state judge should be present at the drawing, but when the marshal and clerk properly certify, as their official act, the panel to the court, this constitutes it the jury for the term. The deputy marshal and deputy clerk are competent officers to superintend the drawing and certify the names drawn to the marshal or clerk. If there is any defect or want of formality in their proceedings or certificate the counsel may have the certificate produced and considered by the court, or may present, as substantive causes of challenge, any objections of irregularity or want of conformity to the requirements of the law in drawing the panel. Challenge overruled.

Mr. Russel (minutes No. 11, p. 65) in his testimony stated the declarations or admissions of the prisoner to him, after his arrest, in respect to the death of the captain and mate.

The counsel for the prisoner objected to the reception of these confessions upon the ground that they were obtained by the witness, in answer to questions put by him to the witness.

BETTS, District Judge. It appearing very satisfactorily to the court that the witness employed no means of persuasion or intimidation to induce the declarations offered in evidence, their admissibility rests upon the general rules of evidence in respect to proof of that character. The elementary writers and the adjudged cases, recognize it as an incontrovertible principle of law that confessions voluntarily made by a party accused are competent evidence against him, in criminal trials for every grade and magnitude of offence. 1 Chit. Cr. Law, 464; 4 Starkie, Ev. (Metcalf's Ed.) 49, 50; Greenl. Ev. 247, 250. The books are emphatic in their cautions as to the credit of such confessions and suggest many weighty considerations which should be attentively regarded by the jury in estimating the bearing and effect of the admission of a prisoner. But with those cautions in view, the declaration must be received and weighed as evidence in the case and oftentimes conclusive in its character against the accused. Nor is there anything in the objection that the admissions were made to an individual and not in court or to a magistrate conducting a judicial inquiry. The authorities repudiate that distinction and recognize this species of evidence as legal solely because it is the free act of the party and comes from the one best knowing the fact asserted and most interested to state it least injuriously to himself. It is to be further observed, that the declarations offered in evidence are no direct admissions of criminality by the prisoner; they go to establish collateral facts, which may be consist-

ent with his innocence or may by connection with other facts become impressive evidence of his guilt. Portions of this species of proof have been already gone into without exceptions on the part of the prisoner's counsel. Thus testimony has been given of the prisoner's declarations to various persons of the cause of his coming ashore in a boat, of the route of his travel, of the ownership of property in his possession and the place and manner of its acquisition, &c., &c., and like reason authorizes the government to give in evidence his declaration respecting the drowning and death of the master and mate. The declarations and admissions of Matthews, implicating the prisoner, and offered in evidence as made in his presence and without contradiction or denial by the prisoner, although at first I was inclined to admit them in consonance with the accepted rule of evidence in civil cases (Starkie, Ev. pt. 4, p. 38), yet on further examination I am satisfied they rest on different principles, and ought to be excluded. The more recent decisions look with great disfavor to the implication as by admissions of a party accused of a crime, because his participation is asserted in his presence by a third person without being denied by him. 14 Serg. & R. 393; 3 Starkie, 33; 3 Car. & P. 103. There is a sound reason for giving less effect to this silence of a party in relation to assertions charging him with a crime than to those affecting his pecuniary interest, because the mind is more liable to be disturbed and the judgment be left uncertain as to what is proper to be done, under an imputation touching his liberty or life, than one solely concerning his property; and, indeed, it may be consistent with the most entire innocence that a party should abstain from any reply to such charges, either treating them with contempt or being overpowered by their unexpectedness or audacity. I think the rule goes to sufficient length in allowing the plain and deliberate admissions of the accused to third persons to be given in evidence against him, and that no implication ought to be received as evidence of guilt, because he has not replied to the statements of another imputing to him a guilty knowledge or a participation in the felony and murder charged in the indictment. This evidence is accordingly overruled.

At the close of the testimony, the counsel for the prisoner moved the court to instruct the jury that the corpus delicti, the death of Nicoll, could not be proved by the admissions or declarations of the prisoner, and that unless that fact was established to their satisfaction by other evidence independent of any confession, a verdict of acquittal must be rendered.

BETTS, District Judge. It would not be consonant to the well-established rule of law to convict of homicide on the uncorroborated declarations of the accused that death had been inflicted or had occurred in his presence. Wills, Ev. 84 (25 Law Lib. N. S.) 2 Leach, 571. Lord Hale was inclined to the opinion that no evidence of the death was sufficient short of proof that the body had been seen after death. This doctrine is not supported by the cases, and Judge Story (U. S. v. Gibert [Case No. 15,204]) justly remarks that the rule, if adopted in strictness, would afford the most complete protection and indemnity from the worst offences, and would amount to an unusual condonation of all murders committed on the high seas. The confession of the death is accordingly admissible in evidence, and if corroborated by the proofs, will be sufficient foundation for a conviction. The death of Nicoll may be inferred or implied from circumstances naturally conducing to that conclusion; and whether such circumstances afford a violent or only a reasonable presumption of the fact, the declarations of the prisoner may properly be taken into account in fixing their effect and application. If, then, the extraneous facts in evidence conduce strongly to prove the death of Nicoll, the declarations of the prisoner in respect to that matter can properly be added to them and be taken into estimation in determining the fact of his death. The declaration, however, is to be taken as a whole, and all parts of it are evidence. The assertion of the decease of the missing mate is not to be separated from the concomitant assertion that he came to his death accidentally in a struggle with the captain, in which both fell overboard and were drowned. The whole statement must be taken into consideration and be weighed by the jury. The rule, however, is equally clear and explicit that the jury are not bound to give the same effect to the excusatory part of the declaration as to that implicating the prisoner. 1 Phil. Ev. 83. The whole is to be judged of in collection and comparison with the other facts in proof.

Case No. 15,742.

UNITED STATES v. MATTHEWS et al.

[2 Sumn. 470.] [1]

Circuit Court, D. Massachusetts. May Term, 1837.

SEAMEN—ENDEAVOR TO REVOLT—DEVIATION.

Where there is a deviation from the voyage in the shipping articles, a refusal of the seamen, subsequently, to do duty on that account does not amount in law to an endeavor to commit a revolt, under the act of congress of 1835, c. 40, § 2 [4 Stat. 776].

[Cited in The Mary Ann, Case No. 9,194.]

Indictment against the defendants [John Matthews and another], for an endeavor to commit a revolt on board of the brig Juan, Franklin Hall, master. Plea, not guilty. At the trial it appeared, that, by the shipping articles, the defendants shipped at Boston on the 16th of October, 1836, on board the brig for a voyage "from Boston to the Penobscot river, and from thence to the West Indies, and back to a port of discharge in the Unit-

[1] [Reported by Charles Sumner, Esq.]

ed States." The brig sailed on the voyage on the 16th of October, 1836, and went from Boston to Frankfort, on the Penobscot river; and from thence, sailed for Matanzas, first intending to touch on her way at Boston, to take on board the owner (Mr. Clarke), who was to go in the brig to Matanzas. The brig arrived in Boston, and came to anchor in Nantasket Roads; and Mr. Clarke then came on board. But the defendants then refused to do any further duty on board, insisting that there was a deviation from the voyage in the shipping articles, and that they were not bound to go farther. Upon this state of the facts the question arose, whether the defendants were discharged, or not, or were guilty of the offence charged in the indictment for such refusal to do duty on board.

Mr. Mills, U. S. Dist. Atty.

Before STORY, Circuit Justice, and DAVIS, District Judge.

STORY, Circuit Justice. The court are of opinion, that under the circumstances stated in the evidence, the refusal of the defendants to do farther duty on board was justifiable, and was not an endeavor to commit a revolt within the statute of 1835 (chapter 40). The touching at Boston was not provided for in the shipping articles, and was a clear deviation from the voyage, which discharged the seamen from any obligation of proceeding farther on the voyage. The defendants ought therefore to be acquitted.

Verdict, not guilty.

Case No. 15,743.

UNITED STATES v. MATTINGLY et al.

[6 Int. Rev. Rec. 19.]

Circuit Court, D. Kentucky. 1867.

INTERNAL REVENUE—DISTILLED SPIRITS—EVADING PAYMENT OF TAX—PENALTY—HOW RECOVERABLE.

[1. A verdict of guilty of having in custody and possession distilled spirits, with intent to sell the same and evade payment of the tax thereon, in violation of section 48 of the act of June 30, 1864 (13 Stat. 240), is not bad, merely because the jury have not found the number of gallons of such spirits.]

[2. The penalties imposed by that section may be recovered by indictment. The government is not restricted to an information or action of debt.]

This was an indictment under section 48, Act June 30, 1864 [13 Stat. 240], charging John and William Mattingly with having in their custody and possession a large quantity of distilled spirits, subject to duty, for the purpose of selling the same, with intent to evade payment of the tax.

Upon trial by jury in the district court, there was a general verdict of guilty. Whereupon defendants' counsel entered motions for new trial and in arrest of judgment. The motion for a new trial was overruled by the district judge, and the case thereupon remitted to the circuit court for argument before full bench on the motion in arrest of judgment. On the 27th of July this motion was fully and elaborately argued before Mr. Justice SWAYNE and District Judge BALLARD.

Counsel for the accused presented the following points which were argued seriatim: (1) The indictment was insufficient, because it did not aver that the whiskey was found in the possession of the accused. (2) The verdict did not authorize a judgment because the jury had not found the number of gallons of spirits. (3) The penalty pronounced by section 48 could only be recovered by information or action of debt, and not by indictment.

B. H. Bristow, U. S. Dist. Atty.

Jos. Speed and H. J. Stites, for defense.

Before SWAYNE, Circuit Justice, and BALLARD, District Judge.

SWAYNE, Circuit Justice, delivered the opinion of the court overruling each of the foregoing points, and concluded by denying the motion in arrest of judgment, and thereupon several judgments were rendered against the defendants for sixteen thousand dollars, that being double the amount of tax on the whiskey (4,000 gallons) proved to have been sold by them.

NOTE. This case elicited much interest, and is regarded as settling important points of practice under the internal revenue laws.

UNITED STATES (MATTINGLY v.). See Case No. 9,295.

Case No. 15,744.

UNITED STATES v. MATTOCK et al.

[2 Sawy. 148.] [1]

District Court, D. Oregon. Jan. 27, 1872.

ILLEGAL PASTURING INDIAN LANDS—"CATTLE"—WHAT INCLUDED.

1. The word "cattle" in its primary sense includes sheep, and it is used in that sense in section 9 of the act of June 30, 1833 (4 Stat. 729), prohibiting any person from pasturing Indian lands with "horses, mules or cattle," under a penalty of $1 for each of such animals.

[Cited in U. S. v. Bridleman, 7 Fed. 896.]

[Cited in State v. Brookhouse (Wash.) 38 Pac. 862.]

2. Penal statutes, construction of.

[Cited in U. S. v. Trice, 30 Fed. 495.]

[Suit by the United States against C. Mattock and others for a penalty.]

Joseph N. Dolph, for the United States.

Orlando Humason, for defendants.

DEADY, District Judge. This action is brought under section 9 of the act of June

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

30, 1834 (4 Stat. 729), which enacts, that "if any person shall drive or anywise convey any stock of horses, mules or cattle, to range or feed upon any land belonging to any Indian or Indian tribe, without the consent of such tribe, such person shall forfeit the sum of one dollar for each animal of such stock."

The complaint was filed October 4, 1871, and alleges that the defendant on September 1, 1871, did drive and convey 1800 head of sheep upon the land within the boundaries of the Umatilla reservation, which then belonged to the Wallawalla, Cayuse and Umatilla tribes of Indians, pursuant to the treaty of June 9, 1855, between the United States and such Indian tribes; whereby, etc., defendant became indebted to the plaintiff in the sum of $1 for each head of sheep so driven, etc.

The defendant demurred to the complaint, because it did not state facts sufficient to constitute a cause of action. On the argument of the demurrer the only reason given in support of it was, that the term "cattle" as used in the statute does not mean sheep.

I think it is apparent from the following citations that the term, in its primary sense, includes sheep and all other animals used by man for labor or food.

Johnson defines "cattle" thus: "Beasts of pasture not wild nor domesticated." Richardson says the term is derived from chattels, and signifies bona mobilia, or movables. He defines it thus: "Kine, horses and some other animals appropriated to the use of man." Webster derives it from the Norman French "catal," or the Old English "catel," signifying "goods, cattle, movables." In the edition of 1837 it is defined as follows: "Beasts or quadrupeds in general, serving for tillage or other labor and for food for man. In its primary sense, the word includes camels, horses, asses, all the varieties of domesticated horned beasts or the bovine genus, sheep of all kinds and goats, and perhaps swine. * * * Cattle in the United States, in common usage, signifies only beasts of the bovine genus. * * * Yet it is probable that a law giving damages for a trespass committed by cattle breaking into an enclosure, would be adjudged to include horses." But the latest edition gives this definition: "Domestic quadrupeds collectively, especially those of the bovine genus, sometimes also including sheep, goats, horses, mules, asses and swine." The American Cyclopædia says: "In its primary sense, horses and asses are included in the term, as well as oxen, cows, sheep, goats, and perhaps swine."

But counsel for the defendant, admitting that the word "cattle" in its primary sense includes sheep, contends that the word as used in the act is restrained to animals of the horse or mule kind, in obedience to the rule of construction given in Smith, Const. Const. § 740, and cited with approbation in U. S. v. Irwin [Case No. 15,445]: "Where general words follow an enumeration of particular cases, such general words are held to apply only to cases of the same kind as those which are expressly mentioned."

U. S. v. Irwin, supra, was an indictment for forgery of a land warrant under the act of March 3, 1825 (4 Stat. 119), which prescribed the punishment for forging any "indent, certificate of public stock, etc., or other public security of the United States." The court quashed the indictment, upon the ground that a land warrant was not embraced in the particular instruments enumerated in the act, they being evidence of a "pecuniary indebtment or liability of the government to the holder," nor in the general phrase "other public security," because that was restrained by the rule above mentioned to cases of the same kind with those particularly named.

But the case is not parallel in this respect with the one under consideration. To make it so, the act of 1834 should read "stock of horses, mules, or other animals." Then with good reason it might be said that under the recognized rule of construction the other animals must be of the same genus or kind with those named—horses and mules—and that sheep, not being of such genus or kind, are not included in the act. And even then it might be plausibly answered, that any animal that feeds upon the grass or herbage which grows upon the Indian land, and thereby impoverishes it, in respect to the purpose of the act, is of the same kind as the horse or mule.

The duty of the court, in construing this act, is to give effect to the intention of congress in enacting it; and this intention must be ascertained as well from the mischief which the act was intended to remedy as the words thereof. Smith, St. Const. Law, § 703.

The mischief to be prevented or remedied by it was the depasturing of the Indian lands by the stock of white persons. Sheep are as much within the reason of the enactment as horses or mules. It can hardly be presumed that congress intended to impose a penalty upon persons for feeding horses upon the Indian range, and at the same time permit them to cover it with sheep with impunity.

Although the word "cattle" in its primary sense includes horses and mules, at this day it is not often so applied in the United States. Therefore, I presume congress, out of abundance of caution, particularized that class of animals, and used the word "cattle" to describe all others included in the term. If the act had read "other cattle," there would be some reason for holding that the general phrase was restrained to other cattle of the horse genus or kind, if there be any such.

But here the term "cattle" is not used merely to round a period, or as an expletory embellishment of what precedes it, but as an independent and particular enumeration

of a class of subjects, in addition to those already named.

It is also urged that this is a penal statute, and therefore to be strictly construed. The rule as stated is admitted. But nothing more is meant by it than that such statutes shall not be extended, by what is known as equitable construction, to cases other than those which clearly appear to have been intended by the legislature, and are fairly included in the language used to express such intention. The intention, then, of the legislature is as proper a subject of inquiry for the court in the case of a penal statute as any other; and that intention when ascertained by applying the usual rules of construction is to govern in the one case as well as the other. The Enterprise [Case No. 4,499]; U. S. v. Wiltberger, 5 Wheat. [18 U. S.] 95; American Fur Co. v. U. S., 2 Pet. [27 U. S.] 367; U. S. v. Winn [Case No. 16,740]; U. S. v. Morris, 14 Pet. [39 U. S.] 464.

In this case it is manifest that the legislature intended to prevent Indian lands from being used by white people as pasture grounds for their stock, without the consent of the Indians. It will not be denied that sheep are as much within the mischief to be remedied as horses or oxen. The term used in the act—"cattle"—in its general and primary sense includes sheep. The term is also often used in common parlance, in the United States, in a narrower sense, to signify only animals of the bovine genus. This being so, the court must construe the act, and declare in what sense the term is used therein; and, in so doing, it is not justified in restricting the language used to any particular class of animals comprehended in the general term cattle, because the act is a penal one.

In U. S. v. Winn, supra, Mr. Justice Story says: "But when the words are general, and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, when the mischief which is to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute, which has various known significations, I know of no rule that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me that the proper course in all these cases is, to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature."

Bearing in mind the rule that the language of the act and the mischief to be remedied by it, must both be considered in ascertaining "the true intent of the legislature," I have no hesitation in coming to the conclusion that the word "cattle," as used in the Indian intercourse act of 1834, includes, and was intended to include sheep, as well as cows and oxen.

The demurrer is overruled.

Case No. 15,745.

UNITED STATES v. MAUK.

[See Case No. 15,715a.]

Case No. 15,746.

UNITED STATES v. MAUNIER.

[1 Hughes, 412;[1] 1 Mart. N. C. 79.]

Circuit Court, D. North Carolina. 1792.

CRIMINAL LAW—EVIDENCE—EXAMINATION IN WRITING—INDICTMENT.

1. An examination of a prisoner, made before his commitment, under impressions of fear, whether signed or not by him, cannot be read in evidence against him on his trial under indictment for murder on the high seas.

2. An indictment for murder on the high seas need not state the length and depth of the wound which caused the death.

Indictment for murder on the high seas.

Before PATERSON, Circuit Justice, and SITGREAVES, District Judge.

Mr. Attorney of the United States Hill offered to give in evidence the examination of the prisoner before his commitment.

Mr. Martin, for the prisoner, objected to this: 1st. Because the prisoner at the time of his examination was under impressions of fear. 2d. Because the examination was not subscribed by the prisoner.

1. The prisoner was a French sailor, and the murder with which he stood charged had been committed upon the high seas. On his landing in North Carolina he was taken up and committed to jail. From thence he was taken on the next day, brought into court in irons, and examined, without being informed that he was then under an examination and not on his trial. He understood not the English language, and no one informed him of what was passing. There was room to believe that he thought, when he was remanded to jail, that he had been tried, convicted, and condemned, for he asked a person who understood the French language on what day he was to be executed. The counsel said although in the case of a person who had resided some time in this country, or in others in which the proceedings are carried on by jury, the objection would be frivolous, yet it must have weight in the case of a foreigner unacquainted with our laws and our language; that what the prisoner had seen in court, except perhaps the confrontation of witnesses, was all that in familiar circumstances he would have seen in his own country had he been tried there, where sentence of death is not pronounced in court in presence of the

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

prisoner, but read to him afterwards by the clerk in the dungeon.

2. The examination and confession subscribed by an offender before a justice of the peace is good and sufficient evidence against such offender. Gilb. Ev. 140. The examination of Sterne and Boroski, was, by the chief justice, refused to be read at their trial. See 3 State Tr. p. 470. And Serjeant Wilson, in his edition of Hale's Pleas of the Crown (volume 2, p. 585, in notes), adds a query, whether the chief justice was not right in such refusal. For, by the opinion of some judges now living, the statute does not extend to the examination of the party accused unless he signed his examination, but only to the witnesses or persons accusing. In Vaughan's Case, Mr. Crauley having made oath that the examination was taken before Sir Charles Hedges, and signed by the prisoner, it was read. 5 State Tr. 229. In Harrison's Case, the attorney-general desired that the defendant's examination, taken before the Lord Chief Justice Brumpton, might be read, and the defendant having acknowledged the hand to be his that was subscribed to it, it was read accordingly. 7 State Tr. 118. In Layer's Case, the prisoner's counsel said, and the chief justice granted, that this examination could not be read unless it was signed by him. 8 State Tr. 474, 8 Mod. 89.

PATERSON, Circuit Justice, thought the examination ought to have been signed by the prisoner.

SITGREAVES, District Judge, said the first objection had much weight with him, and

Mr. Attorney of the United States withdrew his motion.

The prisoner was found guilty upon other evidence.

And it was moved in arrest of judgment, on the ground that the length and depth of the wound were not mentioned in the indictment.

The prisoner's counsel cited Heydon's Case,[2] 4 Coke, 42.

THE COURT did not intimate that they had any doubt, but said if they had they would direct a copy of the indictment and reasons to be transmitted to the supreme court. Curia advisare vult.

THE COURT directed the prisoner to be arraigned on another indictment which had been found against him.

Whereupon he pleaded not guilty, and THE COURT ordered the trial to be proceeded on instantly.

And with some difficulty was prevailed upon to adjourn it to the succeeding Monday, it being Saturday.

An order was then made that the marshal send expresses to the grand jury (who had been discharged), commanding their immediate return.

On Monday following the prisoner was brought to the bar, as he and his counsel expected, to be tried on the second indictment. But THE COURT informed the bar they would take up the motion in arrest of judgment.

On the part of the United States several precedents of indictments were read out of West, in which the length and depth of the wound are not mentioned.

Mr. Martin observed that, in all the indictments (but one) in which the length and depth of the wound were not mentioned, the instrument had gone through the body of the person killed, some limb had been cut off, or the wound had been given with a blunt weapon. In this case the mortal wound was stated to have been given with an axe, on the head. That the authority in Coke was not only unshaken, but frequently recognized.

THE COURT, however, overruled the motion, without making any observation, and passed sentence of death.

At the same time sentence was passed on three other men who had been included in the same indictment, and they were soon after executed.

This is the first time that judgment of death was given under the authority of the United States.

Case No. 15,747.

UNITED STATES v. MAURICE et al.

[2 Brock. 96.] [1]

Circuit Court, D. Virginia. May Term, 1823.

OFFICERS—APPOINTMENT—BOND—SURETIES—IRREGULAR APPOINTMENT—CONTRACT—CONSIDERATION—ACCOUNTING FOR PUBLIC MONEY.

1. The constitution of the United States (article 2, § 2), which declares that the president "shall nominate, and, by and with the consent of the senate, shall appoint ambassadors, &c," "and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law," taken in connexion with the subsequent clause of the same section, which authorizes congress "by law to vest the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of departments," and with the third section of the same article empowering the president to fill "all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session," is interpreted to declare, that all offices under the federal government, except in cases where the constitution itself may otherwise provide, shall be established by law.

[Cited in Auffmordt v. Hedden, 137 U. S. 327, 11 Sup. Ct. 108.]

[Cited in Com. v. Ford, 5 Pa. St. 68; Lewis v. Jersey City, 51 N. J. Law, 242, 17 Atl. 112.]

2. An agent of fortifications is an officer of the United States, whose office is established by law. See acts of congress of April 24,

[2] This reference is at fault; but is taken literally from Judge Martin's book.

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

1816, § 9 [3 Stat. 298], and March 2, 1821, § 13 [3 Stat. 616].

[Cited in Smith v. Whitney, 116 U. S. 181, 6 Sup. Ct. 577.]

[Cited in Guthrie Daily Leader v. Cameron (Okl.) 41 Pac. 636.]

3. The act of congress, passed on the 15th of May, 1820 [3 Stat. 592], providing for the better organization of the treasury department, which gives a new and summary remedy against officers of the United States, who have received public money for which they have failed to account, and against their sureties, substituted by implication the new and sufficient bond called for by that act, for the former bond, and discharged the sureties to the original bond, so far as respected subsequent transactions.

4. Appointments to office can be made by the heads of department, in those cases only which congress has authorized by law, and, therefore, the appointment of an agent of fortifications by the secretary of war, there being no act of congress conferring that power upon that officer, is irregular.

[Cited in Browne v. U. S., Case No. 2,036.]

5. An official bond given by an agent of fortifications, whose appointment was irregular, but whose office is established by law, though void as a statutory obligation, is valid as a contract to perform the duties appertaining to the office of agent of fortifications, and is binding on his sureties. Contract is one of the means necessary to accomplish the objects of the institution of the government, and the capacity of the United States to contract is coextensive with the duties and powers of government. Every contract which subserves to the performance of a duty, may be rightfully made.

[Cited in U. S. v. Hartwell, 6 Wall. (73 U. S.) 393; U. S. v. Garlinghouse, Case No. 15,189; Hall v. Wisconsin, 103 U. S. 8; Van Brocklin v. Tennessee, 117 U. S. 154, 6 Sup. Ct. 672; Auffmordt v. Hedden, 137 U. S. 327, 11 Sup. Ct. 108.]

[Cited in State v. May, 106 Mo. 506, 17 S. W. 660; City of Ellsworth v. Rossiter, 46 Kan. 237, 26 Pac. 675; Com. v. Evans, 74 Pa. St. 140; Dickson v. U. S., 125 Mass. 314. Approved in Jones v. Scanland, 6 Humph. 198. Cited in McCornick v. Thatcher, 8 Utah, 294, 30 Pac. 1093; In re Merriam's Estate, 141 N. Y. 497, 36 N. E. 506. Cited in brief in State v. Bates, 36 Vt. 389. Cited in State v. Wilson, 29 Ohio St. 348; Weston v. Sprague, 54 Vt. 402.]

6. It is not essential to the validity of a contract made between an individual and the government, that it should express the circumstances under which it was made, so precisely and distinctly, as to show the motives which induced it, and the objects to be effected by it. These are matter of evidence.

[Cited in Hall v. Wisconsin, 103 U. S. 8.]

[Cited in Williamson v. Hall, 1 Ohio St. 193.]

7. The duty of the government to secure its debts, necessarily infers the means of securing them, and sureties may therefore be required to the bond given by the debtor.

8. Every contract which is legal on its face, and imports a consideration, is supposed to be entered into on valid considerations, and to be obligatory, if the parties be ostensibly able, until the contrary is shown, and the same rule applies to a government which is capable of making contracts.

9. That is certain which may be rendered certain, and, therefore, if the condition of a bond, instead of specifying the particular purposes for which the bond is given, refers to a paper which does specify them, it is equivalent to the enumeration of those purposes in the bond itself.

10. Where an appointment to office is irregular—is contrary to law and its policy, this does not absolve the person so appointed from the moral and legal obligation to account for public money, which has been placed in his hands in consequence of such appointment.

[Approved in Jones v. Scanland, 6 Humph. 198.]

At law.

MARSHALL, Circuit Justice. This is an action of debt brought upon a bond executed on the 18th day of August, 1818, in the penalty of twenty thousand dollars, with the following condition: "Whereas the said James Maurice has been appointed agent for fortifications on the part of the United States, now, therefore, if the said James Maurice shall truly and faithfully execute and discharge all the duties appertaining to the said office of agent, as aforesaid, then the above obligation to be void, &c." The breach assigned in the declaration is, that large sums of money came to the hands of the said Maurice, as agent of fortifications, which he was bound by the duties of his office faithfully to disburse and account for, a part of which, namely, forty thousand dollars, he has, in violation of his said duty, utterly failed to disburse to the use of the United States, or account for; wherefore, &c. The defendants, the sureties in the said obligation, prayed oyer of the bond, and of the condition, and then demurred to the declaration. The plaintiff joined in the demurrer. The defendants also pleaded several pleas, on some of which issue has been made up, and on others, demurrer has been joined.

The first point to be considered is the demurrer to the declaration. The defendants insist that the declaration cannot be sustained, because the bond is void in law, it being taken for the performance of duties of an office, which office has no legal existence, and consequently, no legal duties. No violation of duty, it is said, can take place, when no duty exists. Since the demurrer admits all the facts alleged in the declaration, which are properly charged, and denies that those facts create any obligation in law, it must be taken as true that James Maurice was in fact appointed an agent of fortification on the part of the United States: that he received large sums of money in virtue of that appointment, and has failed to apply it to the purpose for which he received it, or to account for it to the United States. As the securities certainly intended to undertake that Maurice should perform the very acts which he has failed to perform, and as the money of the nation has come into his hands on the faith of this undertaking, it is the duty of the court to hold them responsible, to the extent of this undertaking, unless the law shall plainly interpose its protecting power for their relief, upon the principle that the bond creates no legal obligation. Is this such a bond? The first step in

this inquiry, is the character of the bond. Does it, on its face, purport to be a mere official bond, or to be in the nature of a contract? This question is to be answered by a reference to the terms in which its condition is expressed. These leave no shadow of doubt on the mind. The condition refers to no contract—states no undertaking to perform any specific act—refers to nothing—describes nothing which the obligor was bound to do, except to perform the duties of an officer. It recites that he was appointed to an office, and declares that the obligation is to be void if he "shall truly and faithfully execute and discharge all the duties appertaining to the said office." Of the nature of those duties no information whatever is given. Whether the disbursement of public money does or does not constitute a part of them, is a subject on which the instrument is entirely silent. The bond, then, is, on its face, completely an official bond, given, not for the performance of any contract, but for the performance of the duties of an office, which duties were known, and had been prescribed by law, or by persons authorized to prescribe them. In his declaration, the attorney for the United States has necessarily taken up this idea, and proceeded on it. In his assignment of breaches, he states that the said James Maurice had been appointed agent of fortifications, and alleges that he had not performed the duties of the said office, nor kept the condition of his bond, but that the said condition is broken in this, that while he held and remained in the said office, divers large sums of money came to his hands, as agent of fortifications, which he was bound by the duties of his office faithfully to disburse and account for; a part of which, forty thousand dollars, he has, in violation of his said duty, utterly failed to disburse or account for. On this breach of his official duty, which is alleged to constitute a breach of the condition of his bond, the action is founded. No allusion is made to any other circumstance whatever as giving cause of action.

The suit then is plainly prosecuted for a violation of the duty of office, which is alleged to constitute a breach of an official bond. The court must, on this demurrer, at least, so consider it, and must decide it according to those rules which govern cases of this description. This being a suit upon an official bond, the condition of which binds the obligors only that the officer should perform the duties of his office, it would seem that the obligation could be only co-extensive with these duties. What is their extent? The defendants contend that no such office exists; that James Maurice was never an officer, and, of consequence, was never bound by this bond to the performance of any duty whatever. To estimate the weight of this objection, it becomes necessary to examine the constitution of the United States, and the acts of congress in relation to this subject. The constitution (article 2, § 2), declares, that the president "shall nominate, and, by and with the advice and consent of the senate, shall appoint ambassadors, &c.," "and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law." I feel no diminution of reverence for the framers of this sacred instrument, when I say that some ambiguity of expression has found its way into this clause. If the relative "which," refers to the word "appointments," that word is referred to in a sense rather different from that in which it had been used. It is used to signify the act of placing a man in office, and referred to as signifying the office itself. Considering this relative as referring to the word "offices," which word, if not expressed, must be understood, it is not perfectly clear whether the words "which" offices "shall be established by law," are to be construed as ordaining, that all offices of the United States shall be established by law, or merely as limiting the previous general words to such offices as shall be established by law. Understood in the first sense, this clause makes a general provision, that the president shall nominate, and by and with the consent of the senate, appoint to all offices of the United States, with such exceptions only as are made in the constitution; and that all offices (with the same exceptions) shall be established by law. Understood in the last sense, this general provision comprehends those offices only which might be established by law, leaving it in the power of the executive, or of those who might be entrusted with the execution of the laws, to create in all laws of legislative omission, such offices as might be deemed necessary for their execution, and afterwards to fill those offices.

I do not know whether this question has ever occurred to the legislative or executive of the United States, nor how it may have been decided. In this ignorance of the course which may have been pursued by the government, I shall adopt the first interpretation, because I think it accords best with the general spirit of the constitution, which seems to have arranged the creation of office among legislative powers, and because, too, this construction is, I think, sustained by the subsequent words of the same clause, and by the third clause of the same section. The sentence which follows, and forms an exception to the general provision which had been made, authorizes congress "by law to vest the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of departments." This sentence, I think, indicates an opinion in the framers of the constitution, that they had provided for all cases of offices. The third section empowers the president "to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session." This power is not confined to vacancies which may happen in offices created by law. If the

convention supposed that the president might create an office, and fill it originally without the consent of the senate, that consent would not be required for filling up a vacancy in the same office. The constitution then is understood to declare, that all officers of the United States, except in cases where the constitution itself may otherwise provide, shall be established by law.

Has the office of agent of fortifications been established by law? From the year 1794 to the year 1808, congress passed several acts, empowering the president to erect fortifications, and appropriating large sums of money to enable him to carry these acts into execution. No system for their execution has ever been organized by law. The legislature seems to have left this subject to the discretion of the executive. The president was, consequently, at liberty to employ any means which the constitution and laws of the United States placed under his control. He might, it is presumed, employ detachments from the army, or he might execute the work by contract, in all the various forms which contracts can assume. Might he organize a corps, consisting of labourers, managers, paymasters, providers, &c., with distinct departments of duty, prescribed and defined by the executive, and with such fixed compensation as might be annexed to the various parts of the service? If this mode of executing the law be consistent with the constitution, there is nothing in the law itself to restrain the president from adopting it. But the general language of the law must be limited by the constitution, and must be construed to empower the president to employ those means only which are constitutional. According to the construction given in this opinion to the second section of the second article of that instrument, it directs that all offices of the United States shall be established by law; and I do not think that the mere direction that a thing shall be done, without prescribing the mode of doing it, can be fairly construed into the establishment of an office for the purpose, if the object can be effected without one. It is not necessary, or even a fair inference from such an act, that congress intended it should be executed through the medium of offices, since there are other ample means by which it may be executed, and since the practice of the government has been for the legislature, wherever this mode of executing an act was intended, to organize a system by law, and either to create the several laws expressly, or to authorize the president in terms, to employ such persons as he might think proper, for the performance of particular services. If, then, the agent of fortifications be an officer of the United States, in the sense in which that term is used in the constitution, his office ought to be established by law, and cannot be considered as having been established by the acts empowering the president, generally, to cause fortifications to be constructed.

Is the agent of fortifications an officer of the United States? An office is defined to be "a public charge or employment," and he who performs the duties of the office, is an officer. If employed on the part of the United States, he is an officer of the United States. Although an office is "an employment," it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed; it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer. If it may be converted into a contract, it must be a contract to perform the duties of the office of agent of fortifications, and such an office must exist with ascertained duties, or there is no standard by which the extent of the condition can be measured.

The army regulations are referred to in acts of congress, passed previous and subsequent to the execution of the bond under consideration. A copy of those regulations purporting to be a revisal made in the war office, in September, 1816, conformably to the act of the 24th of April, 1816, has been laid before the court, and referred to by both parties. These regulations provide for the appointment, and define the duties of the agents of fortifications. They are to be governed by the orders of the engineer department in the disbursement of the money placed in their hands. They are to provide the materials and workmen deemed necessary for the fortifications; and they are to pay the labourers employed. In the performance of these duties they are directed to make out—First, an "abstract of articles purchased;" secondly, "an abstract of labour performed;" thirdly, "an abstract of pay of mechanics;" and fourthly, "an abstract of contingent expenses." These duties are those of a purchasing quartermaster, commissary, and paymaster. These are important duties. A very superficial examination of the laws will be sufficient to show, that duties of this description, if not performed by contract, are performed by persons who are considered as officers of the United States, whose offices are established by law. If, then, we look at the bond and declaration, we find in both every characteristic of an office bond. If we look at the army regulations, the only additional source of information within our reach, we find the duties of an agent of fortifications to be such as would make him an officer of the United States. Is the office established by law? The permanent agents mentioned in the act of March 3, 1809, c. 199, § 3 [4 Bior. & D. Laws, 221; 2 Stat. 536, c. 28], are those who are appointed, "either for

the purpose of making contracts or for the purchase of supplies, or for the disbursement, in any other manner, of moneys, for the use of the military establishment of the United States." If this act authorizes the appointment of such agents, and virtually establishes their offices, it cannot, I think, in correct construction, be extended to other persons than those who are employed in some manner in disbursing money "for the use of the military establishment or navy of the United States." "The military establishment" is a term which seems to be well defined in the acts of congress, and to be well understood, and I do not think the act can be construed to comprehend an agent of fortifications.

In the act of March 3, 1817, c. 517, § 5, it is made the duty of the secretary of war "to prepare general regulations, better defining and prescribing the respective duties and powers in the adjutant-general, inspector-general, quartermaster-general, and commissary of ordnance, department of the topographical engineers, of the aids of generals, and generally of the general and regimental staff; which regulations, when approved by the president of the United States, shall be respected and obeyed, until altered or revoked by the same authority." The exclusive object of this section is, I think, the regulation of existing offices. I do not think it can be fairly construed to extend to the establishment of offices. Yet if under this act, subordinate agencies or offices have in fact been introduced, such offices may be established by subsequent acts of congress. The act of April 24, 1816, "for organizing the general staff, and making farther provision for the army of the United States" (section 9), enacts, "that the regulations in force before the reduction of the army, be recognised, as far as the same shall be found applicable to the service, subject, however, to such alterations as the secretary of war may adopt, with the approbation of the president."

A legislative recognition of the actually existing regulations of the army must be understood as giving to those regulations the sanction of the law; and the subsequent words of the sentence authorize the secretary of war to alter those regulations with the approbation of the president. Such alterations have also the sanction of the act of 1816. This subject appears to have been taken up by the secretary. A pamphlet entitled, "Army Regulations Revised, Conformably to the Act of 24th of April, 1816," has been laid before the court as authentic, and has been appealed to by both plaintiff and defendants, as being the same regulations which are approved and adopted by the act of the 2d of March, 1821, § 13. These regulations direct the appointment of agents of fortifications, and define their duties. They purport to have been revised in the war office, in September, 1816. If the provision they contain respecting agents of fortifications formed a part of the army regulations prior to the act of the 24th of April, 1816, it is recognised by that act. If that provision was first introduced in September, 1816, it is recognised by that act. If that provision was first introduced in September, 1816, it may, if approved by the president, be considered as an alteration authorized by that act. The question whether this alteration has been approved by the president, is perhaps a question of fact, not examinable on this demurrer. When I consider the act of the 24th of April, 1816, and this revisal in the war office, in connexion with the act of the 2d of March, 1821, adopting the revisal of September, 1816, under the name of general regulations of the army, compiled by Major General Scott (for they are represented as being the same regulations), I feel much difficulty in saying that the office of agent of fortifications was not established by law when this bond was executed. I am more inclined to give this opinion, because I am persuaded this cause must be carried before a tribunal which can make that certain which was before uncertain; and because, by overruling the demurrer to the declaration, the other questions of law which occur in the cause, and which would be arrested by sustaining the demurrer to the declaration, will all be brought before the supreme court.

The defendants pleaded several pleas to the declaration. The second plea is, that the defendant, James Maurice, performed the condition of his bond up to the 26th day of September, 1820, on which day a new bond was executed, in pursuance of the act of the 15th of May, 1820, "providing for the better organization of the treasury department." The plaintiff takes issue on that part of the plea which alleges performance up to the 26th day of September, 1820, and demurs to the residue.—The act under which this new bond was executed, gives a new and summary remedy against officers of the United States who had received public money for which they had failed to account, and against their sureties, and contains a proviso: "That the summary process herein directed, shall not affect any surety of any officer of the United States who became bound to the United States before the passing of this act; but each and every such officer shall, on or before the thirtieth day of September next, give new and sufficient sureties for the performance of the duties required of such officer." Section 2. The defendants contend that this new and sufficient bond was a substitute for the old one, and discharged the sureties to the original obligation, so far as respects subsequent transactions.

The plaintiff contends that the bond is cumulative, and that the sureties to the first obligation continue bound for any subsequent as well as any preceding default of the officer. There is certainly no express declaration of the act on this subject; and if the second bond operates a discharge of the first, this effect is produced by implication only: yet the implication is very strong in favour of the

construction. The sole object of the law is to obtain sureties against whom the new and summary remedy it gives might be used. To obtain additional security, does not appear to be one of the motives for which it was passed. The direction that the sureties should be "new" and "sufficient," countenances the opinion that they were solely relied on for the subsequent transactions of the officer. If no additional security was intended to be demanded; if the sole object of the law was to coerce the giving of sureties, against whom this new remedy, by distress, might be used, it seems reasonable to think that the legislature supposed the new sureties alone responsible for the subsequent conduct of their officer. It could not escape the consideration of the legislature, that the same friends who became bound in the first bond, might probably become bound in the second, thinking themselves discharged from the first. But friends may be willing to become bound in a penalty within their resources, or to an amount to which the officer can secure them, and very unwilling to become bound in double that sum. The officer may be able to give security in a penalty of $25,000, and totally unable to give security for $50,000. The government fixes the penalty in which an officer shall give bond and sureties, and is regulated, in fixing that penalty, by all the considerations which belong to the subject. It ought not to be considered as augmenting that penalty, unless the means used for augmenting it are plain, direct, and intelligible. In this case, if the same sureties execute the new bond, they are liable to a double penalty, by an act not clearly understood to have that effect. If there are new sureties to the new bond, the attention of the old sureties may be diverted from watching the conduct of the officer, and they may even be induced to relinquish liens on property, in order to enable the officer to find his new sureties. If the course of legislation on the subject has been such as to furnish to the original sureties reasonable ground for the opinion that they were discharged from all liability for the subsequent conduct of the officer, and reasonable ground for the implication that such was the intention of the legislature, and I think it has, such ought to be the construction of the act. This demurrer, therefore, is overruled.

The fifth plea is, that James Maurice was never legally appointed, but was, on the 1st day of August, 1818, appointed by the secretary of war, agent of fortifications for Norfolk, Hampton Roads, and the lower part of the Chesapeake Bay, without any provisions of law whatever, authorizing and empowering him to make such appointment, and directly contrary to an act entitled, an act &c., passed the 3d of March, 1809. To this plea there is a demurrer.

The first question arising on this demurrer, respects the validity of this appointment, made by the secretary of war. It is too clear, I think, for controversy, that appointments to office can be made by heads of department, in those cases only which congress has authorized by law; and I know of no law which has authorized the secretary of war to make this appointment. There is certainly no statute which directly and expressly confers the power; and the army regulations, which are exhibited as having been adopted by congress, in the act of the 2d of March, 1821, declares that agents shall be appointed, but not that they shall be appointed by the secretary of war. If this mode of appointment formed a part of the regulations previous to the revision of September, 1816, that is a fact which might or might not be noticed if averred in the pleadings. The court is not informed of its existence by this demurrer. It must therefore be supposed not to exist, and James Maurice cannot be considered as a regularly appointed agent of fortifications.

This brings us to the question in the cause on which I have felt, and still continue to feel, great difficulty. The appointment of James Maurice having been irregular, is this bond absolutely void, or may it be sustained as a contract entered into by a person not legally an officer, to perform certain duties belonging to an office? If the office had no existence, it has been already stated, that a bond to perform its duties generally, could create no obligation, but since the office does exist, the condition refers to something certain by which the nature and extent of the undertaking of the obligor may be determined. It is an undertaking that James Maurice shall perform the duties appertaining to the office of agent of fortifications: and this undertaking is in the nature of contract. If this contract does not bind the parties according to its expressed extent, its failure must be ascribed to some legal defect or vice inherent in the instrument. It is contended that the bond is void, because there is an inability on the part of the United States to make any contract not previously directed by statute. The United States is a government, and, consequently, a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment. This great corporation was ordained and established by the American people, and endowed by them with great powers for important purposes. Its powers are unquestionably limited; but while within those limits, it is a perfect government as any other, having all the faculties and properties belonging to a government, with a perfect right to use them freely, in order to accomplish the objects of its institutions. It will certainly require no argument to prove that one of the means by which some of these objects are to be accomplished, is contract; the government, therefore, is capable of contracting, and its contracts may be made in the name of the United States. The government acts by its agents, but it is neither usual nor necessary to express, in

those contracts which merely acknowledge the obligation of an individual to the United States, the name of the agent who was employed in making it. His authority is acknowledged by the individual when he executes the contract, and is acknowledged by the United States when the government asserts any right under that contract. I do not mean to say that there exists any estoppel on either party; I only mean to say that a contract executed by an individual, and received by the government, is prima facie evidence that it was entered into between proper parties. So with respect to the subject of the contract.

Without entering on the inquiry respecting the limits which may circumscribe the capacity of the United States to contract, I venture to say that it is co-extensive with the duties and powers of government. Every contract which subserves to the performance of a duty, may be rightfully made. The constitution, which has vested the whole legislative powers of the Union in congress, has declared that the president "shall take care that the laws be faithfully executed." The manner in which a law shall be executed does not always form a part of it; a power, not limited or regulated by the words of the acts, has been given by the legislature to the executive, to construct fortifications; and large sums of money have been appropriated to the object. It is not and cannot be denied, that these laws might have been carried into execution by means of contract; yet, there is no act of congress, expressly authorizing the executive to make any contract in the case. It is useless, and would be tedious, to multiply examples, but many might be given to illustrate the truth of the proposition. It follows, as a necessary consequence, that the duty, and of course the right, to make contracts may flow from an act of congress, which does not in terms prescribe this duty; the proposition then is true, that there is a power to contract in every case where it is necessary to the execution of a public duty.[2]

It remains to inquire, whether it be indispensable to the validity of a contract, that it should express the circumstances under which it was made, so precisely and distinctly, as to show the motives which induced it, and the objects to be effected by it. This certainly is often done, and in many cases conduces to a clear understanding of the intention of the parties, and of the obligations which the instrument creates; but it is not universally practised, would be often inconvenient, and is necessary, I think, only so far as may be requisite to explain the nature of the contract. We know too well that persons entrusted with the public money, are often defaulters. It is not, I believe, doubted, that the law raises an assumpsit to pay the money which the defaulter owes. An overpayment is sometimes made by mistake; is not the receiver liable to the United States? Yet, there is no act of congress creating the assumpsit in either case. I presume it will not be denied, that a declaration charging that the defendant was indebted to the United States, for money had and received to their use, and that being so indebted, he assumed and promised to pay it, would be sufficient without setting forth at large all the circumstances of the character in which, and the objects for which, the money was received. If the law would raise an implied assumpsit, which would be binding, I cannot conceive that an express assumpsit would be less so; nor can I conceive that such express assumpsit, more than the implied assumpsit, need detail the various circumstances on which its va-

[2] Since the above opinion was delivered, the question, whether a bond taken by the United States, for a lawful purpose, but not prescribed by any law, is absolutely void? has been twice carried before the supreme court of the United States, and in both instances the doctrine laid down by the chief justice has been fully sustained. In U. S. v. Tingey, 5 Pet. [30 U. S.] 115, the court held that "the United States, being a body politic, as an incident to their general right of sovereignty, have a capacity to enter into contracts, and take bonds in cases within the sphere of their constitutional powers, and appropriate to the just exercise of those powers, through the instrumentality of the proper department to which those powers are confined, whenever such contracts or bonds are not prohibited by law, although the making of such contracts, or taking such bonds, may not have been prescribed by any pre-existing legislative act. The court laid down this as a general principle only, without (as was then said) attempting to enumerate the limitations and exceptions, which may arise from the distribution of powers in the government, and from the operation of other provisions in our constitution and laws." But the court, in applying the principle to the case then before them, further added: "We hold that a voluntary bond, taken by authority of the proper officers of the treasury department, to whom the disbursement of public moneys is entrusted, to secure the fidelity in official duties of a receiver, or an agent for the disbursement of public moneys, is a binding contract between him and his sureties, and the United States, although such bond may not be prescribed or required by any positive law. The right to take such a bond is, in our view, an incident to the duties belonging to such a department; and the United States having a political capacity to take it, we see no objection to its validity in a moral or a legal view. From the doctrine here stated, we have not the slightest inclination to depart: on the contrary, from further reflection, we are satisfied that it is founded upon the soundest principles, and the just interpretation of the constitution. Upon any other doctrine, it would be incompetent for the government, in many cases, to take any bond or security for debts due to it, or for deposits made of the public money; or even to enter into contracts for the transfer of its funds from one place to another, for the exigencies of the public service, by negotiable paper or otherwise; since such authority is not expressly given by law in a vast variety of cases." Opinion of the supreme court in U. S. v. Bradley, 10 Pet. [35 U. S.] 343. See, also, Dugan v. U. S., 3 Wheat. [16 U. S.] 172; 4 Pet. Cond. R. 223, and Postmaster General v. Early, 12 Wheat. [25 U. S.] 136; 6 Pet. Cond. R. 480.

lidity might depend. These would be matter of evidence. In any case where an assumpsit would be valid, the government may certainly take a bond, and I perceive no reasons why sureties may not also be demanded. It is the duty of the government to collect debts due to it, however they may have accrued; it results from this duty that the means of securing and collecting the public money may be used. Sureties may therefore be required to the bond demanded from the debtor; the instrument itself is an admission that it is given for a debt, and it is contrary to all our received opinions to require, that it should show how the debt was contracted. Any thing which destroys its validity may, undoubtedly, be shown in pleading; but a bond given to the United States, is, I think, prima facie evidence of debt, and would be sustained on demurrer. So if money be committed to the care of any person for a legitimate object, bond and security on the same principle may be required, with condition that he shall account for it. The jurisdiction of a limited court must undoubtedly appear on the record; but I do not think that the same rule applies to contracts. Infants, femes covert, idiots, and persons under duress, are not bound by their contracts. But their disability must be shown by pleading, and it need not appear in any contract that the parties to it are not liable to these disabilities. Every contract which is legal on its face, and imports a consideration, is supposed to be entered into on valid consideration, and to be obligatory, if the parties be ostensibly able, until the contrary is shown; and the same rule applies to a government which is capable of making contracts.

2. It is also contended that this bond is void, because it is entered into on a consideration which is either forbidden by express law, or contrary to the general policy of the law. The plea refers to the act passed on the 3d of March, 1809, "to amend the several acts for the establishment and regulation of the treasury, war, and navy departments." I have already said, that I do not consider the prohibition of this act as comprehending agents of fortifications, because they do not belong to the military establishment, nor do their employments relate to it. It is unnecessary to enter into any argument in support of this opinion, because it is of no importance to the point under consideration. The effect, if the act applied to the office, would be to show that the appointment of James Maurice to the office of agent of fortifications was not legal—and that effect is produced by the construction I have given to the constitution. I consider the appointment of James Maurice to the office of agent of fortifications, by the secretary of war, as invalid; but the question, is the bond void on that account? still remains to be considered. It was undoubtedly intended as an office bond, and was given in the confidence that James Maurice was legally appointed to office. If the suit was instituted to punish him for the neglect of duty, in the nature of non-user, or for any other failure, which could be attributed in any degree to the illegality of his appointment, I should be much disposed to think the plea a bar to the action. But this suit is brought to recover the money of the United States which came to the hands of James Maurice, in virtue of his supposed office, and which he has neither applied to the purpose for which he received it, nor returned to the treasury. In such a case, neither James Maurice, nor those who undertook for him, can claim any thing more than positive law affords them. The plea does not controvert, but must be understood to confess the material facts charged in the declaration. It must be understood to confess that the money of the United States came to the hands of James Maurice as agent of fortifications; that it was the duty of such agent to disburse it for the use of the United States, in the manner prescribed by the army regulations, or to account for it; that he has failed to do either, and that they were bound for him in this respect. Admitting these things, they say it is a bar to the action brought for the money, that his appointment was illegal.

If the bond contained no reference to the appointment of James Maurice, as agent of fortifications; if its condition stated only, that certain certain sums of money had been delivered to him to be disbursed under the discretion of the principal engineer, in the purchase of materials for fortifications, and in the payment of labourers, its obligation, I presume, would not be questioned. It would be a contract which the United States might lawfully make. If, instead of specifying the particular purposes for which the money was received, the condition of a bond refers to a paper which does specify those purposes, I know of no principle of reason or of law, which varies the obligation of the instrument from what it would be, if containing that specification within itself. That is certain which may be rendered certain, and an undertaking to perform the duties prescribed in a distinct contract, or in a law, or in any other known paper prescribing those duties, is equivalent to an enumeration of those duties in the body of the contract itself. This obligation is an undertaking to perform the duties appertaining to the office of agent of fortifications. Those duties were prescribed in the army regulations, and were such as any individual might lawfully undertake to perform. The plea does not allege that the thing to be done was unlawful, nor does it allege that the illegality of the appointment to office constituted any impediment to a performance of the condition of the bond. Were it even improper to disburse the money received in the manner intended by the contract, it

could not be improper to return it. There can be nothing unlawful in the engagement to return it. The obligation to return it, as in every other case of money advanced by mistake, is one, which, independent of all express contract, would be created by the law itself. So far as respects the receiver himself, he would be bound by law to return the money not disbursed, and if he would be so bound, why may not others be bound with him for his doing that, which law and justice oblige him to do?

Admitting the appointment to be irregular, to be contrary to the law and its policy, what is to be the consequence of this irregularity? Does it absolve the person appointed from the legal and moral obligation of accounting for public money which has been placed in his hands in consequence of such appointment? Does it authorize him to apply money so received to his own use? If the policy of the law condemns such appointments, does it also condemn the payment of moneys received under them? Had this subject been brought before the legislature, and the opinion be there entertained that such appointments were illegal, what would have been the probable course? The secretary of war might have been censured; an attempt might have been authorized to make him ultimately responsible for the money advanced under the illegal appointment; but is it credible that the bond would be declared void? Would this have been the policy of those who make the law? Let the course of congress in another case answer this question. It is declared to be unlawful for any member of congress to be concerned in any contract made on the part of the United States, and all such contracts are declared to be void. What is the consequence of violating this law, and making a contract against its express provisions? A fine is imposed on the violator, but does he keep the money received under the contract? Far from it. The law directs that the money so received shall be forthwith repaid, and in case of refusal or delay, "every person so refusing or delaying, together with his surety or sureties, shall be forthwith prosecuted at law, for the recovery of any such sum or sums of money advanced as aforesaid." If, then, this appointment be contrary to the policy of the law, the repayment of the money under it is not, and a suit may, I think, be sustained, to coerce such repayment on the bond given for that purpose.

The cases cited by the defendants, do not, I think, support the plea. Collins v. Blantern, 2 Wils. 341, was a bond given, the consideration of which was illegal. It was to compound a prosecution for a criminal offence. It was to induce a witness not to appear and give testimony against a person charged with the commission of a crime. The court determined that the bond was void, and that the illegal consideration might be averred in the plea, though not appearing in the condition. It is only wonderful that this could ever have been doubted. The case of Paxton v. Popham, 9 East, 408, and the case of Pole v. Harrobin, reported in a note in page 416 of the same volume, are both cases in which bonds were given for the payment of money for the performance of an act which was contrary to law. These cases differ in principle from that at bar. The bond was not given to induce the illegal appointment, or for any purpose in itself unlawful. The appointment had been made, and the object of the bond was to secure the regular disbursement of, or otherwise accounting for, public money advanced for a lawful purpose. The bond was not then unlawful, though the appointment was. The case of Nares v. Rowles, 14 East, 510, was a suit on a bond given by a collector and his sureties, for the due collection and payment to the receiver general, of certain duties assessed under an act of parliament. The duties were collected, but not paid to the receiver general; in consequence of which, the collector was displaced, and suit brought against one of the sureties in the bond. The defence was, that the duties were not in law demandable, and this defence was founded on an ambiguity in the language of the act. The argument turned chiefly on the words of the statute, but the counsel for the plaintiffs contended also, that supposing the act not to impose the taxes, yet the bond would not be void, for such a security might well be taken, that the duties which were actually collected should not be lost, but might be preserved, to be paid over to those who should be found ultimately entitled to receive the money. It was competent for him to enter into a bond to pay over voluntary payments made to him, although he might not have been able to enforce payment of the rates, from those who might refuse. In answer to this argument, it was said, that unless the act gave authority to assess and collect the duties, he was no collector, and could not be subject to any obligation for not paying money over to the plaintiffs, in that character, which was obtained by extortion. The court seemed inclined to this opinion, but determined that the taxes were imposed and assessed according to law, and therefore gave judgment for the plaintiffs. The impression which may, at the first blush, be made by this case, will be effaced by an attentive consideration of it. If the money collected was not due by law, the plaintiffs could have no right to receive it, and had, consequently, no cause of action against the defendant. The money sued for was not their money, but the money of the individuals from whom it had been unlawfully collected. The bond to collect and pay over this money to the receiver general, was a bond to do an unlawful act. The contract would have been clearly against law. In giving

his opinion on this subject, the chief justice said: "Looking at the condition of this bond, as it appears upon the record, I cannot say that if the rates were collected without any authority, the collector could be called upon to pay them over, because he would be answerable to the individuals from whom he had received the money, and would be entitled to retain it for his own indemnity."

The case at bar is, in principle, entirely different from that of Nares v. Rowles. This is not money obtained illegally from others, and, therefore, returnable to them, but is the money of the United States, drawn out of the treasury. The person holding it is not entitled "to retain it for his own indemnity," against the claims of others, for there are no others who can claim it. The justice of the case requires, I think, very clearly that the defendants should be liable to the extent of their undertaking, and I do not think the principles of law discharge them from it. I am therefore of opinion that the demurrer to this plea ought to be sustained, and that judgment on it be rendered for the plaintiffs.

Case No. 15,748.

UNITED STATES v. MAXON.

[5 Blatchf. 360.] [1]

Circuit Court, E. D. New York. Nov. 30, 1866.

CRIMINAL LAW — COURTS — CONSTITUTIONAL PROVISION — "PERSONAL GOODS OF ANOTHER."

1. Under the 6th amendment to the constitution of the United States, which provides that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," the district in which the trial is had must have been ascertained by law previously to the commission of the crime, and not merely previously to the trial.

2. The phrase "personal goods of another," in the 16th section of the act of April 30th, 1790 (1 Stat. 116), embraces the personal goods of the United States.

This was a motion to quash an indictment [against John Maxon] for grand larceny alleged to have been committed on the 31st of December, 1863, in the navy yard at Brooklyn, New York. At that time such navy yard was within the Southern district of New York. By the act of February 25th, 1865 (13 Stat. 438), the Eastern district of New York was established, and such navy yard fell within its territorial limits and jurisdiction. This indictment was subsequently found in the district court for the Eastern district, and was transmitted to this court. The defendant now moved to quash the indictment.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

Benjamin D. Silliman, U. S. Dist. Atty.

Calvin E. Pratt and John H. Bergen, for defendants.

Before NELSON, Circuit Justice, and BENEDICT, District Judge.

NELSON, Circuit Justice. The indictment in this case charges the defendant with stealing personal property of the United States, within the navy yard in the city of Brooklyn, New York, a place under the exclusive jurisdiction of the federal government, with some qualifications not material. It was found before the United States district court for the Eastern district of New York, at the December term, 1865, and has been transferred to this court for trial. This Eastern judicial district was defined and organized under an act of congress, approved February 25th, 1865 (13 Stat. 438). The offence, therefore, as will be seen, was committed within the former Southern district of New York, from which the Eastern district was taken; and the question presented is, whether or not the defendant was rightfully indicted in this district, or can be tried within it. The sixth amendment to the constitution of the United States provides that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." The argument in support of the jurisdiction is, that if the district is ascertained by law before the trial, the amendment is sufficiently complied with. We think that this interpretation is not in accordance with the fair import of the terms of the provision; nor would it meet the grievance it was intended to remedy, namely, the formation of a district after the offence was committed, to suit the will or caprice of the law-making power. According to the very words of the amendment, there must be a speedy trial by an impartial jury of the state and district in which the crime was committed, which district (the one in which it was committed) shall have been previously ascertained by law, that is, previous to the commission of the offence. This question was somewhat discussed by counsel and court in U. S. v. Dawson, 15 How. [56 U. S.] 467, though the point was not necessarily involved. We think we hazard nothing in saying, that the above view of the amendment is in accordance with the general opinion of jurists and the profession, since its adoption, and with the reasons that led to it.

Another point was made, which it may be proper to notice, and that is, whether the phrase "personal goods of the United States" comes within the words "personal goods of another," as used in the 16th section of the act of April 30, 1790 (1 Stat. 116), under which this indictment is found. We entertain no doubt that it does, and that a lar-

ceny of the personal goods of the United States might constitute the subject of the offence charged.

The motion to quash the indictment is granted.

Case No. 15,749.

UNITED STATES v. MAXWELL.

[1 Cranch, C. C. 605.] [1]

Circuit Court, District of Columbia. Dec. Term, 1809.

WITNESS—COMPETENCY—INTEREST.

1. On an indictment for bigamy, a person who has an action pending against the prisoner for goods furnished to the supposed first wife, is an incompetent witness (by reason of his interest) to prove the first marriage.

[Sited in U. S. v. Anderson, Case No. 14,452.]

2. Quære,—whether, after a nolle prosequi, entered without the defendant's consent, and after the jury is sworn, he can be held to answer again for the same offence?

Indictment [against George Maxwell] for bigamy.

The right of peremptory challenge was allowed to the defendant without being questioned by the attorney for the United States.

F. S. Key and Mr. Morsell, for the defendant, objected to a witness because interested; the witness having a suit against the defendant for necessaries furnished to the first wife. The verdict in this cause is prima facie evidence of the marriage in that suit. So in an indictment for forgery, the party whose name is forged is not a competent witness. So in perjury, a conviction is conclusive evidence in another suit. Bul. N. P. 245; Boyle v. Boyle, 3 Mod. 164; S. P. McNally, 142. In Dr. Dodd's Case, Lord Chesterfield was rejected until he had a release from the obligee named in the forged bond. Peake, Ev. 100; Rex v. Whiting, 1 Salk. 283.

Mr. Jones, contra. The authorities cited only go to the cases of forgery or perjury. Here the witness says on the voir dire that he does not consider himself as interested. McNally, 140. If evidence at all, it is conclusive, if not conclusive it is no evidence. A conviction for assault and battery cannot be given in evidence in the civil suit. The cases in Buller are between the same parties. Abrahams v. Bunn [4 Burrows, 2251] Peake, Ev. 95; McNally, 107, 144.

THE COURT (CRANCH, Chief Judge, doubting) decided that the witness was incompetent, by reason of the interest, being inclined to think that the verdict might be given in evidence for the witness in his suit for the support of the first wife.

Mr. Jones, for the United States, offered a nolle prosequi to be entered, and the jury was discharged.

Mr. Jones, then moved the court to bind the prisoner over to answer to such an indictment at the next term.

THE COURT said they should take time to consider till tomorrow.

Mr. Key objected that the court could not recommit the prisoner, as there was no charge upon the oath of a competent witness.

The question does not appear to have been moved again.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,750.

UNITED STATES v. MAXWELL.

[3 Dill. 275; [1] 21 Int. Rev. Rec. 148; 14 Am. Law Reg. (N. S.) 433; 2 Cent. Law J. 314.]

Circuit Court, W. D. Missouri. April Term, 1875.

CRIMINAL PROSECUTION—INFORMATION.

Offenses "not capital or otherwise infamous" may, by leave of court, upon complaint on oath, be prosecuted in the federal courts by criminal information.

[Cited in U. S. v. Baugh, 1 Fed. 787; U. S. v. Coppersmith, 4 Fed. 205; U. S. v. Yates, 6 Fed. 865; U. S. v. Field, 16 Fed. 778; Re Wilson, 18 Fed. 34; Ex parte Wilson, 114 U. S. 425, 5 Sup. Ct. 939; Erwin v. U. S., 37 Fed. 488; U. S. v. Smith, 40 Fed. 757.]

[Cited in Lustig v. People (Colo. Sup.) 32 Pac. 275; State v. Nolan (R. I.) 10 Atl. 483.]

An information charging the defendant [William R. Maxwell] with several violations of the internal revenue laws was filed by the district attorney by leave of court. Prior to the term, complaint on oath had been made before a United States commissioner, charging the defendant with said offenses against the revenue laws, and the defendant was arrested upon a warrant issued by the commissioner, and held to answer to the United States district court, and required to give bail in the sum of $500, which he did. At the term, the district attorney, upon the said complaint, warrant and recognizance moved the court for leave to file criminal information against the defendant charging him with the said offenses, which leave was granted and the information accordingly filed. The defendant appeared and pleaded guilty. Afterwards his counsel made a motion in arrest of judgment upon the ground that the defendant can only be prosecuted and punished criminally upon the presentment or indictment of a grand jury, and not upon an information. It is upon this motion that the case is before the court.

James S. Botsford, Dist. Atty., for the United States.

Mack J. Leaming, for defendant.

Before DILLON, Circuit Judge, and KREKEL, District Judge.

DILLON, Circuit Judge. The offense charged in the information is a misdemeanor, and not a "capital or otherwise infamous crime." The defendant was originally arrested by virtue of a warrant issued by a

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

commissioner of the United States upon a complaint duly made to him under oath, showing probable cause. There is, therefore, no ground to claim that the guarantees of personal liberty secured by the fourth amendment to the constitution have been violated, which provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."

The information was afterwards filed by leave of court, and the defendant after pleading guilty, moved in arrest of judgment. This motion must be sustained if there is no authority of law for the prosecution of such misdemeanors in the federal courts by criminal information.

The fifth amendment to the federal constitution provides that "no person shall be held to answer for a capital or otherwise infamous crime unless upon presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or other public danger." The offense charged against the defendant is not a "capital or infamous crime." The words "infamous crime," have a fixed and settled meaning. In a legal sense they are descriptive of an offense that subjects a person to infamous punishment or prevents his being a witness. The fact that an offense may be, or must be, punished by imprisonment in the penitentiary does not necessarily make it, in law, infamous. 1 Bish. Cr. Law, §§ 70, 644; Rex v. Hickman, 1 Moody, 34; Com. v. Shaver, 3 Watts & S. 338; Russ. Crimes, 126; 1 Greenl. Ev. §§ 372, 373; People v. Whipple, 9 Cow. 707; U. S. v. Shepard [Case No. 16,273].

The constitutional provisions, therefore, as to the mode of prosecuting capital and other infamous offenses, have no application to the misdemeanor set forth in the information.

But the question remains, whether other than capital and infamous offenses may be prosecuted in any other mode than upon punishment or indictment of a grand jury. In other words, must all federal offenses of whatever character or grade be prosecuted upon an accusation made by a grand jury?

The constitutional provision above quoted does not say that all offenses must be prosecuted with the sanction of a grand jury, but only that certain classes of offenses must be. The fair implication is that offenses other than those falling within the classes specially described may be prosecuted otherwise than by the intervention of a grand jury. And certainly as respects offenses not capital and not infamous, there is no restriction upon congress as to the mode of procedure; and as to such offenses it is entirely competent for congress to provide that they shall be prosecuted upon indictment or information, or in either mode. But there is no act of congress prescribing in terms that such offenses shall be proceeded against upon indictment or by information, or otherwise. Of course they may be prosecuted by indictment. This is admitted; and it is clear from the fifth constitutional amendment and from various provisions of acts of congress in relation to grand juries, etc., that it is contemplated that crimes of all grades may be prosecuted upon the presentment or indictment of a grand jury. But is it contemplated that all offenses although not infamous must be thus prosecuted? There is no act of congress to that effect; and no specific declaration of its will for or against prosecutions by criminal information.

Criminal prosecution for misdemeanors was a familiar mode of procedure in England, "as ancient," says Blackstone (4 Comm. 309), "as the common law itself;" and was the only existing mode of prosecution, it seems, except by indictment or presentment of a grand jury (Id. 308). It was a mode in daily and constant use in England at the time of the American Revolution, as well as in the American colonies. This was well known when the fifth amendment of the constitution was adopted, which provided only for the previous action of a grand jury in capital or otherwise infamous offenses. If it had been intended wholly to prohibit prosecution by information, language expressive of such intention would have been used. Congress has never enacted a code of criminal procedure, and the states have no power to prescribe either modes of proceeding, or rules of evidence in prosecutions for federal offenses. In a general way the federal courts must be governed in these respects by the common law with the modifications pointed out by the supreme court. U. S. v. Reid, 12 How. [53 U. S.] 361.

Congress, nevertheless, created federal offenses, and clothed the federal courts with jurisdiction over such offenses, and no legal reason exists, in the absence of express legislation, why such must be prosecuted in only one of the two well known common law methods.

Owing to causes, not necessary here to notice (4 Bl. Comm. 309, 310), the proceeding by information was unpopular in England, and doubtless also in the colonies, and it has in many of the states from a very early day, been either restricted or prohibited. In the law lectures of Judge Wilson, one of the justices of the supreme court of the United States, which were delivered in 1790, he recognizes an information in the name of the state as one mode of prosecuting crimes and offenses, and after referring to the two kinds (one strictly public, and the other at the instance of a private person or informer) says: "Restraints have, in England, been imposed upon the last species; but the first—those at the king's own suit, filed by his attorney-general—are still unrestrained. 4 Bl. Comm. 307. By the constitution of Pennsylvania, both kinds are effectually restricted.

By that constitution, however, informations are still suffered to live, but they are bound and gagged. They are confined to official misdemeanors; and even against those they can not be filed but by leave of the court. By that constitution no person shall, for any indictable offense, be proceeded against, criminally, or by information, unless by leave of the court, for oppression and misdemeanor in office." 3 Wils. Works, 144, 145. See, also, 4 Wendell's Bl. Comm. 309, note, as to bill of rights and decisions in New York; Whart. Cr. Law (7th Ed.) § 213.

Thus, by constitutional provision and positive legislation in the states, informations, as a mode of criminal prosecutions, were either very much restricted or abolished, and the result was, that in the state courts, the prevailing method of prosecution was by indictment, and naturally the same practice obtained in the federal courts.

But the constitutional provision (fifth amendment) leaves all offenses open to prosecution by information, except those which are capital or infamous, and there is no enactment of congress preventing a resort to this mode of procedure. On the contrary, there are provisions in several acts of congress which imply that informations may be filed for criminal offenses. 1 Stat. 98, §§ 7, 32; 2 Stat. 290, § 3; 3 Stat. 305, § 179; 14 Stat. 145, § 179.

And it has been several times expressly adjudged that offenses not capital or otherwise infamous may be prosecuted in the federal courts by information. U. S. v. Waller [Case No. 16,634], Field and Sawyer, JJ.; U. S. v. Shepard [Id. 10,273], Withey, J.; U. S. v. Ebert [Id. 15,019], Krekel, J. And such seems to have been the opinion of Mr. Justice Story. U. S. v. Mann [Id. 15,717]; [The Bolinda, Id. 1,608]. And see Walsh v. U. S. [Id. 17,116]; Bish. Cr. Prac. §§ 604, 611. Contra: U. S. v Joe [Case No. 15,478]; U. S. v. Isham, 17 Wall. [84 U. S.] 496. In U. S. v. Buzzo, 18 Wall. [85 U. S.] 125, the proceeding by criminal information does not seem to have been questioned in either court. See, also, Territory of Nebraska v. Lockwood, 3 Wall. [70 U. S.] 532; Stockwell v. U. S., 13 Wall. [80 U. S.] 542.

We are of the opinion therefore, that offenses not capital or infamous, may in the discretion of the court be prosecuted by information. We cannot recognize the right of the district attorney to proceed on his own motion, and shall require probable cause of guilt to appear by the oath of some credible person before we will allow an information to be filed and a warrant of arrest to issue. But with these safeguards there is no more reason to fear an oppressive use of information than there is reason to fear an abuse of the powers of a grand jury. Where the accusation is a grave one or where the charge seems to be doubtful, the court will refuse leave to file an information and compel the district attorney to lay it before a grand jury. But it is well known that the internal revenue laws have created a large number of minor offenses, many of them involving no moral turpitude, and that the cost of proceeding by a grand jury and the delay are burdensome and inconvenient both to the government and the defendant.

In this class of cases, most of which are not defended, great and unnecessary expense will be saved by proceeding by information, and we not only think the practice legal, but one which, in cases of this kind, should, with the restrictions above mentioned, be adopted, and encouraged rather than condemned. The courts in this country have never been made the instruments of power in oppressing the citizen, and it can, perhaps, further be safely affirmed that the government has yet to attempt to make use of the machinery of the law for that purpose; and if it should, it seems quite probable that it would be as easy to secure an indictment from a grand jury, as the consent of the court to the filing of an information. This line of observation is, however, scarcely called for, since the court is only concerned on this motion with the lawfulness of a prosecution by information, and is not obliged to vindicate the propriety or policy of this mode of procedure. The motion in arrest of judgment is overruled. Judgment accordingly.

Case No. 15,751.

UNITED STATES v. MAY et al.

[2 Cranch, C. C. 507.] [1]

Circuit Court, District of Columbia. Nov. Term, 1824.

PRACTICE AT LAW—RETURN DAY—TERMS.

The United States are entitled to judgment at the return term, upon revenue bonds, although, by the general rule and practice of the court, the day after the last day of the term is the appearance day to all writs returnable to that term, and the court will, upon motion, rule the marshal to return the writ on some day during the term.

[Suit by the United States against J. C. May and M. Snyder.] Debt upon a revenue bond. The writ was returnable to this term.

Mr. Mason, for defendants, contended that the United States could not have judgment at this term, because the defendants, according to the rules and practice of this court, are not bound to appear, nor the marshal to return the writ until the first day after the end of the court. 3 Tucker, Bl. 274, 275. The marshal continues to serve process returnable to the court until the last day of the term.

Mr. Swann, U. S. Dist. Atty., contra, insisted that the act of congress of March 2, 1799, § 65 (1 Stat. 676), was imperative upon the court, and left them no discretion. The

[1] [Reported by Hon. William Cranch, Chief Judge.]

writ is, on its face, returnable on the first day of the term; and the court may call upon the marshal to return it on any day. And such has been the practice of this court ever since its first establishment. The act of congress is peremptory. The words are: "And where suit shall be instituted, on any bond, for the recovery of duties due to the United States, it shall be the duty of the court where the same may be pending to grant judgment at the return term upon motion," unless the defendant shall make oath that an error has been committed in the liquidation of the duties; "whereupon if the court shall be satisfied that a continuance until the next succeeding term is necessary for the attainment of justice, and not otherwise, a continuance may be granted until the next succeeding term, and no longer."

THE COURT (THRUSTON, Circuit Judge, absent) said that this is the return term of the writ; and that the act of congress was peremptory.

The marshal was then called upon, at the motion of the district attorney, to return the writ; which being done the defendants were called, and not appearing, judgment was entered up against the defendants.

Case No. 15,752.

UNITED STATES v. MAY.

[3 Mason, 98.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1822.

CUSTOMS DUTIES—AD VALOREM—HOW CALCULATED — PURCHASE THROUGH AGENT.

1. By the revenue act of April 20, 1818, c. 74, § 4 [3 Story's Laws, 1680 (3 Stat. 434, c. 79)], in calculating duties on ad valorem goods, the actual cost is to be taken, including all charges except commissions, outside packages, and insurance.

2. If the importer actually pays commissions, the charge is excepted.

3. Nor is it any objection that an agent of the importer makes him debtor for the goods in the invoice, as bought of the agent, if in fact he has acted only as agent for the importer in the purchase.

Debt on a bond for duties. Plea, tender of amount of duties. Replication, that the sum tendered was less than the duties due, and issue thereon. Upon the trial it appeared that the defendant [Samuel May] was a hardware merchant in Boston, and the goods in question were sent to him, by his agent in England, by his order. The invoice, which was of articles of hardware, and the account current, debited the goods, as bought of the agent, and contained a charge of commissions of five per cent. It was proved to be the invariable usage in the hardware trade, a usage, which had existed for more than thirty years, and so long as any of the witnesses could remember, for the hardware merchants to send their orders to agents in Birmingham, Sheffield, &c., to procure their assortments of wares. The articles in these orders are numerous, and to be procured at different manufactories in different places, some of them distant from the place where the agent resides, and of most of them, even if the agent was a dealer in hardware, he would not ordinarily possess the sort and description wanted. On this account it is the usage, to allow the agent a commission of five per cent. on the amount of the invoices for his trouble and services. This is the lowest and the usual price. The agent pays for all the goods purchased, looking to his principal for reimbursement; and the sellers never look to the principal for payment. The invoices and accounts current are invariably made out by the agent, charging his principal as the debtor for goods bought of the agent, even when all the goods have been purchased of others expressly for the principal; and this usage is notorious to all the trade. The defendant's goods in this invoice were purchased by his agent in the usual manner. Upon this evidence, Mr. Blake, district attorney, for the United States, contended, that, notwithstanding the evidence, the charge of commissions was not allowable, as the party must be considered as selling the goods to the defendant. That the invoice was conclusive; that no person could charge commissions on goods sold by himself; and that duties ought therefore to be calculated on the invoice, with the addition of the commissions of five per cent.

Mr. Webster, for defendant, è contrà, contended, that if the five per cent. was bonâ fide paid, as commissions, it was not to be included as part of the invoice value of the goods; and that the evidence of the usage in the case was decisive against the United States.

STORY, Circuit Justice (charging jury). This is a mere question of fact for the jury. The act of the 20th of April, 1818, c. 74, § 4, directs, that the duties on ad valorem goods shall be estimated upon the actual cost, including all charges, except commissions, outside packages, and insurance. There is no dispute as to the meaning of the word "commissions," nor is it susceptible of different meanings in the act. Whatever sum is bonâ fide charged and paid, as commissions, is excepted. A mere charge of commissions, where none is paid, or by the nature of the case could be paid, is not within the intent of the statute. The charge, if made by the seller or buyer of the goods for the purpose of avoiding the payment of duties, is a fraud, and, as such, ought not to be allowed. What is the present case? The invoice and account current are made out in the usual form. Mr. May is made debtor to the agent for the goods; but this of itself

[1] [Reported by William P. Mason, Esq.]

proves nothing, as to the mode in which, or the person of whom, they were bought. It is the general course in all cases of agency, where the agent pays for the goods, to make out the invoice and account current in this form; and it is in proof, that the goods were purchased for Mr. May in the usual manner, and the usual commissions are charged. Where the invoice contains a charge of commissions in the usual cases, this is primâ facie sufficient for the importer. If the charge is supposed to be wrong, the burthen of disproving it rests on the government. It is not to be presumed, that the importer will swear to a charge, that is known to him to be incorrect; and when he offers to take the usual oath as to his invoice, he affirms in the most solemn manner its genuineness and verity. As to the form, in which the invoice is made out, it is conclusive upon no person. If any thing is proved by it, it must be taken altogether. But it is certainly open to explanation; and the explanation given in evidence shows, that the truth of the case is, as the defendant has asserted it to be. The argument of the district attorney is, that the seller of goods cannot charge a commission on the sale; and if he does, it is in fact a part of the price. That may be true; but the question must still remain, whether he is in realty the seller, or a mere agent and broker of the importer. If in the particular case commissions are in fact paid, the law directs them not to be included in the valuation. The universal usage in the hardware trade is, to pay commissions. The reason is obvious. The articles in an assorted order or invoice are numerous. They are to be purchased in small parcels, often at great distances, and frequently at no inconsiderable trouble. If the agent happens to be a dealer in one article, and to have that on hand, he charges his principal only with the manufacturer's price, and thus puts him upon the same footing, as if he purchased of the manufacturer. And in point of fact, as all the witnesses state, it is now rare, from the subdivision of labor, for a broker or agent to keep any hardware goods to sell to his customers upon their orders. The commission of five per cent. on this invoice is the usual and lowest allowance. It is not doubted, that Mr. May has bonâ fide paid it, in the same manner, as all other merchants pay it. If so, the court sees no reason, why it should not be allowed to him. The sole question for the jury is, whether the charge was bonâ fide paid as commissions. If it was, the defendant has tendered all the duties he ought to pay. If it was not, then the verdict ought to be for the government.

The jury returned a verdict instanter for the defendant.

UNITED STATES v. The MAY. See Case No. 9,330.

Case No. 15,753.

UNITED STATES v. MAYER.

[Deady, 127.] [1]

District Court, D. Oregon. Nov. 10, 1865.

PERJURY—CONTRADICTORY AFFIDAVIT—INTERNAL REVENUE—STATEMENT OF INCOME—TESTIMONY—GOOD CHARACTER.

1. Upon an indictment for perjury, an affidavit of the defendant's directly contradicting the one upon which the perjury is assigned, is not sufficient evidence of the falsity of the latter.

2. Under the internal revenue act of June 30, 1864 (13 Stat. 239), a merchant, in making his statement of income, is entitled to deduct from his gross profits the bad debts made during the year to which the statement relates, or such as appear to be bad at the end of the year.

3. The falsity of the oath upon which perjury is assigned may be shown by the books and papers of the defendant, kept under his control and subject to his inspection.

4. Effect to be given to the testimony of hostile or friendly witnesses.

5. Evidence of good character, effect of, upon trial of a criminal charge.

This was an indictment [against Jacob Mayer] for perjury, alleged to have been committed by the defendant in swearing to his income return on May 9, 1865, for the year 1864. The defendant was a merchant engaged in the wholesale and retail staple and fancy dry-goods business in the city of Portland. In his return he stated the gross profits of his business at $8,800, and deductions on account of clerk hire, rent and losses at $6,752—leaving $2,048 of net income. The assessor for the district—Mr. Frazar—being dissatisfied with the return, caused an examination of defendant's books to be made, upon which he assessed his gross profits at $15,000 and deductions at $6,225—leaving $9,613 of net income. The assessor also assessed the defendant with the penalty authorized by the internal revenue act for making incorrect return. After the finding of the indictment—on July 26—the defendant made and verified an amended return, in which his gains and profits and deductions were stated in accordance with the result of the examination of his books as aforesaid, upon which the assessor remitted the penalty aforesaid. The far greater part of the deductions contained in the first return were claimed by the defendant to have been losses by bad debts made within the year. The principal question contested before the jury on the evidence, was as to the truth of the statement concerning the gross amount of the profits for the year. The evidence tended to show that the gross amount of sales was $82,000, and that the profits on sales over first cost, freight, and insurance, were from 15 to 20 per centum; and that on December 31, 1864, the defendant made up and entered in his books a list of what he then deemed bad debts, which amounted to no more than $1,200 to $1,500,

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

some of which, were afterwards collected. The indictment was found on July 7, 1865.

Joseph N. Dolph and Leopold Wolf, for plaintiff.

William Strong and W. W. Page, for defendant.

DEADY, District Judge (charging jury). Gentlemen of the jury, you have listened long and patiently to the allegations and evidence of the parties and the argument of counsel. It is now the duty of the court to instruct you in relation to the law of the case, and to give you such suggestions and directions concerning the evidence and the rules which should govern your deliberations and action as may appear proper and appropriate.

The indictment against the defendant is found under section 42 of the act of June 30, 1864 (13 Stat. 239), commonly called the internal revenue act, which provides as follows: "That if any person in any case, matter, hearing or other proceeding in which an oath or affirmation shall be required to be taken or administered under and by virtue of this act, shall, upon the taking of such oath or affirmation, knowingly and willfully swear or affirm falsely, every person so offending shall be deemed guilty of perjury, and shall, on conviction thereof, be subject to the like punishment and penalties now provided by the laws of the United States for the crime of perjury."

You will observe, gentlemen, that this section defines the crime to consist in "knowingly and willfully swearing falsely" as to any matter in which the oath is required by this act. This act does not prescribe the punishment, but provides that the punishment shall be in accordance with the law of the United States punishing perjury. The general act on this subject (4 Stat. 118), defines the crime to consist in "knowingly and willingly swearing falsely"—not differing materially from the definition given in section 42 of the internal revenue act—and prescribes the punishment to be by a fine not exceeding two thousand dollars and imprisonment at hard labor not exceeding five years.

Something has been said to you by counsel concerning the punishment prescribed by law for this crime, and how much or how little this circumstance should affect the deliberation or the decision of the jury. On that question I deem it proper to say something to you, and I will say it here. It is true, as has been stated by the counsel, that when you have passed upon the fact as to whether the defendant is guilty or not guilty, the punishment must be fixed by the court, and not by you. It is the duty of the jury to find the defendant guilty or not guilty, as they may determine from the facts shown by the evidence. The defendant may be punished under the statute according to the aggravation of the offence, by fine not exceeding two thousand dollars, or it may be one dollar, and by imprisonment in the penitentiary—for that is what confinement at hard labor signifies—for a term not exceeding five years, or for one day. So far, gentlemen, as this punishment is concerned, it is not in itself to determine the result of your deliberations. You are not to find the defendant guilty because the law prescribes a light punishment for the offence, nor to acquit him because it imposes a heavy one. The jury are selected to try the guilt or innocence of the defendant, and not to prescribe the extent or manner of the punishment. The whole people of the United States, represented in congress, are the law-making power, and they determine by a rule uniform throughout the United States, what acts shall be declared criminal, and how and to what extent they shall be punished; so that it is not within the province of any particular jury to judge as to the punishment of a crime. The jury can only determine the guilt or innocence of the prisoner Yet it is human nature, and it is reasonable that, in determining the question of a man's guilt or innocence, a jury should consider the result of their verdict, and that, in proportion to the severity of punishment, their deliberations should be marked with gravity and seriousness. A jury in determining a case where a man's life is at stake, would scan with more care the testimony of witnesses than in some ordinary case where only a few dollars are in controversy; but, nevertheless, you are not to violate your oaths by returning a verdict contrary to your honest convictions arising from the evidence because of the punishment prescribed by law.

While speaking of punishment, I may also say, that if you see proper you may recommend the criminal to the mercy of the court. I do not wish to mislead you in this. It would still rest with the court to examine into the merits of the case and determine the punishment within the limits fixed by the law, but in so doing the court would give respectful heed and consideration to your recommendation, and be governed by it so far as appeared proper and reasonable.

The defendant in this case is charged by the indictment of the grand jury of this district with the crime of perjury, alleged to have been committed on May 9, 1865, by willfully and knowingly swearing falsely to the statement of his gains and profits for the year 1864. To this charge the defendant pleads not guilty, and this plea of his, in law, controverts every material allegation of the indictment, and puts the proof of them upon the government.

The paper in proof which contains the statement sworn to on May 9, 1865, contains many matters not material to your inquiry in the determination of this case. The perjury, if any, was committed in swearing to the statement at the head of the paper, wherein the defendant says that the whole amount of his gains and profits for the year 1864 was only $8,800. Following this immediately is the statement of the expenses of the business

—proper deductions to be made from the gross gains or profits.

Your inquiry, then, as to whether the defendant has committed the crime of perjury as charged in the indictment, will be confined to the truth or falsity of this statement —that the gross gains and profits of the defendant for the year 1864, were only $8,800. The statement of the defendant's expenses in carrying on his business, as set forth in his first return, has not been controverted by any proof, if I recollect aright, except so far as the same is contradicted by the statement in the second return.

The claim of the prosecution, that you may find the defendant guilty on account of the contradictions in the two affidavits in this particular, is not sustained by the law applicable to the proof of perjury. The two affidavits standing alone, simply equalize each other—the proof afforded by them is in a state of equilibrium. Although you may have an opinion that the first is false and the second true, yet it would not be based upon such evidence as the law requires to produce and sustain a verdict of guilty upon an indictment for perjury. There must be some other proof, besides the admission in the second affidavit that the first is false in this particular. As I have said, then, the question for your determination is, whether the defendant committed perjury by willfully stating his gross gains and profits for the year 1864 to be only $8,800—knowing the same to be false.

To ascertain whether this statement is true or not, you must inquire what the gross gains or profits of the defendant really were. For this purpose you may take the proof of the gross amount of sales for the year, which appear to be within a fraction of $80,000. Take the proof as to what are the customary profits of such business during the year and find the reasonable average of them, and this you may assume to be the profits of the amount of sales. Deduct from this amount the expenses of the business as given in the statement of the defendant, except the items of insurance, freight and expressage, and you have the gains and profits except as I will further state to you. I except the items of insurance, freight and expressage, because all the witnesses in stating the usual rate of profits for that year, have taken such expenses into the account.

One other matter of deduction, and that is the insolvent debts or losses. As the court construes the internal revenue act, and it is the most favorable construction that could be made for the defendant, the defendant was authorized to deduct from his gross gains or profits, the amount of any debts which accrued and became insolvent in the year 1864. It is not sufficient that a debt became insolvent between the last day of the year and May 9. His affidavit, although made on May 9, 1865, is made not with reference to the state of things then existing, but as to what existed at the close of the year 1864. If you find from the testimony that any of these debts of which the witnesses have spoken, did become insolvent in the year 1864, or that the defendant as a reasonable man had good reason to think so, then you will deduct these from the gains or profits, thus ascertained. If by this process you find that the gains or profits of the defendant substantially agree with his statement of May 9, then the statement is not false, and your verdict must be not guilty. In determining what debts the defendant regarded as insolvent on December 31, 1864, if you find that the defendant at the time of closing his books at the end of the year, separated his solvent debts from his insolvent debts as a business transaction, this is the best evidence of what the defendant believed to be such debts. When a merchant at the end of the year, without reference to any pending controversy sits down in his counting-room, and deliberately determines that A & B are insolvent and C & D solvent, this is better evidence of what the defendant knew and thought about the condition of these debts at that date, than claims and opinions formed after a controversy has arisen about the matter.

If by this process, however, you find that the return made on May 9, was false, then you are to inquire whether the falsehood was knowingly and willfully stated by the defendant. This is a common sense question for you to determine from the evidence. If a person is honestly mistaken in his sworn statement, this is not perjury, or if he makes it honestly upon the advice of counsel after stating to him all the facts, where the question involves a question of law. But if a man rashly or fool-hardily swears to what he knows nothing about, or has no good reason to believe true, he cannot claim that this is a mistake, and the law declares it perjury. So if an oath is taken upon the advice of an attorney, it is not an excuse or justification, if the advice goes to the facts and not to some question of law. But in this case there is no evidence that the oath of May 9 was made under the advice of counsel or anybody else.

If you find that the oath was false, but taken not rashly or inconsiderately, and without knowledge of its falsehood, then your verdict should be not guilty. But if you find that the oath was false, and the defendant knew it, or took it rashly without knowing whether it was true or not, then you should find the defendant guilty.

One word as to the corrupt intent. The words of the statute defining the crime are knowingly and willfully—the word "corruptly" is not used. It may be a question whether the court should construe this statute, so as to require it to appear that the oath was taken knowingly and willfully with a corrupt intent, but the court will so construe it. A corrupt intent is a purpose to procure or make some unlawful advantage or gain to the affiant, or to injure another. This corrupt intent you may infer from all the circumstances

of the case. It is a mere matter of calculation to prove that the smaller the return, the less taxes the defendant would have to pay. If you find then that the oath was knowingly and willfully false, to a statement of his return which was less than the fact, it is a legitimate and reasonable inference, that the defendant took the oath for the purpose of unjustly and wrongfully securing to himself a portion of this tax, or what amounts to the same, defrauding the government out of it.

These are the general instructions which I deem it necessary to give you—to which I will add some remarks in relation to particular matters.

In regard to the second affidavit, let me remind you that the perjury charged against the defendant in the indictment, is not alleged to have been committed in swearing to it; and therefore, although such affidavit may be false—although the defendant did actually commit perjury in swearing to it, he cannot in this action be found guilty on that account. The question of guilt or innocence turns exclusively upon the fact as to whether the defendant committed the crime of perjury in taking the first affidavit. The defendant has been allowed to show to you the circumstances attending the taking of the second affidavit, so far as he desired to do so. What was said to him and what was said to others engaged in taking it, or who were merely lookers-on and taking no particular part in the matter—for the purpose of enabling you to judge more correctly as to whether this second statement was made by him because it was true, or whether he was induced to take it by the representations and inducements of others, although he knew it was false, thus showing you how much credit you are to give to it, in determining as between it and first affidavit, which is true. Counsel for the defendant in his argument to you last evening, read to you the report of the testimony given by Backenstos, a witness who appears to put everything in the most favorable light for the defendant, and I deem it proper to call your attention in this connection also to the statement of Thomas Frazar, the officer who had control over the proceeding—rather than Backenstos, who is a clerk in Mr. Frazar's office. If you will remember, Mr. Frazar testified that he told the defendant that he might sign the second affidavit or not, as he pleased; that it made no difference with him, whether it was signed or not, the taxes would be collected upon that assessment anyhow, but for the sake of having the papers in the office in regular form, he would prefer that they should be signed by the defendant. Now, Mr. Frazar was the person in authority. You are to consider also, what was said to the defendant at the time he signed the affidavit, by the witness Grooms, who appears to have been a deputy of Mr. Frazar, and who administered this oath and was exercising authority at the time. Grooms said to the defendant, as you will remember, that he had better sign it; that he was instructed to say that if the defendant would sign it, he would thereby be relieved from the penalty imposed by the assessor, on account of the alleged misstatement in the false income return. Mr. Frazar was the officer in authority, and Mr. Grooms was exercising authority as his deputy. You are, therefore, to consider what was said by them. All these circumstances are to be considered by you in determining whether the second affidavit is true or not true, and how far it goes to show that the first one is false.

So far as the testimony relative to the penalty is concerned, it has been given to the jury to enable them to determine how far the defendant may have been induced to make the second affidavit, although he knew it to be false, for the purpose of being relieved from the payment of this additional sum.

As to what proof is necessary to constitute perjury, the old law was, that two witnesses were necessary to establish the falsity of the matter sworn to, but that rule has been greatly modified. First, it was modified by substituting for it, the rule that one witness and corroborating testimony or circumstances should be sufficient to prove the charge of falsity.

In the courts of the United States, books and documents alone have been held sufficient proof of the falsity of the oath. A celebrated case was quoted in your hearing last evening by counsel for the defendant where the falsity of the matter sworn to by the party as shown by the books, and papers kept by the defendant and under his control and inspection, was held sufficient proof of perjury, without a living witness. This was a case in which a party importing goods from Liverpool to the United States made oath to their value at the custom-house, which oath was shown to be false by the books and letters of the defendant. The ruling in this case was affirmed in the supreme court of the United States (U. S. v. Wood, 14 Pet. [39 U. S.] 430), and the law established that a party can be convicted of perjury without the evidence of any living witness as to the falsity of the oath. In this case, the second affidavit is a solemn admission under oath that the first affidavit is false. The testimony in regard to the sales of the defendant, as shown by his books and the testimony as to the profits upon such sales, is testimony as to the truth or falsity of the statement made in the first affidavit. If, then, you believe from the testimony given you, that this statement is false, and that it was made knowingly and willfully and with a corrupt intent, that will be sufficient evidence to justify you in finding a verdict of guilty.

A good deal has been said as to these books of the defendant. You are to presume, gentlemen, and act upon that presumption, that all the testimony which is pertinent to the issue in question and favorable to the defendant, has been submitted to you. Any pre-

tences to the contrary are mere buncomb, made by the counsel for the defendant for the purpose of influencing your minds otherwise than the testimony would warrant. I say such is the presumption. You are to decide this case as you have sworn to do, according to the evidence given you, and not according to what the counsel may tell you as to what might have been proved. So far as these books are concerned their contents have been shown to you only so far as to ascertain their truth and explain the statements made by the prosecution concerning them. This the defendant has been allowed to do—anything more would be irrelevant. For instance, the prosecution proves to you by testimony of the witnesses who have examined the books that the sales amount to so much, which requires no expert book-keeper, no great amount of mercantile erudition to ascertain, and if it did, the defendant might have had twenty book-keepers to examine them if he had desired it The presumption is that this statement of the amount of sales is correct. The prosecution have also shown by Harry Nevison that between January 1, 1864, and January 15, 1865, at the time the defendant was posting his books and taking an account of business for 1864, an examination of the books was made, and that he selected such debts as he then considered bad and entered them on a page of the ledger for 1865. According to this selection the bad debts amounted to something between twelve and fifteen hundred dollars. As for the statement by counsel for defendant that the amount of the profits for the year 1864, should be shown by the books rather than the testimony of witnesses as to the average profits on such sales, you will remember, gentlemen, that the testimony of Backenstos was that he found no profit and loss accounts in the books, and there has been no testimony offered or given to contradict this statement, except that concerning the page of bad debts shown by the prosecution.

A good deal has been said to you about the veracity of the witness, Nevison. You are the exclusive judges of the credibility of the witness and you should not act rashly nor without judgment in exercising that decision. The witness, Nevison, has been assailed by the defendant as unworthy of belief. It is claimed that he harbors feelings of revenge or malice against the defendant, and that he has denied, or refused or failed to remember certain offensive remarks or threats which he made in relation to the defendant which other witnesses have testified to. You will take into consideration, in determining all these circumstances, the question whether a man may not hate another and yet tell the truth about him, whether he may not feel like seeing him punished and yet not necessarily play the part of a liar to injure him, particularly when under oath; but when you find a witness in a state of mind which evidences strong hatred toward the defendant you should be on your guard, for his passion may so sway his judgment or warp his memory as to cause him to misrepresent the facts. He may remember things and brood over them until he greatly enlarges them; but it does not follow, by any means, that because a man dislikes another, he will willfully swear a lie against him. On the other hand some of the witnesses are said to be old and warm friends or dependents of the defendant, and it may be well for you to consider whether love is not as strong a passion as hate. A devoted friend of the defendant is as likely to swear falsely in his favor, as an enemy against him. You are to consider these things; I put you on your guard.

Again, a witness may through mistake swear falsely as to some particular, and yet testify truly as to others. Of this you may be satisfied from the innate probability of his statement or the corroboration or other admitted or established facts and circumstances before you. But if you are satisfied that a witness has intentionally sworn falsely in any material particular in his testimony, the remainder of his evidence should be received with distrust and not credited unless extremely probable in itself or corroborated. You are also the judges as to what the witness did say.

One thing more, as to character. Evidence has been introduced by the defendant to show that he has a good character for truth and veracity. Character is only important as evidence when a case is doubtful. No proof of good character against plain proof of guilt can be considered, because experience has shown that the best of men have fallen; but in cases of doubt, if it appears that a man has had a good character in the community in which he has lived, the fact should be taken into consideration by you as a circumstance against the probability of guilt. The law presumes a man innocent until he is proven to be guilty. To establish the fact that a man has, for years, borne a good character for truth and veracity in a community, it should be shown that he has lived in the gaze of the public, that he has been criticised, canvassed and tried and found worthy of confidence in this respect—but simply to show that nothing has been said about his character pro or con, is little more than the presumption which the law makes—that he is innocent.

In conclusion, gentlemen, allow me to say that you have an important duty to perform, both as regards the people of the United States and this defendant. As has been said of old, an oath is the end of controversy. Whenever it comes to pass that a man may swear falsely with impunity, all confidence between man and man will be at an end. Then there will be an end to the security upon which rests the fabric of civil society and government—the correct and impartial administration of justice.

The jury were unable to agree and were discharged without finding a verdict.

Case No. 15,754.

UNITED STATES v. MAYO.

[1 Curt. 433; [1] 2 Liv. Law Mag. 326.]

Circuit Court, D. Massachusetts. Oct. Term, 1853.

CRIMINAL PRACTICE—PLEA BY ATTORNEY.

Under what circumstances a person indicted for a misdemeanor, may plead by attorney.

[Cited in People v. Genet, 59 N. Y. 82; People v. Redinger, 55 Cal. 294; State v. Conners, 20 W. Va. 5; State v. Garland, 67 Me. 426.]

Mr. Dodge moved to be allowed to plead to the indictment, which was for beating a seaman, in the absence of the defendant [Amariah Mayo]. He produced a special power of attorney from the defendant to himself, authorizing him to plead and defend at the trial, in the absence of the defendant; and also an affidavit, showing that the defendant was master of a vessel, bound on a voyage and ready for sea, when he was arrested; and that if he were to remain till the trial, he would lose his voyage, and be subjected to much other inconvenience. The district attorney consented to the motion, stating that it was a case of no aggravated character.

CURTIS, Circuit Justice. I have considered this motion with some care, as affecting the practice of the court; and I have also conferred with the district judge, who has had occasion, heretofore, to pass on similar questions. I will state the results at which we have arrived.

1. To save his recognizance, even in case of a misdemeanor, the defendant must appear personally.

2. He is liable to be called on his recognizance at any time, either on the motion of the district attorney, or by the order of the court, on its own motion, if it sees cause to direct it.

3. It is in the discretion of the court, to allow one indicted for a misdemeanor to plead and defend, in his absence, by attorney. This discretion will be regulated by the following circumstances.

1. That it is not an offence for which imprisonment must be inflicted.

2. The court must be satisfied, that the nature of the case, and its circumstances, are such that imprisonment will not be inflicted.

3. The district attorney must consent, or it must appear to the court that he unreasonably and improperly withholds his consent.

4. Sufficient cause must be shown, on affidavit, to account for the absence of the defendant.

5. A special power of attorney, to appear and plead and defend in his absence, must be executed by the defendant, and filed in court by the attorney.

I have considered this case; and being of opinion that its facts bring it within these requirements, the attorney may be admitted to plead and defend.

[1] [Reported by Hon. B. R. Curtis, Circuit Justice.]

Case No. 15,755.

UNITED STATES v. MAYO.

[1 Gall. 396.] [1]

Circuit Court, D. Massachusetts. May Term, 1813.

EMBARGO—PENALTIES—LIMITATION.

Penalties under the embargo act of January 9th, 1808, c. 8 [2 Stat. 453], are to be sued for within the time limited by the statute of limitations of April 30th, 1790, c. 9 [1 Stat. 112], and not by the act of March 2d, 1799, c. 128, § 89 [1 Story's Laws, 653; 1 Stat. 695, c. 22], or the act of March 26th, 1804, c. 40 [2 Stat. 290].

[Cited in Walsh v. U. S., Case No. 17,116; U. S. v. Six Fermenting Tubs, Id. 16,296.]

[Error to the district court of the United States for the district of Massachusetts.]

Debt for a penalty under the embargo law of 1808. The defendant [Asa Mayo] pleaded, —1st, the general issue; 2d, the statute limiting prosecutions for any fine or forfeiture under any penal statute to two years from the time of committing the offence. [1 Stat. 112.] To this plea there was a demurrer and joinder.

G. Blake, for the United States.

B. Whitman, for defendant.

STORY, Circuit Justice. The question on this record is, whether the limitation of the 32d section of the act of 30th of April, 1790, c. 9, be applicable to an action of debt, brought to recover a pecuniary penalty, under the 3d section of the act of 9th of January, 1808, c. 8. Since the case of Adams v. Woods, 2 Cranch [6 U. S.] 336, which I confess, at first, struck my mind as going a great length in construction, it must be considered as settled law, that an action of debt for a penalty arising under a statute previously or subsequently enacted is within the purview of that section. It is contended, however, on the part of the United States, that the present case is extracted from that section, by the direct provisions of the 6th section of the act of 9th of January, 1808, c. 8, or of the 3d section of the act of 26th of March, 1804, c. 40. The latter section provides, that any person or persons, guilty of any crime arising under the revenue laws of the United States, or incurring any fine or forfeiture by breaches of the said laws, may be prosecuted, &c. at any time within five years after committing the offence or incurring the fine or forfeiture. It is argued, that the present is a case arising under the revenue laws of the United States, and that in an enlarged sense, these words embrace all laws, where any fine or forfeiture accrues to the government. I have no

[1] [Reported by John Gallison, Esq.]

difficulty in rejecting this construction, as it would draw within its grasp every crime to which a pecuniary fine or forfeiture attaches by law, of whatsoever character it might be; and I might add, that not a single law inflicting a forfeiture would escape its comprehensive power. The true meaning of "revenue laws" in this clause is, such laws as are made for the direct and avowed purpose for creating and securing revenue or public funds for the service of the government. No laws, whose collateral and indirect operation might possibly conduce to the public or fiscal wealth, are within the scope of the provision. The argument on this head therefore utterly fails.

The principal difficulty undoubtedly arises from the language of the 6th section of the act of 9th of January, 1808. That section declares, that all penalties and forfeitures, incurred by force of that act, shall be sued for, recovered, distributed and accounted for in the manner prescribed by the act of the 2d of March, 1799. The latter act, in the 89th section, after providing for the suing and recovering of all penalties and forfeitures accruing by any breach of the act, declares that no action or prosecution shall be maintained in any case under the act, unless the same shall have been commenced within three years after the penalty or forfeiture was incurred. The 91st section then provides for the distribution of all penalties and forfeitures. Does the direction, that the penalties, &c. shall be sued for and recovered in the manner prescribed in the act of 1799, include the limitation, as to the time, within which the suit shall be brought? The act of 1799 is, within the most restricted sense of the terms, a "revenue law," and therefore the clause limiting the suits and prosecutions to three years is repealed by the act of 1804. If there had been no act limiting the time, within which prosecutions on penal statutes should generally be brought, there would have been considerable force in the argument, that the limitation of the act of 1799 was intended to be embraced in the 6th section of the act of 1808, for the reason stated by the court in Adams v. Woods [supra], that it would be utterly repugnant to the genius of our laws, to allow such prosecutions a perpetuity of existence. The argument is weakened by the existence of such general limitation, by a consideration of the temporary nature and objects of the act in question, and by the fact that the limitation of the act of 1799, was, as to cases within that act, completely repealed. Can it for a moment be believed, that the legislature meant to revive, as to the embargo laws, a limitation which had no legal existence, as to any other law? The language employed, in its natural and ordinary import, does not require such a construction, but is satisfied by the exposition, that the penalties were to be sued for and recovered, with costs, in the name of the United States, and to be distributed and accounted for, as in the ninety-first section of the act of 1799. I do not feel at liberty, upon slight grounds, to disturb the opinion of the district court [case unreported], and to take away the benefit of what may be called a general statute of repose and amnesty, which the legislature has deemed sufficiently extensive for the public security in all but its revenue laws. Judgment affirmed.

Case No. 15,756.

UNITED STATES v. MECHANICS' BANK.

[Gilp. 51.] [1]

District Court, E. D. Pennsylvania. Feb. 27, 1829.

ASSUMPSIT—JUDGMENT—EXECUTION—GOVERNMENT PRIORITY—LIEN.

1. The proceeds of an execution out of a state court, being in the sheriff's hands, and claimed both by the plaintiff and by the United States, who were also judgment creditors, were paid to the former on his agreeing to pay them over to the latter, if "the said court" decided they were entitled to them; *held*, that assumpsit for money had and received will lie at the suit of the United States, in this court, against the receiving creditor.

2. The priority of the United States gives no lien on property under execution when it accrued.

3. Levy and condemnation under an execution keep a judgment alive, and preserve the lien without a scire facias.

4. Land may be sold under a later judgment, without any impediment from an earlier one.

This case was tried on the 18th February, 1829, before HOPKINSON, District Judge, and a special jury, who found a verdict for the United States, subject to the opinion of the court on the whole case.

Mr. Ingersoll, U. S. Dist. Atty.
Mr. Bradford, for defendant.

HOPKINSON, District Judge. The facts, on which the question in this case arises, are these: The United States obtained, in this court, two judgments against John Greiner on duty bonds; the first, on the 21st February, 1825, for five hundred and seventy-eight dollars, and fifty cents; the second, on the 2d May, 1825, for one thousand and ninety-two dollars and forty cents. The greater parts of these debts have been recovered; but a balance remains due. On the 1st February, 1826, the United States, issued a fieri facias on each judgment, which were levied on the property in question, being certain real estate in Race street, in the city of Philadelphia; an inquisition was held and the property condemned under the executions. This is the foundation of the claim of the plaintiff. On the other hand Stephen Girard obtained a judgment, since assigned to the defendant, against the same John Greiner, on the 27th October, 1819, in the supreme court of Pennsylvania. On the 23d October,

[1] [Reported by Henry D. Gilpin, Esq.]

1820, a fieri facias was issued on this judgment, which was also levied on the same real estate in Race street. This levy, with a condemnation of the property, was returned to December term, 1820, of the supreme court. Under this levy and condemnation a venditioni was taken out in May, 1826, and the property sold by it, on the 17th of that month. On the 13th February, 1826, the insolvency of John Greiner was declared by a general assignment. The money received by the sheriff from the sale, was paid by him to the defendant, with the consent of the attorney of the United States, but without any waiver of their rights. The president of the Mechanics' Bank, on receiving the money from the sheriff, signed an agreement to which the United States do not appear to be a party, which recites the sale of the property, and the claim of the United States; "which claim is resisted by the Mechanics' Bank, and the point is to be adjusted by the court, out of which the venditioni issued, on a case to be stated." It is then agreed that "if the said court shall decide that the United States are entitled to be paid the amount of their claim out of said money, then the Mechanics' Bank agree to pay to the United States the amount of their said claim." No case ever was stated for the opinion of the supreme court of Pennsylvania, the court out of which the venditioni issued, nor does any movement appear by either of the parties to carry that part of the agreement into effect; but this suit was brought, in this court, by the United States, to try, in this way, the validity of their claim to the money in question. The declaration calls for money had and received for the plaintiffs' use, for money lent and advanced, and on an account stated, and a verdict has been rendered by consent for the plaintiffs, subject to the opinion of the court on the whole case.

The defendant raises two objections to the right of recovery: 1. That no assumpsit, express or implied, exists between these parties, to maintain the suit. 2. That the United States have no right to the money, either on the ground of the insolvency of John Greiner, nor by reason of any laches on the part of the Mechanics' Bank, in proceeding upon their judgment.

1. I am not inclined to sustain the first objection. Money paid by A. to B., to be by him paid to C., will support an action by C. against B. for money had and received to his use; although there was no promise, or direct privity, between C. and B. This is equitably and substantially our case. The money in question was locked up in the hands of the sheriff. By the consent of the United States, without which the defendant could not have received it, and which raises a consideration between them for the promise now asserted, it was paid by the sheriff to the defendant, not thereby changing the property, or the rights of the parties to it, but to be a deposit there, as it would have been in the hands of the sheriff, for the party who should finally be proved, judicially, to be entitled to it. It is true, in the receipt or agreement given to the sheriff by the Mechanics' Bank, the manner of obtaining a legal decision of the difference is mentioned; but it is not of the essence of the matter; it was never pursued by either of the parties; nor, as far as appears here, ever assented to by the United States. It is said that the United States may have their remedy against the sheriff; but how can this be, when it is agreed here at the bar, by both parties, that the sheriff paid the money to the Mechanics' Bank, with the assent of the United States? This action has a very broad and equitable range; the money in question is admitted to be in the hands of the defendant; it is admitted that he received it under a promise to account for it to the United States, if it should prove to belong to them; the bank received it from the sheriff, knowing of the claim of the United States; knowing this they gave up none of their rights to it, by consenting to its being transferred from the hands of the sheriff to theirs. I can therefore see no objection to their following their right and their property, into the hands, into which it has come under these circumstances.

2. The substantial matter of controversy between these parties is found in the second point. No claim is made by the United States, to be preferred to the defendant under the provisions of the act of congress, giving priority of payment to the United States, in certain cases. Indeed no such claim could have been supported. The supreme court of this state, has decided in the case of Wilcocks v. Waln, 10 Serg. & R. 380, that "if the property of the debtor has been seized under a fieri facias, the property is divested out of the debtor, and cannot be made liable to the United States." This is in entire conformity with the decisions of the supreme court of the United States. The only question then is whether the Mechanics' Bank have lost the preference, which the priority of their judgment would give them, by any laches, so as to let in the judgment of the United States before them. The effect of an execution, levied on real estate, to continue the lien of the judgment, under which it was issued, in full force and life, has several times been under the consideration of the supreme court of this state; and with direct reference to the act of assembly requiring a revival of judgment, by scire facias, every five years, to keep up the lien.

It has been uniformly held, that the taking out a fieri facias, levying it on the lands of the defendant, and condemning them by an inquest, all of which were done by the Mechanics' Bank without delay, and several years before the judgment of the United States, in this case, are sufficient without a scire facias to keep the judgment alive, and to preserve the lien on the real estate, thus proceeded against. A short review of the

cases will show this to be the established and unquestioned law of Pennsylvania. In the case of Young v. Taylor, 2 Bin. 228, it was objected that the judgment had not been revived within five years, according to the act of assembly, but it was held by the court, that the taking out a fieri facias, levying on the goods and lands of the defendant, and condemning the lands by an inquest, was notice tantamount to a scire facias under the act; and sufficient to preserve to the party the full lien and benefit of his judgment. In the case of Cowden v. Brady, 8 Serg. & R. 505, the contest was between one Haye, a creditor of Brady, who had a judgment in the county, where the land lay, and one Cowden, who had a prior judgment in another county, but had issued a testatum fieri facias to the county in which the land was situated, which testatum was not followed up by a sale, but "grossly neglected" for several years. The judgment of Cowden was in July, 1807; his testatum fieri facias issued to August term, 1809, and was levied, and the land condemned. It remained dormant from that time until 1813; and again from 1813 to 1816. The proceedings under this execution being returned to the court from which it issued, which was not in the county where the land lay, no notice of them was legally or actually given to any body. Haye's judgment was entered in March, 1811; it was regularly and promptly followed up, and the land in question was duly sold under it, by a venditioni returnable to March term, 1814. The deed to the purchaser at this sale was acknowledged in June, 1814; and the purchaser took possession accordingly. More than two years after this sale, to wit, in April, 1816, the land was again sold by a venditioni under Cowden's judgment. Here the question of preference was, between a judgment in the county of the land, binding it with record notice to all the world; and a fieri facias on a judgment in another county, put into the hands of a sheriff, and there neglected for several years; indeed for two years after the vigilant creditor had sold the land, under regular process to a bona fide purchaser, whose rights and possession were invaded by an ejectment on a title derived from this second sale. In such a case the court could not hesitate to prefer the judgment of Haye; at the same time recognizing the doctrine, that with due notice of the judgment and levy, in the county where the land lies, the creditor may safely indulge his debtor, by a postponement of an actual sale of his land. In the case of Com. v. McKisson, 13 Serg. & R. 144, Judge Duncan delivering the opinion of the court, says, "This is a question of immense importance. It is whether an execution returned 'Levied on land,' falls within the provisions of the act limiting the time, during which judgments shall remain a lien on real estate." The judge examines, with great care the act of assembly, and the adjudged cases bearing on the point; and in conformity with them, and the received opinion and practice of the bar, decides, that a levy on particular lands, preserves the lien of the judgment; and that no scire facias is necessary to keep it alive. It cannot therefore be superseded by a subsequent judgment, or any proceedings under it, "unless such a length of time had elapsed as that, by analogy to the statute of limitations, a presumption of satisfaction would arise." In the case of Dean v. Patton, 13 Serg. & R. 341, Canan had two judgments against Clarke; one prior to Davidson's mortgage, the other subsequent to it; writs of fieri facias were issued under both judgments, and returned levied on personal estate. Canan and Clarke made an arrangement to apply the proceeds of the sale of the personal estate, not to pay Clarke's first judgment, but the last, in order that the proceeds of the real estate might be taken to satisfy his first judgment, and cut out the mortgage creditor; under such circumstances, the court would not allow Canan and Clarke thus to manage the matter between themselves, to the injury of Davidson. As Canan had levied the execution of his first judgment on the personal property of the debtor, he was not permitted to withdraw it, and take for it the proceeds of the land sold by the mortgagor. The principal point of this case has no bearing on that now before the court; nor is there any incidental observation made by the judges, that is not in conformity with the principles of the cases above cited.

No cases have been produced by the district attorney, impeaching or questioning the law as given above. He insists that a man should not be suffered, by issuing a fieri facias and levying it, and keeping it for ever, to hold all other creditors off. No such consequence will follow, as it never has been doubted in Pennsylvania, that a later judgment may go on to the sale of the land, without impediment from an earlier judgment; and although it was long unsettled, it has at last been adjudged, in the case of Com. v. Alexander, 14 Serg. & R. 257, that a purchaser at sheriff's sale, under a judgment, does not take the land subject to a previous judgment, obtained against the former owner of the land, unless it was sold expressly, subject to such prior judgment. The land being thus sold, clear of the incumbrance of earlier judgments, will bring its full value; the proceeds are distributed according to the priority of the liens, and no wrong is done to any body. I will add, that when a statute, in peremptory and unequivocal terms, requires a notice of a special description, given and prescribed by the statute, I should not be inclined to receive any substitute, because I might deem it equally good and effectual for the purposes of the statute. But the practice of admitting what are called tantamount notices, has obtained too firm a footing in the courts both of this country and England, to be now shaken without danger. I have long doubted whether, if these steps could

be retraced, they would be again adopted. If they have accomplished the equity of particular cases, it has been at the expense of certainty in all; and perhaps not without some usurpation of legislative authority. There is, however, no instance, in which it may be better justified, than in the decisions of the courts of Pennsylvania, on the matter here in question. It is my opinion, that the verdict rendered in this case for the plaintiffs, be set aside, and a judgment entered for the defendant.

Case No. 15,757.

UNITED STATES v. MEEKER.

[30 Leg. Int. 344;[1] 9 Phila. 470; 6 Chi. Leg. News, 70; 18 Int. Rev. Rec. 166; 21 Pittsb. Leg. J. 37.]

District Court, D. New Jersey. Oct. 10, 1873.

PENAL BOND—LIMIT OF RECOVERY.

Action against surety on a paymaster's bond, where a penalty of bond was $20,000, and jury found verdict in favor of the government for $25,679.42. *Held*, that the plaintiff was entitled to judgment for the penalty ($20,000) of debt, and for the interest upon that sum in the nature of damages, from the commencement of the suit to the entry of the judgment. The aggregate amount, not exceeding, however, the sum awarded by the verdict.

In debt, on paymaster's bond. This was a suit against the surety of a paymaster for breach of the condition of his official bond. The penalty of the bond was twenty thousand dollars; but upon the trial, the jury found a verdict in favor of the government in the sum of twenty-five thousand six hundred and ninety-seven and forty-two one hundredths dollars. The question was raised whether the judgment upon the verdict should be for the penalty only ($20,000), or whether the plaintiff was entitled to have added to this sum, interest thereon in the nature of damages; and if so, whether the interest should commence from the date of the breach of the condition of the bond, or from the time of the demand upon the surety. THE COURT expressing doubt as to the rule in such cases, it was agreed that the entry of the judgment should be postponed until the parties in interest had opportunity to examine the question.

Mr. Keasby, U. S. Dist. Atty.

Magie & Emery, for defendant.

NIXON, District Judge. After a careful examination of the authorities, I am satisfied that the judgment in this case should be entered for $20,000 (the penalty of the bond) of debt, and for the sum of $——— for damages, being interest on the penalty from the twenty-seventh day of January, 1867, the date of the original writ. That time is fixed for the beginning of interest, because there was no proof of any previous demand upon the surety. This view, I think, is sustained by the following authorities: 2 Greenl. Ev. § 263; Long's Adm'r v. Long, 1 C. E. Green [16 N. J. Eq.] 59; U. S. v. Arnold [Case No. 14,469], affirmed by the supreme court, 9 Cranch [13 U. S.] 104; Bank of Brighton v. Smith, 12 Allen, 243; Harris v. Clap, 1 Mass. 308; Warner v. Thurlo, 15 Mass. 154; Brainard v. Jones, 18 N. Y. 35; and Lonsdale v. Church, 2 Term R. 388. The earlier and later cases are reviewed, and the whole subject discussed, in Long's Adm'r v. Long, by Chancellor Green, with his usual learning, discrimination and skill. I am aware that the courts in England have been in doubt in this matter, and that the cases of White v. Sealy, Doug. 49; Wilde v. Clarkson, 6 Term R. 303; and McClure v. Dunkin, 1 East, 436,—greatly impair, if they do not destroy, the authority of Lonsdale v. Church, supra. I have also adverted to the fact that the late Justice McLean, in Lawrence v. U. S. [Case No. 8,145], while admitting the reasonableness of the rule, that gives interest on the penalty, from the demand upon the surety, or from the breach of the condition, felt constrained by the authority of Farrar v. U. S., 5 Pet. [30 U. S.] 385, to hold that no more than the penalty could be recovered. But a closer examination of this last case, gives force to the suggestion, that what was said upon the question I am now considering, were obiter dicta, in no wise necessary for the decision of the point there under consideration. The court was reviewing exceptions to the form of the judgment —the jury having found for the plaintiff below on the breach assigned, and assessed the damages for the breach of the condition at $41,000, and the judgment that had been rendered thereon, was "quod recuperet"—the damages, not the debt. All that was needful to be said in such a case was, that in an action for debt, a judgment for damages simply, could not be cured or amended. Let the judgment be entered in accordance with this opinion.

[1] [Repriuted from 30 Leg. Int. 344, by permission.]

Case No. 15,758.

UNITED STATES v. MERCER et al.

[Deady, 502.][1]

District Court, D. Oregon. Dec. 19, 1868.

FORFEITED RECOGNIZANCE — REMISSION — WHEN GRANTED.

On an indictment for smuggling, the defendant's recognizance was forfeited for failure to appear for trial according to the condition thereof; afterwards the defendant appeared and submitted to a trial, but the jury being unable to agree, were discharged without giving a verdict; on an application by such defendant, under section 6 of the act of February 28, 1839 (5 Stat. 322), to the court, for the remission of such forfeiture: *Held*, that it appearing to the court that the defendant was guilty of the crime charged, and that the amount for-

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

feited was not commensurate with the punishment deserved, that public justice required the forfeiture to be enforced.

[This was an indictment against A. S. Mercer, S. B. Parrish, George A. Ladd, and H. W. Rappeleye upon the charge of smuggling.]

William Strong, for the application.
W. W. Page, contra.

DEADY, District Judge. This is an application by the defendant, Mercer, to the court, to remit the penalty of $3,000 incurred by his bail, Levi Anderson, W. H. Gray and Philip Johnson, on account of Mercer's failure to appear for trial in May last according to their undertaking for him. The application is made under section 6 of the act of February 28, 1839 (5 Stat. 322), which reads as follows: "In all cases of recognizance in criminal cases taken for, or in, or returnable to, the courts of the United States, which shall be forfeited by a breach of the condition thereof, the said court for or in which the same shall be so taken, or to which the same shall be returnable, shall have authority in their discretion to remit the whole or a part of the penalty, whenever it shall appear to the court that there has been no willful default of the parties, and that a trial can notwithstanding be had in the cause, and that public justice does not otherwise require the same penalty to be executed or enforced."

The circumstances out of which the forfeiture arose and attendant upon it are as follows: In May, 1867, the defendant, Mercer, having been committed by Commissioner Wilcox upon a charge of smuggling, Messrs. Anderson, Gray and Robinson became bound as his bail in the sum of $3,000. On July 3, 1867, Mercer and four others were indicted by the grand jury of this district, for smuggling five one eighth casks of brandy and four barrels of wine and ten of whisky, into this district from the foreign port of Victoria; and that in November, 1867, Mercer and his co-defendants, except one, were arraigned and tried upon the charges in the indictment, and the jury, being unable to agree upon the guilt or innocence of the defendants, were discharged without giving a verdict. In May, 1868, the cause was again brought on for trial, when Mercer made default and did not appear according to the obligation of the undertaking of his bail; at the same time his three co-defendants were put on trial, and the jury being again unable to agree, as before, were discharged and a nolle prosequi entered as to such defendants. On May 15, and after the default of Mercer, the United States commenced an action against Mercer's bail to recover the penalty mentioned in their undertaking. In July following judgment was given for the plaintiffs in the action for want of answer for the sum of $3,000 and costs and expenses—but execution not to issue thereon except by leave of the court. This judgment was not entered until the November following. In July, 1868, Mercer appeared in court, and upon the motion of the United States and the counsel of Mercer, the criminal action pending against him was continued until the November term. In December following Mercer appeared and submitted to trial on the charges in this indictment, and the jury being unable to agree as to his guilt or innocence, was discharged without giving a verdict; and thereupon a nolle prosequi was entered as to Mercer. On July 6, 1868, Mercer made application for the remission of the penalty incurred by his bail upon the grounds stated in his affidavit accompanying the application. The application was continued by the court to await the result of the criminal action. This latter having been disposed of, the application has been heard and submitted to the court for its action.

In his affidavit in support of his prayer for remission, Mercer states that it was his intention to have been present to answer to the indictment in May, 1868, when the second trial took place, and had made his preparations accordingly, but that he "was taken sick with the lung fever and rendered unable to undertake the journey from New York, where I had been on business to this place," (meaning Portland, I suppose); and that his absence as aforesaid was caused solely by his sickness and inability to attend as aforesaid. From this it appears that Mercer left Oregon and went to New York after his trial in November, 1867, well knowing that his bail had undertaken that he should be here in May following, when the action was set for retrial. To say the least of it, this conduct looks as if Mercer was willing to put his bail to great unnecessary risk, and that he regarded his obligation to be here, present in court in May, as a matter altogether secondary to such business or speculations as he might have or find in New York. In other words, if business permitted he would return and be present, if not, then he would not. No reason, urgent or otherwise, is shown for Mercer's going to New York instead of remaining here to await his trial. Absence under such circumstances, even where sickness is shown to be the proximate cause, borders closely upon willful default. But from the statement of "Robert H. Hannah, M.D." Mercer appears to have been taken sick about April 21. This was only twelve days before he was required to be present in this court. He could not have come here at that time in less than twenty days—certainly not in twelve. So it may be inferred that Mercer did not intend to be present, or he would have been far on the road hither, when it is said that he was taken sick in New York, and thereby detained there against his will and purpose. The appearance of the paper purporting to be signed by "Robert H. Hannah, M.D.," is calculated to excite suspicion as to its authenticity. It bears evident marks of having been changed from a simple certificate to an affidavit. The body of it is in the handwriting of the person purporting to be Dr. Hannah.

It commences, "New York, May 27, 1868. This may certify that I, Robert H. Hannah, a practicing physician in the city of New York, was called upon to visit A. S. Mercer, of Oregon," etc. Just below the signature a five cent stamp is placed and duly cancelled by Doctor Hannah, on May 27, 1868. After this was done, it appears that some one took the certificate in hand, to make an affidavit of it. For this purpose there was written at the top of the page, and in the left hand corner—"State of New York, City and County of New York." A line was then drawn through the words "This may certify that." A little further on and between the words "New York" and "was called" a carat (∧) was placed, and the words, "being duly sworn say that I," interlined over it. On the margin opposite this interlineation are the capital letters, "E. L. O., N. P.," apparently intended as the initials of "Edward L. Owen, Notary Public," whose official seal and signature appears below the writing, affixed to the following jurat—"Sworn to before me this third day of May, 1868." All these interlineations and additions to the original certificate, are in one handwriting. The signature of the notary is probably in the same hand, but written with a different pen and ink. The supposed notary is made to certify that he swore Robert H. Hannah to this writing on May third, while in the same writing Hannah states that he had visited Mercer as late as May 23d. Hannah's signature appears from the date of the cancellation of the stamp and the one written at the head of the paper, to have been made on May 27, while according to the jurat of this supposed notary it was sworn to before him on the third day of the same month—just twenty-four days before. The writing is made upon a sheet of letter paper, and it is not likely that it was prepared by a notary, who would have used legal cap. It may be said that Hannah may have first prepared it as his certificate, and that afterwards he went before the notary to swear to it. This is possible, but it is quite probable that upon such application the notary would have rewritten the matter, rather than to have blotted and interlined this one, in the manner that it is. It does not contain over 100 words and the labor of rewriting it, even if more than that of blotting and interlining it, would have been but a trifle. It is not business-like or professional for a notary to put his official seal and signature to an instrument, having the suspicious appearance that this has, to be used as evidence, particularly at a great distance from where he resides. Again the jurat does not state that the writing was subscribed before the notary, but only that it was sworn to before him. Any fellow might have been picked up in the streets of New York and taken before the notary and sworn to the writing. It ought to appear from the jurat that Robert H. Hannah swore to it. These suspicious circumstances could not have escaped the notice of counsel who presented this application. Notwithstanding this, the paper has been submitted in support of the application, without a word of explanation, from which I infer that no explanation favorable to the authenticity or character of the writing could be made. The certificate of a physician is not evidence. It is merely hearsay. A physician must give his testimony under the sanction of an oath, as in the case of men in general. This writing then, even if admitted to be the genuine certificate of "Robert H. Hannah, M.D.," is not legal evidence of the facts stated in it. As to its being his affidavit, I have very serious doubts.

But waiving these questions and even admitting for the moment that Mercer's default was not willful, did it prejudice the United States in the trial of the cause? I am inclined to think that this question ought to be answered in the affirmative, but of this I would not be positive. No testimony was lost between the trials in May and December, that I am aware of. But the defendants being separated in their trials by the absence of Mercer in May, the force of the case for the prosecution was weakened thereby. Upon such trial the party or parties not on trial were pointed out to the jury by the defence as a scape-goat upon which they might safely lay the whole guilt of the transaction which was the subject of the indictment. Delay is the usual defence of the guilty. If nothing else happens by the lapse of time, at least the accusation becomes stale, and of less and less public concern. Juries are not so readily or deeply affected by the moral turpitude of the transaction complained of, and are more reluctant to convict, even when the law and evidence require that they should. Honest witnesses forget many of the striking incidents and details of their story, so that their evidence loses much of its original force and effect, while dishonest and interested ones have the temptation and opportunity to exaggerate or invent circumstances to secure the acquittal of the accused. That causes like these have worked together to prevent Mercer from being found guilty at the last trial upon some of the counts in the indictment, there is much reason to believe.

But the important question in this application arises under the words of the statute, which in effect provides, that although the default was not willful, and the United States was not prejudiced in the trial of the cause, still, if the ends of public justice otherwise require that the penalty should be exacted or enforced, the court must not remit it.

It appears to me, from the evidence produced on the trial of this cause before the jury, that the ends of public justice do require that the penalty should not be remitted. The end and object of public justice is to convict and punish the guilty. There can be no doubt that Mercer, while acting as deputy-collector of customs for this district, assisted some or all of the other defendants to smuggle the four

barrels of wine and two of whisky into this district, as charged in the indictment. On January 25, 1867, the steamer Fideliter entered at Astoria from Victoria. On her manifest there were eleven barrels of dog-fish oil, shipped at Victoria, V. I., by S. Sargent to S. Sargent, at Portland, Oregon. The manifest of cargo contained no mention of any liquors, or of any other barrels, except some barrels of salmon. Mercer, with two inspectors, came up on the Fideliter to Portland. While here, he professes to have received the entry for consumption of those eleven barrels of oil by H. L. Gowan, and he certifies on such entry that H. L. Gowan came before him and subscribed and swore to the affidavit in the entry. H. L. Gowan had not power or authority to make this entry. He was not shown to have been the agent of the owner and consignee Sargent, and therefore Mercer, is shown to have violated the law and instructions in receiving the entry or allowing Gowan to make it even if it was genuine. This is a suspicious circumstance. But I cannot go over the testimony in detail. In my judgment, "H. L. Gowan" is a fiction, and no such person ever appeared before Mercer and made this entry or oath. His certificate to that effect is willfully and corruptly false. The entry is false and was probably made by one of the defendants, who filled up the printed form of entry, and signed it with the fictitious name of H. L. Gowan. Diligent inquiry has been made in this and surrounding counties for the past eighteen months for such a man as H. L. Gowan, but he has never been heard of, or shown to have ever existed. Of these eleven barrels, imported by the assistance of Mercer as dog-fish oil, four contained wine and two whisky. They were afterwards seized, condemned and sold by the government. These eleven barrels were inspected on the wharf under the immediate supervision and with the assistance of Mercer. Two barrels, which actually contained oil, were selected for inspection, one by the inspector, with Mercer's consent, and the other by himself. The barrels when rolled on the wharf were placed on one side, and the inspection of them was delayed until Mercer directed it to be done and took part in it. Mercer had authority to inspect these barrels, but it was not his duty while the two inspectors were present. He is not shown to have inspected or participated in the inspection of any other portion of the cargo. His business was to receive the entries and collect the duties. These barrels were hauled off the wharf soon after they were inspected under the direction of one of the defendants, without any permit, written or verbal, from the deputy being exhibited or communicated to the inspectors. The fact that four barrels of wine and two of whisky were smuggled into the district in January, 1867, is established beyond controversy by the decree condemning them as forfeited to the government for that cause. The evidence shows that six barrels seized and condemned were a part of the eleven described in the entry purporting to have been made before Mercer by H. L. Gowan, on January 28, 1867. This alone proves the entry to have been untrue—that the barrels did not all contain oil. But when we consider that the entry is in the handwriting of one of the defendants, and that no such person as H. L. Gowan exists or made such entry, the conclusion is irresistible that Mercer willfully and corruptly assisted to smuggle these foreign liquors into the district. The statute defining this crime—Act July 18, 1866, § 4 (14 Stat. 179)—prescribes the maximum punishment at a fine of $5,000 and ten years of imprisonment. This penalty sought to be remitted is far below the medium punishment. The crime committed by Mercer is an aggravated one, because at the time, he was in the pay and trust of the government as an officer of the customs, for the purpose of preventing just such frauds upon the government.

The application for the remission is denied.

Case No. 15,759.

UNITED STATES v. MERRIAM et al.

[3 Chi. Leg. News, 113; 13 Int. Rev. Rec. 11.]

District Court, E. D. Michigan. Jan. 3, 1871.

IMPORTATION OF GOODS—FALSE ENTRY—ESTOPPEL OF CONSIGNEES—EVIDENCE—PRESUMPTIONS AGAINST VERDICT.

[1. On a prosecution for an entry of tar from Canada at a false valuation, evidence that other tar was entered at about the same time at a higher valuation was admissible.]

[2. The court will not presume, in order to invalidate a verdict finding one guilty of a false entry of tar from London, Canada, that other tar from Canada entered at the same time at a higher rate was purchased outside of London, and that the market price at different places in Canada was not uniform, it not even appearing that tar was dealt in at any other place in Canada.]

[3. Act March 3, 1863 (12 Stat. 739), imposing a penalty on one falsely and fraudulently effecting an entry of goods at less than their true weight or value was not repealed by Act July 18, 1866, § 4 (14 Stat. 179), providing a penalty for the unlawful importation of goods without entry or payment of duty.]

[4. Purchasers of goods from Canada, who, before the entry of the goods at the custom-house, were fully informed by the seller of the making and forwarding of false invoices for the purpose of entry, and who acquiesced therein and availed themselves of such invoices, are estopped, on a prosecution for such fraudulent entry, to say that they did not themselves perpetrate the unlawful act.]

[5. And such purchasers, if they knew that the article would be invoiced and shipped to them as owners, and that it would be so presented for entry, and took no steps to protest against this being done, or to inform the government officers upon the subject, are estopped to claim that they were not the owners at the time of the entry.]

Trial and conviction at June term, 1870, for false entry of a quantity of petroleum tar. The defendants [Joseph B. Merriam and William Morgan] now move for a new

trial. The grounds alleged as the basis of the motion are eight in number, and are stated in the opinion of the court.

H. B. Brown, for the motion.
A. B. Maynard, U. S. Dist. Atty., contra.

LONGYEAR, District Judge. The first ground alleged, that "the court erred in admitting evidence of the market value of the property imported," was abandoned at the argument. The second ground alleged is, that "the court erred in admitting evidence that other tar was entered about the same time at a higher valuation than that alleged to have been imported by defendants." This evidence was admitted as tending to prove the market value of the tar in question. It was contended on the argument, that for aught that appears in the evidence, this other tar might have been entered at the purchase price. Concede that it was, does not that tend to show market value? What is the market value of any commodity, but the price it brings in the market? Then certainly evidence of what other tar was purchased for at about the same time, would tend to show the market value of the tar in question. It was also said that the purchase price of such other tar was not evidence of the purchase price of the tar in question. Conceded. But the evidence was not admitted, as we have already seen, for that purpose. It was admitted to prove market value, and that purpose alone. It was further said that such other tar might have been entered at more than its market value. But such a possibility does not affect the competency of the evidence for the purpose for which it was admitted. If it had appeared that it was so entered, the weight of the evidence in question would of course have been destroyed.

It was also contended, with much force and earnestness, that there was no evidence where this other tar was purchased; non constat it came from places where the market value was much higher than at London, in Canada, where the tar in question was purchased. It is much to be regretted that congress has as yet made no provision for a short-hand reporter for the federal courts. The importance of having the proceedings and evidence fully reported, especially in criminal cases, is forcibly illustrated by the question here raised, and it cannot well be over-rated. As it is, court and counsel must rely upon their own incomplete and often imperfect memorandums made at the time. When these memorandums are silent upon any given point, it is no evidence that the testimony as to that point was silent. In such case court and counsel are left entirely to their recollections. My minutes simply show that such evidence of other entries was offered, objected to, and admitted. My recollections, in this instance, are at variance with that of the learned counselor. But as my memory is at least as likely to be at fault as his, I shall not base my decision wholly upon it. This specific point was not made on the trial, when the defect, if it be one, might have been cured. Again, the evidence did show that this other tar was imported from Canada, and it did not appear that the article was produced or dealt in at any other place in Canada than where the tar in question came from, or that the market value was not uniform, and the court will not now presume two such important facts to invalidate the verdict.

The third ground alleged, that "the court erred in admitting evidence of conversations between Edwards and Lamb, and others, respecting the market value of tar" (admitted on the authority of the Cliquos Champagne Case, 3 Wall. [70 U. S.] 114), was abandoned on the argument.

The fourth ground alleged is, that the court erred in refusing to charge the jury "that defendants could not be convicted under the first and second counts." The first and second counts of the indictment are laid under section 3 of the act of March 3, 1863 (12 Stat. 739), which provides, "That if any person shall, by the exhibition of any false sample, or by means of any false representation, or device, or by collusion with any officer of the revenue, or otherwise, knowingly effect, or aid in effecting an entry of any goods, wares or merchandise at less than the true weight or measure thereof, or upon any false classification thereof, as to quality or value, or by the payment of less than the amount of duty legally due thereon, such person shall, upon conviction thereof, be fined in any sum not exceeding $5,000, or be imprisoned not exceeding two years, or both, at the discretion of the court." It is contended that this section is supplied by section 4 of the act of July 18, 1866 (14 Stat. 179), and consequently repealed by the last clause of section 43 of the same act (page 188). Section 4, of the act of 1866 provides, "that if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any goods, wares or merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment or sale of such goods, wares or merchandise, after their importation, knowing the same to have been imported contrary to law, such goods, wares and merchandise shall be forfeited, and he or she shall, on conviction thereof before any court of competent jurisdiction, be fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both, at the discretion of said court; and in all cases where the possession of such goods shall be shown to be in the defendant, or where the defendant shall be shown to have had possession thereof, such possession shall be deemed evidence sufficient to authorize conviction, unless the

defendant shall explain the possession to the satisfaction of the jury." And section 43 of said act provides that a number of acts and parts of acts particularly mentioned, "and all other acts or parts of acts conflicting with or supplied by this act be, and the same are hereby repealed." Do the provisions of section 3 of the act of 1863 conflict with, or are they supplied by, section 4 of the act of 1866? If the act, the punishment for which is provided by the act of 1863, constitutes a part of the act of importing, or bringing into the United States, then the former is no doubt supplied by the latter, otherwise not. In the act of 1863, the effecting, or aiding to effect, an entry in the manner or by the means specified, is the act punished. In the act of 1866, it is the importing or bringing into the United States in the manner there specified. Importation is the act of bringing goods, wares and merchandise into the United States from a foreign country. They are brought into the United States as soon as they are brought into its territory; and the act of their importation is complete when they are voluntarily brought into a port of delivery with intent to unlade them there. U. S. v. Lindsey [Case No. 15,603]; The Boston [Id. 1,670]; The Mary [Id. 9,183]; U. S. v. Vowell, 5 Cranch [9 U. S.] 368; Arnold v. U. S., 9 Cranch [13 U. S.] 104. The importation, as thus defined, must of course be complete before the duty to effect an entry can arise. It follows, therefore, as a necessary conclusion, that the act of effecting an entry can constitute no part of the act of importation. It follows the importation, is consequent upon it, but is no part of it. The importation provided against in the act of 1866 is importation "contrary to law." The unlawfulness here meant is limited to the act of importation, and cannot be extended to any act done after the importation is complete, and therefore does not apply to the act of effecting an entry. See U. S. v. Thomas [Case No. 16,477]. It may be asked, to what class of cases, then, will section 4 of the act of 1866 apply? The learned judge of the Northern district of New York, whose opinions are always entitled to great weight, has, in the case of U. S. v. Thomas, above cited, given us his views upon that question. He applies the section to importation where there is an express prohibition, or where the goods imported are required to be in a certain prescribed form, condition, or quantity, as in some of the revenue acts. It is to be observed that the learned judge does not assume to limit the operation of the section to the matters to which he applies it by way of illustration, neither was it necessary for him to do so in the case then before him. However this may be, section 4 of the act of 1866 undoubtedly has a broader application than what might seem at first view to be given to it in the case last cited. The language of the section is "that if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any goods, wares, or merchandise, contrary to law," etc. Now, to import, in its general signification, means to bring into the United States. Why then are these additional words, "or bring" into the United States, used? They are either mere surplusage, or they mean something more than what is included in the words "to import," according to their ordinary signification. To import goods, wares, and merchandise into the United States, in the connection in which the words are here used, evidently means an importation in the ordinary manner, so far as the means and manner of importation are concerned, but contrary to law. "To bring" goods, etc., into the United States, in the connection in which the words are used, means the introduction of goods, etc., into the United States by any other means or in any other manner than that of importation proper, contrary to law; and in this sense will not those words cover any smuggling or clandestine introduction into the United States of any goods, wares or merchandise, subject to duty by law, without attempting to effect an entry at all, and without paying or accounting for the duty? Such was the view of this section taken in the case of Landsberg [Case No. 8,041], decided by this court, in March term, 1870. But the offense provided for in section 3 of the act of 1863 is a very different one from that last above described. The gist of the offense here is the false and fraudulent manner of effecting an entry, where an entry is attempted to be made, while in the other case it is the clandestine introduction of the goods, etc., without entry or payment of duty. I hold, therefore, that section 3 of the act of 1863 is not repealed by section 4 of the act of 1866, and that the first and second counts of the indictment are well laid under said section 3.

The fifth and sixth grounds alleged are that the court erred in refusing to charge the jury that there was no evidence to sustain the first, second and third counts, and that unless the jury found that the tar was actually entered by the defendants themselves, or by an agent previously authorized by them, the defendants knowing that the agent was entering it at less than its cost in Canada, the defendants must be acquitted upon the first, second, and third counts. The following facts were clearly established by the evidence: That the tar was purchased by defendants of one Lamb, at London, Canada, at a fixed price there, to be delivered, however, at Cleveland, Ohio, at a price made up at the purchase price at London with all charges for freight, duty, etc., added, the defendants paying such charges and deducting the same from such price at Cleveland, and so, in the result, actually paying only the original price at London. The tar was shipped to defendants by the

Great Western Railway to Detroit, and thence by the Michigan Southern and Lake Shore Railroad to Cleveland. Lamb made out two sets of invoices, one at the true purchase price to send to defendants and one at much less, for the purpose of entry at Detroit. These latter invoices were delivered to the agent of the Great Western Railway for him to make the entry at Detroit in the usual manner. The tar was so entered by the agent, as agent for defendants, upon such false invoices, the duty paid and the tar forwarded to and received by defendants at Cleveland. Thus far, there is nothing to connect the defendants in any manner with the false entry. There is nothing to show that the agent who made the entry had any knowledge of the spurious character of the invoices, and there can be no doubt that if there were no further evidence in the case, the defendants could not be held liable for the false entry. But there is further evidence. The correspondence between Lamb and the defendants, introduced in evidence, clearly establish the following facts: That the defendants were fully and specifically informed by Lamb of the making and forwarding of the false invoices and of their contents, both before and after they were made; that the tar would be shipped in their name, as owners, by the Great Western Railway; that the false invoices would be delivered to the agent of the railway company, for the purposes of entry, at Detroit; that the duties would be paid and added to the charges, the whole to be paid by them on the arrival of the tar in Cleveland, and that all this was done accordingly. Now it is true that the defendants did not make the entry by themselves in person. It is also true that they did not, by themselves, give the agent of the railway company specific instructions to make the entry for them. But, as has been seen, they were pre advised, and before any entry had been made, that this had been done for them, and they acquiesced in it and availed themselves of it. It is now too late for them to turn round and say that they are not liable because they did not do these things in person. They allowed another to do an unlawful act for them and in their name, with full previous knowledge of all the facts and subsequent acquiescence, and they are now estopped from denying their liability for that act. Subsequent acquiescence or ratification alone, unconnected with a previous or concurrent knowledge or intent, would undoubtedly be insufficient to hold a party liable under such circumstances. But with such previous knowledge or intent, subsequent acquiescence is competent to be taken into consideration. There was therefore no error in refusing to charge as requested.

The seventh and eighth grounds are that the court erred in refusing to charge the jury "that there was no evidence to support the fourth count," and that if the jury found that Lamb contracted to deliver the tar in Cleveland, the defendants must be acquitted under the fourth count. The reason given at the time for this refusal, was, that it is provided in section 62, act of 1799 (1 Stat. 675), that for the purposes of entry, the consignee shall be deemed the owner of the property imported. I am satisfied from the able argument of the counsel for the defendants, and the authorities cited, that the section in question was special in its application, and if not in fact obsolete, has no application to this case. The reason given for the refusal to charge therefore was erroneous, and if the ruling has no other ground to stand upon, it was error. Let us see then how the matter stands independent of the statute. For, although the reason given may be unsound, the conclusion arrived at is not therefore necessarily so. By the agreement between Lamb, the vendor, and the defendants, for the delivery of the goods in Cleveland, they would not become the property of defendants until so delivered, as between the defendants and Lamb. But how is it as between the defendants and the United States under the circumstances of this case? The tar, as we have seen, was invoiced and shipped to the defendants as owners, and was presented for entry as their property. This was sufficient prima facie to warrant the customs officers in entering it as such. The defendants knew the tar would be and was so invoiced and shipped, and, of course, that it would be so presented for entry. They took no steps to protest against its being so done, or to give the officers of the government correct information upon the subject, but afterward availed themselves of the act. As between them and the United States the defendants are now estopped from claiming that they were not the owners at the time of the entry. To allow such a claim under such circumstances would open the door to the perpetration of unlimited frauds upon the revenue with perfect impunity to the perpetrators. The motion for a new trial is denied.

UNITED STATES v. The MERRIMAC. See Case No. 9,476.

Case No. 15,759a.

UNITED STATES v. MERRYMAN.

[2 Hayw. & H. 337.] [1]

Circuit Court, District of Columbia. Feb. 8, 1860.

CONSTABLE—MISCONDUCT—REMOVAL FROM OFFICE.

A constable who uses a criminal process behind which to enter forcibly a man's premises, ostensibly to serve a civil warrant for debt, and for the purpose of taking unlawful possession

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

of property held lawfully as a pledge for a debt, prostitutes the law to the basest purposes, and will be dismissed from office.

At law.

Mr. Ould, U. S. Dist. Atty.
Mr. Stone, for defendant.

It appeared in evidence that Joseph Sweggert sent a cart to a colored man named Rogers to be mended. When complete Sweggert called on Rogers and informed him that he could not use the cart for some time, and Rogers told him to take it away, which he did, and placed it on an open lot immediately in rear of Rogers' shop. The repairs on the cart came to $17, and Sweggert paid $10 in cash on it and $5.32 in lumber, which lumber was afterwards refused as part payment. Sweggert then went up the country to do some hauling, and when he got back to Georgetown by the canal he sent his sons to Rogers for the cart to take his baggage home in. Rogers would not give it up, alleging it was not paid for, and took the screws (nuts) from the axle so that they could not take it away. When Sweggert got home he tried to get the cart and settle up with Rogers, but Rogers had placed it inside his shop and locked the doors. As a last resort Sweggert concluded to warrant Rogers for the money he had paid him on account, and thereby compel him to a settlement.

The warrant was directed to [Horatio H.] Merryman, who proceeded to the shop, and could not effect an entrance. He and Sweggert then consulted together, and Sweggert informed Merryman that Rogers had taken the screws (nuts) from the cart. Merryman instantly decided that that was a felony; that Rogers was guilty of stealing, and that he would now fix him by obtaining a search warrant. So he and Sweggert went together, and Sweggert made oath to the search warrant, which was duly issued, and armed with this criminal process, Merryman proceeded to Rogers' shop, broke it open, entered and took the cart off with him. In so doing however he did not as required by the warrant "return the body" of Rogers, nor make any attempt to arrest him, either then or afterwards, though according to the oath of Sweggert, Rogers was a felon, having as alleged stolen the cart. It was simply using a criminal process, behind which to enter forcibly a man's premises, ostensibly to serve a civil warrant for debt, but in reality for the purpose of taking unlawful possession of a piece of property which Rogers held lawfully as pledge for a debt.

THE COURT, after hearing all the evidence in the case, remarked that such a proceeding on the part of the defendant was a high-handed wrong, and tended to prostitute the law to the basest purposes. It was taking a mean advantage, in order to oppress the poor, and thus to collect debts which could not perhaps be made by any other process. It seems that the defendant after charging Rogers with a high crime, had abandoned entirely that portion of his case, when he recovered the cart, showing the object to have been, not to bring a wrongdoer to justice, but to obtain a contemptible advantage over a fellow man. Such a course was wrong and oppressive, and would be put down by the court whenever brought to its notice.

The clerk was then ordered to dismiss the defendant from the office of county constable, and take away his commission.

UNITED STATES (MESA v.). See Case No. 9,492.

Case No. 15,760.

UNITED STATES v. The METEOR.

[3 Am. Law Rev. 173.]

Circuit Court, S. D. New York. 1868.[1]

VIOLATION OF NEUTRALITY LAWS—SALE OF VESSEL.

[1. The mere carrying on of negotiations by the owners of a vessel, in this country, with the agents of a foreign people, with knowledge that, if the sale were effected, the vessel would be employed against a nation with which the United States are at peace, is not a breach of the neutrality laws, where the negotiations failed and were abandoned.]

[2. Where a vessel is sent by her owners to a neutral port, for the purpose of finding a market for her, but without any previous contract or understanding with a belligerent, she may there be sold to such belligerent, or to any other party, without violating the neutrality laws.]

[Appeal from the district court of the United States for the Southern district of New York.

[This was a libel of forfeiture, filed by the United States against the steamship Meteor, because of an alleged violation of the neutrality act of April 20, 1818 (3 Stat. 448). In the district court there was a decree entered condemning and forfeiting the vessel. Case No. 9,498. From that decree an appeal was taken to this court.]

NELSON, Circuit Justice. This is an appeal in admiralty from a decree of condemnation in a libel of information for the violation of the neutrality laws of the United States. We have examined the pleadings and proofs in the case, and have been unable to concur in the judgment of the court below, but, from the pressure of other business, have not found time to write out at large the grounds and reasons for the conclusion arrived at. We must, therefore, for the present, be content, in the statement of our conclusions in the matter.

1. Although negotiations were commenced and carried on between the owners of the Meteor and agents of the government of

[1] [Reversing Case No. 9,498.]

Chili for the sale of her to the latter, with the knowledge that she would be employed against the government of Spain, with which Chili was at war, yet these negotiations failed, and came to an end, from the inability of the agents to raise the amount of the purchase money demanded; and if the sale of the vessel in its then condition and equipment, to the Chilian government, would have been a violation of our neutrality laws, of which it is unnecessary to express any opinion, the termination of the negotiation put an end to this ground of complaint.

2. The furnishing of the vessel with coal and provisions for a voyage to Panama or some other port of South America, and the purpose of the owners to send her thither, in our judgment, was not in pursuance of an agreement or understanding with the agents of the Chilian government, but for the purpose and design of finding a market for her; and that the owners were free to sell her on her arrival there to the government of Chili, or of Spain, or of any other government or person with whom they might be able to negotiate a sale.

3. The witnesses chiefly relied on to implicate the owners in the negotiation with the agents of the Chilian government, with a view and intent of fitting out and equipping the vessel to be employed in the war with Spain, are persons who had volunteered to negotiate on behalf of the agents with the owners in expectation of large commissions in the event of a sale, or persons in expectation of employment in some situation in the command of the vessel, and very clearly manifest their disappointment and chagrin at the failure of the negotiations, and whose testimony is to be examined with considerable distrust and suspicion. We are not satisfied that a case is made out, upon the proofs, of a violation of the neutrality laws of the United States, and must, therefore, reverse the decree below, and enter a decree dismissing the libel.

An appeal was taken by the government from the decision of the circuit court to the supreme court of the United States, but was not prosecuted to a hearing, being dismissed by consent, November 9, 1868.

[See, also, note to Case No. 9,498.]

UNITED STATES v. The METEOR. See Case No. 15,607.

Case No. 15,761.

UNITED STATES v. MEYER.

Circuit Court, D. Pennsylvania. Oct., 1799.

FEDERAL JURISDICTION—COMMON LAW OFFENCES.

[This was an indictment for libel, and is cited in Wharton's Precedents of Indictments, § 905, note, as an instance of the exercise by the federal courts of jurisdiction over offences of a purely common law origin. The case is nowere reported; opinion not now accessible.]

Case No. 15,762.

UNITED STATES v. MEYERS.

[See Case No. 15,847.]

Case No. 15,763.

UNITED STATES v. MICKLE.

[1 Cranch, C. C. 268.] [1]

Circuit Court, District of Columbia. Dec. Term, 1805.

LIQUORS—RETAILER—WHAT CONSTITUTES.

The gratuitous distribution of ardent spirits at a public gaming-table does not constitute the keeper of the table a retailer of spirituous liquors, within the meaning of the act of assembly of Maryland.

Indictment. 1st count, at common law, for a nuisance, in keeping a public gaming-house. 2d. Under the act of assembly of Maryland, for keeping a faro-table, the defendant being a retailer of spirituous liquors.

THE COURT said they had decided, in Ismenard's Case [Case No. 15,450], on the same indictment, that the distribution of spirituous liquors at the gaming-table, without receiving payment specifically therefor, was not a retailing of spirituous liquors within the meaning of the act.

Mr. Jones, for United States, gave up the 2d count.

Verdict, "Guilty on the 1st count."

Case No. 15,764.

UNITED STATES v. MILBURN.

[2 Cranch, C. C. 501.] [1]

Circuit Court, District of Columbia. Nov. Term, 1824.

BRIBERY—PREVIOUS DECLARATIONS.

Upon the trial of an indictment for offering a bribe to a witness, the previous declarations of the defendant of his motives for offering it, cannot be given in evidence by the defendant.

Mr. Taylor, for defendant, offered evidence that [George] Milburn, before the offer of the bribe, said he intended to offer it, to show how easily the witnesses might be bribed, so as to discredit them, not intending to pay the bribe.

But THE COURT (THRUSTON, Circuit Judge, absent) rejected the evidence.

Case No. 15,765.

UNITED STATES v. MILBURN.

[4 Cranch, C. C. 478.] [1]

Circuit Court, District of Columbia. Nov. Term, 1834.

BAIL—WHO MAY TAKE RECOGNIZANCE.

1. When the marshal has arrested a person charged with a misdemeanor, he may take him

[1] [Reported by Hon. William Cranch, Chief Judge.]

to a justice of the peace, to give bail, by way of recognizance, for his appearance in court to answer for the offence; and the marshal is not bound to take the bail-bond himself.

2. A recognizance thus taken by the justice is valid.

Scire facias upon a recognizance taken by a justice of the peace, upon a capias ad respondendum for a misdemeanor in keeping a public gaming-house. Plea, nul tiel record, and issue.

Mr. Brent, for defendant [George Milburn], contended that the recognizance was void; that the marshal had no right to carry the defendant to a justice of the peace to give bail, but should have taken it himself, under the Maryland act of 1780 (chapter 10); and that the justice had no authority to take the recognizance.

Mr. Key, for the United States, contra. The act was made for the ease of the sheriff. It is only peremptory as to the amount in which the sheriff is to take the bond, when he takes it, not that he shall take it in all cases. It was to enlarge the power of the sheriff.

THE COURT ordered judgment to be entered upon the recognizance, being of opinion that the justice had power to take it.

[See Case No. 15,766.]

Case No. 15,766.

UNITED STATES v. MILBURN.

[4 Cranch, C. C. 552.] [1]

Circuit Court, District of Columbia. March Term, 1835.

COURTS—SPECIAL SESSION—PENDING CAUSES.

1. When a special session of the court is ordered for the trial of criminal causes the criminal causes pending in the preceding regular term cannot be continued to the special session, nor can any order be made therein at such special session.

2. Quaere? whether a new capias ad respondendum, for a misdemeanor, can be issued, while the party is in custody of his bail upon a former capias for the same offence, he having failed to appear according to the tenor of the recognizance of bail?

At a special session of the circuit court of the District of Columbia, for the trial of criminal causes, held on the first Monday of September, 1833, by an order of the court made at the preceding regular March term,

Mr. Key, Dist. Atty., moved the court to order a new capias ad respondendum against the defendant, George Milburn, upon the presentment found at November term, 1834, for keeping a certain gaming-table called a "faro-bank," upon which a capias ad respondendum, returnable immediately at that term, was returned non est. [See Case No. 15,765.] A new capias was issued, returnable to March term, and was returned, "cepi recognizance." The recognizance was forfeited, and writs of scire facias were issued against Milburn and his sureties returnable to the next regular term of the court, namely, November term, 1833, (being the then next November term,) a new capias was issued upon the same indictment, returnable to this special session, upon which Milburn was taken and discharged on habeas corpus by CRANCH, Chief Judge, because he had been arrested before, and given bail upon the same indictment. See Watkin's Case [Case No. 17,269], at the last term, and the opinion of the court.

THE COURT ordered the question upon Mr. Key's motion to be argued on the 23d instant (that is, 23d September, 1833); CRANCH, Chief Judge, contra; being of opinion that the court, at this special session, has no jurisdiction of the prosecution against Milburn pending at a preceding regular term.

Mr. Key. By the act of March 2, 1793 (1 Stat. 333), a special session is, in effect, only an adjournment of the criminal business. It is still a circuit court, having all the criminal jurisdiction of a regular stated session. All process, &c. is to be returned to the special session. It is not process until an indictment or a presentment is found.

(CRANCH, Chief Judge. That act does not apply to this court, it applies only to courts called by the supreme court, or by a judge of the supreme court and the district judge.)

Mr. Key. The act was to apply to cases pending in the circuit court by presentment or indictment, otherwise it might be holden and no offences to try. The opinion of Judge Wilson [U. S. v. Hamilton] 3 Dall. [3 U. S.] 18, is entirely founded on its being a special session overleaping the stated session of the circuit court. It was certainly competent for this court, at the last stated session, to order all its unfinished criminal business to be continued to this special session. If the causes at the last term were ordered to be continued to this special session, and this court has not jurisdiction of them at this session, they are all discontinued. This court, formerly, (in 1821,) held a special session and tried indictments found at a preceding stated session. This court will not oust itself of its jurisdiction by a mere doubt.

Mr. Jones, contra. The act of 1789, § 5 (1 Stat. 73), giving the power to hold special sessions only applies to the time of holding them; the act of March 2d, 1793, § 3, to the place. Both should have the same construction. The process mentioned in the latter act, is the process only which is applicable to the cases to be tried at the special session. In Hamilton's Case, 3 Dall. [3 U. S.] 17, the supreme court say: "There is a provision, 'that all business depending for trial at any special court, shall at the close thereof, be considered as of course removed to

[1] [Reported by Hon. William Cranch, Chief Judge.]

the next stated term of the circuit court,' but there is no power given to remit to a special court, the business depending for trial before the stated circuit court." And in the case of The Insurgents, Id. 513, the opinion expressed in Hamilton's Case [supra] upon this point, is confirmed. These opinions are decisive on that point.

THE COURT (MORSELL, Circuit Judge, contra) was of opinion that we cannot, at this special session, try an indictment found at a stated court; and

THE COURT also (THRUSTON, Circuit Judge, contra) decided that it had not jurisdiction to issue the process in this case; the court having previously decided that it had no jurisdiction to try the cause.

The following is the opinion of CRANCH, Chief Judge, upon his discharge of Milburn upon the habeas corpus, referred to by counsel, in argument, before the supreme court, in Ex parte Milburn, 9 Pet. [34 U. S.] 708:

At November term, 1832, George Milburn was indicted for keeping a faro-bank, against the form of the statute, &c. Upon this indictment a capias ad respondendum was issued, during the term, returnable immediately, and was returned non est inventus. On the 29th of January, 1833, in vacation, a second writ of capias ad respondendum was issued, which did not, in any manner, refer to the former writ. This second writ was returnable to the fourth Monday in March, (the first day of March term,) and was returned, "cepi recognizance," meaning, thereby, that the defendant had been taken, and had given bail. The recognizance was taken in conformity with the provisions of the act of Maryland of October, 1780, c. 10, in the sum of $266⅔ (£100 Maryland currency.) By the second section of that act, the sheriff, upon any criminal writ for any offence less than felony, is required to take a bail-bond of the criminal and his surety, if judged necessary, in a sum not exceeding £100, conditioned that the criminal shall appear in court on the day of the return of the writ, attend the court from day to day, and not depart therefrom without leave of the court; and in case the criminal shall not be considered by the sheriff sufficient for that sum, and cannot find approved security, the sheriff is to take him before a magistrate, to be dealt with agreeably to the law then in force. The general practice of the sheriff, and of the marshal of this District, under this act, has been to take the party before a justice of the peace, who takes the recognizance in the sum of £100, considering the statute as a guide to his discretion.

Although the keeping of a faro-bank is, by the act of the 2d of March, 1831 [4 Stat. 448], made punishable by imprisonment and labor in the penitentiary, yet the nature of the offence is not thereby changed; it is still an offence less than felony; and is, therefore, within the provisions of the act of Maryland of October, 1780, c. 10. At the March term, 1833, to which the writ was returnable, the defendant was called, and, failing to appear, the recognizance was forfeited, and writs of scire facias issued thereupon against him and his sureties, returnable at November term, 1833; and a new capias ad respondendum, upon the same indictment, issued against the defendant during the term, returnable immediately, which was returned non est inventus. This writ did not, in any manner, refer to either of the former writs of capias. On the 1st of June, 1833, in vacation, a fourth writ of capias ad respondendum against the defendant was issued by order of the district attorney, upon the same indictment, returnable to the next November term. This writ, also, did not refer to any former writ. Upon this writ the defendant was taken, and being brought before me by habeas corpus in the vacation preceding the November term, was discharged, upon the ground that he was not lawfully taken by the last writ, as he had already been taken upon a former capias issued upon the same indictment, and had given what by the act of assembly was deemed sufficient bail; in whose custody he still remained. The marshal having returned this matter specially, a motion is now made by the attorney of the United States for this District, for a fifth writ of capias ad respondendum upon the same indictment; and the question is, whether such a writ can now issue in this case agreeably to the principles and usages of law. When the case was before me upon habeas corpus, I thought it could not; and will now state the reasons why I thought so.

In the first place. No such writ had ever been before issued in such a case in this court during the thirty-three years of its existence. I say this with great confidence, because, having had a seat upon this bench during the whole of that period, and having been seldom absent from court, if it had occurred, it could scarcely have escaped my notice; and lest my memory should have failed me, I have recently examined with great care all the docket-entries and minutes of every session of the court in relation to criminal causes from the year 1800 to the present time, with a view to this question. In every session I found entries of recognizances forfeited; but not a single case in which a new capias ad respondendum had been issued against the party who had been taken upon a former writ upon the same presentment or indictment, and had given bail; nor a single case in which a new capias has been issued upon the same indictment or presentment after the forfeiture of the recognizance given upon a former capias. The fact that no such subsequent capias had ever been issued, or even asked for, where cases were occurring at every session in which it would have been proper to issue it, if it could be lawfully issued, was to my

mind, almost irresistible evidence that it could not be lawfully issued.

In the second place. In all the books of entries and precedents of proceedings in criminal cases, which I have had it in my power to consult, (and I have looked into many,) I do not find the form of an entry of any order for a new capias ad respondendum, in a case of misdemeanor, after arrest and bail upon a former capias. It has been suggested, in answer to this objection, that every defendant who forfeited his recognizance, fled the country; and, therefore, it would have been in vain to issue a new capias. But that fact cannot be admitted. It is hardly possible that every person charged with misdemeanor and forfeiting his recognizance, both in England and in the United States, should have fled the country; and that the prosecutors should have been so certain of the fact, and so sure that the defendant would never return, as not to cause a second capias to be issued in the hope of taking the offender, and bringing him to trial.

3. I have not found in the books a single instance of a second recognizance for the same offence, forfeited, and estreated into the exchequer.

4. I have not found a single case, in the English or the American reports, in which a second capias ad respondendum, in a case of misdemeanor, was issued after bail had been given upon a former capias issued upon the same indictment. Nor have I found a case in which such a practice has been sanctioned or even alluded to by the court.

5. I have not found such a doctrine in any of the English or American elementary treatises upon criminal law, where, if such were the law or the practice, it would undoubtedly have been stated.

In arguing the case of Mary Wertz [unreported] at the special session in September last, upon the motion for a new capias, after forfeiture of her recognizance, the counsel for the United States cited several authorities, which deserve consideration.

The first was 1 Chit. Cr. Law, 59, 61. "But if a constable, having arrested a party under a warrant, suffer him to go at large, upon his promise to come again, and find sureties, it is doubted whether he can afterwards be arrested upon the same process; though it should seem that, as the public are interested in the offender's being brought to justice, there is no well-founded objection to such second arrest. And it is certain that if the escape be without the concurrence of the officer, the offender may be retaken as often as he flies, upon fresh suit, although he were out of view, or had reached another country or district." "But where the officer has voluntarily suffered the prisoner to escape, it is said, by some, that he can no more justify the retaking him than if he had never had him in custody before; because, by his own consent, he has admitted that he has nothing more to do with him. It should seem, however, that the misconduct of the officer ought not to prevent a second arrest, in order that the offender may be brought to justice." It will be perceived, at once, that this authority refers only to the power of the officer to make a second arrest upon the same warrant, in case of escape, and is no authority for issuing a second capias ad respondendum, after arrest and bail upon the first.

The next authority cited was from the same volume, p. 100, where it is said: "In criminal cases, no justification being requisite, bail is absolute in the first instance. The magistrate may, however, examine them upon oath as to the sufficiency of their estate; and it is said that if he be deceived, he may require fresh sureties." This, however, is not the present case. It is not alleged that the estate of these sureties is insufficient. Chitty refers to 2 Hawk. P. C. c. 15, where the reason is given thus: "For that insufficient sureties are no sureties." The second arrest, therefore, could, in that case, be justified only because no bail had been given. It does not appear in Chitty or Hawkins, or in Hale's Summary, 96, or in Dalt. Just. c. 70, and 114, cited by Hawkins, whether a second arrest on the same process is intended, or an arrest upon new process. The former is most probable. For the language of Hawkins is, "And if a person who has power to take bail, be so far imposed upon as to suffer a prisoner to be bailed by insufficient persons, it is said that he, or any other person who hath power to bail him, may require the party to find better sureties, and to enter into a new recognizance with them, and may commit him on his refusal; for that insufficient sureties are no sureties." This language seems to imply that the party is already arrested and before the magistrate, which may be by a new arrest on the same warrant, as in cases of escape. And in the case of Rex v. Salter, 2 Chit. 109, it was decided, that "after a defendant has been admitted to bail on a criminal charge, the court will not increase the bail on an affidavit disclosing facts in aggravation of the original offence, and rendering the enormity of it greater than had appeared to the court, when they granted the rule for the allowance of bail." In that case, Mr. Justice Bailey said, that "he doubted how the defendants, having been once arrested, could be arrested again, which, in fact, must be done to compel them to give additional bail." The case put by Chitty and Hawkins is one in which, in effect, no bail was given. In the present case, sufficient bail has been given, and the party is still in their custody.

The next authority cited is 1 Chit. 102. "The admitting bail, where it ought not to be taken," "is liable to be visited as a negligent escape at common law;" that is, as I understand it, the sheriff or magistrate who takes the bail is liable to be punished as for

a negligent escape. But it does not follow that the sheriff or magistrate has a right to a new writ to arrest the party. The utmost that the law would allow would be, that the party should be taken again by the same writ, as in other cases of escape. But that is not like the present case, in which the bail was properly taken, and is in full force.

The next authority cited is 1 Chit. 338. "Whenever the king grants an authority of oyer and terminer, the power to issue process is incidentally given; for, as there can be no inquiry respecting offences without the presence of the party, wherever the power is intrusted of determining the former, there must also be authority to compel the latter." If the defendant, not being in actual custody, voluntarily appear in court, it is discretionary, and not obligatory, in the court. to detain him; but they may leave him to be taken by the ordinary legal process. The correctness of these principles cannot be questioned; but it does not follow that the defendant may be arrested upon a second capias ad respondendum, after having given sufficient bail upon the first writ issued upon the same indictment for the same misdemeanor.

The next authority cited is 1 Chit. 342. "The practice in issuing the bench-warrants is, that where the parties are not under recognizance, the prosecutor has a right, during the assizes or sessions, to this process against them, to bring them immediately into court to answer. But when the parties are under recognizance, no process can be had against them during the assizes or sessions, because it is looked upon in law as but one day, and the defendant has the whole to make his appearance. In such case, however, the prosecutor may, if the defendant has not appeared, bespeak a bench-warrant during the assizes or sessions, which will be issued at the close thereof. If the assizes or sessions are over, and no bench-warrant has been previously applied for, then a warrant from a single judge, or justice of the peace, may be obtained; and in order to make the application effectual, it must be grounded upon the certificate of the clerk of assize, or the clerk of the peace, that the indictment has been found against the defendant, upon which the warrant will be granted." It is evident that the recognizance here spoken of is the recognizance taken by a magistrate out of court, before presentment or indictment, in which case the defendant is charged only upon suspicion, the magistrate having no power to pronounce authoritatively upon the truth of the allegation. But a presentment or indictment affirms the fact positively and precisely. It may or may not be the same offence for which the defendant was bound over, or it may be of a more aggravated character; it is not connected by the record, with the previous recognizance; it therefore becomes a new cause of arrest, and has always been so considered by this court; and a capias ad respondendum issues, of course, returnable to the next term, unless specially ordered to be returnable immediately, which is often done in cases of an aggravated nature; but this does not show that a second capias ad respondendum can be properly issued against a defendant who has been arrested and given sufficient bail, on a previous capias, upon the same indictment in a case of misdemeanor.

The next authority cited is 1 Chit. 695. "When any corporal punishment is to be inflicted on the defendant, it is absolutely necessary that he should be personally before the court at the time of pronouncing the sentence. But where a pecuniary penalty only can be awarded, judgment may be given in his absence, if a clerk in court will undertake for the fine, and the court think fit to dispense with his attendance. And one reason of this distinction is, that a capias pro fine may be issued to take him, in case he refuse to pay the sum imposed on him, though it is said that there can be no process after judgment to bring him in, in order to set him in the pillory, or to visit him with any corporal infliction;" "and, therefore, where the judgment may probably be of a corporal nature, or the offence is of a gross and public nature, the court, who may, in all cases, act, in this respect, according to their discretion, will insist on the appearance of the offender, even though a clerk assents to answer for the fine." Such, also, has been the doctrine and the practice of this court; and in cases of misdemeanor the court has often, in its discretion, refused to suffer the cause to be tried unless the defendant be personally present; and if the defendant, when called, did not appear, has proceeded to forfeit his recognizance. And where the defendants, in such cases, have been tried and convicted in their absence, the court has often ordered writs of capias to be issued ad audiendum judicium; but this does not show that the court can or ought to issue a second capias ad respondendum after sufficient bail given upon the first.

These are all the authorities, from the books, cited on the part of the prosecution in Mary Wertz's Case; but there are others which seem more strongly to countenance the practice contended for by the attorney of the United States than those which were cited; and I shall proceed to consider them. It is said in Highm. Bail, 200: "If the offenders appear not upon their recognizances the first day, the default is to be recorded, and the recognizances to be forfeited; nevertheless, processes, or warrants, as the case shall require, to go out against them and their bail; so likewise as to those who are bound to give evidence; that, if possible, the business be not deferred to another sessions; in which time, commonly, the prosecutors and witnesses are taken off, and the matter compounded." Kel. J. 2. The above is a

literal copy of one of the rules of practice "to be observed by the justices of the peace and others, at sessions in the Old Bailey, for London and Middlesex, in the 16th Car. II., by" three judges of the king's bench, and two judges of the common pleas, "and signed by them, and read in open court, and ordered to be filed by the clerk, that all justices might take copies by them if they please; for that they shall not for the future pretend ignorance of their duty." The first rule is, "that all recognizances and bailments taken by any justice of the peace be certified into the court the first day of every session before noon," &c. The second, (as above cited by Highmore,) "If the offenders appear not upon their recognizances the first day," &c. So that it is evident that the recognizances mentioned in the rule cited by Highmore are those which were taken by justices out of court, and before presentment or indictment; and that the processes which were to issue against the offenders and their bail, were to be like those against persons bound to give evidence; that is, process founded upon their recognizances. And no doubt Highmore alludes to the like recognizances taken before presentment or indictment, when, in page 202, he says: "If a principal do not appear, and the recognizance be forfeited and paid by the bail, yet the principal shall remain open and liable to the law, whenever he can be taken; for the penalty in the recognizance is no other than as a bond to compel the bail to a due observance thereof, and has no connection with the principal. They could not sue him thereon for money paid to his use, or on his account, for it was paid on their own account, and for their own neglect; but having paid it, they are wholly exonerated, though the offender remains liable for his offence." Highmore cites no authority, and is none himself. He has certainly misunderstood the law in supposing that the bail cannot sue the principal for the money paid on the recognizance. See Fisher v. Fallows, 5 Esp. 171.

2 Hawk. P. C. c. 27, § 29. "It seems that if a defendant appear to an indictment, or appeal of felony, and afterwards, before issue joined, make an escape, whether from his bail, or from actual prison, the common capias, alias, and pluries, &c., shall be awarded against him, unless there had been an exigent before, in which case a new exigent shall be immediately awarded; and if a defendant, against whom no exigent had been before awarded, make such default, after issue joined, and an inquest awarded to try it, it seems that a capias, &c., shall be awarded against him ad audiendum juratam, &c.; and, as I take it, the same day on which the capias is returnable, shall be given to the inquest; for it seems agreed that the inquest shall never be taken by default in the case of felony, as it may for an inferior crime." Hawkins refers to Hale's Summary, 211; 2 Hale, P. C. 201, 202; 16 Assizes, pl. 13; 26 Assizes, pl. 51; Fitz. Exigent, 10; Staundf. P. C. 70, letters E and F; 2 Hale, P. C. 224; Brooke, Abr. tit. "Waiver de Choses," 39. Hale, in his Summary (page 211), speaking of appeal in felony, says: "If the defendant comes in by capias, and, after appearance, make default, a new capias; if upon exigent, a new exigent, and upon second appearance shall plead de novo, for the first inquest is sine die." He cites no authority. Hawkins, in his note (e) to that part of the text which says, that if a felon escape from his bail before appearance, a new capias shall be awarded, says, but this is made a quære. Cromp. & F. 150b. I have not been able to find Crompton, (I suppose the book referred to is Fitzherbert's Justice, enlarged by Richard Crompton, 4to. 1617,) and therefore cannot say upon what ground the doubt of Crompton or Fitzherbert arose. I have, however, examined the authorities cited by Hawkins, and find that the cases referred to were not cases of bail, but of mainprise; which differ in this essential point, that bail is custody, but mainprise is not. Thus Lord Hale says, in his Summary (page 99, 5th Ed.): "Mainpernors are only surety; but bail is custody; and, therefore, the bail may seize the prisoner if they doubt he will fly, and detain him, and bring him before a justice; and the justice ought to commit the prisoner in discharge of the bail; or put him to find new sureties." And Lord Coke, in his 4th Institute, folio 178, says, that the entry is traditur in ballium; that the word "ballium" is "from the French noun 'bail,' that signifieth a guardian, keeper, or gaoler," and that, in the customs of Normandy, "bailment is called a living prison." In the Year-Book of 33 Hen. III., Fitz. Mainprise, 12, it is said: "By Shard, there is a diversity between bail and mainprise; for the entry of bail is, that such an one traditur in ballium, in which case they are his keepers; and if they suffer him to escape, they shall answer for it." In Y. B. Edw. III., Fitz. Mainprise, 13, it is said, "They would justify; but it seems they could not; for the entry is that such an one and such an one have mainprised (manuceperunt.) But where he is delivered to them in bail, they may well imprison him." Per Wilby, in Debt, &c. In 4 Inst. 170, Lord Coke says: "In the next place we are to speak of mainprise,—manucaptio,—which deriveth itself and signifieth a taking into the hand. Every bail is mainprise, (for those that are bail take the person bailed into their hands and custody,) but every mainprise is not a bail; because no man is bailed but he that is arrested, or is in prison; for he that is not in custody or in prison cannot be delivered out; as before it appeareth; but a man may be mainperned that never was in prison; and therefore mainprise is more large than bail." And in the same page he says, "The entry is, Et super hoc prædictus a dimittitur" (is discharged) "per manucap. E. D. and E. F.

qui cum manuceperunt ad habendum corpus ejus hic ad præfatum terminum et sic de die in diem &c., quousque," &c. "And this is properly in the entry said by mainprise and no bail," &c. "Now, forasmuch as every bail is a mainprise, (as hath been said,) bail is oftentimes termed in our books by the name of mainprise, as before it hath partly appeared, and as it appeareth in the writ de manucaptione, and in divers acts of parliament." "Lastly there is a manifest diversity between de die in diem and bail. For he that is by mainprise de die in diem, no bill can be maintainable against him; otherwise it is against him that is by bail; per cursum curiæ." In 2 Hale, P. C. 124, Lord Hale says: "Bail and mainprise are used promiscuously oftentimes for the same thing," "but yet in a proper legal sense they differ." "He that is delivered per manucaptionem only, is out of custody; but he that is bailed is, in supposition of law, still in custody; and the parties that take him to bail are in law his keepers, and may reseize him to bring him in; and, therefore, if a man be let to mainprise, suppose in the king's bench, an appeal, or other suit, cannot be brought against him as in custodia marescalli; but if he be let to bail, he is, in supposition of law, still in custodia marescalli. 3 Edw. III.; Mainprise, 12; 36 Edw. III.; Id. 13; 32 Hen. IV. 6a; Protection, 13; 21 Hen. VII. 20b, per Fineaux, and 9 Edw. IV. 2a." "And in p. 125, he says, the entry on the record in the one case is deliberatur per manucaptionem, and in the other case traditur in ballium." In page 126, he gives the proper form of the recognizance of bail, and in page 127, he says: "The advantage of this kind of bail is this, that it is not only a recognizance in a sum certain, but also a real bail, and they are his keepers, and may be punished by fine beyond the sum mentioned in the recognizance, if there be cause, and may reseize the prisoner, if they doubt his escape, and bring him before the justice, or the court, and he shall be committed, and so the bail be discharged of his recognizance." 36 Edw. III. Mainprise, 13; 23 Edw. III. Mainprise, 23; Cromp. & F. F. 157 (a). So in his chapter touching justices of gaol-delivery (2 Hale, P. C. c. 5, p. 35), who have only a commission to deliver the gaol of the prisoners therein being, he says: "If a person be let to bail, yet he is, in law, in prison, and his bail are his keepers, and therefore the justices of gaol-delivery may take an indictment against him as well as if he were actually in gaol; but he that is let to mainprise is not in custody." 21 Hen. VII. 33 (a); 9 Edw. IV. 2a; 39 Hen. VI. 27 (b), in one case the entry is traditur in ballium, in the other deliberatur per manucaptionem." In p. 199, of the same book, he says, "Justices of gaol-delivery regularly cannot issue a capias or exigent, because their commission is to deliver the gaol de prisonibus in eâ existentibus, so that those whom they have to do with are always intended in custody already." So in his chapter concerning certain treasons, (1 Hale, P. C. c. 25, p. 325,) in speaking of that clause of the statute of 13 Edw. c. 1, which exempts from the penalties of the act those who should give alms in money, meat, apparel, &c., to any offender, "during the time of his imprisonment," he says, "but, nota, it extends no further than during the time of his imprisonment; yet the law is all one if he be under bail, for he is in custodia still, for the bail are, in law, his keepers; and he that is delivered to bail in the king's bench is, nevertheless, said to be in custodie marescalli." And in page 620, he says: "If a felon be in prison, he that relieves him with necessary meat, drink, or clothes, for the sustentation of life, is not accessary. So if he be bailed out till the next sessions, &c., it is lawful to relieve and maintain him; for he is quodammodo in custody, and is under a certainty of coming to his trial." Cromp. & F. 42; 6 Dalt. Just. p. 286 (or 530). See, also, the following cases in the Year-Books, showing the distinction between bail and mainprise, and that the former is custody, and the latter is not. Pasch. 9 Edw. IV. 4; 21 Hen. VII. 33; 39 Hen. VI. 27, 6, pl. 39; 32 Hen. VI. f, 1, pl. 3; 9 Edw. IV. 2; 22 Hen. VI. 59, 60; 21 Hen. VII. 20. See, also, Dalt. Sheriff, 356, c. xcvi., and Gorge & Lane's Case, Godb. 339; and 1 Chit. Cr. Law, 104. See, also, Gorsuch v. Holmes, 4 Har. & McH. 4; Osborn v. Jones, Id. 5, note a.

S. Chase, C. J.: "If, on suing the bail-bond, the prisoner is out of custody of the sheriff, I conceive he can never again be in his custody, in virtue of the mesne process in that action; and the sheriff would be liable to false imprisonment if he were to take him against his consent, and I apprehend that against his consent he cannot be surrendered to the sheriff by his bail, but they may keep him, and surrender him in court. There is a difference between manucaptors, which are that the party shall appear at the day, and bail. 3 Vin. Abr. 'Bail,' 493, pl. 11, cites Godb. 339."

These authorities seem clearly to establish the doctrine, that bail is custody, and that mainprise is not. Hawkins refers to Hale, and Hale cites the same cases which Hawkins has noted in the margin of his 2d book, c. 27, § 19, to show that if a felon escape from his bail, a capias ad respondendum or ad audiendum juratam, may be issued, according as he had pleaded or not before his default. If those cases are cases of mainprise, and not of bail, and if bail be custody, and mainprise be not, then the cases cited do not support the doctrine for which they were cited, and if they did, yet the doctrine itself is only applicable to a case of felony; but the present case is one of misdemeanor. The only cases cited to support the doctrine, are 16 Assiz. 13; 26 Assiz. 51; and T. 19, Edw. III.; Fitz. Exigent, 10, which seems

to be the same case as 16 Assiz. 13. The case in 16 Assiz. 13, is thus stated by Fitzherbert, tit. "Corone," &c., 173: "In appeal of rape, the defendant pleaded not guilty, and was let to mainprise to attend the inquest and judgment, and afterwards came not; whereupon capias was awarded against him, and alias and pluries now returned, and he came not. Scott awarded an exigent, and said, that if he rendered himself pending the exigent, he would try to make the inquest come again, for it is now without day by the exigent issued upon his first plea; and so it was done, and note that he would not take the inquest by default, for it is a case of felony." The case in T. 19, Edw. III., Fitz. Exigent, pl. 10, is thus stated by Fitzherbert: "Appeal of rape. The defendant pleaded not guilty, and was let to mainprise to attend the inquest; and afterwards came not; whereupon capias was awarded against him to hear the inquest, and also an alias and pluries now returned, and he came not. Scott: If we award more capias, this process is infinite; and we cannot take the inquest by default in this case, because the judgment is of life and member; and if the exigent issue, the inquest will be without day, and pending the exigent he may render himself, and plead de novo, which would be great delay. Th. (Thorpe.) This suit is but a trespass at common law, wherefore try (asseies) to take the inquest by his default. Scott: Here we can do nothing but award the exigent, and if he do not (qu?) render himself (s'il ne rend) pending the exigent, we will try to make the inquest come upon his plea pleaded," "et ita factum est." The case in 26 Assiz. 51, Fitz. Corone, &c. pl. 196, was this: "A woman brought appeal in the K. B. of the death of her husband. The defendant rendered himself pending the exigent against him, and pleaded not guilty, &c., at which day search was made by the coroners of the place, and he was not found; and by inquest it was found that he had escaped without the will of the marshal. Shard demanded of the justices of the common bench whether the inquest should be taken, &c., or whether a capias, &c., or an exigent de novo should be granted; and by the award of them all, the exigent de novo was awarded, whereby it was commanded that the sheriff should take him, if, &c., ad audiendum judicium; and if not, &c., that he should be demanded, &c. And note, that the same defendant was taken at the suit of the wife of another, &c., and, notwithstanding, by the advice of all the justices and the council, the marshal was charged but for an escape, and it was again well debated."

The two first of these cases, if they are not the same, are exactly alike in principle, and are cases of mainprise, which is not custody; so that the defendant was absolutely at large, and not even bound by recognizance to appear; for it does not appear, by the forms of entry of mainprise, that the principal enters into any obligation to appear; (4 Inst. 179, 180; Co. Ent. 51, c. 52 b, &c.,) there could be no reason, therefore, why a capias should not issue against the defendant upon his failing to appear at the day. But when a defendant is delivered to bail, he is still in law as much in custody as if he had remained in the custody of the sheriff. The sheriff was but his keeper, and so are his bail. A capias cannot regularly issue against a person who appears by the record to be in custody, 30 Assiz. 23. "If the return be cepi corpus, no new exigent, because in custody of record." Staundf. P. C., folio 70, letters E and F, (Ed. 1588,) after stating the two cases from Fitz. Corone, 196, and Exigent 10, (as above,) says: "And see 30 in the book of assize, 23, where, in an appeal of death, the sheriff returned cepi corpus, and at the day had not the body, for which he was amerced, and was commanded to have the body, and so two or three times, and nothing was done; wherefore the plaintiff prayed an exigent, for he said the prisoner had escaped as the sheriff was bringing him to gaol, and the justices answered that they would not award the exigent against one who appeared to them to be in prison; but they would command the sheriff to have the body, and if he return this escape, then the plaintiff shall have his prayer, and not otherwise." The case from Fitz. Corone, 196, was the case of an escape of the defendant after rendering himself upon the exigent, and a new exigent was awarded; but not till the escape was found by inquest. So that it seems to be settled, that, after a return of "cepi," the court will not award a new capias unless it appear of record that the defendant has escaped. The mere refusal of the sheriff to bring in the body is not evidence of an escape upon which the court can act; so the refusal of bail to surrender their principal is not such evidence of his escape as to justify the court in issuing a new capias. For, by the common law, the bail were as liable to be amerced as the sheriff, for not bringing in the body at the day, and no more summary process was given to bring in the body of a defendant who was bailed, than to bring in the body of a defendant who appeared by the record to be in the custody of the sheriff. The custody of the bail is, in law, substituted for that of the sheriff, and they have the same power over the defendant to keep him and bring him into court. They are substituted for the common gaol. In the language of the customs of Normandy, they are "a living prison." After a return of "cepi," there can be no new capias, but in the case of escape appearing of record; and there must be an entry on the roll sufficient to warrant the writ. There must be an "ideo præceptum est." Dyer, 211b, Officium Clerici Pacis, 37.

The cases we have been considering were cases of felony, and they show on their face that the doctrine for which they were cited

is only applicable to such cases, and not to cases of misdemeanor. There is no case to be found, it is believed, in the books of reports, or of entries, or in the elementary treatises, in which a second capias ad respondendum was issued upon the same indictment, in a case of misdemeanor, while it appeared of record that the defendant was in custody either of the sheriff or of the bail. There is a great difference in the proceedings in regard to felony and misdemeanor. In felony the first process is capias, then an alias capias, and then an exigent and outlawry. In misdemeanor, it is first a venire facias, then, if the defendant has lands, distress infinite; if he has no lands, and the sheriff returns nihil upon the distringas, then a capias, alias, and pluries, and then an exigent and outlawry. The common law was very careful of personal liberty. By that law all offences were bailable. 2 Inst. 189. The exceptions have been introduced by various statutes; and the reason why bail is denied in cases of murder, &c., is that the offence is so enormous that the escape of the offender can never be compensated to the public by the bail being subjected to a pecuniary penalty. Blackstone (Comm. bk. 4, c. 22,) says: "This commitment being only for safe custody, wherever bail will answer the same intention, it ought to be taken, as in most of the inferior crimes; but in felonies, and other offences of a capital nature, no bail can be a security equivalent to the actual custody of the person. For what is there that a man may not be induced to forfeit to save his own life? and what satisfaction or indemnity is it, to the public, to seize the effects of them who have bailed a murderer, if the murderer himself have escaped with impunity?" And again, he says: "But where the imprisonment is only for safe custody before the conviction, and not for punishment afterwards, in such cases bail is ousted or taken away, wherever the offence is of a very enormous nature; for then the public is entitled to demand nothing less than the highest security that can be given, namely, the body of the accused, in order to insure that justice may be done upon him, if guilty." And again, after designating the cases which are not bailable, and observing that the court of king's bench can bail in all cases, he says: "And herein the wisdom of the law is very manifest. To allow bail to be taken commonly, for such enormous crimes, would greatly tend to elude the public justice; and yet there are cases, though they rarely happen, in which it would be hard and unjust to confine a man in prison, though accused even of the greatest offence. The law has, therefore, provided one court, and only one, which has a discretionary power of bailing in any case."

The inference from these passages is, that, in cases of "inferior crimes," bail "will answer the same intention" as "commitment," and is "equivalent to the actual custody of the person," or, at least, that such was the opinion of the legislature when they left those inferior cases liable to bail as at common law, deeming it better, for the good of society, that these offenders should have the chance of escape, by forfeiting their recognizances, than that they should be detained in actual prison until trial. Such also seems to have been the understanding of the legislature of Maryland when they passed the act of 1780, c. 10, "to enable the sheriffs to take bail-bonds in certain cases," which enacts that it shall be lawful for sheriffs to take bonds of all persons taken by them on any criminal writ, for any offence less than felony, with security if they shall think it necessary; and that they shall be obliged to take such bail-bond, in a sum not exceeding £100, conditioned that the said criminal shall appear in court on the day the writ is returnable, attend the court from day to day, and not depart therefrom without the leave of the said court; and in case the criminal shall not be considered by the sheriff sufficient for the sum aforesaid, and cannot find sufficient security, the sheriff "shall take him before a magistrate, to be dealt with agreeably to the law now in force;" and where there is a failure of performance of the condition of the bond, a writ shall issue for the recovery of the penalty, &c.; and, if the sheriff shall fail to take such bond, to be approved by the court, or to take the criminal before a magistrate to be dealt with according to law, he shall be liable to be proceeded against in the same manner as he would have been on his default in not bringing in the party according to his return, if that act had not been made. This shows that the legislature supposed that a bond in the penalty of £100 was sufficient security in all cases less than felony; and instead of directing a new criminal writ to be issued against the defendant upon his default in not appearing, they have expressly directed that the writ shall be issued for the recovery of the penalty. And in the whole statute law of Maryland, including the English statutes, "introduced, used, and practised by the courts of law or equity" of that state, there is not a clause or a word which alludes to a second capias ad respondendum upon an indictment for misdemeanor, after arrest and bail upon a previous capias issued upon the same indictment. The act of assembly of October, 1780, c. 10, obliges the sheriff to take a bail bond in all cases less than felony, if tendered, and the security be sufficient. If a defendant, who has been arrested and given bail, is arrested again on a second writ, he is again entitled to bail; and so toties quoties; and it may be that he can never be brought to trial. So also if he should remove out of the jurisdiction of the court into another state or government, he could not be brought to trial, unless in case of escape and demand from the executive, &c. These chances were, no doubt, calculated by the parliament of England and the legislature of Maryland, when they were considering what cases should be bailable, and

what should not. It is believed that at the time of the separation of this part of the District of Columbia from the state of Maryland, it was not the practice in that state to issue a second capias ad respondendum upon an indictment for misdemeanor, after arrest and bail upon a former capias issued upon the same indictment. No case of that kind has been cited. Mr. Mason, who was the first attorney of the United States for this district, had been long an eminent practitioner in the courts of that state, and if such had been the practice there, he would, undoubtedly, have introduced it here; but during the whole time he held the office here, he never issued, nor applied for, a second capias in such a case, although, at every term there were cases of forfeited recognizances; and we all know that he was remarkably faithful and attentive to his duty, and accurate in all his forms of proceeding. Judge Kilty, also, who was the first chief judge of this district, and who was afterwards chancellor of Maryland, was well conversant with the practice of the courts of that state, and had just revised and published a valuable edition of the laws of Maryland, yet he never suggested an idea of such a practice; and, until the present, no such case has occurred in this court. It is stated, however, upon very respectable authority, that such is the practice in some of the courts in Maryland.

The judge of the Baltimore criminal court (a court erected since the separation of this part of the district from Maryland) states that the practice of his court is, "for the prosecutor, at every term where the person charged does not attend, to call him on his recognizance, and, if he does not answer thereto, to call his security to bring in his principal. If the latter also makes default, the court enters judgment for the penalty, and execution is issued thereon against the parties, and a bench warrant on the presentment or indictment, as the case may be, is, as a matter of course, issued against the offender to bring him in. If he is taken, or his security brings him in, the penalty is generally released on payment of costs attending the proceedings to recover it." And, in reply to a letter from the attorney of the United States for this district, he says, "that our courts make no such discriminations as stated in your letter between recognizances taken before or after presentment and indictment;" "and if the party fails to give his personal appearance, our uniform practice is, and has always been since the days of Judges Chase and Martin, to call him on his recognizance, enter the forfeiture, and issue execution thereon, and renew the capias or bench warrant against the principal." "It is also our practice, when the principal is brought into court and stands committed, to release or remit the forfeited recognizance if the money has not been paid, on payment of the costs attending the forfeiture." He also says, "The judges of the county court, and some of the most experienced practitioners to whom I showed your letter, entirely concur with me in the foregoing, especially in that portion of it relating to the recovery of the penalty and renewing the process against the delinquent, notwithstanding the payment of the money." The attorney-general of Maryland (Josiah Bayly, Esq.), in a letter to the attorney of the United States for this District, dated Cambridge, Md., October 7, 1833, says: "The practice of the courts in this judicial district for the last forty years has been, in all cases of presentments or indictments, where the party charged has been bound in recognizance, to issue a warrant in the nature of a capias, returnable to the next term; or, in certain cases where the party can be taken during the term, or may elude the process of the court, a bench warrant, returnable immediately; and, if the party is arrested and brought up, the court compel a speedy trial, unless legal grounds exist for the continuance, and, in that case, they take recognizance with sufficient security, or commit. If the party has been bound to appear to answer a criminal charge before the finding a presentment or indictment, and such presentment or indictment is found at the term to which he is bound to appear, the court order him to be called, and if he does not appear, direct his recognizance to be forfeited, and a warrant in the nature of a capias to be issued, returnable to the next term. Upon the return of those warrants 'cepi,' a rule is laid on the sheriff to bring the body in court by a certain day during the term, and, on failure to comply with the rule, the sheriff is amerced in a sum sufficient to enforce obedience, or inflict punishment for neglect of duty; and if the party can be found, a warrant in nature of a capias is renewed, or a bench warrant, as the nature of the case may require." After giving his opinion upon the construction of the act of October, 1780, c. 10, and some other points, he says: "In all cases where the sheriff brings the party into court under the rule laid for that purpose, the court either take the party's recognizance with security, or commit, if he be not ready for trial. If the party does not appear, according to the condition of the recognizance, it is forfeited, and a warrant in the nature of a capias renewed by order of the court, or the attorney, to answer the charge in the presentment or indictment in the same manner, and the same proceedings are had, as if he had never recognized. Similar proceedings are adopted, if the party escape after commitment, although the sheriff may be punished for suffering the escape." A gentleman of the bar (Mr. Thomas F. Bowie) in Upper Marlborough, in a letter dated 4th October, 1833, to the attorney of this district, says: "I have taken some pains to ascertain the practice of this court in reference to the question proposed in your letter, and the practice has been, whenever the sheriff has arrested an individual upon criminal process issuing on a presentment or indictment, and taken a bail-bond, if the per-

son arrested does not appear, new process invariably issues to bring him in, and he is tried under the same indictment." Mr. O. H. Williams, who, I suppose is clerk of Washington county, Maryland, states that he has not been able to find, and does not recollect, a case in that county, of a new writ issuing on a presentment or indictment where the first writ was returned cepi, the party recognized, and the recognizance forfeited; but the practice in such case has been to enter the case on the criminal docket "discontinued." Mr. Schley, the clerk of Frederick county, Maryland, does not recollect any particular case in point. It is stated by the counsel for the defendant, that it appeared, upon inquiry of the clerks of Charles and St. Mary's counties, in Maryland, that there was no such practice in their courts. The practice in Maryland, therefore, is not even now universal or well settled, and no case has been shown by which it is established. If there be such a practice in any of the courts, it may have been caused by not distinguishing between the recognizances taken by justices of the peace before presentment, and those taken by way of bail upon a criminal writ issued upon a presentment or indictment. The presentment or indictment is a new cause of bail, unconnected, it may be, in fact, and certainly unconnected by the record, with the previous arrest by the magistrate's warrant; but a second writ upon the same indictment, is for the same cause of arrest, and if the defendant has once given sufficient bail, and is, in law, in custody, it seems to me contrary to all the analogies and rules of the common law to require him to give bail again. In cases of felony, it may, perhaps, be done, because felony is not, in general, bailable, and the party has no absolute right to be bailed; but even in cases of felony I find no positive law, nor any decided case to justify it.

As, therefore, it had never been done by this court in a case of misdemeanor; as there was no order of the court to justify it; as I could find no form of such an entry in any of the books of entries; as I could find no case reported in which it was ever allowed, or in which a second recognizance for the same offence, has ever been estreated into the exchequer; as there is no such rule stated in any of the elementary treatises upon the criminal law; and as it seemed to me to be contrary to the analogies and the spirit of the common law,—I cannot but think myself to have been fully justified in discharging the defendant upon the habeas corpus. If, however, I have erred in my view of the law, that error may have arisen from my desire, upon all occasions, to support those principles of the common law which our ancestors claimed as their birthright, and which are the surest guards of personal liberty; and no one will rejoice more than myself to see my errors corrected.

[For subsequent proceedings, see Cases Nos. 15,767 and 15,768.]

Case No. 15,767.

UNITED STATES v. MILBURN.

[4 Cranch, C. C. 719.] [1]

Circuit Court, District of Columbia. March Term, 1836.

GAMING—DISORDERLY HOUSE—INDICTMENT—EVIDENCE.

1. An indictment charging that the defendant kept a certain gaming-table called a faro-bank, is not sufficient under the penitentiary act of the District of Columbia [4 Stat. 448].

2. The keeper of a room in which common gaming is carried on for his lucre and gain, and under his management and control, is guilty of keeping a disorderly house, and evidence of his keeping a faro-bank therein may be given under the count for keeping a disorderly house; but an indictment for keeping a common disorderly house is not supported by evidence of keeping a room in which gaming is carried on. It is not necessary to prove that the defendant was also the keeper of the house; nor to prove other disorderly conduct.

[Cited in People v. Spousler, 1 Dak. 289, 46 N. W. 460.]

The first count in the indictment [against George Milburn] was for keeping "a certain gaming-table called a faro-bank." This count was, upon the defendant's motion, quashed by the court, for the reasons stated in U. S. v. Cooly [Case No. 14,859].

The second count charged that the defendant kept "a certain common ill-governed, and disorderly house;" "and in the said house, for filthy lucre and gain, certain evil-disposed persons, of evil name, fame, and conversation, to frequent and come together, on the days and times aforesaid, there, unlawfully and wickedly, did cause and procure, and the said persons in the said house, at unlawful times, as well in the night as in the day, on the days and times aforesaid, there to be and remain, drinking, tippling, cursing, swearing, quarrelling, and gaming, and otherwise misbehaving themselves, unlawfully and wickedly did permit and suffer, to the great damage and common nuisance of the good citizens of the United States, in the manifest destruction and corruption of youth and other people, in their manners, conversation, morals, and estate, and against the peace and government of the United States."

Mr. Dunlop, for the United States, to support this count, offered evidence that the defendant kept a public faro-table, at which there was gambling for money.

W. L. Brent, for defendant, objected that it was not evidence of his keeping a disorderly house; and Mr. Dandridge, on the same side, contended that, as the keeping of a common gaming house was a distinct offence, evidence of that offence cannot be given, under this count, for keeping a common disorderly house. It should have been indicted as a common gaming-house. 1 Russ. 267; 3 Chit. 673, 674.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Mr. Dunlop, contra. A common gaming-house is a common disorderly house, and may be indicted as such. 3 Chit. 673, 674.

CRANCH, Chief Judge, was of opinion that evidence that the house was kept for a common gaming-house, for lucre and gain, where all persons, disposed to sport their property, were permitted to meet and gamble for money, is evidence of a disorderly house; and referred to U. S. v. Ismenard [Case No. 15,450], in this court, at December term, 1803.

THRUSTON, Circuit Judge, was of the same opinion, but was understood to contend, that, as the indictment was in the common form of an indictment for a disorderly house, charging, among other disorderly conduct, the permitting of gaming, only, and not specifying it to be kept as a common gaming-house, for lucre and gain, the United States could not succeed upon this indictment, although they should prove that the defendant kept a common gaming-house, for lucre and gain, where all persons disposed, &c., were permitted to meet and gamble for money.

MORSELL, Circuit Judge, absent.

The jury having been adjourned to the next day, and the court being full,

Mr. Brent, for defendant, moved the court to instruct the jury, "that, if they should be of opinion, from the evidence, that the defendant was the keeper of a room in which gaming was carried on, yet it does not support the charge in the indictment, which is for keeping a common disorderly house; and unless it be satisfactorily proved that he was the keeper of the house, he cannot be found guilty under the present indictment, but is entitled to a verdict of acquittal, unless the jury should be satisfied that other disorderly conduct has been proved."

Mr. Brent and Mr. Dandridge, in support of this motion, contended that a disorderly room is not a disorderly house, and that the indictment should have been for keeping a public gaming-room for lucre and gain. 2 Chit. 40; 3 Chit. 674, 675; Archb. 363; 3 Chit. 678, note k; Bac. Abr. "Gaming," A.

Mr. Dunlop, contra, prayed the court to instruct the jury, "that, if they should be satisfied, from the evidence, that the defendant was the keeper of a room in the house of one Grantham, in which room common gaming was carried on, for the lucre and gain of the defendant, and under his management and control, then he is guilty of keeping a disorderly house, as charged in the second count of the indictment;" and, in support of his prayer, cited 3 Chit. 623; Reg. v. Peirson, 2 Ld. Raym. 1197, 1 Salk. 382; 1 Russ. 299.

THE COURT (nem. con.) gave the first part of the instruction moved by Mr. Brent, namely, that if the jury should be of opinion, from the evidence, that the defendant was the keeper of a room in which gaming was carried on, yet it does not support the charge in the indictment which is for keeping a common disorderly house.

But (THRUSTON, Circuit Judge, contra) refused to give the residue of that instruction.

And (THRUSTON, Circuit Judge, contra) gave the instruction prayed by Mr. Dunlop.

Verdict, not guilty.

Case No. 15,768.

UNITED STATES v. MILBURN.

[5 Cranch, C. C. 390.] [1]

Circuit Court, District of Columbia. March Term, 1838.

GAMING—FARO-BANK—INDICTMENT.

An indictment for keeping a "gaming-table," is insufficient; it should charge the keeping of a common gaming-table. An indictment for keeping a faro-bank is also bad; it should be a common faro-bank; or "a faro-bank, the same being a common gaming-table."

[Cited in Stettinius v. U. S., Case No. 13,387.]

[Cited in People v. Sponsler, 1 Dak. 289, 46 N. W. 460.]

Indictment [against George Milburn] containing two counts: 1st, That the defendant kept "a gaming-table, against the form of the statute," &c. 2d. That he kept "a faro-bank against the form of the statute," &c.

W. L. Brent, for defendant, demurred to the whole indictment, because neither count charges the keeping of a common gaming-table, or a common faro-bank, or a faro-bank, the same being a common gaming-table, and cited U. S. v. Cooly [Case No. 14,859], and U. S. v. Ringgold [Id. 16,167].

Mr. Key, contra, contended that it was sufficient to charge the offence in the words of the statute, and cited 1 Chit. 281. The words of the twelfth section of the penitentiary act are, "that every person duly convicted of keeping a faro-bank or gaming-table shall be sentenced to suffer imprisonment and labor, for a period not less than one year, nor more than five years."

But THE COURT (CRANCH, Chief Judge, contra, as to the second count) stopped Mr. Brent in reply, and quashed the indictment. See Archb. Cr. Pl. 24.

Case No. 15,769.

UNITED STATES v. MILLARD.

[13 Blatchf. 534.] [2]

Circuit Court, S. D. New York. Dec. 21, 1876.

INTERNAL REVENUE — POSSESSION OF CIGARS ON WHICH TAX NOT PAID.

An indictment under section 3397 of the Revised Statutes charged that the defendant "did buy, receive and have in his possession" cigars on which the tax to which they were liable had not been paid, the statute using the words "buys, receives or has in his possession:" *Held*, that the averment was divisible, and that a conviction could be had on proof of possession alone.

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[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Hon. Samuel Blatchford, District Judge, and nere reprinted by permission.]

Benjamin B. Foster, Asst. U. S. Dist. Atty. Lucien Birdseye and Abram J. Dittenhoefer, for defendant.

Before BENEDICT, District Judge.

This was an indictment [against Samuel H. Millard], under section 3397 of the Revised Statutes, charging that the defendant "did buy, receive and have in his possession" cigars on which the tax to which they were liable had not been paid. On the trial, it was held, that the averment was divisible, and that a conviction could be had on proof of possession alone, the statute using the words "buys, receives or has in his possession."

Case No. 15,770.

UNITED STATES v. MILLER et al.

[5 Biss. 128.] [1]

Circuit Court, N. D. Illinois. June, 1870.

INTERNAL REVENUE—DISABLED DISTILLERY—INTENT TO DISTILL.

1. In an action on a distiller's bond, under the act of congress of July 20, 1868 [15 Stat. 125], a plea that the still blew up, of which the assessor was duly notified, whereupon he locked up and took control of the property, is a good plea as to the time the still was thus disabled.

2. If the partially manufactured material is duly turned over to the proper officers, the distiller should not be charged for spirits which he could not distill.

Action of debt on a distiller's bond, executed by defendants [John S. Miller and others], dated October 3, 1868, the bond being in the usual form, in the penal sum of $27,000, and under the act of July 20, 1868, § 20 (2 Brightly's U. S. Dig. 322; 15 Stat. 125). Averment that Miller, the distiller, from October 6th to 31st, 1868, at Sterling, distilled a large quantity of spirits subject to tax, and returned to the assessor less than 80 per cent. of the producing capacity of the still. Defendants pleaded that on a certain day the still blew up, of which fact the assessor was notified, whereupon he put a lock upon the furnace and fastened up the fermenting tubs, in which condition the establishment remained until October 28, when, the repairs being completed, business was resumed. It is averred that all the wines distilled were duly returned. The government filed a demurrer to the plea.

BLODGETT, District Judge. There must be an intent to distill, and if the distiller was so circumstanced as to preclude the idea that he intended to distill, I don't think he can be charged. The statute does not provide for the stoppage or suspension of business by a casualty. It provides for a man's bringing his business to an end by some systematic arrangement on his part, but here is the interposition of an accident which utterly prevents him from going on. The question is, what shall be done with the partially manufactured material in the distillery? It seems to me if he gives it over to the custody of the proper officers of the government, so that it clearly appears that the work of distilling was suspended, he should not be charged with duties on spirits he did not distill, and which, under the circumstances, he could not distill.

The demurrer is overruled.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

Case No. 15,771.

UNITED STATES v. MILLER.

[14 Blatchf. 93.] [1]

Circuit Court, S. D. New York. Jan. 19, 1877.

INTERNAL REVENUE—REMOVAL FROM STOCK—FAILURE TO ENTER IN BOOK.

Spirits consigned to M. arrived, and he was notified, by the carrier, of their arrival. He surrendered his bill of lading, paid the freight, sold the spirits to a third party, and gave such party an order to receive the spirits, on which such party, the next day, received the spirits, and removed the same to his own premises. M. was indicted, under section 3318 of the Revised Statutes, for omitting to enter the spirits in his book, at the time of sending them out of his stock and possession: *Held*, that such removal of the spirits was a removal from the stock and possession of the defendant, within the meaning of section 3318.

This was an indictment [against Charles N. Miller] under section 3318 of the Revised Statutes, against a wholesale liquor dealer, for omitting to enter certain spirits in his book, at the time of sending them out of his stock and possession. Certain spirits consigned to the defendant, from the West, arrived in New York on March 15th, and notice of their arrival was given to the defendant by the carrier. Thereupon the defendant surrendered his bill of lading, paid the freight, and sold the spirits to a third party, sending the purchaser an order for their delivery to him. On the next day the purchaser presented the order, and received the spirits into his possession, and removed the same to his own premises.

Roger M. Sherman, Asst. Dist. Atty.
Treadwell Cleveland, for defendant.

THE COURT held that the removal of the spirits, under the circumstances stated, was a removal from the stock and possession of the defendant, within the meaning of section 3318.

Case No. 15,772.

UNITED STATES v. MILLER.

[2 Cranch, C. C. 247.] [2]

Circuit Court, District of Columbia. Oct. Term, 1821.

WITNESS—INCRIMINATING DISCLOSURES—OPINION OF COURT.

A witness, in a criminal cause, will be compelled to answer a question which he says, up-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

[2] [Reported by Hon. William Cranch, Chief Judge.]

on his oath, he cannot answer without disclosing a fact which may be material and important evidence to criminate himself, as participator in the same offence for which the defendant stands indicted; provided the court should be of opinion that no direct answer to the question could furnish evidence against the witness.

[Followed in Devaughn's Case, Case No. 3,837. Cited in U. S. v. Baugh, 1 Fed. 787.]

Indictment [against Samuel Miller] for fighting a duel with one R. Smith. Doctor John A. Kearney, a witness for the United States, was asked whether he saw the defendant shoot at Smith. The witness objected to answer, and said that he could not answer the question without disclosing a fact which might be material and important evidence to criminate himself as participator in the same offence for which the prisoner then stood indicted.

Mr. Jones, for defendant, in behalf of the witness, contended that he was not bound to answer the question, because it might compel him to disclose a fact which would be a necessary link in the chain of evidence to support a prosecution against himself, if such a one should be instituted, for being concerned in the same misdemeanor, and cited the opinion of Chief Justice Marshall, in Burr's Case [Case No. 14,693], in which he says: "The gentlemen of the bar will understand the rule laid down by the court to be this: It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case the witness must himself judge what his answer will be; and if he says on oath that he cannot answer without accusing himself, he cannot be compelled to answer." Mr. Jones also cited St. 46 Geo. III. c. 37; Peake, Ev. 128, 134, 138, 139, 160, 161, 167, 184; Phil. Ev. 206; Rex v. Edwards, 4 Term R. 440; Rex v. Inhabitants of Castell Careinion, 8 East, 77; Cooke's Case, 1 Salk. 153, 4 State Tr. 748; Lord Geo. Gordon's Case, Doug. 593; Title v. Grevett, Ld. Raym. 1008; Cates v. Hardacre, 3 Taunt. 424; People v. Herrick, 13 Johns, 82; U. S. v. Burr [Case No. 14,693]; 4 Bl. Comm. 329; 1 Hale, P. C. 301; McNal. Ev. 256. The fact that the witness was present at the duel was a fact which it would be necessary to prove upon a prosecution against him for being concerned in the misdemeanor. He could not answer the question affirmatively, therefore, without furnishing matter for his conviction.

THE COURT, however (CRANCH, Chief Judge, contra), was of opinion that no direct answer to the question could furnish evidence against the witness, and that he was bound to answer it. This the witness still refused to do; and THE COURT committed him for the contempt. He petitioned the supreme court of the United States for a writ of habeas corpus, at February term, 1822, but it was refused upon the ground that that court had no appellate jurisdiction in criminal causes. [Ex parte Kearney] 7 Wheat. [20 U. S.] 38.

Case No. 15,773.

UNITED STATES v. MILLER.

[4 Cranch, C. C. 104.] [1]

Circuit Court, District of Columbia. Dec. Term, 1830.

GAMING—KEEPER OF HOUSE—EVIDENCE.

1. Evidence of the declaration of another person, that he was the guilty person, cannot be given.

2. Evidence that the defendant dealt the cards, at faro, is prima facie evidence that he kept the house.

Indictment [against Henry Miller] for a nuisance in keeping a public gaming-house.

Mr. Coxe and Mr. Dandridge, for defendant, offered evidence of the declaration of another person, that he was the keeper of the house and gaming-table.

The United States attorney objected, and THE COURT refused to receive the evidence.

THE COURT, also, (CRANCH, Chief Judge, absent) instructed the jury that dealing the cards, as keeper of the faro-table, was prima facie evidence that such dealer was the keeper of the house.

Case No. 15,774.

UNITED STATES v. MILLER.

[3 Hughes, 553.] [2]

Circuit Court, E. D. Virginia. Jan. 22, 1878.

CONSPIRACY—INDICTMENT AGAINST ONE ONLY.

If an indictment founded upon section 5440 of the Revised Statutes of the United States charges a conspiracy by two or more persons, but is an indictment of one only of such persons, it is good on demurrer.

[Cited in U. S. v. Baugh, 1 Fed. 787; U. S. v. Smith, 40 Fed. 757; Ex parte Wilson, 114 U. S. 425, 5 Sup. Ct. 939.]

[Quoted in People v. Richards, 67 Cal. 421, 7 Pac. 834.]

Information [against Henry Miller] for conspiracy to defraud the United States.

On demurrer to the information for not joining other conspirators as co-conspirators, the court (HUGHES, District Judge) said:

The information is founded upon section 5440. That section makes the conspiring by two or more persons to defraud the government a punishable offence, and declares the commission of any act intended to effect the

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

object of the conspiracy by any one of the conspirators to be a punishable offence in all of them. A preliminary question has been raised on this section 5440, whether it makes the conspiracy to defraud the United States the offence for which it prescribes the punishment named by it, or whether it makes the act committed to "effect the object of the conspiracy" that offence. It is very clear from a critical examination of the language of the section, that the offence created by it is a conspiracy by two or more persons to defraud the United States. See U. S. v. Donau [Case No. 14,983]. It is on this view of the law that the demurrer is founded.

The question raised by the demurrer is, whether the person who is alleged to have committed the act in furtherance of the conspiracy can be indicted separately; that is to say, whether it is not necessary to indict at least two persons charged with engaging in the conspiracy, in order for the prosecution to be valid. There has been much loose writing on this question by some of the authors of textbooks on criminal law, and they have confounded rather than enlightened us with their counsels. We may, therefore, have to cut loose from them, and resort to the authoritative decisions of the courts, and the teachings of reason in the decision of the question before us.

It may be worth while to say that conspiracy is the combination of two or more persons, by concerted action, to accomplish some unlawful purpose, or to accomplish a lawful purpose by some unlawful means. There can, therefore, be no conspiracy except by two or more persons. "If any two or more persons conspire," is the language of the statute upon which the present information is founded. It is, therefore, certainly incumbent upon the prosecution to prove a conspiracy here by two or more persons. The establishment of a conspiracy by proof is essential to a conviction. Nothing is more clearly settled than that the proof must show a conspiracy by two or more persons to do the unlawful act mentioned by the statute, whether or not the indictment be brought against more than one. But whether or not two or more persons must be proceeded against jointly in the same indictment, is another question.

This information charges a conspiracy by three persons, one of whom, Lee, is dead, and another, Gettslick, is already under conviction in this court for an act committed in furtherance of the conspiracy charged. It is not the practice of the government to prosecute any person to conviction for more than one of the same series of offences. Hence there is no indictment here except against Miller, who is the last one of the three persons charged to have conspired to defraud the government who have not been convicted. The particular question arising on the demurrer, therefore, is, will an information against him alone lie without joining Gettslick? There is no doubt that if Gettslick were joined there could be a severance in the trial of the joint information. Nor is there any doubt that if there are three persons indicted for conspiracy one could be acquitted and the other two convicted; that is to say, that there could be a severance in the verdict. And it is equally clear that if the verdict be severed the judgment of the court upon the verdict must be several. It is true that where three or more are joined in an indictment for conspiracy, and some are acquitted by the jury, and others convicted, on motion for a new trial by one of the convicted, the court, if granting the motion of that one, would order a new trial for all the convicted. But that would be on principles of humanity, leniency, and abundant caution; and not as a matter of strict right. Reg. v. Gompertz, 9 Q. B. Div. 824.

As there may thus be a severance in the trial, in the verdict, and in the judgment, that is to say, in every part of the proceedings except the indictment, we may conclude that there may be also a severance in an indictment for conspiracy, unless there be some reason peculiar to such an indictment plainly making the several proceeding improper. I can see no such reason. It will not do to say that because two at least must be convicted of a conspiracy, and that any one person who should be the only one convicted must be discharged; therefore, two at least must be joined in the indictment. But that same reasoning would forbid the severance of the trial, and deprive any one of the accused of his right to be tried alone. If it be conceded that there may be a severance in the trial of persons jointly indicted for conspiracy, it follows, so far as the reason just alluded to is concerned, that there may likewise be a severance in the indictment. Some of the text-writers say, arbitrarily, that indictments for conspiracy must be joint, but they give no reason, other than the one just stated, for their proposition, and it is difficult to find a reason. I do not think any sufficient reason exists.

We are, therefore, thrown back upon the decisions of the courts, and I do not find any decision requiring that indictments for conspiracy must in all cases be joint. In the case of U. S. v. Cole [Case No. 14,832], there was an indictment of twelve persons named, charging a conspiracy by them and one other person who was alleged to be dead, and there was no averment that any persons other than the thirteen were concerned in the conspiracy. There the court charged the jury, virtually, that if they acquitted all those who were indicted save one, that one would go quit even though they found him guilty. As that indictment did not charge that the persons named and other persons besides conspired, the charge was, of course, strictly in accordance with the law of the case. But that charge of the court does not intimate, and carries no authority for the proposition, that an indictment of each one of those accused persons severally would not have been good.

The case of People v. Mather, 4 Wend. 229, is a celebrated one. The charge of the indictment was of a conspiracy to abduct William Morgan, who was supposed to have revealed the secrets of the Masonic fraternity. The indictment was of Mather alone, and the charge of the indictment was that Mather with "other persons unknown," had conspired etc., although it was a fact that many of the other persons were well known. There the court held that the indictment against Mather alone was good, and there was a conviction, and a new trial was denied. The court said that "in a charge of conspiracy it seems no more necessary to specify the names of the defendant coadjutors than in an indictment for an assault and battery to name others besides the accused who were concerned in the trespass."

In the leading and early case of Rex v. Kinnersley, 1 Strange, 193, the information charged that two named persons, Kinnersley and Moore, had conspired. Moore was not found, and the trial proceeded on the information as against Kinnersley alone. Kinnersley was convicted, and a judgment, after review by certiorari, was given against him, before the arrest and trial of Moore. There was a similar judgment in the case of Rex v. Nicholls, 13 East, 412, in note. There but one of two named conspirators was indicted, the other being dead. There was a verdict of guilty, and on review by certiorari, a judgment of conviction. It was a single indictment.

The latest and best of the text-writers on criminal law, Mr. Bishop, reviewing all the cases, lays it down as his conclusion that there need not be more than a single person made defendant in an indictment for conspiracy. 2 Bish. Cr. Proc. § 186. I think that is a true statement of the law of the subject. But it is essential, as I stated in the beginning, that the information shall charge that two or more conspired, and, of course, it follows that the proof must implicate two or more persons. The language of the statute on which the information now under trial is founded, is that "if two or more persons conspire," etc. Such is the charge in the present information, and I decide very confidently that the information is sufficient in law, and so the demurrer is overruled.

Case No. 15,775.

UNITED STATES v. MILLER.

[16 Int. Rev. Rec. 25.]

District Court, N. D. New York. July, 1872.

INTERNAL REVENUE LAW—FAILURE TO KEEP BOOKS.

[Under Act July 13, 1866, a brewer who neglects to enter in a book the materials purchased by him for the production of fermented liquors is liable to a fine of $500, regardless of whether he intended to commit a fraud.]

Prosecution of Martin Miller, a brewer, for violation of the internal revenue law.

That portion of the law which it is claimed was violated in this case is section 49 of the act of July 13, 1866 [14 Stat. 164], which provides: "That every person owning or occupying any brewery or premises used, or intended to be used, for the purpose of brewing or making such fermented liquors, or who shall have such premises under his control or superintendence as agent for the owner or occupant, or shall have in his possession or custody any brewing materials, utensils, or apparatus, used or intended to be used, in the manufacture of fermented liquors, shall from day to day enter or cause to be entered in a book to be kept by him for that purpose, an account of all material by him purchased for the purpose of producing such fermented liquors, including grain and malt."

Punishment for violation of this section is provided for by section 51 of the same act, which reads as follows: "The owner, agent, or superintendent of any brewery, vessels, or utensils used in making fermented liquors, who shall evade or attempt to evade the payment of the tax thereon, or fraudulently neglect or refuse to make true and exact entry and report of the same in the manner required by law, or to do or cause to be done any of the things by law required to be done by him as aforesaid, or who shall intentionally make false entry in said book or in said statement, or knowingly allow or procure the same to be done, shall forfeit, for every such offence, all the liquors made by him or for him, and all the vessels, utensils, and apparatus used in making the same, and be liable to a penalty of not less than five hundred nor more than one thousand dollars to be recovered with costs of suit, and shall be deemed guilty of a misdemeanor, and shall be imprisoned for a term not exceeding one year. And any brewer who shall neglect to keep the books, or refuse to furnish the account and duplicate thereof as provided by law, or who shall refuse to permit the proper officer to examine the books in the manner provided, shall for every such refusal or neglect forfeit and pay the sum of three hundred dollars."

The case resulted in favor of the government, and judgment was rendered against the defendant for $300 and costs of suit, as provided by said section 51.

Mr. Crowley, U. S. Dist. Atty.

D. N. Lockwood, for defendant.

HALL, District Judge (charging jury). This is a civil action brought against the defendant for the purpose of recovering a penalty of $300, which, it is alleged, he has incurred in consequence of a failure to comply with one of the provisions of an act passed July 13, 1866. (The judge here read the sections of the act above given, and proceeded.) This suit is founded upon the allegation that the defendant neglected to enter or cause to be entered, from day to day, in a book which the statute provides shall be kept by him for that purpose, an account of all material purchas-

ed by him for the purpose of producing fermented liquors, including grain and malt. Any brewer who shall neglect to keep such book, or refuse to keep such account, or who shall refuse to allow the proper officer to see such book, as required by this section, is liable, for every refusal or neglect thereof, to pay a penalty of $300, and it is for such penalty that this suit is brought. The statute makes a clear distinction between cases where failure to keep the book and account required results from ignorance or negligence, and the case in which the failure is for the fraudulent purpose of evading the payment of a portion of the proper taxes, and with an intent to defraud the government. In case the party is proceeded against as a criminal, and is to be subjected to fine and imprisonment, there must be an intent to evade the proper tax; but in a civil action for the penalty no question of intent is raised. It is not necessary to prove an intent to commit a fraud; but the mere fact of the neglect to keep a book subjects the party to a penalty of $300. Therefore, in this case, the question of intent need not be considered by you; and the only question is whether the defendant has complied with the provisions of the statute with regard to the keeping of this brewer's book under the section I have read, and which provides that he shall from day to day enter or cause to be entered, in a separate book to be kept by him for that purpose, an account of all materials by him purchased, for the purpose of producing fermented liquors, including grain and malt. In respect to this provision, it appears that books in printed form have been designed, and that, subsequent to the time when this suit was commenced, the defendant procured a book, in the form indicated by the commissioner of internal revenue. Subsequent to that time it is not alleged that he failed to make the proper entries; and it is insisted on the part of the defence that prior to that time he made the required entries in a pass-book, which he kept for that purpose.

In reference to that question, gentlemen, it is proper that I should say to you, in the first place, that, after the evidence given on the part of the United States, making out a prima facie case against the defendant for not keeping this book, by the ordinary rules of the common law and by a statute passed by congress for that purpose, the burden is cast upon the defendant to show he did keep such a book, and made the entries by law required. You are therefore to consider whether the evidence in this case establishes the fact that he did keep a separate book, in which was entered from day to day what was required by the provision of this statute to be entered. It was not necessary, in my judgment, that he should purchase a book precisely in the form of the one that has been produced here; but he should make the required entries in a separate book, and the entries therein should be such as to enable the officers of the government to ascertain, without examination of other entries, what it was intended they should be able to ascertain by the book required by this statute. The object of requiring a separate book doubtless was that the officers of internal revenue, when they required an examination, should not be compelled to look through the ordinary books of the brewery, or through any other book except the one that contains the precise entries required by law. The object of the book was to give to the officers information of the quantity of materials delivered, so that they could, by inquiry elsewhere or by further examination, reach the evidence that the book was incorrect, if it was in fact incorrect. You will, of course, readily perceive the object of keeping the book, and also the object of requiring these entries to be made in a separate book, so as to facilitate the examinations that might be required, in the interests of the government, on the part of the revenue officers.

The question for you to consider, under the proofs in this case, is whether the evidence establishes the fact that during the whole period embraced in this information, which is from May 22, 1870, to the 13th of March, 1871, the defendant kept such a book as the statute requires, and made the entries required therein from day to day, in such manner as to furnish the information which the statute requires to be furnished to the officers by such a book when they apply for its examination. That is the only question, as I understand it, that you are called upon to consider in this case.

Case No. 15,776.

UNITED STATES ex rel. CARHART v. MILLER COUNTY.

[4 Dill. 233.] [1]

Circuit Court, E. D. Arkansas. 1878.

COUNTY WARRANTS—RIGHTS OF JUDGMENT CREDITOR—MODE OF ENFORCING JUDGMENT—PROVISIONS OF THE CONSTITUTION OF ARKANSAS.

1. Payment of judgments rendered on ordinary warrants issued by counties in Arkansas, can only be enforced in the manner provided by the constitution and laws of the state.

2. The present constitution of the state, as to the rights and remedy of the holder of such warrants, distinguishes between those issued before and those issued after its adoption.

3. A relator, whose judgment is based on county warrants issued after the adoption of the present constitution, is not entitled to the levy of a tax to pay such judgment in excess of the constitutional limitation, nor to have part of the general tax specially appropriated and set aside to pay such judgment. Aliter, as to judgments on negotiable bonds issued under acts which require or authorize the levy of a special tax to pay them, and as to judg-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

ments upon warrants issued prior to the adoption of the present constitution of the state.

[Cited in Board of Com'rs of Grand Co. v. King, 14 C. C. A. 429, 67 Fed. 207.]

On the 28th day of October, 1876, the relator recovered in this court a judgment against Miller county, for the sum of $7,267.52 and costs of suit. This judgment was recovered on ordinary county warrants, issued for the ordinary expenditures of the county accruing since the date of the adoption of the present constitution. Article 16 of the present constitution of the state, which went into effect on the 30th day of October, 1874, contains these provisions:

"Sec. 9. No county shall levy a tax to exceed one-half of one per cent for all purposes; but may levy an additional one-half of one per cent to pay indebtedness existing at the time of the ratification of this constitution.

"Sec. 10. The taxes of counties, towns, and cities shall only be payable in lawful currency of the United States, or the orders or warrants of said counties, towns, and cities respectively.

"Sec. 11. No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same; and no moneys arising from a tax levied for one purpose shall be used for any other purpose."

The revenue act of the state declares that it shall be unlawful for the county court to levy, "for all general county purposes," a rate exceeding five mills. Act March 5, 1875, p. 223, § 3. By an act approved December 14, 1875, it is provided "that all county warrants and county scrip shall be receivable for any taxes for county purposes," with this limitation only, that the collector shall not "receive scrip issued since the adoption of the constitution in payment of the tax levied to pay the indebtedness existing before the adoption of the constitution."

The relator sued out an alternative writ of mandamus, requiring the county court to show cause why it should not levy a tax of five mills on the dollar on the taxable property of the county, payable in currency, and apply the same, or such portion thereof as this court may direct, towards the payment of the relator's judgment. To this writ the county court returns, in substance, that the relator's judgment was recovered on ordinary county warrants, issued for the ordinary expenditures of the county accruing since the 30th day of October, 1874; that each and every year since the said warrants were issued, including the current year, the county court has levied on all the taxable property of the county, for "general county purposes" (which are set out in detail), a tax of five mills on the dollar; that the revenue derived from said levies has not in any of said years been sufficient to pay the ordinary current expenses of the county for the year; that the like rate of tax for ordinary county purposes will be levied for the year 1878, and each year thereafter; that such levies will be in the future, as they have been in the past, inadequate to defray the necessary current expenses of the county. The case is before the court on a demurrer to this return.

E. W. Kimball, for relator.
J. M. Moore, for the county.

Before DILLON, Circuit Judge, and CALDWELL, District Judge.

CALDWELL, District Judge. No court, state or federal, can by mandamus compel the levy of a tax not authorized by some law of the state applicable to the case. Supervisors v. U. S., 18 Wall. [85 U. S.] 71; Burroughs, Tax'n, § 91; U. S. v. City of New Orleans [Case No. 15,871]; Vance v. City of Little Rock, 30 Ark. 435; U. S. v. County of Clark, 95 U. S. 769.

In the last case cited, the court say: "It need not be said that no court will, by mandamus, compel county officers of a state to do what they are not authorized to do by the laws of the state. A mandamus does not confer power upon those to whom it is directed. It only enforces the exercise of power already existing when its exercise is a duty."

The counsel for the relator does not question the soundness of this proposition, and does not ask the court to require the county to levy a rate in excess of five mills, but insists that it should require the levy of that rate and the application of all or some portion of it to the payment of the relator's judgment.

Except to pay debts contracted before its adoption, the constitution of this state limits the rate of taxation that may be imposed by a county "for all purposes" to five mills on the dollar, and provides that such tax may be paid in lawful currency, or the orders or the warrants of the county; and these constitutional provisions are supplemented by acts of the legislature declaring it to be unlawful for the county court to levy "for all general county purposes" a rate exceeding five mills, and declaring that all county warrants shall be receivable for all county taxes, except those levied to pay debts existing before the adoption of the constitution.

No power is given to levy a special tax to pay the class of warrants upon which the relator's judgment was rendered, and no special authority is given to appropriate or apportion any part of the five mill tax that may be levied to the payment of such warrants or judgments recovered thereon.

This was the law when the warrants were issued upon which the relator's judgment was rendered. The relator knew this to be the law when he received the warrants, and must have known that if the ordinary expenses of the county exceeded the revenue derived from the tax the county was authorized to levy, the warrants could not be discharged in money, and were only valuable as a legal tender in payment of all county taxes, with the exception mentioned.

If this court could require the county to set apart any portion of the five mills the county is authorized to levy, and require such portion to be collected in currency to pay the relator's judgment, it could appropriate the whole levy for that purpose, and require all of it to be collected in currency. The constitution and laws of the state forbid that this should be done. It would be an infringement upon the constitutional right that every holder of like warrants has to pay his county taxes in such warrants, and would be a violation of the whole theory and policy of the constitution of the state in relation to the conduct and administration of county affairs under that instrument.

It is impossible to distinguish this case from the case of Supervisors v. U. S., 18 Wall. [85 U. S.] 71. Mr. Justice Strong, in delivering the opinion of the court in that case, says: "In this case, the warrants upon which the relator's judgment was obtained were all ordinary warrants, drawn upon the treasurer of the county, and, as is admitted by the demurrer, drawn for the ordinary expenses of the county; they were such instruments as the legislature contemplated might be employed in conducting the current and usual business of the county. The act which empowers the county board to levy a tax for ordinary county revenue speaks of them, and evidently intends that they shall be satisfied, either from the proceeds of that tax or by their being received in payment thereof. They are simply a means of anticipating ordinary revenue."

And the court held, in that case, that, under the laws of Iowa, which are, so far as relates to ordinary county warrants as construed by her courts, in legal effect identical with the laws of this state, the county could not be required to levy a special tax to pay such warrants. In its practical results, there is no difference between a special tax and the special appropriation of the whole or a part of a general tax for a particular purpose. Neither can be done in the absence of a law sanctioning it.

The relator does not suggest that there is any money in the treasury applicable to the payment of the warrants on which his judgment was rendered, or that the levy of the maximum rate of county taxes will result in placing funds applicable to this purpose in the treasury, and the fact is conceded to be otherwise, for the county tax each year is paid in the warrants of the county, leaving at the end of each year large amounts of warrants outstanding.

This case must not be confounded with the case of judgments on negotiable bonds issued by counties prior to the adoption of the present constitution, under authority of acts of the legislature, which authorize and require the levy of a special tax, or of a tax sufficient in amount to pay interest on such bonds, and the bonds themselves at maturity; nor with the case of judgments on county warrants issued prior to the adoption of the present constitution.

In the case of bond judgments, the authority and duty of the county court to levy a tax to pay them are found in the law authorizing their issue; and in the case of judgments rendered on warrants issued prior to the adoption of the present constitution, the right to levy a tax of five mills to pay them is found in the last clause of section 9 of article 16 of the constitution [of 1874]. But the laws applicable in the case last mentioned have no application to the relator's judgment, which was rendered on warrants issued subsequent to the adoption of the present constitution, and must be governed by it and laws passed under it. The demurrer to the return to the alternative writ is overruled, and the peremptory writ refused. Judgment accordingly.

NOTE. In U. S. v. Jefferson Co. [Case No. 15,472], the relators having recovered judgment on negotiable bonds issued under the act of April 29, 1873, which required the "levy of a special tax" to pay them, Caldwell, J., in an exhaustive opinion, reviewing the cases, decided the following propositions as applicable to all judgments on negotiable bonds issued prior to the adoption of the constitution of 1874, under acts requiring the levy of a sufficient tax to pay the same:

1. Where a statute authorizes a county to issue its negotiable bonds, and makes it the duty of the county court "to levy a special tax of sufficient amount to pay the interest and principal of said bonds, as the same become due," the power of taxation, thus given, enters into and becomes a part of the obligation of the contract between the county and every holder of such bonds; and, under the constitution of the United States, this obligation of the contract cannot be impaired or lessened in any degree by the constitution or laws of the state afterward enacted.

2. In such case, it is the duty of the county court to levy, and cause to be collected, a tax sufficient in amount to pay the interest and principal of such bonds as the same mature, and if it does not perform this duty, it may be compelled to do so by mandamus.

3. The restriction on the taxing power of counties contained in the constitution of 1874, does not repeal or impair the provisions of prior laws under which bonds were issued requiring the levy of a special tax to pay the interest and principal of such bonds, as they become due.

Case No. 15,777.

UNITED STATES v. MILLS.

[15 Int. Rev. Rec. 18.]

District Court, D. Massachusetts. Jan. 15, 1872.

SMUGGLING—SENTENCE—FINE.

In this case Dexter T. Mills and Lund were brought up on the 15th of January before SHEPLEY, Circuit Judge, for sentence upon a conviction for smuggling in a case which occupied the circuit court here during a fifteen days' trial a year since. After Mills and Lund were convicted they filed motions for a new trial and in arrest of judgment, which raised every possible ques-

tion as to the weight and character of the testimony, the regularity of proceedings in the venires upon which the grand and petit juries were empannelled, and the sufficiency of the indictment. These motions were elaborately argued last summer, and were all overruled by SHEPLEY, Circuit Judge [case unreported].

The case was tried by George S. Hillard and M. J. Dickinson, Jr., for the United States (Mr. Dickinson then being assistant United States attorney), and Mr. Hillard's argument to the jury (the last while he was United States attorney) has been considered his best effort of the kind. The preparation of the case, and entire control of the details of evidence and management of the trial, fell upon Mr. Dickinson, and as they had Messrs. Ranney, Lothrop, Stevens, and Morse (four of the ablest Boston lawyers) against them, they may justly feel proud of the successful termination of the case, by the imposition and payment (within an hour) of the largest fine ever imposed and paid in the U. S. courts of this district. Larger fines were imposed in the Mellen, Ward, and Hartwell Cases, because the law required fines equal to amounts embezzled; but the fines were remitted, and imprisonment was the only actual punishment inflicted.

T. K. Lothrop, who appeared for Lund, asked for a postponement of sentence in his case on account of the sickness of his wife. The district attorney not objecting, the request was granted by the court. Mr. Lothrop also desired to make a suggestion to the court upon the motion made in arrest of judgment. The court had decided, as he understood, that some of the grounds of the motion, such as the sufficiency of the venires, would have been good, if they had been taken advantage of earlier in the cause. If the court would be willing to hear it further, he would like to argue the question of the reasonableness of presenting these grounds for arrest under the practice of this court. The judge said that he would be very willing to hear the question argued, if counsel desired to speak further upon it.

D. H. Mason, U. S. Atty., in moving the court for the sentence of Mills, said:

"I now move for sentence upon Dexter T. Mills, who stands convicted for a violation of section 4 of the acts of congress of July 18, 1866, c. 201 (14 Stat. 179). The indictment is before you. The defendant more than a year ago had a protracted trial by a jury of his country, assisted by able and distinguished counsel. Every means of defence known to the law was then exhausted, and after full deliberation a general verdict of guilty was rendered against him. A motion for a new trial and in arrest of judgment was at once made, and both the law and the evidence were carefully re-examined by your honor, resulting by the opinion of this court in the full confirmation of the guilt of this defendant. The court and the jury in their different capacities entirely concur in this judgment. There is no other tribunal established by law competent to review the case. Everybody who can speak under the law has pronounced him guilty. I am bound to say, as an officer of the government, that I have seen nothing in the condition or conduct of this defendant towards the government, during or since the trial, which I can allude to in mitigation of his sentence. He stood in open defiance of the law when the crime was committed—he seems to me to stand so now; after so much time and such a trial, it is too late to talk about injured innocence. The crime is a very serious one, and was committed against the government which was protecting the defendant. It is one difficult to detect and prove; convictions are therefore rare. The revenues of the country, as well as the authority of the law and the interest of honest importers, have suffered greatly by this crime. The motives of smugglers and of those who aid them are entirely mercenary, selfish, and inexcusable. I leave the defendant to the court under the law. My distinguished friend who assisted at the trial of this case, and is now the special counsel for the government, is more familiar with the nature of the proof which was then given than I am, and I will leave it to him to say what he may desire in reference to this sentence."

Mr. M. F. Dickinson Jr., formerly assistant U. S. attorney, who was associated with Hon. Geo. S Hillard, then U. S. attorney in the trial of this case, then made a brief statement of the principal facts in the case. The indictment contained sixty-nine counts. The defendants were charged with fraudulently receiving, concealing, and facilitating the transportation of smuggled goods, in violation of the sixth section of the act of July 18, 1866. A large number of the counts were nol pros'd before the trial, or during its progress. The defendants were convicted upon eleven counts charging eleven different importations into the port of Boston. The importations were made in the schooner D. H. Hodgkins during the year 1869. The goods smuggled were gin, brandy, whiskey, nutmegs, and a small quantity of woolen socks and hay. Other importations were to New York, and those were the counts nol pros'd. The last cargo was seized on the 18th of November at Loring's wharf, and this cargo was forfeited to the United States. Mr. Dickinson presented to the court a rapid résumé of the part played by Mr. Mills in the business, claiming that the latter acted as financial agent in the unlawful transactions, rather than as the manipulator of the goods.

Mr. Ranney, in behalf of the defendant, said that Mills had been convicted, and it must be assumed that he was guilty. The court was familiar with the case, as well as with those

facts which had been stated as other facts which ought to weigh in mitigation. He was not convicted of smuggling goods, but of receiving and of fraudulently participating in the sale of such goods. For that alone he was to be sentenced. Mr. Mills was indicted with Mr. Lund and three or four others. These others were so circumstanced that they alone could explain the true position of Mills. They could not, however, testify, and if they had been permitted, he thought that Mr. Mills would not have been convicted. It did not appear by the evidence offered by the government that he ever handled the goods or had anything to do with them. Besides, Mr. Mills was not a participant in the smuggling. The government got all the goods in the last cargo. The counts founded upon the New York importations had been abandoned and should have no influence upon the sentence. He desired to call a few gentlemen who have known Mr. Mills for many years, who would testify as to his character and reputation as a citizen and honorable merchant.

THE JUDGE said that he supposed that this would hardly be denied, but that he would hear the testimony of a few of them if it was desired.

Charles L. Thayer, president of the City Bank, Dr. Charles E. Buckingham, Mr. Charles F. Poor, Mr. Daniel A. Patch, Mr. Warren B. Potter, and Mr. George F. Dexter were then called, and testified to the character of Mr. Mills as an upright and honorable citizen and business man.

The clerk then read the sentence as imposed by the court, which was $3,000 for a violation of the law as alleged in each of the seven counts, amounting in all to $21,000.

Case No. 15,778.

UNITED STATES v. MILWAUKEE & ST. P. RY. CO.

[5 Biss. 410.] [1]

Circuit Court, W. D. Wisconsin. Sept., 1873.

BRIDGES—AUTHORITY TO REGULATE CONSTRUCTION—NAVIGABLE WATERS—LEGISLATIVE POWER.

1. Congress has authority to regulate or prohibit the construction of bridges across the Mississippi river.

2. It can also delegate that authority to one of the chiefs of the department.

3. The United States has the right to prevent their construction otherwise than as prescribed by congress, and the federal courts have jurisdiction for that purpose.

4. The acts of congress of April 1, and June 4, 1872 [17 Stat. 46, 215], construed.

5. Under these acts the secretary of war had the right to determine whether the construction of a bridge at a given point would seriously affect the navigation of the river and to declare that a bridge should not be there built.

6. This being a legislative power, the judicial department of the government will not interfere with it.

7. Though the disapproval of a particular location by the secretary of war may not be in technical form, it will not therefore be ignored by the court.

This was a suit in equity brought to enjoin the defendant from building a railway bridge across the Mississippi river, in the vicinity of La Crosse.

The bill alleges that the Mississippi river is a navigable, public river; that congress has assumed control of its protection and improvement, and of the matter of constructing bridges across it at that place; that congress has conferred certain duties and authority upon the secretary of war in reference to locating bridges across said river, and has appropriated, from year to year, large sums of money for the protection and improvement of the navigation of the river; that the defendant is engaged in constructing a bridge across said river, which interrupts and obstructs its navigation; that the secretary of war (being thereto duly authorized by the laws of the United States) has disapproved of the construction of a railway bridge at the place where the defendant is prosecuting said work, and has determined that due regard to the security and convenience of navigation, and to the convenience of access and the wants of other railways crossing said river, will not permit the building of said proposed bridge; that the defendant heretofore located its bridge at the point where it is now engaged in building it, and submitted its location to the decision and approval of the secretary of war, and that the secretary of war disapproved of said location; that the building of said bridge by the defendant, is without authority of law, and contrary to the decisions, regulations and determinations, duly made in the premises, of the secretary of war, and is in direct and flagrant disregard of the statutes of the United States in that behalf made and provided, and that the construction of said bridge will result in direct, lasting and irremediable injury to the navigability of said river, to the commerce being conducted thereon and to the works of improvement being there carried on by complainant. The bill prays for a temporary and also a perpetual injunction. The complainant's counsel read several affidavits upon the hearing, showing that the defendant was engaged in building the bridge as alleged, and also read a copy of the proceedings of the secretary of war in reference to the location of the bridge.

The defendant filed its answer, setting up at length the legislation and proceedings of the secretary of war in reference to the construction of the bridge, and alleging that by virtue of the legislation of the states of Wisconsin and Minnesota, and of the act of congress of April 1, 1872, it is authorized to erect and maintain a bridge across the Mis-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

sissippi river upon the site by it selected. Defendant denies that the work interrupts or obstructs the navigation of the river, and also that the secretary of war disapproved the location of the bridge made by the defendant. With its answer, the defendant produced numerous affidavits to show that the bridge being built by it would not materially obstruct navigation, and that it would not be more of an obstruction or more injurious to navigation than it would be if located at the foot of Mount Vernon street, the point designated by the secretary of war.

The acts of congress touching this matter are "An act to authorize the construction of a bridge across the Mississippi river, at or near the town of Clinton, &c.," approved April 1, 1872 (17 Stat. 46), and "An act further regulating the construction of bridges across the Mississippi river," approved June 4, 1872 (Id. 215).

Application for preliminary injunction on bill and affidavits.

W. C. Webb, U. S. Dist. Atty., J. C McKinney, and H. S. Orton, for the United States.

Decision of secretary of war on subject is conclusive. Kendall v. U. S., 12 Pet. [37 U. S.] 618; Decatur v. Secretary of Navy, 14 Pet. [39 U. S.] 573; Gaines v. Thompson, 7 Wall. [74 U. S.] 347; Secretary v. McGarrahan, 9 Wall. [76 U. S.] 298; U. S. v. Wright, 11 Wall. [78 U. S.] 648; U. S. v. Adams, 7 Wall. [74 U. S.] 463; U. S. v. Wright, 11 Wall. [78 U. S] 648; Works v. Junction R. Co. [Case No. 18,046]; 39 Eng. Law & Eq. 553; Wilcox v. Jackson, 13 Pet. [38 U. S.] 498.

Congress has exclusive power to legislate, and when exercised, all parties must conform. Wilson v. Blackbird Creek Mach. Co., 2 Pet. [27 U. S.] 245; 13 How. [54 U. S.] 578; U. S. v. New Bedford [Case No. 15,867]; Gilman v. Philadelphia, 3 Wall. [70 U. S.] 713; U. S. v. Railroad Bridge Co. [Case No. 16,114]; Columbus Ins. Co. v. Curtenius [Id. 3,045]; Ang. Water Courses, 555; Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1.

The government has the right to maintain suits in equity for injunction on such cases. U. S. v. City of Duluth [Case No. 15,001].

J. W. Cary and Gregory & Pinney, for defendant.

The United States has no right to authorize bridge. Wheeling Bridge Case, 13 How. [54 U. S.] 583; Gilman v. Philadelphia, 3 Wall. [70 U. S.] 713. If bridge is not an obstruction in fact, no injunction can issue. The question, therefore, is, will the bridge be a nuisance? Mississippi & C. R. Co. v. Ward, 2 Black [67 U. S.] 485; Barnes v. City of Racine, 4 Wis. 454. Statute of Wisconsin has conferred right to build bridge (Laws 1872, c. 119, § 10, subd. 5) and the state of Minnesota has given its consent by special act.

Decision of secretary not final nor conclusive. Lindsey v. Hawes, 2 Black [67 U. S.] 554; Garland v. Wynn, 20 How. [61 U. S.] 6.

DRUMMOND, Circuit Judge. The bill asks for an injunction in this case, because the defendant has commenced a bridge across the Mississippi river, and a navigable slough of the same, about two miles above the city of La Crosse, and has placed materials there which obstruct the navigation.

When the defendant fixed upon that point for the construction of a bridge, the secretary of war was duly notified, and after hearing the parties fully upon the subject, disapproved of the construction of a bridge there. The secretary of war decided that a due regard to the security and convenience of navigation, and convenience of access and wants of other railways crossing the river, would not permit the building of a bridge at that place, and therefore disapproved of the same.

The principal question is, whether the secretary of war had the authority to declare that the bridge should not be built at the point where the defendant proposed to build it, and this depends upon the construction of the acts of congress of the 1st of April, 1872, and of the 4th of June of the same year, authorizing and regulating the construction of bridges across the Mississippi river.

The Mississippi is a great national highway, the navigation of which is free to all citizens of the United States. If bridges are to be thrown across it, there can be no doubt of the authority of congress to declare that they should be so constructed as to impede in the least possible degree the navigation of the river; or to say how many shall be constructed; or to prohibit their construction altogether. This authority grows out of the national character of the river, as a great navigable channel of travel and of commerce. It follows from this that congress can prescribe the place and the manner of construction, so as not to interfere with the navigation, and when congress has legislated as to the construction of bridges on the Mississippi, within certain limits, and declared the mode of construction, they can only be built in the way pointed out by congress. Therefore, if any individual or corporation attempts to construct them otherwise, or elsewhere, then congress has directed, the United States must have the right to prevent it: and there is no doubt that this can be done through the civil process of the courts.

Then what terms has congress prescribed for the construction of the bridge proposed to be built by the defendant in this case? They are contained in the acts of congress already referred to. The first section of the act of April 1, 1872, authorizes the construction of a bridge across the Mississippi river at such point on the river within 15 miles of the town of Clinton, in the state of Iowa,

as may accommodate the Chicago, Burlington & Quincy Railway, and its connections on the west side of the river. And this section contains various directions as to the manner in which the bridge is to be constructed; and, also, several provisos, one of which is that it is not to interfere with the bridge already constructed at Clinton; and another is that it shall not be considered such interference provided it is necessary to cross the approaches to that bridge.

The second section of that act also declares still further in what manner the bridge shall be constructed, whether it is to be a draw-bridge or a bridge without a draw, the space between the spans, the width of the draws, and various other matters connected with the bridge. The third section declares that a bridge constructed in the manner pointed out in the previous part of the law shall be a lawful structure, and shall become a post route. The fourth section provides that when a bridge has been constructed in the way pointed out, different railway companies may use the bridge and its fixtures and machinery, upon such terms and conditions as shall be prescribed by the secretary of war, provided the parties cannot agree among themselves. Then follows the fifth section, which has been so often referred to in the argument. That declares "that the structure herein authorized (obviously referring to the construction of a bridge at a point on the Mississippi river within fifteen miles of the town of Clinton) shall be built and located under and subject to such regulations for the security of navigation of said river as the secretary of war shall prescribe."

The first section declares where the bridge shall be built, and for what purpose. It was to accommodate the Chicago, Burlington & Quincy Railway, and its connections on the west side of the river. Undoubtedly the secretary of war was subject to the conditions contained in the first section—he could not go beyond them. But the fifth section contains a qualification of the terms and conditions in the first section which the secretary of war was to see should be carried out. They were, that while it was to be constructed for a particular purpose, it should be so constructed that the security of navigation of the river should not be interfered with.

And therefore it became the duty of the secretary of war, under this fifth section, when the question was presented to him of the construction of a bridge at a particular place, as stated in the first section, to see that it should be so constructed as to preserve the navigation of the river.

That being so, I think we are enabled to construe the remainder of this law. The sixth section authorizes the Muscatine & Western Railroad Company to construct and maintain a bridge across the Mississippi river at the city of Muscatine in the state of Iowa. This bridge was to be constructed according to the terms and conditions contained in the previous parts of this law, subject to them in all respects; but of course only so far as the language made the case applicable. As to this, and as to the seventh and eighth sections, that part of the first section which refers to the Clinton bridge would not be applicable.

Then, as to the bridge authorized to be constructed at Muscatine, the fifth section applied to it, and while the section limited the construction of the bridge at Muscatine, still the secretary must see that it should be so constructed that the navigation should not be impaired or affected.

Then the seventh section, which refers to the construction of a bridge between the counties of Carroll and Whiteside, in the state of Illinois, and the counties of Jackson and Clinton in the state of Iowa, uses this language: "That a bridge shall be constructed and maintained at any point that these companies may select." And the same language is used in the eighth section, which particularly refers to this defendant, and authorizes the construction of a bridge between the county of La Crosse, in the state of Wisconsin, and the county of Houston, in the state of Minnesota. But in both these sections the construction of the bridge in each case is subject to all the terms and requirements contained in the foregoing sections of the act.

Then the question is, how far the fifth section affects the eighth section, and whether it was intended by the law-makers that, in authorizing the bridge to be constructed between the county of La Crosse, in Wisconsin, and the county of Houston, in Minnesota, the secretary of war was to determine, as to the construction and the location of the bridge whether the point that they selected would interfere seriously with the navigation of the river, and so had the right to declare that the bridge should not be constructed there.

There is an apparent conflict between this section and the fifth section, provided we construe the word "locate" in the fifth section as meaning what in its popular sense it is supposed to mean, the placing of the bridge at a particular point on the river. But we think that the fifth section must be construed as qualifying the seventh and eighth sections precisely in the same way as it qualified the first section, and that it meant to say, "You can construct your bridges at such points as you may select, subject to the power or authority of the secretary of war to decide whether that point is such as to seriously affect navigation of the river, and if it does, that he shall have the right to say that the bridge cannot be constructed there."

Congress, as has been said, would undoubtedly have the right to declare where the bridge shall be constructed. Having that right, it can delegate the authority to one of

the chiefs of a department, and confer upon him the right, and that we think it has done in this case.

The individual or the corporation constructing a bridge has his or its own interest alone to consider in the construction, but the secretary of war, as representing the United States, has to consider other interests—First, the navigation of the river; secondly, under the act of June 4, 1872, the convenience of access to the bridge; third, the wants of railways and highways crossing the river.

So that I think that the language as used in the seventh and eighth sections must be considered as qualified by the language contained in the fifth section. And this will appear more manifest from the act of June 4, 1872. The view I was first inclined to take of that act was that it might be considered as only referring to acts that were subsequently to be passed by congress, authorizing the construction of bridges. It undoubtedly does so refer, and intended to declare that if congress should thereafter pass any act authorizing the construction of bridges upon the Mississippi river, the terms and conditions contained in the fifth section of the act of April 1, 1872, should be considered as applying.

But it is probable that congress had a still further object in the passage of this last act, inasmuch as the language contained in the seventh and eighth sections of the law of 1872 was general. They intended to make the case so clear in relation to any bridge that might thereafter be constructed as to remove all doubt upon the subject, and therefore said explicitly, that in relation to any bridge thereafter constructed the terms of the fifth section of the act of April should apply. And then the act of June 4th adds this clause to the previous part of the act, "that in locating the bridge the secretary of war shall have due regard to the security and convenience of navigation, to convenience of access, and to the wants of all railways and highways crossing the river;" rather, I think, as my brother judge has said, adding significance and point to the meaning of the term as used in the fifth section of the act of April, and showing that the secretary of war must exercise a discretion as to these particular matters in the location of the bridge.

One of the principal objects was to prevent the multiplicity of bridges, to have as few bridges as possible across this great river, and, therefore, to compel railways and highways which must make the transit of the river, and which were not widely separate, to use one bridge.

Now this is a great power undoubtedly, and affects immense interests, and the defendant feels, with some justice, perhaps, that it has been exercised in derogation of its own peculiar rights and privileges. But that was a matter for congress to determine. The authority of congress over the river is manifest. It can exercise it against the interest of particular corporations or localities, and, as it is a legislative power, it is not for the judicial department of the government to interfere with it.

It is perhaps true that the secretary of war has only a negative upon the acts of the defendant, as to the construction of a bridge, and that he can only indirectly declare where the bridge shall be constructed. But that he has the right under these laws to say that the bridge shall not be constructed at a given point, because if constructed there it will interfere unnecessarily with the navigation of the river, and that there will not be due regard to the convenience of access, and to the wants of railways and highways crossing the river, we can have no doubt.

It may be difficult for us to understand as a matter of fact, looking upon this river in the light of the evidence, how it is that a bridge cannot be built anywhere else except at the foot of Mount Vernon street, between the counties of La Crosse and Houston, but still that is not a question for our consideration.

On the whole, therefore, we think, for the reasons stated, that it is competent for the United States to come into this court and ask that the defendant shall not be permitted to construct the bridge at the place proposed, because the secretary of war has indicated his disapprobation of that point. Technically, perhaps, his objection is not in such form as it should have been. But his disapprobation is apparent, and cannot be ignored by the court.

The injunction will therefore be ordered.

[The injunction was subsequently made perpetual. Case No. 15,779.]

Case No. 15,779.

UNITED STATES v. MILWAUKEE & ST. P. RY. CO.

[5 Biss. 420.] [1]

Circuit Court, W. D. Wisconsin. Sept., 1873.

BRIDGES—NAVIGABLE WATERS—POWER TO LOCATE—CONDITIONS PRESCRIBED BY SECRETARY OF WAR.

1. The federal courts will not review a decision of the head of the department on a matter referred to him by congress for determination.

2. In the construction of statutes courts should give to words their ordinary meaning.

3. In the act of June 4th, 1872 [17 Stat. 215], congress designed that the secretary of war should locate the bridge across the Mississippi river, to accommodate all the interests involved.

4. By the fourth section of the act of April 1st, 1872 [17 Stat. 46], the secretary of war had authority to pass upon the location of the bridge, and this court will not review his decision, but will assist in enforcing it.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

5. The secretary having disapproved a location selected by the company, it has no right to construct a bridge at that point.

6. A disapproval by the secretary is binding, though not expressed in the manner and form required by the act.

7. Where congress has prescribed the limitations and conditions upon which a bridge may be constructed, a company has no right to build a bridge otherwise.

8. The federal courts have jurisdiction of a suit by the United States to restrain the placing of obstructions in its navigable waters.

[This was a motion for an injunction to restrain the defendants from building a bridge across the Mississippi river, in the vicinity of La Crosse. For hearing on an application for preliminary injunction on bill and affidavits, see Case No. 15,778.]

HOPKINS, District Judge. The right of the government to the injunction applied for is based upon the decision or action of the secretary of war under the authority conferred on him by section five of the act of April 1st, 1872 (17 Stat. 46), and by the act of June 4th, 1872 (17 Stat. 215). The extent of that authority is the first question to consider and settle.

It is claimed by the plaintiff that by those acts he was empowered to pass upon the question of the location of the bridge by the company; that the right given to them by the eighth section of the act of April 1st, supra, to select the point to build the bridge was subordinate to the judgment of the secretary of war; that the selection by the railroad company was not final, but subject to the approval or disapproval of that officer.

If this is the true construction of the acts, the power of the court in the premises is greatly restricted, for we think the doctrine is well settled by the United States supreme court, in an unbroken series of decisions, that when a matter is referred to one of the heads of the department for his determination which involves the ascertainment of questions of fact in order to a proper exercise of his judgment, that the decision of such officer is conclusive, unless the act conferring the authority, or some other act, authorizes an appeal or review of such decision. U. S. v. Wright, 11 Wall. [78 U. S.] 648.

This court, therefore, is not authorized to review his decision or inquire whether his reasons assigned for it are sufficient, if the acts clothe him with such authority. If such an officer, in the discharge of the duty imposed upon him, makes a mistake, the remedy of the party injured is by appeal to the law-making power, and not to the courts.

The defendant denies that the secretary was authorized by either of the acts above referred to to pass upon the question of the location of the bridge, and insists that their right to locate the point to build the bridge was absolute, and that the power of the secretary related only to the manner of constructing, and to the plans of the bridge and the way and manner of "locating" the bridge at such place; that the word "locate" has reference to the position and construction of the bridge at the point selected by the company, and that the secretary's action in disapproving the location, and his claim to decide that question, were without authority and void; also that the word "locating," used in the act of June 4th, must be held to have been used in the same sense; that the direction to the secretary in that act, to have regard to the convenience and accessibility of other railroads and highways to the place selected, related to the mode of construction so as to accommodate such interests, but did not allow him to forbid the building of the bridge at such point. This, I think, is too narrow and restricted a meaning to give to the word "locate" as used in these acts.

Courts in the construction of statutes are to give to words their ordinary meaning; to presume that they were used by congress in their ordinary sense; neither to enlarge nor restrict unduly their signification, and if possible give to every word its full meaning; when that is impossible, to give such construction as best to carry out the intention of the legislature as gathered from the whole act.

To my mind the act of June 4th throws great light upon the meaning of congress on the subject. They are charged with the duty of preserving and protecting the free navigation of the Mississippi river. They have exclusive jurisdiction over that subject, and as it has now become necessary in the march of improvement, and to satisfy the demands of commerce, to permit transit across the river by means of bridges, which, however skillfully planned and constructed, do, to some extent, interfere with the free use of the river, it is their duty to limit the number of such bridges as much as possible; and in order to accomplish that purpose, it seems to me that congress, by the act of June 4th, supra, ordained that, in addition to the authority conferred by the fifth section of the act of April 1st, that "in locating any such bridge, the secretary of war shall have due regard to the convenience and security of navigation, to the convenience of access and to the wants of all railways and highways crossing said river." The object of this provision, to my mind, was to require the secretary of war to have the bridge located so as to accommodate all those interests, and thus prevent the multiplicity of bridges at the same locality.

I cannot conceive of any other purpose for directing the secretary in the discharge of his duties under the act to have regard to such other interests. The fourth section of the act of April 1st authorizes the secretary to prescribe the terms and conditions upon which other railroad companies may use such bridge. Thus the intention of congress is manifest, that the secretary of war was clothed with the authority of passing upon the question of locality, and might, as a matter of course, disapprove of any location that should not

fulfill the conditions of the act; that therefore he had jurisdiction and authority to pass upon the question whether the place selected by the defendants would fulfill the conditions and requirements of the act, and having decided that it would not, the court cannot review his decision; but must, to the extent of its power, assist in enforcing it when appealed to for that purpose.

It is unnecessary to pass upon the question of the right of the secretary to locate a bridge; but if he has the authority to reject the location of the defendants, practically as well as logically, such power would spring from his right to negative all selections or locations made by others. But this is perhaps immaterial to the decision of this motion, and it is noticed simply because it was so earnestly pressed upon our attention on this argument.

The attorney-general, in his opinion read on the argument, holds that the secretary had not the authority to locate, by which I presume he meant primarily, but had the authority to disapprove of a location selected by the company, and that when he does so, the bridge cannot be constructed by the company at such point. That construction is in accordance with my interpretation of the law.

The defendant has made a very strong case in the affidavits read on this motion upon the merits of the case, and has shown by affidavits of men skilled in the navigation of the river, and in the construction of railroad bridges over navigable waters, that this location is less injurious to the navigation of the river than the one indicated by the secretary of war; and that it is equally as convenient and accessible to other railroads and highways. If we were at liberty to pass upon that branch of the case, we should feel compelled to hold so. But, as before stated, we think we are not authorized to consider that question on this motion. In saying this we do not mean to be understood as questioning the correctness of the decision of the secretary, for he evidently had not this evidence before him when he made his decision, and what we say touching the merits is predicated upon the facts proven before us on this motion.

The question was raised by defendant that the secretary had not disapproved of the location in the form and manner as required by the act. It may be that his proceedings have not been strictly formal, but we find no difficulty in discovering from the records that he had repeatedly disapproved of the location, and had finally notified the defendants that the matter was fully settled and closed as far as he was concerned, so that the objection is not tenable.

It was also claimed by the counsel for the defendant that they had a right to build a bridge without the authority of congress. Suppose that to be so in places where congress have not acted on the subject, I think the right does not exist where congress have acted and prescribed the limitations and conditions upon which a bridge may be constructed, as they have done in this case. Wilson v. Blackbird Creek Manuf'g Co., 9 Wheat. [22 U. S.] 1.

The objection that the court has not jurisdiction, and that the United States cannot maintain a suit in this court to restrain the placing of obstructions in its navigable waters within this district, and to compel their removal, is not sustained by the authorities, and it is sufficient to say that the right of the government to proceed in equity by bill in such cases is clear upon principle and authority.

I therefore think that the motion of the plaintiff for the injunction to restrain the defendants from building the bridge across the Mississippi river at the point mentioned should be granted, and an injunction for that purpose will issue in accordance with the prayer of the bill.

Case No. 15,779a.

UNITED STATES v. The MINEOLA.[1]

District Court, S. D. New York. May 22, 1879.

COLLISION BETWEEN STEAMERS—EXCESSIVE SPEED—SIGNALS.

[1. A steamer coming down the East river at night is in fault for approaching, at a speed of 10 miles an hour, a group of three vessels crossing the river both ways in front of her, especially after she has failed to get any answer to her first signal.]

[2. Vessel *held* not in fault for failure to observe a weak signal blast given by an approaching steamer which was not seen because of the interposition of another steamer.]

[3. The ferryboat M., going from New York to Brooklyn at night, was turning to go up the East river while the steamer P. was coming down midchannel. Between them, obstructing the view, were two other steamers, going towards the New York shore. The M. discovered the P. as the latter was sheering towards the Brooklyn shore to pass behind the intervening steamers, and signaled that she would pass the P. to starboard. The latter, however, answered that she was going to port, whereupon the M. immediately commenced backing, and continued to do so until struck by the P. *Held*, that the M. was not in fault.]

[This was a libel by the United States against the steam ferryboat Mineola to recover damages for a collision between the Mineola and the lighthouse tender Putnam.]

Sutherland Tenny, Asst. U. S. Dist. Atty.

Mr. Duer and B. D. Silliman, for claimants.

CHOATE, District Judge. This is a libel to recover damages caused by a collision between the steamer Putnam, a government lighthouse tender, and the steam ferryboat Mineola. The collision happened on the evening of the 21st of March, 1876, about 8 o'clock, in the East river. The night was clear and starlight; the tide, strong ebb; the wind, fresh from the southwest. The Putnam was coming down the East river,

[1] [Not previously reported.]

bound from Northport, L. I., to Governor's Island. The Mineola was bound from her slip at Fulton Ferry, New York, to her slip at Fulton Ferry, Brooklyn. When the Putnam was about opposite Catharine Street Ferry, on the Brooklyn side, she observed the Mineola leave her slip on the New York side. The Putnam was then coming down about the middle of the river at a speed, with the tide, of about 10 miles an hour. Almost at the same time that the Mineola left her slip, the ferryboat Hamilton left the Fulton Ferry slip on the Brooklyn side for Fulton Ferry, New York. The steamship City of Hartford had come down the East river on the Brooklyn side, and was at about the same time rounding to in the river to go into her berth at Peck Slip. The wheels of the City of Hartford were stopped, and she was ahead of the Hamilton, and so much in her way that the Hamilton found it necessary to slow and stop for her, after leaving her slip. The Mineola, in going out on an ebb tide, went out on a starboard wheel to counteract the effect of the tide, and she could not so overcome the effect of the tide as to head up the river till she got about to the middle of the stream. When the Putnam was nearly abreast of Catharine Ferry, on the New York side, the Mineola was clear of her slip and the Hamilton clear of hers, and both steering nearly straight across the river, and the City of Hartford nearer the middle of the river than the Hamilton, and heading towards the New York shore. The Putnam then, when the two ferryboats were well out in the river, gave one whistle, a single blast, which does not appear to have been observed on either the Hamilton or the Mineola. This may be accounted for by the fact that the whistle of the Putnam was not loud, and the wind was towards her. She proceeded on her course, and, no answer being given, she gave another single whistle. This was heard on the Hamilton, and understood by her to be a signal that the Putnam would cross her bows. It was not heard on the Mineola. At this time the relative positions of the vessels had changed. The Mineola had reached the middle of the river, and was turning so as to head up stream, but not yet heading directly up. The Hamilton had gone so far ahead as to be between the Mineola and the Putnam, and the City of Hartford was lying across the river, slowing, moving towards her slip, and still a little in advance of the Hamilton. The pilot of the Hamilton, on receiving, as he supposed, this signal from the Putnam, was just making his preparations to respond to obey the signal, when he observed the Putnam suddenly sheer towards the Brooklyn side, to pass under his stern, and he therefore kept on his course. Almost immediately after this signal was given by the Putnam, and this change of her course, the Mineola, being now headed well upstream, saw the white light—the masthead light—of the Putnam over the upper works of the Hamilton. The pilot of the Mineola made it out to be a steamer coming down the river, and heading somewhat towards the Brooklyn side, and evidently coming astern of the Hamilton and the City of Hartford. This second signal whistle of the Putnam had been intended as a signal for the Mineola, which had been seen by the Putnam before the Hamilton intervened between them. The pilot of the Mineola, on seeing the light of the Putnam, and observing that she was intending to go astern of the Hamilton, concluded that the Putnam and the Mineola could not safely undertake to pass each other on the port side after the Putnam should pass astern of the Hamilton; that there would not be room or time enough for them to execute this maneuver after the Putnam got by the Hamilton. He accordingly gave a signal of two whistles, indicating his intention to pass the Putnam on the starboard side. The Putnam immediately responded with a single whistle. She was still hidden from the Mineola by the Hamilton. The Mineola, on receiving this signal, instantly slowed, stopped, backed, and continued to back till the collision. The Putnam, at or before the time she got the two whistles from the Mineola, stopped her engines. She did not back. Having the tide with her, she continued to have considerable headway. She passed the Hamilton very near her stern. I think the preponderance of the testimony is that she sheered to starboard at or immediately after getting clear of the Hamilton; that, when the Hamilton first uncovered her to the Mineola, the green light of the Putnam was seen from the Mineola; that then, as she came on her, her green light disappeared, and her red light appeared. This is the testimony of the lookout on the Mineola, and it corresponds with the movements of the Putnam, as observed both from the Hamilton and the Mineola. The two vessels came together, their port sides striking each other a glancing blow, doing some damage.

That there was fault on the part of the Putnam cannot be doubted. She was coming at too high a rate of speed as she approached this group of vessels crossing ahead of her both ways, in a very narrow part of the river; and especially as her signals were not answered, and she could not certainly determine how, or upon what course, the Mineola was going, she should have sooner slowed and stopped, or, having run on as she did till she stopped, she should then have backed. The vessels were so near together at the time the Putnam stopped that they came together, although the Mineola instantly backed, on getting the Putnam's answer of one whistle to her own signal of two whistles.

The only serious question in the case is whether the Mineola was also in fault. It is urged that she was in fault in not observ-

ing the first or second signals given by the Putnam, and in not, in obedience to those signals, keeping towards the Brooklyn side, in order to pass the Putnam on her port side. In respect to the first signal given by the Putnam, as the vessels were then so far apart, and especially as there were two steamboats in the river nearer to the Putnam than the Mineola, for either of which it might well have been supposed to have been intended, if it had been observed, it can hardly be claimed to have been a fault that it was not taken notice of by the Mineola. It is to be observed, also, that this first whistle was apparently not heard by the Hamilton, although the Putnam was seen from the Hamilton at or about the time it was shown to have been blown. This is of some importance as corroborating the testimony to the effect that the Putnam whistle was not a loud whistle. I do not think the testimony warrants the conclusion that the Mineola was in fault in not observing the second whistle of the Putnam. The Mineola was then only partly turned up the stream. The Putnam was hidden from her by the Hamilton and the City of Hartford. It is doubtful if the whistle was loud enough to reach the Mineola, except very faintly. If it had been heard, and had been understood to come from the Putnam, the natural conclusion of the pilot of the Mineola would have been that it was intended for the Hamilton, as the pilot of the Hamilton himself understood it; and, if this had been so, it could not have called for any movement of the Mineola to avoid the Putnam, since the Putnam must, if intending to cross the bows of the Hamilton, have sheered sharply towards the New York shore, and cleared the Mineola without any change in the course of the Mineola straight up the river, which she was then on the point of taking. The real question is whether the judgment of the pilot of the Mineola was correct, when he made the white light of the Putnam over the Hamilton, that the only safe way for them to pass with the Putnam going astern of the Hamilton was on each other's starboard hand; and on this question, while the testimony is conflicting, I think the preponderance of the evidence is in favor of the Mineola. Her headway was checked by turning to head up the river. The distance of the Hamilton ahead was short. The Putnam was obviously on a sheer towards Brooklyn to get by the Hamilton. If the Putnam kept on in the same course, she had ample room between the Mineola and Brooklyn shore to pass safely. If the Mineola attempted to run between the Putnam and Brooklyn with the Putnam on this sheer, it was at least doubtful if it could be done Having formed this judgment as to the situation, the pilot of the Mineola gave the proper signal, and when the Putnam gave the contrary signal he instantly did all he could to avoid the collision. He instantly backed, and continued to back till the boats came together. The testimony does not show that the movements of the Mineola were governed, as suggested by the libellants' counsel, by the motive on the part of the pilot to keep a convenient position to make his slip, rather than to avoid the Putnam and prevent a collision. The libellants have failed to sustain their allegations of negligence against the Mineola, and the libel must be dismissed. Libel dismissed.

Case No. 15,780.

UNITED STATES v. MINER.

[11 Blatchf. 511;[1] 19 Int. Rev. Rec. 101.]

Circuit Court, S. D. New York. March 11, 1874.

CRIMINAL LAW—FORMER JEOPARDY—POSSESSION OF COUNTERFEIT PLATE.

A defendant was tried on an indictment charging him with the possession of a counterfeit plate, and was acquitted. A second indictment was found against him, charging him with the possession of another counterfeit plate. He pleaded to the latter indictment, that he had been once tried and acquitted of the same act of possession stated therein. From the evidence given on such trial, and which was the evidence to be given on the trial of the second indictment, it appeared, that the act of possession charged was but a single act, and that the first trial necessarily involved a determination of the act of possession charged in the second indictment. The verdict of the jury on the first trial met with the approval of the court, and it advised the district attorney that the defendant ought not to be again put on trial upon the same evidence, and that a nolle prosequi ought to be entered on the second indictment. The district attorney accordingly moved that a nolle prosequi be entered, and the motion was granted.

[This was an indictment against Joshua D. Miner, charging the possession of a counterfeit plate, with unlawful intent.]

Ambrose H. Purdy, Asst. Dist. Atty., and Ketchel & Jelliff, for the United States.

William Fullerton and Charles F. McLean, for defendant.

BENEDICT, District Judge. In this case, the defendant has interposed a plea of former jeopardy. He is, in the present indictment, charged with the possession of a certain $2 counterfeit plate, with an unlawful intent, and the plea avers that he has been once tried and acquitted of the same act of possession stated in this indictment. It is agreed, that the evidence which the district attorney proposes to give on the trial of the present indictment is, in every respect, substantially the same as that given upon the trial of the former indictment, and that it may be referred to upon this issue. This evidence shows the existence of two counterfeit plates, with the possession of one of which the defendant was charged in the former indictment, and as to the possession

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

of the other in this. But, from the evidence, the court can see that the act of possession charged was, as a fact, but a single act, and that the trial of the former case necessarily involved a determination of the act of possession charged in this indictment. The two plates were shown to have been so connected at the time, that the possession of one necessarily involved the possession of the other. Where two counterfeits are engraved upon the same piece of metal, or otherwise so connected as to form, in substance, but a single article, and the charge is that of unlawful possession, it would seem that the possession of both may be made the basis of a single charge, and that separate trials for each engraving should not be permitted. Upon the peculiar facts of this case, the inclination of my mind is, therefore, in favor of the defendant's plea. But, if the law be otherwise, I have no hesitation in advising the district attorney that it is not expedient again to present to a jury the testimony exhibited upon the trial of the former indictment against this man, where the possession of the two plates was also proved. In that case, a very intelligent jury refused, upon the evidence produced, to find that the defendant had the possession of the plates as charged. The conclusion of that jury met with the approval of the court, and it cannot, with propriety, be impugned; and the prisoner should not be again put on trial upon the same evidence. Rex v. Davis, 6 Car. & P. 177. If, therefore, as a matter of law, the defendant's plea be not sustainable, the alternative would be to advise the district attorney to enter a nolle prosequi in the case. In either event, there would be no trial of this indictment.

Upon the delivery of the foregoing opinion, the district attorney moved that a nolle prosequi be entered, and the motion was granted.

Case No. 15,781.

UNITED STATES v. MINGO.

[2 Curt. 1;[1] 17 Law Rep. 435; 3 Liv. Law Mag. 275.]

Circuit Court, D. Massachusetts. June 5, 1854.

HOMICIDE—FELONIOUS KILLING—SELF-DEFENCE—JURISDICTION—TRIAL—RIGHT TO OPEN AND CLOSE.

1. In a capital case the junior counsel has a right, in opening, to argue at length the law and the facts, but only one counsel has a right to close, except where all the witnesses examined by the defendant's counsel have been previously examined before the grand-jury, and were called at the trial by the government.

2. M. killed J. with a dangerous weapon, and the evidence was contradictory as to provocation, and as to which was the assailant. The court instructed the jury that it was incumbent upon the government to prove a felonious killing, and if upon the whole evidence, the government had failed to satisfy the jury beyond a reasonable doubt, that the killing was felonious, the verdict of the jury must be: "Not guilty of murder."

[Cited in brief in U. S. v. Sickles, Case No. 16,287a.]

[Cited in brief in State v. Evans, 65 Mo. 576.]

3. It is not usual to call upon the government to offer direct evidence to prove that the defendant was first apprehended within the district where he is tried, and if there is evidence to show that the defendant committed the offence in a ship then on the voyage direct to B., a port in the district, and the prisoner is in custody in B., the jury is warranted in finding the fact that he was first brought into B.

4. If two fight with deadly weapons in a mutual combat, begun in hot blood, and death ensue, it is manslaughter.

5. When killing in self-defense is justifiable.

[Cited in State v. Donnelly, 69 Iowa, 707, 27 N. W. 370.]

This was an indictment for murder, committed by the defendant [Joseph Mingo] upon William Johnson, on board of the American ship John Dunlap, on the high seas. At the trial the killing was fully proved, and the defendant contended that it was done in excusable self-defence. From the evidence it appeared that the defendant and the deceased were both seamen, on board of an American ship, which at the time of the homicide, was on the voyage from Apalachicola to Boston; that being previously acquainted, they had shipped at Boston for the voyage out and back; that the defendant was a Haytien negro; and the deceased a colored man from Baltimore; and expressions of ill-will and anger by each party to the other, before and on the day of the killing, were put in evidence. The evidence was also uncontradicted, that about eight o'clock on the morning of the thirtieth of January, after some conversation, the two negroes came together on deck, near the fore-hatch, Johnson holding a large hatchet, and Mingo a sheath knife, in his right hand, that each used his weapon against the other, and that Johnson received three stabs in the belly from Mingo's knife, and died of one of them next morning. But as to which party made the advance and attack, on which side of the deck they met, in what direction they first moved, at what time in the affray either armed himself, at what time the stabs were given, and what words were used before they met, the testimony of nine witnesses, who were on deck and saw the affray more or less completely, was contradictory. The defendant's counsel prayed the court to instruct the jury in conformity with the opinion of Mr. Justice Wilde, in Com. v. York, 9 Metc. [Mass.] 93: "1. That when the facts and circumstances accompanying a homicide are given in evidence, the question whether the crime is murder or manslaughter, is to be decided upon the evidence, and not upon any presumption from the mere act of killing. 2. That if there be any such pre-

[1] [Reported by Hon. B. R. Curtis, Circuit Justice.]

sumption, it is a presumption of fact, and if the evidence leads to a reasonable doubt, whether the presumption be well founded, that doubt will avail in favor of the prisoner. 3. That the burden of proof in every criminal case, is on the commonwealth to prove all the material allegations in the indictment, and if, on the whole evidence, the jury have a reasonable doubt whether the defendant is guilty of the crime charged, they are bound to acquit him." The defendant's counsel also prayed the court to instruct the jury, that as no evidence had been offered to prove that the defendant was first apprehended, or brought within this district, he was entitled to an acquittal.

B. F. Hallett, U. S. Dist. Atty.

J. H. Prince and F. E. Parker, for the prisoner.

Before CURTIS, Circuit Justice, and SPRAGUE, District Judge.

Before the argument, CURTIS, Circuit Justice, stated to the counsel that "in a capital case the junior counsel has a right to argue at length the law and the facts, but only one counsel has a right to close. In this case, however, as all the witnesses are government witnesses, and none were called for the defence but those whom the government declined to examine, two counsel will be permitted to close, in full, on the law and facts, not, however, making this a precedent for cases in which the prisoner's counsel calls witnesses not examined before the grand-jury, and sworn on the part of the government."

In summing up to the jury, CURTIS, Circuit Justice, said: To bring this case within the jurisdiction of the court, the jury must be satisfied, 1. That the offence was committed on board an American vessel; 2. That the deceased and the prisoner were of the crew; 3. That the prisoner was first apprehended within this district. The first proposition is admitted by his counsel; the second, there is much and uncontradicted evidence to prove. Of the third, no direct evidence has been offered. But you have evidence to show that the ship was bound to Boston, and that the defendant is in custody in Boston. It is not usual to call upon the government to offer direct evidence on this point, and during the introduction of the evidence, the defendant's counsel made no point upon it, so as to induce the government to bring forward direct evidence. The evidence now in the case to which I have alluded, is sufficient in law to warrant the jury in finding the fact.

The fact of the killing being proved, and not denied, one of three views may be taken of it: First, that Mingo first attacked Johnson; that he made the attack with a dangerous weapon; and that though Johnson resisted with a dangerous weapon, Mingo killed him. If a man attacks another with a dangerous weapon, and kills him, no sufficient provocation appearing, the law presumes malice from the act. And if you find that Mingo attacked Johnson with a dangerous weapon, and killed him, without other provocation than words, it is murder. On the question of the burden of proof, after consultation, the court are of opinion that it is incumbent upon the government to prove a felonious killing; and if upon the whole evidence the government has failed to satisfy the jury beyond a reasonable doubt, that the killing was felonious, the verdict must be, not guilty. After recapitulating the evidence, the judge continued: It is your province, gentlemen, to determine whether such a case is proved; but I am at liberty to say, and feel it my duty to say, that I do not think the government has proved a case of murder beyond a reasonable doubt.

The second view is, that previous ill-will was borne by each of these men to the other; that, being near each other on deck, words passed between them; and that both being excited and willing to fight, they armed themselves, simultaneously, or nearly so, with dangerous weapons, both fought, and Johnson was killed. You will say whether it is made out beyond a reasonable doubt, that it was a mutual combat, in which both engaged willingly. If so, it is manslaughter. If the defendant entered into the combat willingly, he cannot say that he killed his adversary in self-defence. Where such encounters take place deliberately, as in duels, and homicide ensues, it is murder; but where it is in hot blood, such homicide is manslaughter.

Third. If it was not a mutual combat, but Johnson made the first attack on Mingo with a deadly weapon, yet if Mingo could reasonably have avoided killing his adversary, without certain and immediate danger of his life, or of great bodily injury, the homicide is not excused as being in self-defence. But in considering whether Mingo could reasonably have avoided killing Johnson, the law does not demand of him the same coolness and the same deliberate exercise of judgment, which you, viewing the circumstances after the event, and being in safety, can and will exercise. It requires him not to avail himself of such an occasion to indulge his passion. He must have acted from a desire to protect his own life, and not from a desire to kill his adversary; and he must have actually believed, at the moment, that the only way to protect himself from certain and immediate danger of his life, or of great bodily harm, was to stab his adversary; and the circumstances must have been such, that you can see that Mingo might, reasonably, and did actually so believe, at the time he struck the fatal blow. If the circumstances were such as that you can see these things, then you have a right to say, and should say, he acted in self-defence, and is not guilty of manslaughter.

The jury found the defendant not guilty.

Case No. 15,782.

UNITED STATES v. MINIFIE.

[2 Cranch, C. C. 109.] [1]

Circuit Court, District of Columbia. Dec. Term, 1814.

WITNESS—FREED NEGRO.

A colored person who has been "made free in virtue of" act Md. 1796, c. 67, is not a competent witness against a white person.

Indictment, for larceny, against [Christopher Minifie] a white man.

Mr. Jones, for the United States, offered, as a witness, a black man who had obtained his freedom by being removed from Virginia to Maryland, contrary to the Maryland law of 1796, c. 67.

Mr. Key, for defendant, objected; and relied upon the fifth section of that statute, which declares that no slave "who shall be manumitted or made free by virtue of that act," "shall be entitled" "to give evidence against any white person."

THE COURT (CRANCH, Chief Judge, contra) rejected the witness.

CRANCH, Chief Judge, not having the statute then before him, supposed it referred only to voluntary manumission.

Case No. 15,783.

UNITED STATES v. MINTURN et al.

[21 Int. Rev. Rec. 182.]

Circuit Court, S. D. New York. April, 1872.[2]

CUSTOMS DUTIES — WITHDRAWAL BY VENDEE — LIABILITY ON BOND OF ORIGINAL IMPORTER.

Where original importers have entered goods for warehouse, and given a bond to secure the duties, and have subsequently sold the goods in bond and authorized the vendees to withdraw them from warehouse on payment of duties, and the goods are withdrawn without payment of the proper duties in full, the original importers are liable on their bond, after the withdrawal of the goods, for the balance of duties unpaid, and which should have been paid on the last withdrawal.

SHIPMAN, District Judge. This is a suit on a bond given to secure the payment of duties, dated August 2nd, 1865. The defendants, as the successors of Grinnell, Minturn & Co., are the principals, and Clark, the surety. The condition will show the object of the bond, and is as follows: "The condition of this obligation is such, that if the above named principals, or either of them, their or either of their heirs, executors, administrators, or assigns, shall, on or before one year from the date of the importation of the goods, wares and merchandise hereinafter mentioned, withdraw the said goods, wares and merchandise in the mode prescribed by law, from the public store or bonded warehouse, where the same may be deposited at the port of New York, and well and truly pay or cause to be paid unto the collector of customs of the said United States for said port, the sum of twenty-three thousand seven hundred and eighty-seven and $^{99}/_{100}$ dollars, or the true amount, when ascertained, of the duties imposed by laws now existing, or to be hereafter enacted, upon said goods, wares and merchandise, the same having been imported by them," etc. The goods referred to consisted of 580 packages of sugar, and were entered for warehouse and deposited in the public stores. The duties were ascertained and liquidated, the weight being 755,621 lbs.; rate of duty, 3 cents per lb.: amount of the whole, $22,668.63. On the 9th of August, 1865, Grinnell, Minturn and Co., the importers and owners of the sugar, sold the whole cargo to Gibson, Early and Co., of Cincinnati, and endorsed at the foot of the warehouse entry as follows: "We hereby authorize Messrs. Gibson, Early and Co. to withdraw the sugars described in this entry. (Signed) Grinnell, Minturn & Co., August 9, 1865." There were three withdrawals. The first for transportation, Gibson, Early and Co., August 17, 1865; the second for consumption, by Wylie and Wade, August 27, 1865, and the third, for consumption, by Wylie and Wade, Sept. 4, 1865. The last two withdrawals were made by Wylie and Wade, in pursuance of an authority to that effect signed by Gibson, Early and Co., and entered at the foot of both withdrawal entries.

The act of August 18, 1846, § 1 (9 Stat. 53), authorizes the warehousing of goods, and provides that after the prescribed formalities have been observed the said goods, wares and merchandise shall be taken possession of by the collector or chief revenue officer of the port, and the importer, owner or consignee. The act then points out the manner in which the stores shall be secured, and proceeds as follows: "There to be kept with due and reasonable care, at the charge and risk of the owner, importer, consignee or agent, and subject at all times to their order upon payment of the proper duties and expenses, to be ascertained on due entry thereof for warehousing, and to be secured by a bond of the owners, importers or consignees, with surety or sureties, to the satisfaction of the collector, in double the amount of said duties, and in such form as the secretary of the treasury shall decide." The sale in bond of the sugars in question was in the usual course, and in pursuance of a custom universally recognised among merchants and by the collector of customs. The several deliveries were made upon the withdrawal entries in the usual way and upon the usual authorization to the purchaser, with the single exception, that at the last withdrawal, the officers delivered the goods without first exacting the full amount of duties due the United States, leaving a balance of $1,506.99 unpaid. To recover this sum the present suit was brought. The defendants insisted that under the circumstances they are not liable for the amount claimed. Their argument is that their sales

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Affirmed in 106 U. S. 437, 1 Sup. Ct. 402.]

in bond are part of a system of dealing with warehouse goods, recognised and sanctioned by the government; that the latter treats the vendee as the owner, holds the goods as the primary security for the payment of the duties; and that the parties to the original bond are thenceforth no longer principals, but are sureties, and as such are entitled to the same protection as sureties in ordinary cases between individuals. They insist upon the application of the general principle that where a party releases any portion of a primary security he, to that extent, releases the surety and this, too, whether such discharge of the security is the result of a direct and intentional act, or the result of mere laches. Now it is clear upon the proof in this case that the permit issued to Wylie and Wade on the 4th of September, 1865, to withdraw the balance of this importation, leaving $506.99 of the duties unpaid, was fraudulently or negligently issued. It does not appear whether this was done corruptly or carelessly; but as fraud is not to be presumed in the present state of the proof, it must be deemed to have been issued negligently and improvidently. It was laches and gross laches. But assuming merely for the purpose of testing the right of the plaintiffs to the application of the rule above stated, that the plaintiffs, after the sale of the goods and the recognition of the vendees by the custom-house authorities, occupied toward the United States the position of sureties only, it does not, in view of the decided cases, follow that the laches of the agents of the government discharged the defendants. The doctrine that laches is not imputable to the government is too firmly fixed to be now shaken. U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720; U. S. v. Van Zandt, 11 Wheat. [24 U. S.] 184; Dox v. Postmaster-General, 1 Pet. [26 U. S.] 326; Hunter v. U. S. 5 Pet. [30 U. S.] 173; U. S. v. Lyman [Case No. 15,647].

In Dox v. Postmaster-General, Marshall, C. J., after commenting on the case of U. S. v. Kirkpatrick, and the case of U. S. v. Van Zandt, remarks: "These two cases seem to fix the principle that the laches of the officers of the government, however gross, do not of themselves discharge the sureties on an official bond, from the obligation it creates, as firmly as the decisions of this court can fix it." The same general principle pervades the other cases cited, and it follows that the claim of the defendants is untenable. Judgment must be entered for the plaintiffs for $2,145.94, being the amount of principal with interest to the first day of the present term.

[The judgment of this court was affirmed by the supreme court. 106 U. S. 437, 1 Sup. Ct. 402.]

Case No. 15,784.

UNITED STATES v. MISSISSIPPI, ETC., BOOM CO.

[See 3 Fed. 552.]

Case No. 15,785.

UNITED STATES v. The MISSOURI.

[9 Blatchf. 433;[1] 15 Int. Rev. Rec. 74.]

Circuit Court, E. D. New York. Feb. 23, 1872.[2]

PENALTIES—HOW RECOVERED—MANIFEST OF CARGO—SCIENTER.

1. Under section 8 of the act of July 18th, 1866 (14 Stat. 180), which declares that a vessel shall be holden for the payment of the penalty imposed upon her master by section 24 of the act of March 2d, 1799 (1 Stat. 646), where goods are brought into the United States by her, which are not included or described in the manifest of her cargo, the vessel may be proceeded against in rem, in the admiralty, to enforce such lien against her.

[Cited in The Helvetia, Case No. 6,345; The Joshua Seviness, Id. 7,549; Pollock v. The Sea Bird, 3 Fed. 575; The Sidonian, 38 Fed. 442; The C. G. White, 12 C. C. A. 314, 64 Fed. 581.]

2. The manifest of the cargo of such vessel, filed in the custom house, is competent evidence on the question as to whether such goods were entered on the manifest of her cargo.

3. It is not necessary to the liability of the master to such penalty, that it should appear he had knowledge that the goods were on board of the vessel.

4. If the absence of such knowledge is to be of avail, it must be proved as a defence.

[Appeal from the district court of the United States for the Eastern district of New York.]

[The steamer Missouri was libelled in a proceeding in rem, under the 8th section of the act of July 18, 1866, to recover the sum of $2,998 due to the United States from the master or person in charge of said vessel, as a penalty for bringing into the United States from a foreign port a quantity of cigars valued at the sum named and not included in the manifest of said vessel, in violation of the 24th section of the act of March 2, 1799. Decisions in favor of the United States were rendered by Judge Benedict, in the district court, upon exceptions filed and upon the trial of the action. The Missouri [Cases Nos. 9,652 and 9,653].[3]

John J. Allen, Asst. Dist. Atty.
Goodrich & Wheeler for claimants.

WOODRUFF, Circuit Judge. There is, I think, some doubt, whether the act of July 18th, 1866, § 8 (14 Stat. 180), which declares, that the vessel shall be holden for the payment of the penalty imposed upon the master (where goods are imported or brought into the United States, which shall not be included or described in the manifest of the cargo) by the act of March 2d, 1799, § 24 (1 Stat.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

[2] [Affirming Case No. 9,653.]

[3] [From 15 Int. Rev. Rec. 74.]

646), authorizes a proceeding in admiralty for the enforcement of the lien thereby declared. Its language is, that "such vessel * * * may be seized and proceeded against summarily, by libel, to recover such penalty, in any district court of the United States having jurisdiction of the offence." The use of the term "libel," in the act, is not claimed to be conclusive. Indeed, the proceeding in this case is, in very form of words, an information, which is apt to indicate a proceeding to enforce a forfeiture based upon a seizure under the revenue laws of the United States; and, in these proceedings, it is styled, a "libel of information." It is plausibly argued, that the act which gives the United States the right to hold the vessel for the payment of the penalty imposed on the master, contemplates a seizure in the first instance and a libel founded thereon; that such a proceeding is a proceeding at law, in which the owners are entitled to a trial by jury; that the very basis of the proceeding is, that the master has incurred a penalty; that, for the recovery of such a penalty, an action at law, to be tried by a jury, would be necessary; that the proceeding can only be conducted in the district court having jurisdiction of the "offence"; that the master could only be pursued at law for the penalty of the offence; and that it ought not to be deemed the intention of the legislature to authorize a proceeding against the vessel in a form which deprives the owners of that mode of trial. To hold, therefore, that, under the act, a seizure was necessary in the first instance, and that the act contemplated a libel of the vessel so seized, and an intervention and issue thereupon at law, to be tried by a jury, as in ordinary seizures under the revenue laws, would do no violence to the statute. But, upon reflection, my conclusion is in accordance with the opinion of the district judge upon this point. The Missouri [Case No. 9,652],—and with that of Judge Blatchford in the case of U. S. v. The Queen [Id. 16,107].

The facts seem to me established in conformity with the claim of the libellants. More than 200 boxes of cigars were brought into the United States, on board of the steamship Missouri, which were not entered on the manifest of the cargo, but were found secreted on board. The intent to introduce them clandestinely, without the payment of duties, was plainly indicated by the circumstances.

The objections to the evidence by which the facts are established are untenable. The manifest, and only manifest, of the cargo filed in the custom house, is either proof that these goods were not on the manifest of the cargo, or that no part of the cargo was entered upon any manifest; for, the proof is, that no other manifest was filed.

The officers who found the cigars testify to the fact, and they identify and prove the original entry of such finding, and the seizure of the cigars thereupon; whether as official documents, or contemporaneous memoranda made by the witnesses, which they verify, is immaterial. It is enough that they are entries subscribed by them, in the discharge of their official duty, to the truth of which they now testify. All certificates of seizure not established by express proof, the district court rejected, and, in consequence, a large quantity of cigars mentioned in the libel were not included in the estimate of value awarded in this case.

A decision of the circuit court in the Third circuit—U. S. v. The Stadacona [Case No. 16,371]—is cited to me, which seems to proceed upon this construction of the statutes—that, in order to charge the master of the ship with the penalty imposed by the act of 1799, it must appear that he had knowledge that the goods were on board of the ship. It would, of course, follow, that, if the master is not liable to the penalty, the vessel cannot be charged, under the act of 1866. In the opinion, it is, nevertheless, declared, that the goods were properly condemned and forfeited. It would be possible to suggest, that the precise circumstances mentioned in the act of 1799, which create the forfeiture of the goods, are accompanied by the declaration, that the master shall forfeit and pay a sum equal to the value, and it is not entirely obvious that one of these forfeitures is incurred if the other is not also. But, if the decision of the circuit court was correct in that case, it will not avail the claimants in this. There, it was proved, that the steward of the vessel had, without the knowledge of the master, secreted on board certain pieces of silk, in a place which was boarded up and covered with tin. The space thus inclosed was apparently wholly inaccessible, and the master was not aware that it had ever been opened. It was, therefore, deemed by the court impossible for the master to enter the goods upon the manifest, when he had no knowledge that they were on board, and could not, by the exercise of any ordinary diligence, have obtained such knowledge; and the court, not without much reason, founded in a sense of justice to the master, deemed, upon a construction of the whole act, that goods so secreted were not a part of the cargo, in such a sense that the master was punishable if he did not enter them on the manifest. I greatly doubt that the court intended to adopt the broad proposition, that a master could, in all cases, protect himself from the penalty, and save the vessel from liability, by proof that he had not actual knowledge that the goods were on board. Such a construction of the act would go far to destroy its efficiency for any purpose. But, even such a construction would not avail in this case. It would be necessary to hold, not only that want of knowledge by the master would save him and the vessel from the forfeiture imposed by the act, but to hold, also, that the libellants must affirmatively prove such knowledge. This, it is

certain, I think, cannot be required. If want of knowledge will avail, it must, under these statutes, although a negative, be proved as a defence. The statute makes no qualification. It declares, that, if the goods are imported or brought in, and do not appear in the manifest, the forfeiture is incurred. It is a presumption, upon which the statute manifestly proceeds, that the master has entire control of the vessel and its lading; that he has power to exclude all goods which are not properly brought and subjected to entry on the ship's papers; and that he is to be presumed to know what goods are on board his ship; and, if we admit that he may, in a case such as that referred to, show that his apparent power was evaded and his presumptive knowledge avoided, and that the goods were secretly gotten on board and brought, by a fraud or deception practised on himself, which no ordinary vigilance would prevent, the government may, nevertheless, proceed, in the first instance, upon the fact, that the goods were brought, and put him, or the owners of the vessel, to an explanation. In the present case, the goods were of very considerable bulk; they were deposited in not less than five or six different places on board; they could, apparently, have been discovered by very little diligence in examining the ship; and they were very readily found by the officers of the revenue. Surely, this was sufficient to put the owners of the vessel to some explanation; and they might have examined the master himself, if he could testify to any want of knowledge that the goods were on board. As the case stands, the proof is, that the goods were imported without entry on the manifest, and the inference is warranted that the master knew it.

But, the provisions of the act of 1799 itself seem to me to reach this precise question. The proviso to the imposition of the forfeiture (section 24) permits the master to show that the omission to enter the goods in the manifest is by mistake—that is, that the "manifest is incorrect by mistake." If, then, on arrival, goods are discovered which have been brought by seamen or others without his knowledge, so that his manifest was made in good faith, in the belief that it contained all dutiable goods, and his mistake therein is shown to be caused by a deceit and fraud practiced on himself, he is to make that fact appear to the collector, naval officer and surveyor, or a major part or them, and, in such case, the forfeiture is not incurred.

I do not think it necessary to pursue the discussion into the other details of the argument in behalf of the claimants. In respect to those, so far as is material to the conclusion, I concur in the decision made in the district court. The libellants must, therefore, have a decree for the amount awarded below, with costs.

UNITED STATES v. The MISSOURI. See Case No. 9,652.

Case No. 15,786.

UNITED STATES v. MISSOURI, K. & T. RY. CO.

[1 McCrary, 624;[1] 1 Cent. Law J. 428.]

Circuit Court, D. Kansas. June, 1874.[2]

LAND GRANT TO AID RAILWAYS—INDIAN RESERVATION—TREATY WITH OSAGE INDIANS.

For reasons similar to those in the case of U. S. v. Leavenworth, L. & G. R. Co. [Case No. 15,582], the lands reserved for the benefit of the Osage Indians did not pass, under the land grant of congress, to the state, to and in the building of railways, approved July 26, 1866 [14 Stat. 289].

The facts in the case appear in the case of the same plaintiff against the Leavenworth, Lawrence & Galveston Railroad Company.

George R. Peck, Dist. Atty., Wilson, Shannon, and McComas & McKeighan, for the United States.

T. C. Sears, for defendant.

Before MILLER, Circuit Justice, and DILLON, Circuit Judge.

MILLER, Circuit Justice. This case differs from that of the same plaintiff against the Leavenworth, Lawrence & Galveston Railroad Company, in this: that the act of congress which is the foundation of defendant's claim to the lands in controversy, was passed July 26, 1866. The significance of this difference in the dates of the grants is found in the assertion of defendants that the lands in question had then been ceded, by the treaty which we have discussed in that case, to the United States. It is hence argued that, as the United States had then the title to these lands, unincumbered by the Indian right of occupancy, there is no reason to suppose they were not included in the general granting clause, or that they were reserved within the meaning of the excepting clause.

It will be perceived, by looking at the date of the act of congress, and the dates of the respective stages of the treaty, that the treaty had passed the senate, but with material amendments, June 26, 1866, one month before the approval of this bill by the president. But it had then to be submitted to the Indians for their action on these amendments. Their approval was given September 21, 1866, two months after the passage of the act of congress, and the treaty only became valid and operative by the proclamation of the president of January 21, 1867. [14 Stat. 693.] There was, therefore, no valid subsisting treaty by which the Indian title to these lands was extinguished when the act of July 26, 1866, became a law. But if the treaty had been fully ratified at the date of the passage of the act under which defendants claim, that treaty was, itself, as much a reservation of these lands, within the

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[1] [Reported by Hon. Geo. W. McCrary, Circuit Judge, and here reprinted by permission.]

[2] [Affirmed in 92 U. S. 760.]

meaning of the excepting proviso, as the treaty of 1825 was in the case we have before considered. It directed a sale of all these lands. It disposed of all the proceeds of the sale, and, by a necessary implication in appropriating them to other purposes, they were reserved for those purposes. The amendment to the treaty which we have considered, as it regards the other case, can have no application to the act of July 26, 1866, because by its express terms it is limited to existing laws. The amendment had been acted on, and passed from the control of the senate, a month before this bill became a law. It was not an existing law when the amendment was proposed and adopted, and the amendment, therefore, had no reference to it.

The argument that the bill and the treaty must both be considered as pending at the same time, and therefore construed with reference to each other, is not, in my judgment, entitled to much weight. If it had been the intention of the senate, in making the treaty, to have consented or contracted that the bill which was then pending, and which might, or might not, become a law, granting lands to the state of Kansas, should include these lands, they would certainly have used language that looked to that purpose. Their language has reference only to grants already made to existing laws. So, if congress had intended to grant these lands, knowing that a treaty for their cession was then under consideration in the senate, which, by its provisions, appropriated the lands and proceeds of their sale to other purposes, they surely would have used some language to specifically include these lanc. . or at least to take them out of the excepting clause.

A decree similar to that in the other case must be entered. Decree accordingly.

[On appeal to the supreme court, the above decree was affirmed. 92 U. S. 760.]

Case No. 15,787.

UNITED STATES v. MITCHELL et al.

[Baldw. 366.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1831.

FORGERY — UTTERING COUNTERFEIT CHECK — POSSESSION OF OTHER FORGED PAPER.

1. Passing a paper is putting it off in payment or exchange. Uttering it is a declaration that it is good, with an intention to pass, or an offer to pass it.

[Cited in U. S. v. Nelson, Case No. 15,861.]

[Cited in State v. Redstrake, 39 N. J. Law, 371.]

2. The party accused of passing or uttering counterfeit paper, must be present when the act is done, privy to it, or aiding, consenting, or procuring it to be done. If done by consent, all are equally guilty.

[Cited in brief in Smith v. State, 20 Neb. 284, 29 N. W. 924.]

3. Passing a counterfeit note in the name of a fictitious person, an assumed name, or on a bank which never existed, is within the law. It is not necessary that the note, if genuine, would be valid, if on its face it purports to be good: the want of validity must appear on its face.

[Cited in U. S. v. Shellmire, Case No. 16,271.]

[Cited in McCartney v. State, 3 Ind. 356.]

4. The possession of other counterfeit paper by the defendant or a confederate at the time of passing counterfeit notes, is evidence of the scienter.

[Cited in Anson v. People, 148 Ill. 504, 35 N. E. 148.]

The defendants [Mitchell and Fisher] were indicted for uttering and passing a counterfeit order or check drawn by Cummings, president of the office of discount and deposit of the Bank of the United States at Savannah, countersigned by the cashier thereof, payable to the order of Bullock, directed to the cashier of the Bank of the United States, for the payment of five dollars. It appeared in evidence that the defendants came together from Philadelphia in a gig about twenty miles. At a tavern where they stopped, Fisher attempted to pass the order or check laid in the indictment, which was a counterfeit. Mitchell was present under an assumed name. In the stable where they stopped on the road, was found a quantity of similar paper, and in a part of the gig was also found a large bundle of the same paper, all counterfeit. The circumstances in evidence were strong to show a concert between the defendants, and their knowledge that the order in question was counterfeit.

Mr. Dallas, U. S. Dist. Atty.

Rush & Williams, for defendants.

BALDWIN, Circuit Justice (charging jury). That the order or check laid in the indictment, is forged, is clearly proved, and cannot be doubted if you believe the witness; your next inquiry will be, whether it was passed, uttered or delivered as true, knowing it to be counterfeit by both the defendants, or either of them. The passing or delivering of a paper, is putting it off or giving it in payment or exchange. Uttering it, is a declaration that the note or order is good (2 Bin. 339), or an offer to pass it as good. To merely show it, without an offer to pass it, or depositing it for safe keeping, is not an uttering. There must be an intent to pass it as good. Russ. & R. 200. To convict a party for uttering or passing, he must have been present at the act. 2 Leach, 1096; 2 East, P. C. 974; Russ. & R. 25, 249, 363. But if he delivers the paper to a servant, to be sent to a customer (Russ. & R. 212; 2 Leach, 1048; 4 Taunt. 300), or is sufficiently near to the person who utters or passes it with his privity to give his assistance (Russ. & R. 363), or acts his part, or does any thing connected with the uttering

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

or passing (Russ. & R. 446), the party accused is considered as present. So if he, knowing the paper to be counterfeit, delivers it to another, who, knowingly, passes it as true (Russ. & R. 72; 4 Bos. & P. 96; 2 Leach, 978), or gives it to a boy for the purpose of passing them, and he does pass them (Car. Cr. Law, 191). The note is uttered when it is delivered for the purpose of being passed. When put off they are passed, and every person who is present and consenting to the uttering or passing, or in any way aiding or assisting in doing it, or doing any act or thing in concert with the person who utters or passes the paper, which is connected with their common object, is guilty of the offence. The knowledge that the paper was counterfeit, is a question of fact which the jury must ascertain from the whole conduct and demeanour of the parties accused, their acts and declarations during the transaction, or it may be inferred from their having in their possession, or the possession of an accomplice or confederate, other counterfeit paper of the same manufacture (Car. Cr. Law, 195), of similar appearance (Russ. & R. 120, 244, 247), or such paper found in a place of which one of the parties had the key or control (Russ. & R. 110; 5 Bos. & P. 87, &c.; 4 Bos. & P. 93, 94). This evidence is admitted on indictments for forgery, in order to show that the defendant knew the note in the indictment to be forged, from the fact of having with him, or in his custody, other counterfeit paper for the purpose of passing it, it being presumed that if he knew the latter to be counterfeit, he knew the other to be so.

It has been contended by the defendants' counsel that this prosecution cannot be sustained, because it is not proved that the name of Cummings, and the indorsement of Bullock, are forged; and because the order in question is not obligatory on the bank on which it is drawn. But the law is well settled, that it is forgery to counterfeit a paper in the name of a person who never existed (1 Leach, 83; 2 East, P. C. 991; 6 Serg. & R. 570; Foster, 116), or in a fictitious name (1 Leach, 172, 215; 2 East, P. C. 957, 959, 960; Russ. & R. 75), or on a bank when there was no such bank as the paper purported (6 Serg. & R. 569), or in an assumed name (Russ. & R. 209, 260, 278, 290), if it is done with the intention to defraud, and the paper on its face purports to be good and genuine (1 Leach, 103; 10 State Tr. 183). It is not necessary to a conviction, that the note or order, if genuine, would be obligatory on the parties whose names have been counterfeited. If it purports to be payable to order, and is not indorsed (Russ. & R. 149, 186), or if it wants any requisites enjoined by law to give validity to the genuine paper, as a stamp, &c. (2 Leach, 703, 885, 958; 2 East, P. C. 942, 956; Russ. & R. 193, 195, 255, 297; 4 Bos. & P. 1; Russ. & R. 67), or if it purports to have been issued by a bank which is prohibited from issuing or circulating such paper under a penalty (12 Serg. & R. 237), or if the forged paper purports to be the will of a man who is alive (1 Leach, 99; 2 East, P. C. 950, 1001; 6 Serg. & R. 570), the counterfeiting it is forgery. If the paper on the face of it is void, then it is not the subject of forgery, but if its invalidity is owing to any thing not appearing on its face, it is the subject of forgery. 12 Serg. & R. 237; 1 Leach, 431; 2 East, P. C. 953, 954. If paper is forged, and is calculated to impose upon and deceive persons of common observation, the uttering or passing of it is the offence defined by the law. Assuming the order in the indictment to be a forged one, it is not material whether the signature or indorsement is genuine, the paper is false and counterfeit as an order or check on the bank. Nor is it material whether the bank would be bound to pay it if genuine; it purports to be an order for the payment of money, which binds the drawer, though it may not bind the bank. You will apply these principles of law to the evidence and find accordingly; in point of law, the evidence is sufficient to convict both defendants; you will judge whether it is so in fact. If you think they came together for the purpose of passing counterfeit money, it is immaterial who did the acts which constitute the offence; or if they came without such design, but afterwards formed it, or acted in any way in furtherance thereof, you will find both guilty if you think either of them consummated the offence, or you will find them separately guilty or not.

The jury found Fisher guilty, and Mitchell not guilty.

Case No. 15,788.

UNITED STATES v. MITCHELL.[1]

[2 Dall. 348; Whart. State Tr. 176.]

Circuit Court, D. Pennsylvania. 1795.

TREASON AGAINST THE UNITED STATES—OPPOSING THE EXECUTION OF LAWS—EVIDENCE OF OVERT ACT.

[1. A combination to suppress the excise officers of the government, and prevent the execution of an act of congress, accompanied by a display of force consisting of a number of men arrayed in a military manner, and with arms, and, by acts of violence, for the purpose of compelling an excise officer to resign his commission, is a levying war, and constitutes treason against the United States.]

[2. Where it is shown by the evidence of several witnesses that the accused was present and took part in a treasonable conspiracy, it seems that proof by two or more witnesses that he marched as a volunteer with arms and in military array, with a party which actually used force to prevent the execution of an act

[1] [This was one of the trials arising out of the so-called "Whisky Insurrection," occurring in Western Pennsylvania in the year 1794. For a full account of the proceedings of the disaffected parties, see U. S. v. Insurgents, Case No. 15,443.]

of congress, is sufficient without proof by two witnesses that he was actually present when the acts of violence were committed.]

Indictment for high treason, by levying war against the United States. It was alleged, that the prisoner was one of the party that assembled at Couche's Fort, armed; that he proceeded thence to Gen. Neville's, and assisted at the burning of the general's house; that he attended with great zeal at the meeting at Bradock's field; and that on the day prescribed for signing a submission to the government he was intoxicated, refused to sign himself, and was active in dissuading others from signing. The circumstance of the prisoner's being at Couche's was proved by a number of witnesses; his being at Bradock's field, by one witness and his own confession; but there was only one positive witness to the fact of his having been at the burning of General Neville's house though a second witness said "it ran in his head that he had seen him there," and a third declared that he had passed him on the march thither. The scope of the testimony as it respected the general object of the insurrection, and as it particularly applied to the prisoner, will be found sufficiently stated in the course of the arguments and charge.

The attorney of the district (Rawle) having closed the evidence, proceeded to state the law, in support of the prosecution. So frequently and fully has the offence of levying war against the government been defined, that a doubt can hardly be raised upon the subject. Kings, it is true, have endeavoured to augment the number, and to perplex the descriptions, of treasons, as an instrument to enlarge their powers, and to oppress their subjects; but in republics, and, particularly, in the American republic, the crime of treason is naturally reduced to a single head, which divides itself into these constitutional propositions: 1st, levying war against the government; and, 2dly, adhering to its enemies, giving them aid and comfort:—In other words, exciting internal, or waging external, war, against the state. The second branch of the crime, thus designated, renders it unlawful and treasonable for any citizen to adhere to a foreign, public enemy, whether assailing the frontiers, or penetrating into the heart, of our country. But while such a co-operation endangers the success and prosperity of the community, the effects of domestic insurrection (which the first branch of the division contemplates) strike at the root of its existence; and, in free countries above all, must be prevented, or corrected, by the most vigilant and efficient sanctions of the law. What constitutes a levying of war, however, must be the same, in technical interpretation, whether committed under a republican, or a regal, form of government; since either institution may be assailed and subverted by the same means. Hence we are enabled, in the first stage of our own experience, to acquire precise satisfactory ideas upon the subject, from the matured experience of another government, which has employed the same language to describe the offence, and is guided by the same rules of judicial exposition. By the English authorities, it is uniformly and clearly declared, that raising a body of men to obtain, by intimidation or violence, the repeal of a law, or to oppose and prevent by force and terror, the execution of a law, is an act of levying war. Doug. 570. Again;—an insurrection with an avowed design to suppress public offices, is an act of levying war: And, although a bare conspiracy to levy war, may not amount to that species of treason; yet, if any of the conspirators actually levy war, it is treason in all the persons that conspired; and in Fost. Crown Law, 218, it is even laid down, that an assembly armed and arrayed in a warlike manner for a treasonable purpose is bellum levatum, though not bellum percussum. Those, likewise, who join afterwards, though not concerned at first in the plot, are as guilty as the original conspirators; for in treason all are principals; and whenever a lawless meeting is convened, whether it shall be treated as riot, or treason, will depend on the quo animo. 4 Bl. Comm. 81; 1 Hale, P. C. 133, 134; Fost. Crown Law, 213, 210, 215, 218; 1 Hawk. P. C. 37; 4 Bl. Comm. 35; 1 Hale, P. C. 440; 8 State Tr. 247; 2 State Tr. 586; 7 Keilw. 19; 3 Inst. 9.

The evidence, unfortunately, leaves no room for excuse, or extenuation, in the application of the law to the prisoner's case. The general and avowed object of the conspiracy at Couche's Fort, was to suppress the offices of excise in the Fourth survey. As an important measure for that purpose, it was agreed to go to General Neville's house, and to compel him to surrender his office, and his official papers. Some of the persons who were at Couche's Fort, went, accordingly, to General Neville's, and terminated a course of lawless and outrageous proceedings by burning his house. The prisoner is proved by four witnesses to have been at Couche's Fort; and so far from opposing the expedition to General Neville's, he offered himself to reconnoitre. Being thus originally combined with the conspirators, in a treasonable purpose, to levy war, it was unnecessary that the purpose should be afterwards executed, in order to convict them all of treason, and much less is it necessary to his conviction, that he should have been present at the burning of General Neville's house, which was the consummation of their plot, or that the burning should be proved by two witnesses. But he is, likewise, discovered, by one of the witnesses at least, within a few rods of the general's, at the moment of the conflagration; and he is seen marching in the cavalcade, which escorted the dead body of their leader, in melancholy triumph, from the scene of action to Barclay's house. It is not necessary to consider the meeting at Bradock's field as an independent treason, though the avowed intention was to attack the garrison at Pittsburgh, and to expel certain pub-

lic officers from the town; but the conduct of the prisoner on that occasion, concurring in every violent proposition that was made; and his refractory and seditious deportment on the day prescribed for signing the declaration of submission to the laws; are corroborative demonstrations of that mala mens, that dark and dreary turbulence of soul, which is regardless of every social, moral, and religious obligation.

PATERSON, Circuit Justice. Before the defence is opened, I wish to direct the attention of the prisoner's counsel to two considerations: 1st. Whether the conspiracy to levy war at Couche's Fort, was not, in legal contemplation, an actual levying of war? 2d. Whether the proceedings at General Neville's house were not a continuation of the act, which originated at Couche's Fort? For, several witnesses have proved that the prisoner was at Couche's Fort, and one positive witness has proved, that he was at Gen. Neville's house.

The counsel for the prisoner (E. Tilghman & Thomas) premised, that they did not conceive it to be their duty to shew, that the prisoner was guiltless of any description of crime against the United States, or the state of Pennsylvania; but they contended, that he had not committed the crime of high treason; and ought, therefore, to be acquitted upon the present indictment. The adjudications in England upon the various descriptions of treason, have been worked, incautiously, into a system, by the destruction of which, at this day, the government itself would be seriously affected: but even there, the best judges and the ablest commentators, while they acquiesce in the decisions that have already taken place, furnish a strong caution against the too easy admission of future cases, which may seem to have a parity of reason. Constructive, or interpretative treasons, must be the dread and scourge of any nation that allows them. 1 Hale, P. C. 132, 259; 4 Bl. Comm. 85. Take, then, the distinction of treason by levying war, as laid down by the attorney of the district, and it is a constructive or interpretative weapon, which is calculated to annul all distinctions heretofore wisely established in the grades and punishments of crimes; and by whose magic power a mob may easily be converted into a conspiracy; and a riot aggravated into high treason. Such, however, is not the sense which congress has expressed upon this very subject; for, if a bare opposition to the execution of a law can be considered as constituting a traiterous offence, as levying war against the government, it must be equally so, in relation to every other law, as well as in relation to the excise law; and in relation to the marshall of a court, as much as in relation to the supervisor of a district: And yet, in the Penal Code of the United States, the offence of wilfully obstructing, resisting, or opposing, any officer, in serving, or attempting to serve any process, is considered and punished merely as a misdemeanor. 1 Swift's Ed. p. 109, § 22. Let it be granted, that to compel congress to repeal a law, by violence, or intimidation, is treason (and the English authorities rightly construed, claim no greater concession) it does not follow, that resisting the execution of a law, or attempting to coerce an officer into the resignation of his commission, will amount to the same offence. Let it be granted, also, that an insurrection, for the avowed purpose of suppressing all the excise offices in the United States, may be construed into an act of levying war against the government (and the English authorities speak expressly of the universality of the object, as an essential characteristic of this species of treason) it does not follow that an attempt to oblige one officer to resign, or to suppress all the offices in one district, will be a crime of the same denomination. 1 Hale, P. C. 135. Nor can another doctrine, urged in support of the prosecution, be fairly recognized. It is laid down in all the books, which have been cited, it is admitted by the attorney general, that a bare conspiracy to levy war, does not amount to treason; but, it is contended, that if, at any time afterwards, a part of the conspirators should execute the plot, the whole of them will be involved in the guilt and punishment. Thus, no opportunity is left for repentance; the motives which restrain the absentees from attending at the scene of action, however pure, can furnish no excuse;—and they are doomed to answer for the conduct of others, which they may, in fact, disapprove, and which they cannot, in any degree, controul. The state of the evidence, however, renders it unavoidable, that this ground should be taken; for, unless the proceedings at Couche's Fort and at Gen. Neville's house can be so combined and interwoven as to form one action, there are not two witnesses to prove that the prisoner was at the latter place; and the conduct at the former, could only amount, under the most rigid construction, to a conspiracy to levy war, not to an actual levying of war against the government. With the necessity for two witnesses to an overt act of treason, it is not in the power of judges or juries to dispense;—it is a shield from oppression with which the constitution furnishes the prisoner; and it cannot be supplied by vague conjectures, founded on the feeble recollection of a witness; nor by idle declarations of the party himself, in a state of intoxication; a state that does not justify the perpetration of a crime, but may fairly be supposed to deprive the criminal of a knowledge of the extent of his confession. 2 Hawk. P. C. 604, in note. Fost. Crown Law, 240; 4 Bl. Comm. 356; [Respublica v. Roberts] 1 Dall. [1 U. S.] 39, 40.

If this view of the law is correct, it will be easy to shew, that its operation upon the facts, will entitle the prisoner to an acquittal. By the meeting at Bradock's field no

act of treason was committed; nor was any plan for levying war contrived. The people assembled there upon a general invitation, founded on the calamitous state of the country; and, though they proposed banishing certain citizens (who were not public officers of the United States) from Pittsburgh (which cannot surely be deemed treason) they neither executed that project, nor committed any other outrage; but after some menaces and an idle parade, dispersed to their respective homes. The prisoner was certainly at Bradock's field; but no treason being committed there, his attendance is not a foundation for the present indictment. It may be admitted, likewise, that at Bradock's field, he made some vaunting declarations of a traiterous intention; but a traiterous intention there, is no proof of his having levied war against the government at another time, and in another place. With respect to the criminal proceedings at Gen. Neville's house (which after all amount to the crime of arson, and not of treason) it is agreed that only one positive witness proves the fact of the prisoner's having been there; but even that witness states, that the prisoner was alone, at the distance of 30 or 40 rods; and it is not recollected whether he had a gun. Then it only remains to consider the effect of the prisoner's presence at Couche's Fort; for, his being seen in a cavalcade on the road for Gen. Neville's, and his conduct on the day prescribed for signing the submission to government, when he was notoriously drunk, may prove him to be a very bad man, but will not be sufficient to maintain a charge of high treason. It does not, then, appear by the testimony of two witnesses, that the meeting at Couche's Fort was convened for the purpose of accomplishing a compulsory repeal of the excise laws, or a suppression of the excise offices. The meeting seems to have originated merely in a wish to consider what it was best to do in the actual state of the country. On that point a committee was chosen, or rather was self created; and the members determined to send a flag to Gen. Neville. It does not appear with what view the flag was to be sent; but it will not be presumed, when the evidence is silent, to be with a view to attack the general's house, to force a repeal of the excise law, or to compel the officer's resignation; and even the fact itself is only proved by one witness. Besides, the conduct of the committee, however culpable, will not be sufficient to involve the whole assembly in the guilt of treason. It is true, that the prisoner expressed his willingness to reconnoitre Gen. Neville's house; but this expression, likewise, is only proved by one witness; and even if it were proved by fifty witnesses, it does not amount to an overt act of treason by levying war; nor does it appear that he ever did reconnoitre, or furnish intelligence to the committee. The proof against Porter [Case No. 16,073] was as strong, and yet he was acquitted. Upon the whole, if the proceedings at Couche's Fort and Gen. Neville's house, must be considered as one action, that action must take its colour, quality, and character, from what was done at the latter place; and as there are not two witneses to the overt act committed there, it is immaterial what was the conduct of the prisoner at Couche's Fort. The perpetration is the gist of the crime; and he only is to be adjudged guilty, who joined in the actual perpetration.

The attorney general of the United States (Bradford) in reply. It is essential to the security of life, liberty, and property, that the powers of government should exist under some modification; and under whatever modification they exist, an attempt to defeat or destroy them, must be treason. If, however, the principles asserted in the course of the prisoner's defence should prevail, a flagrant attempt to obstruct the legitimate operations of the government, to prevent the execution of its laws, and to coerce its officers into a dereliction of their trust, must no longer be regarded as high treason; every man engaged in the administration of the public affairs has erred in considering the insurrection as any thing more than a common, contemptible riot; Vigol, who has been convicted, ought to have been acquitted; and all the prisoners committed upon the same charge, ought instantly to be released! But this doctrine and its consequences will not be found compatible with our constitution; and cannot receive the countenance of a court of justice.

To proceed, however, in a more minute analysis of the defence; it has been argued, that congress has provided a specific punishment, for the offence of resisting or obstructing the service of process, obviously distinguishing it from treason; and that it is as much treason to resist the execution of one law as another; to resist the marshall of a court, as much as the supervisor of a district. The analogy is, in a great measure, just. In either case, if the resistance is made by a few persons, in a particular instance, and under the impulse of a particular interest, the offence would not amount to high treason; but, if, in either case, there is a general rising of a whole county, to prevent the officer from discharging his duty in relation to the public at large, the offence is, unquestionably, high treason. Thus an opposition was lately made to the appointment of a particular judge in Mifflin county, and he was forcibly driven from the bench; but the offence was prosecuted merely as a riot, upon this principle of discrimination, that the design was not to prevent the governor from appointing any judge, but only to displace an unpopular individual.

Again, it has been urged, that the criminal intention must point to the suppression of all the excise offices in the United States, or it cannot amount to high treason. If it

is meant by this argument, that the insurgents of Pennsylvania must have contemplated a march from Georgia to New Hampshire, it is extravagant and absurd: but, in another view, it is perfectly correct; for, if it was intended that, by their lawless career and example, congress should be forced into a repeal of the obnoxious law, it necessarily followed, that, from the same cause, the offices of excise would be suppressed throughout the Union. That universality of object, which the books require, was inseparable from the nature of the opposition; for, it was impossible to contemplate the repeal of the excise law in one survey, or in one state, without effecting it in every survey, and in every state. The truth is, however, that the insurgents did not entertain a personal dislike for Gen. Neville; but in every stage of their proceedings, at Couche's Fort, at the general's house, and at Bradock's field, they were actuated by one single, traiterous, motive, a determination, if practicable, to frustrate and prevent the execution of the excise law. The whole was one great insurrection; and it is immaterial at what point of time, or place, from its commencement to its termination, any man became an agent in carrying it on. Many persons, indeed, may have attended innocently at Couche's Fort, as was the case with Porter; but those would not remain long, after the purpose of the meeting was developed. To render any man criminal, he must not only have been present, but he must have taken part with the insurgents; yet, whether he was present at Couche's Fort, on the march to Gen. Neville's, or at the burning of the general's house, if his intention was traiterous, his offence was treason. 3 Inst. 9. The overt act laid in the indictment (which is drawn from the most approved precedents) is levying war; and war may be levied, though not actually made. Fost. Crown Law, 218. It is agreed that this overt act must be proved by two witnesses; but there is a difference as to what constitutes the act itself. Now, it is manifest from every authority, that to assemble in a body, armed and arrayed, for some treasonable purpose, is an act of levying war; this was the case at Couche's Fort; and the prisoner's active attendance there is proved by a number of witnesses. It is not required that every witness should have seen him at the same spot, at the same moment, and in the same act; but if they see him at the place and time of rendezvous, exhibiting the same species of traiterous conduct, the law is satisfied. The conspiracy to levy war being effected, all the conspirators are guilty, though, they did not all attend at Gen. Neville's house. 1 Hale, P. C. 132; Fost. Crown Law, 213, 215. Besides, the meeting at Bradock's field is a distinct and substantive act of treason; and the prisoner is proved by four witnesses to have been there. The design of the meeting, was, avowedly, to oppose the execution of the excise law, to over-awe the government, to involve others in the guilt of the insurrection, to prevent the punishment of the delinquents, to banish unpopular individuals from the town, and to attack the garrison of Pittsburgh. The hasty declarations of the quo animo, proceeding from the prisoner himself, ought not to have much weight, were they not to strongly corroborated by other testimony.

PATERSON, Circuit Justice (charging jury). The first question to be considered is, what was the general object of the insurrection? If its object was to suppress the excise offices, and to prevent the execution of an act of congress, by force and intimidation, the offence, in legal estimation, is high treason; it is an usurpation of the authority of government; it is high treason by levying of war. Taking the testimony in a rational and connected point of view, this was the object: It was of a general nature, and of national concern.

Let us attend, for a moment, to the evidence. With what view was the attack made on General Neville's house? Was it to gratify a spirit of revenge against him as a private citizen, as an individual? No:—as a private citizen he had been highly respected and beloved; it was only by becoming a public officer, that he became obnoxious; and it was on account of his holding the excise office alone, that his house had been assailed, and his person endangered. On the first day of attack, the insurgents were repulsed; but they rallied, returned with greater force, and fatally succeeded in the second attempt. They were arrayed in a military manner; they affected the military forms of negociation by a flag; they pretended no personal hostility to General Neville; but they insisted on the surrender of his commission. Can there be a doubt, than, that the object of the insurrection was of a general and public nature?

The second question to be considered, is—how far was the prisoner traiterously connected with the insurgents? It is proved by four witnesses, that he was at Couche's Fort, at a great distance from his own home, and that he was armed. One witness proves, positively, that he was at the burning of Gen. Neville's house; and another says, "it runs in his head, that he, also, saw the prisoner there." On this state of the facts, a difficulty has been suggested. It is said, that no act of treason was committed at Couche's Fort; and that, however treasonable the proceedings at Gen. Neville's may have been, there are not two witnesses, who prove that the prisoner was there. Of the overt act of treason, there must, undoubtedly, be proof by two witnesses; and, it is equally clear, that the intention and the act, the will and the deed, must concur; for, a bare conspiracy is not treason. But let us consider

the prisoner's conduct in a regular and connected course. He is proved, by a competent number of witnesses, to have been at Couche's Fort. At Couche's Fort the conspiracy was formed, for attacking Gen. Neville's house; and the prisoner was actually passed on the march thither. Now, in Fost. Crown Law, 218, the very act of marching is considered as carrying the traiterous intention into effect; and the jury (who will sometimes find the most positive testimony, contradicted by circumstances, which carry irresistible conviction to the mind) will consider how far this aids the doubtful language of the second witness, even as to the fact of the prisoner's being at Gen. Neville's house.

On the personal motives and conduct of the prisoner, it would be superfluous to make a particular commentary. He was armed, he was a volunteer, he was a party to the various consultations of the insurgents; and in every scene of the insurrection, from the assembly at Couche's Fort to the day prescribed for submission to the government, he makes a conspicuous appearance. His attendance, armed, at Bradock's field, would of itself amount to treason, if his design was treasonable.

Upon the whole, whether the conspiracy at Couche's Fort may of itself be deemed treason; or, the conspiracy there, and the proceedings at Gen. Neville's house, are considered as one act, (which is, perhaps, the true light to view the subject in) the prisoner must be pronounced guilty. The consequences are not to weigh with the jury:—it is their province to do justice; the attribute of mercy is placed by our constitution in other hands.

Verdict—Guilty.

The prisoner was pardoned: and the president afterwards granted a general amnesty to all the insurgents, who were not objects of depending prosecutions.

Case No. 15,789.

UNITED STATES v. MITCHELL.[1]

[2 Dall. 357.]

Circuit Court, D. Pennsylvania. 1795.

CRIMINAL LAW—EVIDENCE—PROOF OF OTHER CRIMES—TREASON.

[1. On a trial for treason, where it was claimed that a circular letter had been written by leaders of the insurrection calling upon militia officers and other citizens to assemble at a place named, with arms, etc., *held*, that a copy of such letter was not admissible in evidence, unless it were shown that it was one of the copies actually circulated at the time of the insurrection.]

[2. It is not competent, on a trial for treason, to prove that the accused, in the course of the insurrection, joined with others in robbing the public mails, when there is already pending a separate indictment against him for that offence, and there is no evidence that the mail was intercepted and rifled with a traitorous intent.]

[This was an indictment for treason.]

In the course of the trial the following points were ruled by THE COURT:

1. The attorney of the district proposed to prove, that a circular letter had been written at Canonsburgh, on the 28th of July, 1794, by several leaders of the insurrection, calling upon the militia officers, and other citizens, to assemble at Braddock's Field on the first of August following, with arms, ammunition and provisions; that the witness had seen the original letter, which was left with him, under instructions to pass it on to another person; and that the copy now produced was conformable, in substance, to the original.

But it was objected by the counsel for the prisoner, that before a copy of the letter could be given in evidence, the loss of the original must be proved; and even then the witness must be able to attest, that he had compared them, and that the copy offered was in all respects correct.

It was answered, by the attorney of the district, that from the general circulation of the letter, copies must have been multiplied, and during a season of such confusion (to which the common rules of evidence are entirely inapplicable) it is impracticable to trace the comparison of any one copy with the original.

BY THE COURT. If it can be proved, that the copy of the letter now produced, was one of those copies, which were actually circulated at the time of the insurrection, it is admissible evidence: but, otherwise, it cannot be read to the jury.

2. The attorney of the district offered testimony to prove, that, in the course of the insurrection, the prisoner joined in robbing the public mail of the United States; and that several of the letters thus intercepted, had been read at the meeting at Braddock's Field.

But it was objected, on behalf of the prisoner, that the robbery of the mail was a felony, for which, as a substantive and independent crime, he was actually charged by another indictment; and that, therefore, evidence relating to it should not be given on the present issue, as the prisoner was not prepared to answer, and a prejudice might be excited against him in the mind of the jury.

BY THE COURT. An act committed with a felonious intention, cannot be given in evidence upon the trial of an indictment for high treason. It does not yet appear, that the mail was intercepted and rifled with a traitorous intention; and, as far as it respects the prisoner, there is another indict-

[1] [This was one of the trials arising out of the so-called "Whiskey Insurrection," occurring in western Pennsylvania in the year 1794. For a full account of the proceedings of the disaffected parties, see U. S. v. Insurgents, Case No. 15,443.]

ment against him, charging the offence merely as a felony. Under these circumstances the testimony cannot be admitted.

Case No. 15,790.

UNITED STATES v. MITCHELL et al.[1]

[1 Hughes, 439.] [2]

Circuit Court, D. South Carolina. Nov. Term, 1871.

CONSPIRACY—ACTS DONE IN FURTHERANCE OF ILLEGAL PURPOSE—KU KLUX.

1. Upon an indictment of conspiracy, if the jury find that a conspiracy existed, and that the accused was a party to it, it is sufficient to warrant a conviction that the object of the conspiracy was to effect one of the purposes alleged in the indictment.

2. Each member of an unlawful conspiracy is a conspirator and is responsible, personally, for every act of the conspiracy, and for the acts of each member thereof, done by common consent in furtherance of its illegal purposes, and also for such acts done in furtherance of the conspiracy not consented to beforehand, if assented to subsequently to their perpetration; whether the party charged was actually present or not when such act was done.

3. It makes no difference in guilt, if the motive of a party joining a conspiracy was not illegal when he did join it, if he was afterwards aware of its illegality and still remained a member.

This was an indictment of conspiracy [against Robert Hayes Mitchell and others] in violation of section 6 of the act of congress, approved May 31st, 1870 [16 Stat. 140], entitled "An act to enforce the right of citizens to vote," etc. The indictment contained two counts, one for conspiracy to violate section first of the said act, and the other with intent to oppress, threaten, and intimidate one James Williams, a male citizen of the United States, of African descent, because he had exercised the right of voting on the third Wednesday in October, 1870. Robert Hayes Mitchell was first called up and his case was tried separately. [See Case No. 14,893.] In the trial of this case it was given in evidence by the prosecution that there existed in several of the northwestern counties of South Carolina, a powerful, secret, oath-bound organization, known as the "Ku Klux Klan," whose object was the defeat of the Republican party; and that the means used to accomplish this result were the killing of white Republicans and the whipping and intimidation of negroes, to keep them from voting.

The "obligation," "constitution," and "by-laws" of the organization were proved by members of the Klan, and were as follows:

"Obligation.

"I (name) before the immaculate Judge of heaven and earth, and upon the Holy Evangelists of Almighty God, do, of my own free will and accord, subscribe to the following sacredly binding obligation:

"1. We are on the side of justice, humanity, and constitutional liberty, as bequeathed to us in its purity by our forefathers.

"2. We oppose and reject the principles of the radical party.

"3. We pledge mutual aid to each other in sickness, distress, and pecuniary embarrassment.

"4. Female friends, widows, and their households shall ever be special objects of our regard and protection.

"Any member divulging, or causing to be divulged, any of the foregoing obligation, shall meet the fearful penalty and traitor's doom, which is Death! Death! Death!"

"Constitution.

"Article 1. This organization shall be known as the —— Order, No. —— of the Ku Klux Klan, of the State of South Carolina.

"Article 2. The officers shall consist of a cyclops and scribe, both of whom shall be elected by a majority vote of the order, and to hold their office during good behavior.

"Article 3. It shall be the duty of the cyclops to preside in the order, enforce a due observance of the constitution and by-laws, and an exact compliance to the rules and usages of the order; to see that all members perform their respective duties; appoint all committees before the order; inspect the arms and dress of each member on special occasions; to call meetings when necessary; draw upon members for all sums needed to carry on the order.

"Sec. 2. The scribe shall keep a record of the proceedings of the order, write communications, notify other Klans when their assistance is needed, give notice when any member has to suffer the penalty for violating his oath, see that all books, papers, or other property belonging to his office, are placed beyond the reach of any but members of the order. He shall perform such other duties as may be required of him by the cyclops.

"Article 4. Section 1. No person shall be initiated into this order under eighteen years of age.

"Sec. 2. No person of color shall be admitted into this order.

"Sec. 3. No person shall be admitted into this order who does not sustain a good moral character, or who is in any way incapacitated to discharge the duties of a Ku Klux.

"Sec. 4. The name of a person offered for membership must be proposed by the committee appointed by the chief, verbally stating age, residence, and occupation;, state if he was a soldier in the late war; his rank;

[1] A full report of the proceedings in this and similar cases of conspiracy tried at the same term, may be found in the "Ku Klux Conspiracy" (being the report, with accompanying testimony, made by the joint special committee of congress, to inquire into the condition of affairs in the late insurrectionary states, printed in 1872), vol. 5, pages 1615 to 1990. The present report is furnished for this volume by William Stone, Esq., late the United States attorney for South Carolina.

[2] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

whether he was in the Federal or Confederate service, and his command.

"Article 5. Section 1. Any member who shall offend against these articles, or the by-laws, shall be subject to be fined and reprimanded by the cyclops, as two-thirds of the members present at any regular meeting may determine.

"Sec. 2. Every member shall be entitled to a fair trial for any offence involving reprimand or criminal puishment.

"Article 6. Section 1. Any member who shall divulge any of the matters of the order shall suffer death.

"Article 7. Section 1. The following shall be the rules of order. Any matter herein not provided for shall be managed in strict accordance with the Ku Klux rules.

"Sec. 2. When the chief takes his position on the right, the scribe with the members forming a half-circle around them, and, at the sound of the signal instrument there shall be profound silence.

"Sec. 3. Before proceeding to business, the scribe shall call the roll and note the absentees.

"Sec. 4. Business shall be taken up in the following order:

"1. Reading the minutes.

"2. Excuse of members at preceding meeting.

"3. Report of committee of candidates for membership.

"4. Collection of dues.

"5. Are any of the order sick or suffering?

"6. Report of committees.

"7. New business."

"By-Laws.

"Article 1. Section 1. This order shall meet at ——.

"Sec. 2. Five (5) members shall constitute a quorum, provided the cyclops or scribe be present.

"Sec. 3. The cyclops shall have power to appoint such members of the order to attend to the sick, the needy, and those distressed, and those suffering from radical misrule, as the case may require.

"Sec. 4. No person shall be appointed on a committee unless the person is present at the time of appointment. Members of committees neglecting to report shall be fined thirty cents.

"Article 2. Section 1. Every member on being admitted shall sign the constitution and by-laws, and pay the initiation fee.

"Sec. 2. A brother of the Klan, wishing to become a member of this order, shall present his application, with the proper papers of transfer from the order of which he was a member formerly, shall be admitted to the order only by a unanimous vote of the members present.

"Article 3. Section 1. The initiation fee shall be ——.

"Article 4. Section 1. Every member who shall refuse or neglect to pay his fines or dues shall be dealt with as the chief thinks proper.

"Sec. 3. Sickness, or absence from the country, or being engaged in any important business, shall be valid excuses for any neglect of duty.

"Article 5. Section 1. Each member shall provide himself with a pistol, Ku Klux gown, and signal instrument.

"Sec. 2. When charges have been preferred against a member in a proper manner, or any matters of grievance between brother Klux are brought before the order, they shall be referred to a special committee of three or more members, who shall examine the parties, and determine the matters in question, reporting their decision to the order. If the parties interested desire, two-thirds of the members present voting in favor of the report, it shall be carried.

"Article 6. Section 1. It is the duty of every member who has evidence that another has violated article 2 to prefer the charge and specify the offence to the order.

"Sec. 2. The charge for violating article 2 shall be referred to a committee of five or more members, who shall, as soon as practicable, summon the parties and investigate the matter.

"Sec. 3. If the committee agree that the charges are sustained, that the member on trial has intentionally violated his oath or article 2, they shall report the fact to the order.

"Sec. 4. If the committee agree that the charges are not sustained, that the member is not guilty of violating his oath or article 2, they shall report to that effect to the order, and the charges shall be dismissed.

"Sec. 5. When the committee report that the charges are sustained, and the unanimous vote of the members is given in favor thereof, the offending person shall be sentenced to death by the chief.

"Sec. 6. The prisoner, through the cyclops of the order of which he is a member, can make application for pardon to the great grand cyclops of Nashville, Tennessee, in which case execution of the sentence can be stayed until pardoning power is heard from."

During the progress of the trial it was given in evidence that this organization deliberately planned the murder of one James Williams, a colored Republican, who had been a captain in a militia company in York county; that pursuant to the orders of one J. W. Avery, the chief of the order in York county, between forty and sixty members of the Klan met at night in an old muster-field, mounted, armed, and disguised, and proceeded to the house of said Williams, broke into it, took him to the woods near by, and there hung him until he was dead; a card being left upon him, which was found the following morning, bearing the words, "Jim Williams on his big muster." On the same night the same party visited divers other houses of colored people, took them out, threatened them, robbed them of their arms, and in-

formed them that if they voted again they should be killed. The defendant was among those who participated in this "raid." Amzi Rainey, colored, testified that the Ku Klux came to his house one Saturday night about ten o'clock, broke it open by force, and beat his wife. Rainey had gone into the loft of his house when he found the Ku Klux were there, but search was made for him, and he was found and brought down. After a series of cruelties, Rainey was forced to swear that he would never vote another radical ticket.

Dick Wilson, colored, in the course of his examination said that the Ku Klux visited his house on the 11th of April, about two or three o'clock in the morning. The door was forced open, and the men outside began firing into the house. Afterwards witness was compelled to go with them to the house of his son, who lived near him, where an unsuccessful search was made for him. When they could not find his son, they came out of the house, and asked witness where he was. He said, "Gentleman, I don't know." The reply was, "Don't you call me any gentleman; we are just from hell-fire; we haven't been in this country since Manassas," etc. After more talk, some one said to him, "We'll make a Democrat of you to-night." They made this man lie down, and whipped him with ramrods until he promised to publish a card stating that he was done with the Republican party, and with Scott and his ring.

During his argument before the jury, Mr. Johnson, one of the counsel for the defendant, made use of the following language, with reference to the facts proved at the trial: "But Mr. Attorney-General (Mr. Chamberlain) has remarked, and would have you suppose, that my friend and myself are here to defend, justify, or palliate the outrages that may have been perpetrated in your state by this association of Ku Klux. He makes a great mistake as to both of us. I have listened with unmixed horror to some of the testimony which has been brought before you. The outrages proved are shocking to humanity. They admit of neither excuse nor justification. They violate every obligation which law and nature imposes upon men. They show that the parties engaged were brutes, insensible to the obligations of humanity and religion. The day will come, however, if it has not already arrived, when they will deeply lament it. Even if justice shall not overtake them, there is one tribunal from which there is no escape. It is their own judgment, that tribunal which sets in the breast of every living man—that still small voice that thrills through the heart, the soul of the mind, and as it speaks, gives happiness or torture—the voice of conscience, the voice of God. If it has not already spoken to them, in tones which have startled them to the enormity of their conduct, I trust, in the mercy of heaven, that that voice will speak before they shall be called above to account for the transactions of this world; that it will so speak as to make them penitent, and that trusting in the dispensations of heaven, whose justice is dispensed with mercy, when they shall be brought before the bar of their great tribunal, so to speak, that incomprehensible tribunal, there will be found, in the fact of their penitence or in their previous lives, some grounds upon which God may say Pardon!"

D. T. Corbin, U. S. Atty., and D. H. Chamberlain, for the United States.

Reverdy Johnson and Henry Stanberry, for defence.

BOND, Circuit Judge (charging jury). You have listened with patience to the recital of the evidence in this cause, and without commenting upon that, the court proposes to state to you the law applicable to the evidence, which must guide you in making up your verdict. The indictment, gentlemen, is for a conspiracy, which is an agreement by two or more persons to do an unlawful thing, or to do a lawful thing by unlawful means. The thing to be punished is the unlawful conspiracy, and not the particular acts done in pursuance of it. The conspiracy is a crime, if nothing be done in pursuance of it. The indictment, gentlemen, contains two counts. The first charges the defendant and others, jointly indicted with him, with having conspired to violate the first section of the act of May 31st, 1870, by unlawfully hindering, preventing, and restraining a certain class of persons therein named from the future exercise of the right to vote at an election to take place in October, 1872, on account of their race, color, or previous condition of servitude. And the second count charges that he, with others, did conspire to injure, because of his color, James Williams, because he had exercised the right to vote previously. It is to these counts that you are to refer the evidence, and to apply the law which the court gives you. If you find, from the evidence, that there was no such conspiracy as that described in the first count, or if there was a conspiracy, the object of which and its purpose were different from that set forth in the count, and that the object and purpose set forth in the count was not one of its purposes and objects, then the party charged is not guilty under the first count, though he may have been engaged in the conspiracy. But it is not necessary, if the jury find there was a conspiracy, and that the party was engaged in it, that they should find its purpose to have been single. If they find that one of its purposes was that set forth in the first count, to prevent citizens from the exercise of the right to vote because of their color, it is sufficient. An association having such a purpose is an unlawful conspiracy, and a party engaged in it may be punished under the first count.

Each member of such an association is a conspirator, and is responsible, personally, for every act of the conspiracy, and for the acts

of each member thereof, done by common consent, in furtherance of its illegal purposes, and also for such acts done in furtherance of the conspiracy not consented to beforehand, if assented to subsequently to their perpetration, and that whether the party charged was himself actually present or not when such act was done. And if the jury believe, from the evidence, that the various Klans spoken of by the witnesses, were but parts of one general conspiracy, this rule applies not only to the members of the same Klan, but to the acts and conduct of the members of the different Klans done in furtherance of the conspiracy. And it makes no difference in guilt if you find from the evidence that the motive of a party who joined the conspiracy was not illegal when he did join it, if you also find, that after he became a member, he was aware of the fact, or had reason to know, that the true object of the conspiracy was to prevent or hinder the free exercise of the elective franchise by intimidation or violence, as aforesaid, on account of color, and that he still remained a member and participated in its meetings, and that, though you may also find he never himself actually used the force, intimidation, or violence, and was not present when it was used.

And now, if the jury find, from the evidence, that the party charged did so conspire to prevent the citizens described from exercising their right to vote on account of their color, at a future election, specified to be the election to take place on the third Wednesday of October, 1872, then the party charged is guilty under the first count of the indictment. And if the jury find, from the evidence, that they did so conspire, and for the same reason, to injure and oppress, on account of his color, one Jim Rainey, alias Jim Williams, because he had antecedently, on the third Wednesday of October, 1870, exercised his right to vote, then he is guilty on the second count.

But if the jury find, from the evidence, that no such conspiracy existed, or that if it existed, the intimidation or injury of voters because of their exercise of the suffrage, or to prevent its exercise, formed no part of its purpose, or that, if that were its purpose, the defendant was not engaged in it, then the defendant is not guilty. But the jury is not bound to believe the sole purpose of the conspiracy to be that set out in the first count; if they find it to be one of the purposes, it is sufficient. Nor if they find that the beatings and intimidation spoken of by the witnesses took place or existed, are the jury bound to believe that the reasons given at the time by the conspirators, if they find reasons were given, were the true reasons for such conduct, but the jury may determine, from all the evidence in the cause, what the true reasons were for such violence.

If the jury find, from the evidence, as we said before, that the conspiracy set forth in the first and second counts in the indictment existed, and the defendant engaged in it there, he is guilty on both counts. If there existed no such conspiracy at the time set out in the indictment, or if existing, it had another object which did not include that set out in the indictment, or if existing, and having the illegal purpose, the defendant took no part in it, then he is not guilty. The jury are at liberty to find one of three verdicts. They may find the party guilty generally, or not guilty generally, or they may find him guilty on one count, and not guilty on the other.

The jury found a verdict of guilty on the second count. A motion was made for a new trial, but it was overruled, and the prisoner was subsequently sentenced to eighteen months' imprisonment and a fine of one hundred dollars.

Case No. 15,791.

UNITED STATES v. MITCHELL.

[2 Wash. C. C. 478.] [1]

Circuit Court, D. Pennsylvania. Jan., 1811.

EMBARGO—EVIDENCE—CERTIFICATE OF SURVEY—LOG-BOOK.

1. Although a certificate of a survey of a vessel is not evidence of the facts stated in it, yet, if the surveyors, in a deposition regularly taken, refer to the certificate, as containing all they know, it is evidence.

[Cited in The Director, 34 Fed. 60.]

2. The certificate of the American consul at a foreign port, under his seal of office, that the ship's papers were lodged with him, agreeably to the requisitions of the embargo law, is good evidence of that fact, but not of other facts stated in it.

[Cited in Levy v. Burley, Case No. 8,300; The Alice, 12 Fed. 925.]

3. If a log-book be offered in evidence, it should be proved to be the book kept on the voyage. It is not sufficient to prove the handwriting of the mate, as to some of the entries in it.

Debt on an embargo bond. The defence was, that the vessel, by stress of weather, was forced into St. Thomas's, where she was so disabled that she could not, without repairs, have returned to the United States; and that the government prohibited the carrying away the cargo. To prove the condition of the vessel at St. Thomas's, the defendant read the depositions of two of the surveyors, who were appointed to view her and who refer to the survey, and declare that it contains a true statement of her condition: that it contains all they knew then, or now know on the subject. The reading of the survey was objected to.

BY THE COURT. In Watson v. Insurance Co. of North America [Cases Nos. 17,284 and 17,285], we determined that a survey is not evidence of the facts stated in it. But in this case, the witnesses have incorporated it into, and made it part of their depositions,

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

and of course attest the verity of the facts stated in it, as fully as if they had set forth the same facts in their deposition. Of course it may be read.

The certificate of the consul at St. Thomas's, that the ship's papers were lodged with him, agreeably to the act of congress, under his seal of office, was admitted as evidence, and other parts of it, as to other facts, struck out.

The defendant offered a book, as the log-book of the vessel, and insisted, that as the district attorney had given him notice to produce the log-book, this made it evidence. To identify it, the only evidence was by a sailor belonging to the vessel, who deposed as to the hand-writing of the mate, in many parts, and that he saw him marking the words "Log-Book of the Lydia," on the cover of the book, on the voyage.

BY THE COURT. The calling for a paper does not make it evidence, unless the party calling chooses to read it, in which case he admits it. But in this case, the call was for the log-book, and no evidence is given that this is the log-book kept on the voyage, but may have been afterwards made up by the mate, to suit the purpose of this cause. The cover does not identify it, as the same words might have been written on any piece of canvas, and put on this book.

The charge merely stated the point for the jury to decide, viz. that the defendants were prevented, from perils of the sea, or other unavoidable accident, from relanding the cargo in the United States. To excuse themselves for going to St. Thomas's, they should prove, that the injured state of the vessel, and adverse winds, prevented them from putting into some port of the United States, and compelled them to go to St. Thomas's; and that, when there, they were prevented by the government from returning, with the cargo, to the United States.

[For another trial of this case, see Case No. 15,792.]

Case No. 15,792.

UNITED STATES v. MITCHELL et al.

[3 Wash. C. C. 95.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1811.

EMBARGO—DEBT ON BOND—PERILS OF THE SEA—CERTIFICATE—LOG-BOOK—SEAWORTHINESS.

1. Debt on a bond given under the embargo laws. The question on the evidence was, whether the defendants were prevented by perils of the sea, from performing the condition of the bond. It was alleged, that the vessel was, by perils of the sea, driven into St. Thomas; and that when there the authorities of the island obliged the master to sell her cargo.

2. The certificate of the governor of St. Thomas (the signature being proved), without a seal, given at the time the captain petitioned for leave to depart with his cargo, that such petition was refused; is an official act by a person, who, it is probable, would not give a deposition, and is different from evidence of matters not official, and may be read in evidence.

3. The log-book was allowed to be given in evidence, in proof that the bills of lading had been made out from it; the witness declaring he was perfectly sure it was the log-book kept on the voyage, although he did not recollect having seen the mate make regular entries in it; and also, that every exertion had been made, to procure the attendance and testimony of the mate.

4. The rule, in U. S. v. Dixey [Case No. 14,967], condemned by the court. If the vessel was not seaworthy, the injury done to her or to her voyage by perils of the sea, will not excuse the defendants, who should clear themselves from all imputations of this kind; but the rule as to seaworthiness, ought not to be more strict in such cases as this, than in cases of insurance. It is sufficient, if the vessel were seaworthy for the voyage upon which she was destined; and the want of this, must be proved by him who affirms the fact, if sufficient causes for her disability, such as storms, &c., are proved. Aliter, if no such cause appears.

Debt on an embargo bond; and the question on the evidence was, whether the defendants were prevented by perils of the sea, or other unavoidable accidents, from landing their cargo at some port in the United States? The voyage was from Philadelphia to Charleston and Savannah. The night of the day after the pilot left her, she was exposed to a violent storm, which continued, with some intermissions, for some days. She suffered greatly in her masts and rigging, insomuch, that she was compelled to keep before the wind; and the winds continued so adverse, that it was stated by a witness, that it was not possible to make a port in the United States. The log-book strongly supported this statement. She went into St. Thomas, where she was unladen by order of the judge, upon a report of surveyors; and was prevented, by a general prohibition of the government of the island, from carrying away the cargo, which consisted of provisions. It appeared, by a certificate of the governor of the island, whose signature was proved, but to which there was no seal, which certificate was given at the time the petition of the captain was made to him, for leave to take away the cargo, that it was refused. This certificate was objected to.

BY THE COURT. The certificate is of an official act, given at the time, by which it appears, that the captain had petitioned for leave to take away the cargo, which the governor refused. We know no way by which that fact could be better proved, than by this certificate, unless the deposition of the governor had been taken, which it is not to be supposed he would have consented to give. This is very different from evidence of matters not official, in which latter case, such a certificate could not be admitted.

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

The log-book, which was not admitted at the former trial [Case No. 15,791], was now admitted upon this additional evidence, that in relation to the cargo taken on board, the bills for landing at St. Thomas, were made out from this book, which the witness declared he was perfectly sure was the log-book kept on that voyage, though he did not recollect seeing the mate make entries regularly in it; and upon this further proof, that advertisements had been inserted in two papers in this city, shortly after the last trial, requesting information where the mate was, as by calling at a particular place, he would hear something to his advantage. This book is now better identified, than it was at the last trial, and due diligence has been used to obtain better evidence than that of the mate himself, without success.

WASHINGTON, Circuit Justice (charging jury). Something has been said, about the want of seaworthiness in this vessel. If sufficient proof of her want of seaworthiness for the intended voyage, has been given, to the satisfaction of the jury, it is fatal to the defence; because, the defendants, to entitle themselves to the excuse they set up, should clear themselves from all blame in respect to the accident which prevented their complying with the condition of the bond. But, in respect to seaworthiness, the rule, in a case of forfeiture, must not be more rigid than is laid down in actions on policies of insurance; and that is, if the vessel, without any apparent and sufficient cause, begins to leak, and to show herself unfit to perform the voyage, the presumption is that she was not seaworthy when the voyage commenced; and the person who affirms she was so, must prove it by sufficient evidence. But, if a sufficient cause for her leaking is proved, as the existence of severe weather, as in this case; the burthen of proof is thrown upon the party who affirms that she was not seaworthy when the voyage commenced. Whether any such evidence has been given by the United States, you are to decide. The question is, not whether she was sufficiently staunch and strong, and found for any voyage, but for this voyage? Another argument used by the district attorney, was, that when the accidents happened, which compelled her to go before the wind, she ought to have returned to Philadelphia. If at this time it was apparent that she could not make a southern port, and that she could get into a more northern port, she certainly was bound to do so. This was formerly determined in a case in this court; because, in that case, the vessel not being able to lay to the wind, so as to make a southern port, on account of the want of ballast, and having performed but a small part of her voyage, it was decided, that the master ought to have returned, and gone somewhere to supply his original omission. But in this case, there was no reason to suppose, that this vessel could not make a southern port, in consequence of the injury to her masts, nor does it appear, that she could not have done it, had the winds favoured. She had performed much the greatest part of her voyage, and was driven from the coast by westerly winds; so at least is the evidence. The law, in such a case, did not impose on the defendants the necessity of returning, so long as they could fairly hope, with favourable winds, to reach the port of their destination. As to the facts of the case, the court will only say, that if you credit the evidence given of them, the defendants have fully brought themselves within the exception provided in their favour.

Verdict for defendants.

Case No. 15,793.

UNITED STATES v. MOLLER.

[10 Ben. 189.] [1]

District Court, S. D. New York. Dec., 1878.

EXECUTION AGAINST PERSON—NEW YORK CODE—PENALTIES—DAMAGES FOR FRAUD.

1. Judgment having been recovered against the defendant under Rev. St. U. S. §§ 2839, 2864, for the value of goods illegally imported, and an execution against his property having been returned unsatisfied, and an execution against the person having been issued, on motion to set aside the latter execution: *Held*, that the question whether defendant was liable to arrest on execution is by Rev. St. U. S. § 990, made dependent on the law of New York.

2. Under the law of New York (Code, §§ 548, 549, 1489), defendant was not liable to arrest.

3. The action was not one to recover damages for a fraud, nor for a penalty within the meaning of Code N. Y. § 549.

[Cited in U. S. v. Reid, 17 Fed. 498.]

[This was an action by the United States against Anton Moller, for the value of goods illegally imported.]

B. B. Foster and J. J. Adams, for the motion.

Mr. Tenney, Asst. U. S. Dist. Atty., opposed.

CHOATE, District Judge. This is a motion to set aside an execution against the person. The suit was for the value of merchandize entered in violation of Rev. St. §§ 2839, 2864, by which, in case goods are entered by means of a false invoice, the goods or their value are declared forfeited to the United States. The declaration was in the form of a declaration in debt, according to the old practice. The defendant was defaulted and judgment was entered upon his default. An execution against his property having been returned unsatisfied, this execution against the person was issued. The question whether the defendant is liable to arrest on execution, depends upon the law of

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

the state of New York. If upon a judgment for the same cause of action in a state court, he would be liable to arrest on execution, he is so liable on this judgment; otherwise not. Rev. St. § 990.

The present law of New York, regulating the matter, is contained in sections 548, 549, and 1487 of the Code of Civil Procedure. By section 1487 an execution against the person is limited to two cases: First, "where the plaintiff's right to arrest the defendant depends upon the nature of the action"; and secondly, "in any other case where an order of arrest has been granted and executed in the action and has not been vacated." There was no order of arrest in this action; therefore, the sole question is whether this is a case where the nature of the action gives the plaintiff the right to an arrest. The reference here is to sections 548 and 549. Section 548 prohibits arrest in a civil action, except as prescribed by statute. Section 549 provides that the defendant may be arrested "where the action is brought for either of the following causes: (1) To recover a fine or penalty; (2) To recover damages for a personal injury; an injury to property, including the wrongful taking, detention or conversion of personal property; * * * fraud; deceit;" and certain other cases admitted to have no similarity to this suit. It is insisted by the plaintiff that this is "an action to recover damages for fraud," within the meaning of this section; but it seems to me that this claim can not be sustained. Section 549, in view of the prohibition contained in section 548, and of the nature of the right affected by this legislation, the right of personal liberty, if not to be strictly construed, should not be strained beyond the fair and proper meaning of the terms used to bring a case within its provisions. An action to recover damages for fraud is an expression apparently referring to that class of actions, well defined at the common law, in which the ground of the action was an actionable fraud practiced by the defendant on the plaintiff and the purpose of the action to recover the damages resulting to the plaintiff therefrom. Doubtless, it does not exclude cases where those damages may be made exemplary by the verdict of the jury. Is the present an action similar in the grounds on which it is based, or in the purposes it is designed to effect? Clearly not. It is an action of substantially a different and peculiar character, sui generis. Violations of the revenue laws have been in this country and in England always visited with this class of forfeitures, primarily of the goods, by means of which the offence was committed, and collaterally to prevent a loss to the government by reason of the sale or consumption of the goods, before discovery of the offence, by forfeiture of their value as an independent remedy. The theory of these statutes is that, by reason of the breach of the law, the goods become the goods of the government, if it sees fit to insist upon its right, and the action for their value is given as an equivalent or substitute for the right of seizure and forfeiture of the goods themselves. It is very true that under present and recent legislation there is no forfeiture either of the goods or their value, unless there is an actual intent to defraud the government; but although the proof of this is a prerequisite to a recovery, this does not make the action in substance an action to recover damages for the fraud, or alter its nature, essentially. The recovery has no relation whatever to any damages which the government may have suffered by reason of the fraud practiced. The amount to be recovered is neither more nor less than the value of the goods. It generally far exceeds the amount of duty of which the government has been deprived, but with changes of values and of markets, it is quite supposable that the value may be less. Nor by any latitude of construction can the forfeiture be regarded as of the nature of exemplary damages for the fraud. The legislature of New York has not seen fit to allow an arrest in an action to recover forfeited goods or their value, and congress has seen fit to limit the arrest of defendants on execution to cases in which it is allowed by the legislature of New York, and has made no special provision for an arrest in this class of actions.

It is also claimed by the plaintiff that this is an action for a "penalty" within the meaning of the first subdivision of section 549. But the word "penalty," in connection with the word "fine," seems to refer to pecuniary penalties, under penal statutes. It has been repeatedly held that these revenue laws are not penal laws. And in no proper or common sense is this forfeiture a penalty.

Defendant discharged.

Case No. 15,794.

UNITED STATES v. MOLLER.

[16 Blatchf. 65;[1] 7 Reporter, 390.]

Circuit Court, S. D. New York. Feb. 28, 1879.

CRIMINAL INFORMATION—ILLEGAL IMPORTATION—PENAL RECOVERY.

1. It is not necessary that a criminal information should show either that the defendant has been held to answer the charge, on a complaint before a commissioner, or that the charge has been found true by a grand jury.

2. A criminal information for a violation of section 5445 of the Revised Statutes of the United States, in effecting an entry of merchandise, need not set forth the various steps or documents by which the entry was accomplished, so long as the information is otherwise sufficient.

3. The question whether a criminal prosecution for the acts complained of will lie after the recovery of a penalty by a civil suit for the same acts, does not arise on a demurrer to the information.

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

[This was a criminal information against Anton Moller. Heard on demurrer.]

William P. Fiero, Asst. U. S. Dist. Atty.
Benjamin B. Foster, for defendant.

BENEDICT, District Judge. This case comes before the court upon a demurrer to the information. It is first contended, in support of the demurrer, that the proceeding by information will not lie, because it does not appear on the face of the information, either that a complaint had been laid before a commissioner, and the defendant thereupon held to answer to the charge set forth in the information, or that the charge had ever been found true by a grand jury. Although it has been the practice in this district, where it is intended to proceed by information, to make a preliminary complaint before a commissioner—a practice which I certainly do not intend to discountenance—I know of no practice or rule that requires the information to show on its face that such a course has been pursued. In the absence of any such requirement, the question of the right to proceed by information, without a preliminary hearing before a commissioner, is not raised by a demurrer.

The next objection presented is, that certain documents, by means of which, it is charged, the offence was committed, are not set out by their tenor. In support of this objection, authorities are cited, to the effect, that, when written instruments enter into the gist of the offence, they should be set out in words and figures. But, written instruments do not enter into the gist of the offence charged in this information. The offence charged is that created by section 5445 of the Revised Statutes, which provides, that "every person who, by any means whatever, knowingly effects, or aids in effecting, any entry of any goods, wares or merchandise, at less than the true weight or measure thereof, or upon a false classification thereof as to quality or value, or by the payment of less than the amount of duty legally due thereon, shall be fined, &c." The statute, it will be observed, says, "by any means whatever," clearly showing that the means employed to effect an entry of goods upon a false classification as to value, or by payment of less than the legal duty, are not of the essence of the crime. The gist of the offence consists in the fraudulent entry, and it is unnecessary to set forth in an information the various steps whereby the entry was accomplished. The information charges, that the defendant, at a certain time and place, effected an entry of certain goods, so described as to identify the goods as well as the entry thereof; and to show that by law the goods were subject to a duty of 60 per cent. ad valorem, coupled with the averment that they were liable to that rate of duty. It is then stated that said goods were entered by the defendant upon a false classification as to value, and the particular in which the classification was false is stated. It is also charged that such entry was effected by a payment of less than the legal duty, and the amount of the duty paid and the amount of duty legally due are stated. These averments contain every ingredient of the offence, and constitute a statement of the acts alleged to have been done, with sufficient particularity to inform the defendant in regard to the charge, and to show to the court that an offence has been committed. The other averments of the information, undertaking to describe, with more or less certainty, the means employed by the defendant to effect the said entry, were unnecessary, and, being unnecessary, any defect therein will not invalidate the information.

The remaining point made is, that the information will not lie because of the recovery of a penalty by civil suit based on the same acts here complained of. [See Case No. 15,793.] Clearly, this question does not arise upon demurrer, and it cannot, therefore, be now determined.

There must be judgment for the prosecution, on the demurrer, with leave to the defendant to plead.

Case No. 15,795.

UNITED STATES v. The MOLLIE.

UNITED STATES v. The BONITA.

[2 Woods, 318.] [1]

Circuit Court, E. D. Texas. May Term, 1876.

SHIPPING—STEAM INSPECTION LAWS—PRACTICE IN ADMIRALTY—DECREE—DEFAULT.

1. Where a seizure is made on water and the proceeding is consequently in admiralty, and there is default, the court should use a wise discretion whether to require proofs or not.

2. In all such cases, proclamation to appear should be made and a decree entered for default and contumacy, and upon reading the libel and proceedings thereon, and with or without proof as the court may direct, such decree should be made as the nature of the case may require.

3. A small pleasure boat twenty-nine feet long and seven feet wide, without deck, propelled by a small steam engine with a cylinder of nine inches stroke and three and one-half inches diameter, run occasionally by its owners for amusement upon Buffalo Bayou below Houston, Texas, is not a vessel navigating the public waters of the United States within the meaning of the steam inspection laws.

[Cited in Hartrauft v. Du Pont, 118 U. S. 227, 6 Sup. Ct. 1188.]

[Appeal from the district court of the United States for the Eastern district of Texas.]

This was a libel filed in the district court for penalties for nonobservance of the steamboat inspection law. No party appearing to claim the vessel, the district court, on examining a witness as to its character, dismis-

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

sed the libel [case unreported], and the United States attorney appealed. No person yet appearing, the question arose as to the method of proceeding, namely, whether a decree of condemnation ought to be entered as of course for the default, or whether the United States attorney ought to prove the allegations of the libel.

BRADLEY, Circuit Justice. The steamboat inspection law does not prescribe the method of recovering the penalties therein imposed; but as the libel in this case was for penalties for which the vessel is made liable, and subject to seizure, the mode of proceeding will be regarded as to be governed by the general act, section 923 Rev. St., which is based upon the eighty-ninth section of the revenue collection act of 1799 [1 Stat. 695]. By this act, "if no person appears and claims such vessel, goods, etc., and gives bond to defend the prosecution thereof, and to respond the cost, in case he shall not support his claim, the court shall proceed to hear and determine the cause according to law."

What is meant by hearing and determining according to law, is the point to be ascertained. The phrase has met with some judicial exposition; and it seems to be settled that the mode of hearing depends on the practice of the court in which the proceeding is conducted. If it is a court of common law, or if the proceeding is according to the course of the common law, the practice is one thing; if it is a court of admiralty, proceeding in due course of admiralty, it is another thing. On seizures for condemnation and forfeiture at common law, an information is filed, setting forth the offense and the ground of seizure, and praying the relief desired. This is the course on seizure made upon land. In this proceeding, proclamation is made on the return of the writ, and if default be made, a judgment of condemnation by default is entered, and an order of sale of the thing condemned. This is the course of proceeding in the court of exchequer in England. A complete record in such a case may be found in Parker, Exch. 57, in the case of Attorney General v. Lade, referred to in Miller v. U. S., 11 Wall. [78 U. S.] 303, where this method of entering judgment is approved.

But if the seizure is made on water, and the proceeding is in admiralty, there is some difference of opinion as to the practice to be pursued. Some authorities state that a final decree will be made on the default; others, that proofs must be made of the allegations of the libel. The twenty-ninth rule in admiralty, as prescribed by the supreme court of the United States, directs that "if the defendant shall omit or refuse to make due answer to the libel upon the return day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default; and thereupon the libel shall be adjudged to be taken pro confesso against him, and the court shall proceed to hear the cause ex parte, and adjudge therein as to law and justice shall appertain." The method here prescribed—"proceeding to hear the cause ex parte"—would seem to require something more than a mere entry of a decree. Conkling, in his treatise on United States Courts (part 3, p. 568, c. 3, § 3), says, that in the district courts of New York, on the return day of the warrant of arrest, or some subsequent day of the term, the district attorney reads the libel or information, or so much thereof as is necessary to show what property it is that is proceeded against, by whom the seizure was made, and the grounds of seizure. He thereupon moves that the usual proclamation be made; and the crier accordingly makes one proclamation to the purport, that if any one can aught say why the property mentioned in the libel or information should not be condemned as forfeited to the United States, he may come forth and shall be heard. If no claimant appears the district attorney moves for a decree of condemnation, and that the property be sold at a designated place, and it is so ordered by the court of course, without further inquiry. Judge Betts, in speaking of decrees for default and contumacy generally, says, that "if no one appears, the proctor moves the decree of default and condemnation, and that the matter be referred to the clerk for computation, or that a venditioni exponas issue, if no reference is necessary." Betts, Adm. 36. In some cases, of course, it is obviously necessary to institute some inquiry to liquidate the libellant's demand. Probably different district courts had prescribed different rules on this subject before the adoption of the general admiralty rules by the supreme court, in 1844. Where the rule was (as the twenty-ninth general rule now is), that the judge should proceed and hear the cause ex parte, Judge Ware said, in 1839, that according to the ordinary and regular course of the court, the cause should be heard upon the evidence produced upon the part of the libellant only. The Centurion [Case No. 2,554]. In a case before Judge Sprague, in 1858, on a libel in rem for a forfeiture in which the phrase of the statute, "The court shall proceed to hear and determine the cause according to law," was brought directly to his attention, he held that after default there must be some hearing before a decree of forfeiture, but to what extent, must depend upon the circumstances of the case. The court, he says, will at least examine the allegations of the libel to see if they are sufficient in law, and the return of the marshal and such affidavit or affidavits as the district attorney shall submit. Where it appears that the owners have had full notice of the proceedings and ample opportunity to intervene, and have voluntarily declined to do so, slight additional evidence will be sufficient. Indeed, a willful omission by the owners to answer, and thereby make disclosure as to the ma-

terial facts within their knowledge might of itself satisfy the court that a forfeiture should be decreed. But the court will require the prosecutor to introduce full proof of the allegations in the libel, whenever the circumstances shall make it reasonable. U. S. v. The Lion [Id. 15,607].

The result seems to be that the court must be governed by a wise discretion, whether to require proofs or not. In all cases, proclamation to appear should be made and a decree entered for default and contumacy; and then, or upon reading the libel and proceedings thereon, and either with or without further proof as the court may direct, such decree should be made as the nature of the case may require. In the present case, being informed that the boat is a mere skiff, to which it is doubtful whether the inspection laws were meant to apply, I have deemed it advisable to hear proofs.

On the merits, D. J. Baldwin, U. S. Atty., cited and relied on sections 4399, 4400, 4426, 4437, 4443, 4446, and 4449, Rev. St. U. S., and the instructions of the treasuury department.

THE CIRCUIT JUSTICE. This is a libel against a small pleasure boat, twenty-nine feet long, seven feet wide, and without deck, but propelled by a small steam engine with cylinder of nine inches stroke and three and a half inches diameter. It is run occasionally by its owner and the owner of the engine for their amusement, on the Buffalo Bayou below Houston. In my judgment, this is not a vessel navigating the public waters of the United States, within the meaning of the steam inspection laws. Section 4426 of the Revised Statutes enumerates the various kinds of small steam craft which were intended to be embraced within the law. It declares that the hull and boilers of every ferry boat, canal boat, yacht, or other small craft of light character, propelled by steam, shall be inspected under the provisions of this title. Such other provisions of law for the better security of life as may be applicable to such vessels shall, by the regulations of the board of supervising inspectors, also be required to be complied with, before a certificate of inspection shall be granted. And no such vessel shall be navigated without a licensed engineer and a licensed pilot.

Now the vessel in question is neither a ferry boat, canal boat nor yacht. Does it belong to the added category of "other small craft of light character?" These words must be interpreted upon the principle of noscitur a sociis. The last clause of the section shows that, to be within the law, a vessel must at least be one which will admit of the employment of a licensed engineer and a licensed pilot. It is not to be supposed that a mere pleasure skiff, of the kind now under consideration, was intended to be embraced within the regulations of this law. The libel is dismissed.

The same decree will be entered for the same reason in the case of U. S. v. The Bonita.

Case No. 15,796.

UNITED STATES v. MONONGAHELA BRIDGE CO.

[26 Law Rep. 107; 11 Pittsb. Leg. J. 169; 2 Pittsb. Rep. 475.]

District Court, W. D. Pennsylvania. Dec., 1863.

PENAL ACTION—TOKENS TO BE USED IN LIEU OF MONEY—TOLL TICKETS.

1. Act Cong. July 17, 1862 [12 Stat. 592], construed.

2. Bridge, railroad and passenger railway companies may issue tickets "good for one trip," without violating the provisions of the act.

3. Those tickets are not designed to supplant the circulating medium, but are matters of convenience, equally to the passenger and the companies.

4. If they bore any resemblance or similitude to the coin of the United States, or the postage currency authorized by congress, or if the purpose, indicated upon their face, was to cause them to circulate as money, the corporations issuing them would be amenable to the penalties of the act.

This case, together with the cases of U. S. v. Allegheny Bridge Co. and U. S. v. Northern Liberties Bridge Co. was argued by Bakewell, Loomis & Shaler for defendants, and by Mr. Carnahan, U. S. Dist. Atty.

McCANDLESS, District Judge. The question raised by the demurrer is, whether these corporations are liable to the penalty under the provisions of the act of congress of July 17, 1862, for issuing paper tickets to be received for toll. The indictment charges that the defendants "did issue, circulate, and pay divers checks, memoranda, and obligations, each for a sum less than one dollar, intended to be received and used in lieu of the lawful money of the United States." The tickets are described as having printed on their face, "Monongahela Bridge—good for one trip," with the name of the collector of tolls added. We do not think that this is a violation of the act of congress. Unlike the tokens recently issued by the merchants of this city, and for which penalties have been imposed by this court, these tickets have no resemblance or similitude in shape, design or material, to the coin of the United States, nor to the postage currency, the free and untrammelled circulation of which it was the design of the act to advance and protect. They cannot even be dignified by the name, given in anything but polite phraseology, to the worthless issues of rotten boroughs, which in our past history flooded the country, and against a renewal of which the prohibitions of this act are directed. They do not contain a promise to pay money, they are not the representatives of money, and therefore cannot be said to circulate, or be intended to circulate

as money. Money is the medium of exchange among the people. Its peculiar characteristic is, that it is the one thing acceptable to all men, and in exchange for which they will give any commodity they possess. The power to make it is an exclusive attribute of sovereignty, no difference of what material it may be composed. It may be of the precious or the baser metals, or it may be of paper, provided it has the stamp of the sovereign authority. Any infringement of this supreme prerogative is visited with merited punishment by all nations that claim to have organized or well-regulated governments.

What are these tickets, but a mere permit to pass on the defendant's bridge, the printed evidence that the holder has the right of way over a public thoroughfare for a given distance? Their exclusion would (prohibition would) be subject to the penalties of this law all railroad and passenger railway companies which issued tickets, as well for the convenience of the public as for their own protection. No passenger is bound to receive them, nor should they be tendered, except during periods when there is great scarcity of the smaller coin of the United States, and when the exchange is a mutual accommodation to the passenger and the collector; as every passenger is bound to pay his toll, and in the lawful circulating medium the embarrassment is more frequently with him than with the company. But as the latter enjoy a monopoly of the particular highway, it is their duty so to use their franchise as not to put the public to unnecessary inconvenience. The grant of corporate privileges is for the public good; and from our knowledge of the gentlemen having the management of these companies, we are satisfied they entertain no desire to abuse them. They have an interest in common with the community in preserving the purity of the currency, and a departure from this policy would only react on themselves.

Let judgment be entered for the defendants on the demurrer, the costs to be paid by the United States.

Case No. 15,797.

UNITED STATES v. The MONTE CHRISTO.

[The case reported under above title in 17 Int. Rev. Rec. 31, is the same as Case No. 9, 720.]

Case No. 15,798.

UNITED STATES v. MONTELL.

[Taney, 47.] [1]

Circuit Court, D. Maryland. April Term, 1841.

PENALTIES—WHAT ARE—SUM SECURED BY BOND—DISTRIBUTION.

The act of congress of December 31, 1792, c. 45, § 7 [1 Story's Laws, 271; 1 Stat. 290, c. 1], provides in effect that previous to any registry of a ship or vessel, the ship's husband, or acting and managing owner, together with the master thereof, and one or more sureties, shall become bound to the United States in a certain sum (according to the size of the vessel) that such registry shall be solely used for the vessel for which it is granted, and shall not be sold, lent or otherwise disposed of, to any person or persons whatsoever; and if the vessel be lost, or shall, by other disaster, be prevented from returning to the port, and the registry be preserved; or if the vessel be sold, in whole or in part, to a foreigner, that the register in such cases shall be delivered up to the collector, within certain times specified in the act. The 29th section of the same law declares that all the penalties and forfeitures incurred for offences against that act may be sued for and recovered in such courts, and be disposed of in such manner, as penalties and forfeitures which may be incurred for offences against the act of August 4, 1790, c. 62 [1 Story's Laws, 117; 1 Stat. 145, c. 35], and by this last-mentioned act, one moiety of all penalties, fines and forfeitures (not otherwise appropriated) are to be divided in equal portions between the collector, naval officer and surveyor. Judgment was recovered in the district court, on a bond given under the above-mentioned act, and a petition was filed by the collector, claiming one moiety of the sum recovered for himself and the naval officer and surveyor, on the ground that it was a penalty or forfeiture for an offence against the act of congress. *Held*, that the sum secured by a bond given under that act, is a penalty or forfeiture inflicted by the sovereign power for a breach of its laws, and is to be distributed in the mode provided for such penalties and forfeitures by the 29th section. It is not a liquidated amount of damages due under a contract, but a fixed and certain punishment for an offence; and it is not the less a penalty and a punishment, because security is taken before the offence is committed, in order to secure the payment of the fine, if the law should be violated.

[Cited in Allen v. U. S., Case No. 240. Quoted in Clark v. Barnard, 108 U. S. 458, 2 Sup. Ct. 891. Cited in brief in U. S. v. Cutajar, 59 Fed. 1001.]

[Appeal from the district court of the United States for the district of Maryland.]

[This was a suit by the United States against Francis T. Montell upon a bond given for the proper return of his vessel's register. Judgment was had upon the bond in the district court, and the sum of $1,200 paid. The collector of customs thereupon filed his petition in the district court, praying that a moiety of the sum recovered be paid to him and to the naval officer and surveyor. The district court dismissed the petition (case unreported), and the cause is now heard on appeal.]

N. Williams, U. S. Dist. Atty.

Wm. F. Frick, for petitioner.

TANEY, Circuit Justice. This is an appeal from the decree of the district court, and the point in dispute will be better understood by stating, in the first instance, the provisions of the acts of congress upon which it depends.

The act of December 31, 1792, c. 45, § 7 [1 Story's Laws, 271; 1 Stat. 290, c. 1], entitled "An act concerning the registering and recording of ships or vessels," provides, that previous to any registry of a ship or

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

vessel, the ship's husband, or acting and managing owner, together with the master thereof, and one or more sureties, shall become bound to the United States in a certain sum (according to the size of the vessel), that such registry shall be solely used for the vessel for which it is granted, and shall not be sold, lent or otherwise disposed of, to any person or persons whatsoever; and if the vessel be lost, or shall by other disaster be prevented from returning to the port, and the registry be preserved; or if the vessel be sold, in whole or in part, to a foreigner, that the register in such cases shall be delivered up to the collector, within certain times specified in the act of congress. I do not give the words of the section, nor detail all of its particular provisions on this subject; I merely state enough to explain its object and intention. Its main object is to secure the return of the register, and to preserve it from improper use; and for that purpose, it requires both the master and the ship's husband, or acting and managing owner to become bound in the sums mentioned in the law

The 29th section of the same law declares, that all the penalties and forfeitures incurred by offences against that act, may be sued for, prosecuted and recovered, in such courts, and be disposed of, in such manner, as penalties and forfeitures which may be incurred for offences against the act of August 4, 1790, c. 62 [1 Story's Laws, 117; 1 Stat. 145, c. 35], and by this last-mentioned act, one moiety of all penalties, fines and forfeitures (not otherwise appropriated) are to be divided in equal portions between the collector, naval officer and surveyor.

The case now before the court arises upon the foregoing sections of these two acts of congress. Francis T. Montell, the owner, became bound with John B. Corner, the master, and James E. Montell, their surety, for the return of the register of the Elvira, in the sum of $1200. The register was not returned according to law; whereupon suit was brought on the bond, and a judgment recovered against the two Montells, in the district court and the money paid into court, where it still remains under the agreement filed. The collector thereupon filed his petition in the district court, praying that a moiety of the sum recovered should be paid to him and the two other officers before mentioned; and the question presented by his petition is this:—Is the sum recovered upon the bond of Montell a penalty or forfeiture recovered for an offence against the act of congress? If it is, then the officers above mentioned are entitled to the moiety they claim. The district court was of opinion that the sum recovered was not a penalty or forfeiture for an offence against the act of congress, and therefore dismissed the petition; and from this decision the collector has appealed to this court.

The question is one of some difficulty. Penalties and forfeitures imposed by statute are not usually provided for by bond and security given in advance. The sum recovered from Montell is recovered upon a contract; the action was brought upon a contract; and was not and could not have been brought in any of those forms which are usually necessary for the recovery of fines or forfeitures imposed by law. Yet this sum was, in truth, forfeited by Montell, by reason of his violation of a duty imposed by the act of congress; it was a specific penalty upon the owner and master, for the commission of a particular offence against the policy of that law. And although the amount was secured by bond given for the performance of the duty, yet this duty was a part of the same policy with other duties mentioned in the act, and for which other penalties are inflicted; a moiety of which last-mentioned penalties, it is admitted, go to the collector, naval officer and surveyor.

Thus, for example, the eleventh section of the act, authorizes a citizen who purchases a vessel out of the district where he resides (in which all vessels owned by him ought to be registered), to register the vessel in the district in which she may be; and the section requires the certificate of registry to be delivered up to the collector, upon the arrival of the vessel within the district to which she legally belongs; and if it is not so delivered, the owner or owners, and the master, severally forfeit one hundred dollars.

So, too, in section 12, a vessel purchased by an agent for a citizen of the United States, in a district more than fifty miles distant from the one to which she would legally belong, after such purchase, is entitled to be registered in the district where she may be at the time of the purchase, and the certificate of registry is required to be delivered up to the collector, upon her arrival in her own proper district, and the master, and owner or owners, severally forfeit one hundred dollars, if it is not so delivered.

So again, in section 13, a mode is pointed out by which a master, having lost or mislaid the register of his vessel, may obtain a new one, in a district to which his vessel does not belong, and where, therefore, she is not entitled regularly to be registered; but he is required to deliver it up to the collector of the port to which the vessel belongs, within ten days after her arrival in the district, and if he fails to do so, he forfeits one hundred dollars.

So also, in section 14, when a vessel is sold to another citizen of the United States, or she is altered or built upon in the manner mentioned in the law, her former certificate of registry is required to be delivered up, and the vessel to be registered anew; and if the former one is not delivered up, the owners forfeit five hundred dollars.

Now, as respects the forfeitures and penalties mentioned in these four sections, the one moiety is, unquestionably, given to the collector, naval officer and surveyor; and it is not easy to imagine that the penalty, se-

cured by bond, in the seventh section, was to be disposed of in a different manner. All of these sections, including the seventh, require the return of the certificate of registry, in cases where the vessel to which it was granted is lost, or can no longer lawfully use it, and all of them inflict penalties for not returning it as required by law. In this respect the penalty under the seventh section is, in principle and policy, the same with the penalties imposed by the other sections; and the only difference between them is, that in this section security is given for the amount, and a contract made to pay it, in case the offence shall be committed. But is it less a penalty on that account?

It certainly is not to be regarded as a bond with a collateral condition, in which the jury are to assess the damages which the United States shall prove that they have sustained; for, according to that construction, the amount of damages would not depend upon the amount of the penalty prescribed in the section, which is graduated according to the size of the vessel, but would depend upon the discretion of different juries, and larger damages might be given where the penalty was only four hundred dollars, than in a case where the penalty was two thousand. This, obviously, is not the intention of the law; and the United States are entitled to recover the whole sum, for which the party is bound if any one of the conditions are broken. Besides, how could the United States prove any particular amount of damages to have been sustained by them in a suit on this bond? What do they lose? It would be difficult, I think, by any course of proof, or any process of reasoning, to show that the United States had sustained any particular amount of damages in a case of this description, or to adopt any rule by which the damages could be measured by a jury, or be liquidated by agreement between the parties.

The sum, for which the parties are to become bound, is manifestly a penalty or forfeiture, inflicted by the sovereign power for a breach of its laws. It is not a liquidated amount of damages due upon a contract, but a fixed and certain punishment for an offence. And it is not the less a penalty and a punishment, because security is taken before the offence is committed, in order to secure the payment of the fine if the law should be violated.

This view of the subject is strengthened by the provision in the act which requires that the managing owner, and the master of the vessel, shall both be parties to the bond. The object of this regulation is obvious. They are the persons who have the custody and control of the certificate of registry, and are therefore the proper objects of punishment, if it is not delivered up according to law; they are required to be parties, in order that the penalty, the punishment for the offence, may be imposed upon them. If this is not the object, if the design is merely to secure the United States against damages, liquidated or unliquidated, it would not matter who were bound in the bond, provided they were able to pay; any other obligors, with sufficient sureties, would be as available to the United States for damages, liquidated or unliquidated, as the owner or master of the vessel; yet, no bond, however well secured, can be received under this section, unless both the owner and master are parties. It is not damages, therefore, that are intended to be secured, but punishment intended to be inflicted upon those who are justly and properly responsible for any improper use of the vessel's register; and if the offence is committed, and the sum is secured for which they are bound, it is the recovery of a penalty imposed by the act of congress.

It is, moreover, worthy of remark, that the penalties imposed in the 11th and 12th sections, for not delivering up the certificate of registry, are, like those in the 7th section, imposed upon both the master and the owner; and this would appear to be done, because, in the cases provided for in these two sections, as well as those mentioned in the 7th, the certificate would, at different times, necessarily, according to the ordinary course of business, be in the custody of each of them; and the reason for not requiring bond with surety, in the cases mentioned in the 11th and 12th sections, would seem to be, that the registry is obtained in a district where the owner does not reside, and where, therefore, he might find it difficult to procure the security. But the penalty is inflicted upon the same description of persons, and for the same purposes, as that directed to be secured in the 7th section; and I perceive nothing in the act from which it can be inferred that they are to be disposed of differently, when they are recovered from the offending party. The words of the act evidently include them; it declares "that all the penalties and forfeitures which may be incurred for offences against that act," shall be distributed in the manner hereinbefore mentioned. The money now in question is, undoubtedly, a penalty, and has been recovered as such for the offence against that act; and when the words of the law so plainly embrace the case, and its general scope and policy lead to the same conclusion, the form in which the penalty is secured is not, of itself, sufficient to authorize the court to restrain the meaning of the act of congress within narrower limits than its words import.

I am not aware that there has been any decision upon the point now before me, in any of the other circuits of the United States. The reasoning, however, of the court in the case of U. S. v. Hatch [Case No. 15,325], corroborates the opinion I have expressed. That was a suit upon a bond for four hundred dollars, conditioned for the return of the ship's crew, as prescribed by the act of February 20, 1803, c. 62, § 1 [2 Story's

Laws 883; 2 Stat. 203, c. 9], and which, mutatis mutandis, is the same in form and in principle with the one I am now considering. The question in that case was, whether damages were to be assessed by the jury, or the whole penalty recovered as liquidated damages. Mr. Justice Thompson, in delivering the opinion of the court, remarks, that he considers the construction of that act "the same as if it had expressly declared that, if the master did not comply with the duties therein required, he should forfeit the sum of four hundred dollars; and the reason why a bond is to be given, is, that security is required, and there must be some way in which the surety shall signify his assent to the undertaking." This reasoning is perfectly just, and applies equally to the case before me. It is the only ground upon which it can be maintained, that the whole penalty is absolutely forfeited by a breach of any one of the conditions.

It is true, that in the case above quoted, the sum for which the parties are bound is treated as liquidated damages, in the argument at the bar, and in the opinion of the court. The distinction is not there noticed between liquidated damages for the violation of a contract, by reason of which one party was damnified, and a fixed penalty imposed, by way of forfeiture, by the sovereign authority, for a breach of the law; and the construction given to the act of 1803, as above stated, which considers the penalty as a forfeiture for an offence, is hardly consistent with the notion that it is also to be regarded as liquidated damages; but the attention of the court was not drawn to this distinction, and the case before them did not require it.

Assuming the rule of construction, in relation to the act of 1803, to be the one above mentioned, and applying it to the act now in question, by the same rule it will follow, that the sum recovered on the bond in this case, is to be considered as a forfeiture for an offence. In other words, it is a fixed penalty, imposed by law as a punishment for a breach of duty enjoined by law, and must be treated as such, in the appropriation to be made of it under the act of congress.

The decree of the district court must, therefore, be reversed, and one moiety of the sum recovered be equally divided between the collector, naval officer and surveyor.

[See Case No. 9,723.]

UNITED STATES (MONTELL v.). See Case No. 9,723.

Case No. 15,799.

UNITED STATES v. MONTGOMERY.

[2 Dall. 335.] [1]

Circuit Court, D. Pennsylvania. 1795.

ATTACHMENT—BY WHOM TO BE SERVED.

An attachment being awarded against the witnesses, who did not attend at the return of the subpœna that had issued in this cause on the part of the defendant, the marshall (Nichols) suggested that they resided in a distant county, and asked the opinion of the court, whether it was his duty to serve the process.

BY THE COURT. An attachment is the process of the court, regularly issuing for the administration of justice; and, therefore, must be served by the marshall.

[1] [Reported by A. J. Dallas, Esq.]

Case No. 15,800.

UNITED STATES v. MONTGOMERY.

[3 Sawy. 544.] [1]

District Court, D. Oregon. Dec. 28, 1875.

RECEIVING PROPERTY STOLEN FROM MAIL — POSSESSION—INDICTMENT—WITNESSES —CONFESSIONS.

1. An indictment under section 5479 of the Revised Statutes, which charges the defendant with receiving, concealing, and aiding in the concealing, of gold dust stolen from the mails, only charges one crime, and proof of doing either will warrant a verdict of guilty.

2. A defendant indicted with another for receiving, concealing, and aiding in the concealing, of stolen property, may be found guilty thereon of a separate receiving, etc., when such other defendant has been discharged therefrom upon a plea of autrefois convict.

3. What constitutes a guilty receiving, concealing, and aiding in the concealing, of stolen property under section 5479 aforesaid.

4. The possession of gold coin received at the mint in exchange for gold dust stolen from the mails, is not a possession of such dust.

5. The receiving, etc., of the stolen property must have been done in the district where the indictment is found.

6. A defendant, however degraded or abandoned, is nevertheless presumed to be innocent of the crime charged in the indictment.

7. Witnesses—Circumstances affecting the credibility of.

8. Confessions—What weight to be given to.

[Cited in U. S. v. Reeves, 38 Fed. 410.]

[This was an indictment against Sarah Jane Montgomery for receiving property from Andrew J. Harmison, which he had stolen from the United States mail.]

Rufus Mallory and Joseph N. Dolph, for plaintiff.

William H. Effinger, Richard Williams, and James D. Fay, for defendant.

DEADY, District Judge, (charging jury). The indictment in this case is founded upon section 5470 of the Revised Statutes, which, among other things, provides that any person who shall receive, or conceal, or aid in concealing, any article of value, knowing the same to have been stolen or embezzled from the mail of the United States, shall be punishable by a fine of not more than $2,000, and by imprisonment at hard labor not more than five years.

The reason and necessity of such a statute

[1] [Reported by L. S B. Sawyer, Esq., and here reprinted by permission.]

is apparent. The post-office is one of the principal departments of the government. Upon the security and celerity with which the mails are carried and delivered throughout the country depend to a great extent the preservation of the business and social relations of the people. Upon the long-established maxim that "a receiver is as bad as a thief," the statute has also provided for the punishment of persons who assist others in stealing or embezzling from the mails by receiving the stolen property, or concealing it, or aiding in concealing it, substantially in the same manner as the thief himself.

By this indictment the defendant is accused in different modes or counts, of receiving, concealing, and aiding in the concealing, of three cans of gold dust, of the aggregate value of $1,830, the same having been stolen from the mails of the United States, to the knowledge of the defendant, in October, 1874, near Canyonville. But these seventeen counts only charge one crime, that of receiving, concealing, and aiding in the concealing, of the stolen dust, under the circumstances stated, and the proof of receiving, concealing, or aiding in concealing, is sufficient to establish the guilt of the defendant. To this indictment the defendant has pleaded not guilty, and the effect of this plea is to put in issue or controvert all the material allegations of the indictment. This being so, the burden of proof is upon the United States, to prove to your satisfaction each of such allegations, before it can ask a verdict of guilty at your hands.

The defendant stands before you as a person charged with the commission of a grave crime, and the fact that she is also a woman and a mother does not change the rules of law or the duties of jurors in such cases. In determining the question of her guilt or innocence, you are not to be swerved by any sympathy for her sex or condition, but you are to say truly whether she is guilty or not as charged, irrespective of such considerations or the consequences to her or others that may follow your verdict. Of course, the fact that the defendant is a woman may be more or less material in judging of her conduct and motives in fleeing the country as she did with Harmison, the party who appears to have stolen this dust and had it in his possession. In considering their relations and intimacy, upon the question of whether this stolen dust was received or concealed by her, or her aid, you may properly consider the fact of the difference in their sex—that they were traveling and cohabiting together as man and wife, with trunks and other traveling gear in common. The indictment charges that the defendant and Harmison both committed this crime, without alleging whether it was done jointly or severally, and counsel for defendant now insists that neither party can be found guilty of a separate receiving under such a charge. Waiving the consideration of that precise question, as not being material to the present aspect of the case, the fact being that Harmison has been discharged from this indictment upon his plea of autrefois convict, the defendant is now being tried upon it alone, and may be found guilty under it of committing the crime therein charged, separately.

Before the defendant can be found guilty of the charge in the indictment the United States must show that the gold dust in question was stolen or embezzled from its mails. The record of Harmison's conviction in this court of the crime of stealing three similar cans of gold dust from the mails, has been introduced in evidence. This is sufficient evidence of the fact until the contrary appears, it being also shown or proven to your satisfaction that the property mentioned in the two indictments is the same. It must also be shown that the defendant, knowing it to have been so stolen or embezzled, received it from the thief, or concealed, or aided the thief or some one else in concealing it. To constitute a guilty receiving of stolen property by the defendant, it must appear that she voluntarily took it into her control and possession, or voluntarily had it in her possession and control, with intent to prevent the larceny or the thief from being discovered, or the property from being reclaimed by the true owner or for his benefit; but it need not appear that she received it with intent to make any gain or profit thereby to herself.

A guilty concealing also implies that the defendant voluntarily secreted this dust, or put it out of the way, or in some manner disposed of it with a like intent as in the case of receiving. To aid in concealing stolen property a party must do some act with intent to assist the thief or other person, then in the guilty possession of the property, in concealing it, or furtively disposing of it, with a like intent as in the case of receiving. The possession of property by the defendant for which the stolen gold dust was exchanged—as for instance, gold coin for which it may have been exchanged by Harmison at the Philadelphia mint—will not support the charge in the indictment. The possession of such coin would not be the possession of the stolen property, and would not of itself tend to prove the defendant guilty of the charge in the indictment. But if the stolen dust was made into coin this circumstance would not change its identity and the possession of such coin would be the possession of the stolen property.

But this cannot be a material question in this case because it is admitted that if this dust was changed into or for coin by Harmison, it was done at the Philadelphia mint. Now the defendant cannot be convicted of the crime charged in the indictment upon proof of receiving, concealing, or aiding in concealing, this dust or the coin into which it may have been changed beyond this district—without the state of Oregon. Evidence has been given to you in regard to the conduct and declarations of Harmison and the defendant be-

yond this district, during their journey to Texas and back again, but only for the purpose of throwing light upon their acts and conduct while in this district. It being incumbent on the United States to show that this dust was stolen from the mails, instead of introducing the record of Harmison's conviction of the theft, in the first instance, the prosecution saw proper, as it had the right to do, to go into the original proof of the fact. In so doing the acts and declarations of Harmison, both within and without this state, tending to prove that the larceny was committed by him, have been given to you. But you are to remember that this evidence was only received for the purpose of proving the theft of the property, and that the defendant is not to be affected by the acts or declarations of Harmison, only so far as it appears the former were known to her or the latter were made to her, or in her presence and assented to by her.

Although you should find that the defendant knew from Harmison, or otherwise, that this dust had been stolen from the mails, that itself is not sufficient to convict her of the crime charged. And, in this connection, it may be material for you to consider the sex of the defendant for the purpose of determining whether her flight, and subsequent association with Harmison, was as his accomplice in the crime or his paramour. Proof that the defendant fled the country with the thief as his wife is not sufficient to sustain the charge in the indictment. A woman who deserts her husband and flees the country with another man who has committed larceny, ought not to complain if a jury finds her guilty of receiving, or aiding in concealing, the property stolen by her paramour, upon circumstances which would be deemed insufficient in the case of an honest woman. But you are not to convict the defendant of the crime charged in the indictment because she appears to have been guilty of the crime of adultery. The defendant's illicit relation with Harmison may have afforded her favorable opportunities, and offered strong temptations, to assist him in concealing the fruits of his crime, but it is not sufficient of itself to establish the fact that she did so assist him. But whatever her conduct or condition, the law presumes that the defendant is innocent of the crime charged against her until the contrary is proven beyond a reasonable doubt. In this respect, and so far as the crime charged in the indictment is concerned, she stands before the law as the peer of any woman, however virtuous or honorable. This presumption of innocence is the shield which the law interposes between her and her accusers, and it cannot be thrust aside or beaten down except by the force of evidence which shall satisfy your minds beyond a reasonable doubt, of her guilt.

A reasonable doubt is a substantial one—not a mere whim, caprice or speculation. It arises out of the case, from some defect or insufficiency in the evidence which makes a juror hesitate and feel that he is not satisfied. Mathematical certainty is not attainable in criminal trials. If you are morally certain of the defendant's guilt you should say so by your verdict, but unless you are, however you may suspect it, you must say not guilty. You are the judges of the credibility of the witnesses and the weight to be given to their testimony.

The evidence of Cardwell tending to show that the defendant attempted to suborn him to swear falsely on the trial of Harmison was admitted without objection, but it is my duty to say to you that it is not relevant or competent proof of the crime charged in this indictment. It may tend to show that the defendant was willing to run any risk, or even commit a crime, to save her paramour from conviction and punishment, but it does not prove that she committed the crime for which she is on trial. Montgomery, the late husband of the defendant, is contradicted by several witnesses and by the reporter's notes of his testimony on Harmison's trial. Besides, it appears from his own evidence that he knew of the theft soon after it was committed, in October, 1874, and had had the gold dust in his buggy and in his house without disclosing the fact. Besides, Cardwell, a witness called by the prosecution, testifies that Montgomery saw him at Canyonville, about the time the warrants were sworn out for Harmison and the defendant, and urged upon him the necessity of their—that is, Montgomery and Cardwell making up a good story about the robbery, and sending Harmison and the defendant "up." Upon this trial he testified that when Harmison left this dust for him at the tollhouse the defendant said he was foolish not to take it, when he spoke of their little child, and said it would ruin them. Upon cross-examination he stated that he testified to this conversation on Harmison's trial, but it appears from the reporter's notes that he did not. The witness was the husband of the defendant, and she deserted him for Harmison. He may entertain unkind feelings towards her on this account, and he may desire, as he said to Cardwell, according to the latter's testimony, to "send her up." All these circumstances go to affect the credibility of this witness. What weight shall be given to his testimony you must judge, always remembering that a witness who is intentionally false in a material part of his testimony ought to be at least distrusted, as to the rest of it.

The postal agent, Mr. Underwood, who acted as deputy marshal in pursuing and arresting Harmison and the defendant at Seguin, Texas, and bringing them here for trial, testifies to conversations and confessions of the defendant all along the route from there here. This kind of testimony should be received with caution. The witness testified in a very indefinite manner as to the time and place of these conversations—giving them apparently in his own language and not always in

the same words. After being on the stand one afternoon, and apparently going over the whole subject, he came back the next morning and testified to important conversations with the defendant in Texas, and between there and St. Louis, which he had not stated the day before, or apparently remembered. Besides, in stating a material part of a particular conversation, he first said she used the word "they," and afterwards said she used "we"—a change which makes a material difference in the sense and effect of the admission. I make these suggestions not by way of calling in question or casting doubts upon the integrity of the witness, but that his testimony may be received with due caution. Apparently this prosecution was set on foot by him, and he has since been earnestly engaged in the arrest of Harmison and the defendant and the pursuit of evidence to secure their conviction, and he is liable to be unconsciously influenced by his zeal in the premises and the very natural desire of success in what he has undertaken.

Upon the subject of verbal confessions, I read to you as a part of my charge, from 1 Greenl. Ev. §§ 214, 215, as follows: "The evidence of verbal confessions of guilt is to be received with great caution. For, besides the danger of mistake, from the misapprehension of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, it should be recollected, that the mind of the prisoner himself is oppressed by the calamity of the situation, and that he is often influenced by motives of hope or fear to make an untrue confession. The zeal, too, which so generally prevails, to detect offenders, especially in cases of aggravated guilt, and the strong disposition, in the persons engaged in the pursuit of evidence to rely on slight grounds of suspicion, which are exaggerated into sufficient proof, together with the character of the persons necessarily called as witnesses, in cases of secret and atrocious crime, all tend to impair the value of this kind of evidence, and sometimes lead to its rejection, when, in civil actions, it would have been received. The weighty observation of Mr. Justice Foster is also to be kept in mind, that this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence, by which the proof of plain facts may be, and often is confronted."

Subject to these cautions in receiving them and weighing them, it is generally agreed that deliberate confessions of guilt are among the most effectual proofs in the law. Their value depends on the supposition that they are deliberate and voluntary, and on the presumption that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience. Such confessions, so made by a prisoner, to any person, at any moment of time, and at any place subsequent to the perpetration of the crime, and previous to his examination before the magistrate, are at common law received in evidence, as among proofs of guilt. The only direct evidence in the case which brings this defendant into what might be considered possession of this dust, in Oregon, is that of Montgomery, concerning the dust being left at the toll-house, near Canyonville, where he and she lived in the spring of 1875. According to his account, he came home one day, and found his wife, the defendant, lying on the lounge in the front room, when she laughed and said: "Dan Smith (Harmison) has been here and left you a present." He asked what it was, and she replied by rising up and leading him into the back room, and pointing him to a sack in the potato-box. He put his hand into the sack, felt the cans of dust, and drew one of them in sight, when he said: "It is that d—d infernal dust! Give it back to him, and have nothing to do with it." The defendant urged him to keep the dust; but he declined, saying it would be the ruin of them, when she promised to return it, and Montgomery never saw it afterwards. Upon this evidence, assuming it to be true, I do not think, as a matter of law, that the defendant was then and there guilty of the crime charged in the indictment. A package is brought to the house and left with her for her husband, which she delivered to him, and he refuses to accept it, and directs her to return it to the person who brought it, which she does. This alone does not make her guilty of receiving, concealing, or aiding in the concealing, of stolen property, even if we assume, as is probable, that she knew these cans of dust had been stolen from the mails. And although it was wrong to advise her husband to take it (if she did), yet she did not hereby commit the crime with which she is charged.

Gentlemen of the jury: The case is now submitted to you to say upon your oaths, under the law and evidence given you in court, whether the defendant is guilty or not. Take the law so given you and apply it to the facts, as you may find them from the evidence, and make up your verdict accordingly.

The jury, after an absence of half an hour, returned into court and gave a verdict of "Not guilty," and the defendant was discharged.

[See Case No. 15,308.]

Case No. 15,800a.

UNITED STATES v. MOONEY.

[37 Leg. Int. 317;[1] 14 Phila. 564; 26 Int. Rev. Rec. 267.]

District Court, E. D. Pennsylvania. July 13, 1880.

INTERNAL REVENUE — RETAIL LIQUOR DEALER — STAND-CASKS.

Stand-casks in a retail liquor dealer's saloon are not required to be marked or stamped, under section 3289 of the Revised Statutes, although they may hold over five gallons.

[1] [Reprinted from 37 Leg. Int. 317, by permission.]

This was an information for forfeiture. On the trial of the case the following was substantially the testimony given:

Thomas Serger, sworn: "I was appointed appraiser and visited Mr. Mooney's place, and saw a number of stand-casks containing over five gallons each. I saw no brands or stamps on them. The quantity was marked. No brands or stamps on any of them."

Cross-examined: "These were the usual ornamental stand-casks, arranged and built in, as is common in the trade here; four large stand-casks and seven riders. They each contained over ten gallons."

Government rests.

Defendant opens and calls:

John McConnell, sworn: "I am a liquor-dealer; for twenty years have been. I am familiar with stand-casks such as spoken of in this case. They are used by a great number of retail dealers; pretty generally used. It is not advantageous to carry on the business without such stand-casks. The ordinary packages will open and the liquor evaporate; and there are other difficulties in keeping the liquor in original packages. We pump the liquor from the barrels into stand-casks. The stand-casks are painted and prepared for permanent use. The liquor is clearer as drawn from the stand-casks than when taken from the barrel. The stand-casks are fixtures in the store. Some of the smaller ones, as in this instance, can be taken out."

John K. Valentine, U. S. Dist. Atty.

R. P. White, for defendant.

BUTLER, District Judge. Judgment must be entered for the defendant, on the point reserved. I find nothing to justify the forfeiture. The defendant is a retail dealer. The spirits were found in "stand-casks," such as are customarily used in the trade,—vessels permanently affixed to the store, and constituting a part of the realty; containing, in this instance, each, as the witnesses say, "over five gallons." The claim to forfeiture is based on section 3289 of the Revised Statutes, which provides, that "all distilled spirits found in any cask or package, containing five gallons or more, without having thereon each mark and stamp, required therefor by law, shall be forfeited to the United States;" which section the plaintiffs' counsel reads as if the words "required therefor by law," were omitted, making it apply generally to such spirits found in all casks and packages whatever. This construction is not justifiable. The words referred to confine the application to spirits in such casks and packages (and in such quantities), as by other sections of the statute are required to be marked and stamped. These other sections are 3320, 3321 (as altered by the act of August 15, 1876; 19 Stat. 152), and 3323; which, plainly, are inapplicable to this case. No theorizing respecting the object of congress can extend the effect of these sections beyond the plain import of their terms. If it was intended to forfeit spirits found (in the quantities here shown) in all descriptions of unstamped vessels, it would have been easy to say so. That it was not said so leaves no room to doubt that it was not so intended. If this were open to doubt, however, it could not be forgotten that those who claim a forfeiture must be prepared to show a plain warrant for it.

Judgment must be entered for the defendant on the point reserved.

Case No. 15,801.

UNITED STATES v. MOORE.

[2 Bond, 34.] [1]

District Court, S. D. Ohio. June Term, 1866.

SHIPPING—STEAM INSPECTION—GOVERNMENT SERVICE.

A steamboat navigating the Ohio and Mississippi rivers was impressed into the service of the government, by a military order, to transport troops and supplies. During the period of said service, the year for which she had previously been inspected expired: *Held*, that the owner of the boat was not liable to a penalty for her non-inspection while in the government service.

[This was a suit by the United States against Robert Moore.]

R. M. Corwine, U. S. Dist. Atty.

Lincoln, Smith & Warnock, for defendant.

LEAVITT, District Judge. This is a suit for a penalty of five hundred dollars against the defendant for permitting his steamboat, the "Sunny South," to be navigated without inspection. It is alleged, and it is proved by the defendant, that when the year for which the boat had been previously inspected expired, she was not in his possession or under his control. The owner of the boat and the defendant in this suit was sworn as a witness on the hearing of the case, and his statement was briefly and substantially, that he was the owner of the Sunny South; that in 1864 she was employed upon the Ohio and Mississippi rivers; that she was brought to Memphis for the purpose of selling her; that, while lying there, she was impressed by a military order into the service of the government to transport troops and supplies; that she was in such service when her inspection papers expired; that, after she was discharged from the service she was not run for the conveyance of freight or passengers; that, after laying some time at Memphis when released by the government, she was brought to Cincinnati for repairs; and that, in coming up the river for that purpose, she carried neither freight nor passengers. There is no evidence that after she was impressed by the military authorities, she was used by or for the benefit of the owner in the transportation of cargo or passengers.

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

The sole question for the decision of the court is, whether in this state of facts the owner has incurred the penalty of the law for not causing the inspection of the boat. It is a new question, and I am of the opinion that the owner can not be held liable. I do not propose to discuss the question at length, but will merely remark that I can not hold the owner liable to the penalty for non-inspection while the boat was in the possession and under the sole control of the government. If the officials of the government thought it necessary, for the safety of the cargo or persons on board, to have the boat inspected, it was their duty, and not the duty of the owner, to take out inspection papers. For aught that appears in the case, the boat, when the inspection expired, might have been at some remote point not known to or accessible to the owner, and it would be a palpable hardship to hold him guilty of a violation of the law in not having the boat inspected under the circumstances stated. This hardship would be the more palpable from the statement of the owner, as understood by the court, that he was not running the boat when impressed by the government, and had no intention to run her until she was repaired and inspected. The fact that after the boat was discharged by the government, the owner ordered her to Cincinnati for repairs, and that in coming up the river she carried neither cargo nor passengers, justifies the conclusion that it was the purpose of the owner scrupulously to observe the requirements of the law.

The judgment of the court is, that the libel be dismissed.

Case No. 15,802.

UNITED STATES v. MOORE.

[2 Brock. 317.] [1]

Circuit Court, D. Virginia. May Term, 1828.

MARSHAL—LIABILITY FOR FAILURE OF DEPUTY TO SERVE PROCESS—ARREST OF DEBTOR—MEASURE OF DAMAGES.

1. A marshal is liable, upon his official bond, for the failure of his deputy to serve original process; but the measure of his liability, is the extent of the injury received by the plaintiff, produced by such negligence. If the loss of the debt, be the direct legal consequence of the failure to serve the process, the amount of the debt is the measure of damages; but the mere failure to execute the process, does not, in itself, necessarily infer the loss of the debt to the plaintiff, by the negligence of the officer, because, the plaintiff might sue out other process, on the failure of the officer to execute the first process. The question, whether the loss of the debt was, or was not, the direct legal consequence of the negligence of the officer, is a question of fact, depending on circumstances, of which the jury must judge.

2. Where a writ of capias ad respondendum, comes to the hands of a deputy-marshal who arrests the debtor, and the debtor thereupon, pays to the deputy the amount of the debt for which he was sued, and the officer discharges the debtor from custody, and returns the writ, "Debt and costs satisfied," this is not an official act which binds his principal. The deputy-marshal is a mere ministerial officer, and he has no right to adjust the debt, and make himself responsible to the plaintiff. He is bound to pursue the mandate of the writ, and that requires him to arrest the debtor, and take bail. The discharge of the debtor from custody, without taking bail, is, indeed, a misfeasance in office, for which his principal, the marshal, is responsible; but he is only responsible to the extent of the injury done to the plaintiff. The return of the deputy, shows that no bail was taken, and if, by taking out other process, the plaintiff could have secured his debt—which is a fact to be determined by the jury—the loss of the debt to the plaintiff, is not the necessary legal consequence of the conduct of the deputy, and no injury, in a legal sense, is done to the plaintiff thereby.

[Distinguished in Mosby v. Mosby, 9 Grat. (Va.) 605.]

This was an action of debt, brought upon an official bond, executed by the defendant's intestate, Andrew Moore. The bond was executed in 1815, in the penalty of $20,000, and the condition of the bond was, that the principal obligor, Andrew Moore, should faithfully discharge the duties of marshal of the district of Virginia. This suit was brought in June, 1825. The declaration claimed the penalty of the bond, and the defendant pleaded, conditions performed. The plaintiffs filed their replication, assigning several breaches of the condition of the bond, viz.: 1. That on the 16th day of May, 1816, an execution in favour of the United States, was issued from the district court of the United States, held at Norfolk, upon a judgment rendered against John H. Fawn, for $1548.85, with interest from the 14th day of January, 1816, directed to the marshal of the Virginia district, which came to the hands of William P. Foster, the duly qualified deputy of Andrew Moore, and that by virtue thereof, the amount of the execution was levied, and recovered by the said deputy, for which he had failed to account to the United States. 2. That on the 18th day of May, 1816, a writ of capias ad respondendum was issued against Goodnow & Wales, debtors of the United States, at the suit of the United States, for the sum of $922.95, with interest from the 11th day of May, 1816, directed to the marshal of the Virginia district; and on the 2d day of July, another writ of capias ad respondendum was issued against Thomas Powell, also a debtor of the United States, at the suit of the United States, for the sum of $185.36 with interest from the 19th of June, 1816, also directed to the marshal of the Virginia district, which writs were issued from the clerk's office of the same court, and at the dates of their emanation respectively, came to the hands of the said William P. Foster, the deputy of Andrew Moore; but the deputy utterly neglected to execute, or make due return on either writ, whereby the United States was prevented from recovering judgments against each of their debtors, and the debts were wholly lost to them. 3. That the

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

debts mentioned in the second breach being due to the United States, and the writs having been issued and come to the hands of the said deputy, as therein set forth, the deputy arrested the debtors by virtue thereof, who thereupon respectively paid to him the full amount of their debts, and the deputy forthwith discharged the defendants from arrest, and wilfully failed to make due return of the said arrests or either of them, or to account for, and pay the amounts so levied to the United States, whereby the United States were prevented from obtaining judgments against their debtors, and the debts were wholly lost to the plaintiffs. 4. That the money mentioned in the first breach, having been levied; and the writs mentioned in the second breach having issued, and come to the hands of the said deputy, and the amount of the debts mentioned in the third breach having been received by the deputy, as therein set forth, respectively; on the 16th of November, 1819, on the motion of the United States, by their attorney, the said district court of the United States, held at Norfolk, adjudged, that Andrew Moore was liable for the three debts above recited, and that an attachment should issue against him for his failure to pay them; and the plaintiffs averred that the said judgment and the attachment it awarded, had not, in any manner been discharged or satisfied, and that the debts remained wholly unpaid.

At the May term of this court, 1828, the jury found the following special verdict, assessing contingent damages: "We find for the plaintiffs on the first breach assigned, and assess their damages to the value of $1548.85, with interest thereon, from the 14th of January, 1816, till paid. And we find for the plaintiffs on the second breach assigned, and assess their damages, by reason of that breach, to the value of $1108.21, with interest on $922.95, from the 11th of May, 1816, and interest on $185.36, from the 9th of June, 1816, till paid. And we find for the plaintiffs on the third breach assigned, and assess their damages, by reason of that breach, to the same amount and interest assessed on the second breach. And we find for the plaintiffs on the fourth breach assigned, and assess their damages, by reason of that breach, to the value of $2657.06, with interest on $1548.85, part thereof, from the 14th of January, 1816, and on $922.95, another part thereof, from the 11th of May, 1816, and on $185.36, the residue thereof, from the 9th of June, 1816, till paid. And if the court shall render judgment for the plaintiffs on the fourth breach assigned, then we find for the defendant on the other breaches; and if the court shall be of opinion that the plaintiffs are not entitled to judgment on our finding on that breach, and shall be of opinion that they are entitled to recover on either the second or third breach, then we find for the defendant on that one of the said second or third breaches, on which judgment shall not be entered, so that, in any event, the total amount of damages assessed against the defendant, on all the breaches for which judgment is to be rendered, shall not exceed the amount above assessed on the fourth breach."

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

MARSHALL, Circuit Justice. This is an action of debt brought upon the official bond of the marshal of this district, the intestate of the defendant, upon which the jury have found a verdict which assesses contingent damages, dependent on a case stated by the parties. This case is so stated, as to require the court to take into view the instructions which would have been given to the jury at the trial, had instructions been asked.

The first breach assigned in the replication is, that the moneys were received by the deputy of the marshal for the United States, on executions placed in his hands, which money has never been paid over. On this breach no controversy arises.

The second breach assigned is, that two writs of capias ad respondendum were issued against debtors of the United States, which were placed in the hands of the same deputy, who neglected them or either of them, or to return them or either of them,—"whereby, the United States were prevented from recovering judgment against each of the said debtors, and each of them have been, and are, totally lost to the said United States." Damages are assessed to the amount of these two debts. The case stated, is that two writs of capias ad respondendum, against two several debtors of the United States, were placed in the hands of the deputy, who, instead of executing them, received the sums due from the several defendants, and made return thereof on the writs, after which the suits were dismissed. The United States have never received this money, and they now claim it from the estate of the marshal. In this second assignment of breaches, the receipt of the money is not brought into view. The neglect of duty in not serving the process, is the fault alleged to have been committed by the officer; and for this neglect his principal is unquestionably liable. But what is the extent of his liability? But one general answer can be given to the question. As in all other instances of neglect, he is liable to the extent of the injury produced thereby. This is to be ascertained by jury. The replication alleges that the debt has been lost thereby; and if this fact be as alleged, the amount of the debt is the measure of damages. But this is a subject for the consideration of the jury. It was not submitted to the jury, and has been transferred to the court. If the loss of the debt was the direct and legal consequence of this neglect, the verdict ought to stand; but if this be a subject on which the judgment of the jury, under the instruction of the court ought to be exercised, then it would be improper in the court to decide upon it until that judgment is exercised. It is too obvious to require discussion, that the loss of a debt

is not the necessary consequence of neglecting to serve the first process which comes to the hands of the officer. The law provides for new process; and the question, whether that new process may not be as available to the plaintiff as the original process, depends on circumstances, of which the jury must judge. If, in this case, the plaintiff has been prevented from issuing new process by the act of the officer, that is not alleged in this part of the replication. If it may be given in evidence on this real assignment, then we must look in the act which is alleged to have arrested further proceedings. That act is the receipt of the money due to the United States. If the officer was not authorized to receive this money, his receipt of it could not bind the United States, nor prevent further proceedings according to law. If he was authorized to receive it, the defendant will admit that the plaintiff could proceed no farther; and that the loss of the debt is the consequence of not serving the process, and receiving the money. This question will be properly considered, under the third breach assigned in the replication.

3. The third breach is, that the officer did arrest the said debtors, as commanded by the said process, who, thereupon, respectively paid to the said deputy, the full amounts of their respective debts aforesaid; and in consideration thereof, the said deputy did then and there discharge the said debtors from the arrests aforesaid, and willfully failed to make due return of the said arrests, or either of them, or to account for and pay the amounts so received from said debtors, or any part thereof, to the said United States, whereby the said United States was prevented from obtaining judgments against their said debtors for their said debts, and the said debts were, and are wholly lost to the said United States. To support this breach, it would be necessary to show, in the first place, that the debtors were arrested. This is not proved; but may, and perhaps ought to be, assumed by the jury, from the facts admitted in the case. The material inquiry, then, presents itself: Was the receipt of the money an official act? Was it authorized by the mandate of the writ? We are decidedly of opinion that it was not. The mandate of the writ was to take the person of the defendants mentioned therein, and to have them before the court, to answer the United States in a plea of debt, &c. A controversy exists between the parties, which is to be adjusted, not by the officer, but by the court. His duty is ministerial, not judicial It is to bring the debtor into court to receive its judgment, not to render that judgment. The sum actually due, is, generally, less than that demanded in the writ, and in these cases, it was considerably less. The officer does not know officially the real amount of the debt, and, consequently, cannot adjust it and receive the money. If he is not authorized to ascertain the sum due, and to receive that sum, neither is he authorized to receive the whole sum mentioned in the writ, and to discharge the persons arrested. His duty is prescribed by the words of the writ; he is to obey its mandate. It would be time misapplied to enter into a consideration of the consequences of permitting the officer to depart from the mandate of the writ, and to make himself accountable to the United States, when not authorized by law so to do. It is enough to say that the writ did not authorize him to receive the money, and that its receipt was not an official act. Since the money was not received by virtue of the writ, with the authority of which the deputy was entrusted, his principal cannot be chargeable by the legal force of that receipt; if he is chargeable, it is in consequence of the official acts performed or omitted by his deputy. The act performed is, making his return, which is, "Debt and cost satisfied." The charge in the replication, is, that upon receiving the money he discharged the debtors. That this proceeding is a misfeasance in office, which subjects the principal to the action of the United States, is not controverted; but on this breach, as on the second, the amount of damages depends on the amount of injury. The return of the officer did not prevent the United States from taking such farther steps as are authorized by law; if the return shows service of the process, the plaintiffs might proceed against the defendants and the marshal for want of bail; if it does not show service, or if it shows a discharge, the plaintiffs might sue out a new process. The return that the debt was satisfied, did not bind the United States. The amount of injury, therefore, depends on all the circumstances, and those circumstances must be weighed by a jury. The counsel for the United States insists, that the money received by the deputy, is the measure of damages sustained by the United States, that the deputy is responsible for the sum so received, and as he received it by colour of his office, the principal is also responsible to the same extent. But if the receipt of this money did not stop the United States, if it was not an official act authorized by the process or by law, the loss of the debt does not appear to be a necessary consequence from the return on the writ, or the neglect to take bail.

NOTE. After the above instructions were given, the jury found for the plaintiffs on the first breach assigned, as in the special verdict; for the defendant, on the second and fourth breaches, and for the plaintiffs on the third, assessing their damages on that breach at one cent.

Case No. 15,803.

UNITED STATES v. MOORE.

[2 Lowell, 232.] [1]

District Court, D. Massachusetts. April, 1873.

FALSE SWEARING—SCIENTER—AFFIDAVIT.

1. False swearing, under St. March 1, 1823, § 3 (3 Stat. 771), is committed by knowingly swearing falsely to any material fact, though that fact be only the witness's belief of a material fact. But it is not committed by rash or reckless swearing.

[Cited in U. S. v. Edwards, 43 Fed. 67.]

2. A defendant made affidavit that a certain treasury note, of which he produced a fragment, had been nearly all destroyed on a certain day, which was not true in fact. There was some evidence from which the jury might have inferred that the defendant, though rashly, believed the fact to be as he stated it. The indictment charged that the defendant made the statement knowing it to be false. *Held*, the jury should be asked to find whether the defendant made the statement knowing it to be false; and that a further instruction, that the offence would be made out by showing that he swore to personal knowledge of the fact, when he knew he had no such knowledge, was erroneous, because there was no evidence that he had sworn to such knowledge.

3. An affidavit to the existence of a fact does not import that the affiant has personal knowledge thereof, unless so stated, or the fact be of such a character that he must have personal knowledge.

[Cited in Steagald v. State (Tex. App.) 3 S. W. 777.]

4. Whether a written affidavit contains such a statement, is a question of law, and should not be left to the jury.

U. S. v. Atkins [Case No. 14,474], examined and explained.

The statute of March 2, 1863, § 1 (12 Stat. 696), is, that any person in the land or naval forces of the United States, or in the militia in actual service in time of war, who shall make, or cause to be made, any claim upon the government of the United States, knowing such claim to be false, fictitious, or fraudulent, or who shall, for the purpose of obtaining payment of any such claim, make any false . . . statement, certificate, affidavit, or deposition, knowing the same to contain any false or fraudulent statement or entry, or any false oath to any fact, statement, &c., may be tried by court-martial, and be punished. Section 3 authorizes the punishment by any court of competent jurisdiction of any person not in the military or naval forces, who shall do any of the acts prohibited by the foregoing provisions of the act. The act of March 1, 1823, enacts, that if any person shall swear falsely in support of a claim against the United States, he shall, upon conviction thereof, suffer as for wilful and corrupt perjury. 3 Stat. 771.

The second count of the indictment charged that the defendant [Michael Moore], on a certain day, at Boston, made a false and fraudulent claim against the United States, for the redemption of a certain treasury note of the denomination of fifty dollars, issued under a certain statute, set out by its title and date; and, for the purpose of obtaining payment of said false and fraudulent claim, the defendant caused to be presented to the treasurer of the United States a fragment of said note, and did make representation in writing that said note was, on or about the 17th of March, 1871, nearly all destroyed, which was false; that said note had never been destroyed, but had been redeemed; that the defendant, in support of his said claim, did make a certain declaration in writing of the following tenor. There is then set out, in full, the alleged false statement concerning the destruction of the note. And it is further alleged, that the defendant, well knowing that the said declaration was false, did subscribe it, and make oath to its truth, at Boston, before Charles H. Fleming, a justice of the peace, empowered to administer an oath in this behalf. It set out the matter in which the statement was false, and that the defendant well knew it to be so; that the matters so sworn were material for obtaining payment of said note; and concluded: "And so the jurors say, that the defendant did knowingly swear falsely in support of a claim against the United States, before Charles H. Fleming, a justice," &c. This count was drawn under section 3 of the act of 1st March, 1823, ubi supra.

The evidence tended to show that a considerable number of notes like the one in question in this case had, after their redemption by the treasury, been mutilated by some person in the employ of that department, by cutting out the vignette. It was not shown that this was done with any fraudulent purpose, or that any injury had in fact been intended, or had resulted, to the government, or that the defendant knew these facts; nor was there any testimony tracing this fragment from Washington to Boston. A boy, who lived near the defendant at South Boston, testified that he picked up the fragment on the street on a day when there had been a procession and a fight; that he gave it to his father, to see if it was of any value. The father testified that he gave it to the defendant, for the same purpose; and he said he supposed the remainder of the note had been destroyed in the fight, and he thought he told the defendant so. The truth of this story was denied by the government. Upon the affidavit being presented at Washington, the fact was at once discovered that the note had been redeemed long before.

The jury found the defendant guilty on the second count; and he moved for a new trial upon several rulings, which had been duly reserved, but are not necessary to be here referred to, and upon one part of the charge, which is recited in the opinion of the court.

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

E. P. Nettleton, Asst. Dist. Atty.
I. W. Richardson, for defendant.

LOWELL, District Judge. I have made up my mind that my instruction to the jury upon one point was not sufficiently full and explicit, and may, perhaps, have misled them, to the injury of the defendant. I charged in the words attributed to Judge Sprague, in U. S. v. Atkins [Case No. 14,474], "that the jury must be satisfied that the defendant swore to a declaration which, at the time, he knew to be false; and that may be either by swearing to a fact which he knows is not true, or by swearing to his knowledge of the fact when he knew he had no such knowledge." There appears to be a much fuller report of the charge in that case, from which, and from an examination of the records of the court (volume 39, p. 696) I find that there was but one trial of the action, and that there was a count for perjury, and one for false swearing, under the statute of 1823, which is the law on which the second count proceeds in this case and on which the report in the Law Reporter [2] says the government relied in that case. It seems, therefore, that the authority is fully in point; but, by the more ample report of it, I find that the learned judge explained his meaning carefully, giving very full examination to the point whether the defendant had intended to state the fact as being within his own knowledge. Even with these explanations, I do not regard the ruling as being precisely accurate, as I will hereafter explain.

There is some difference of opinion in the United States as to whether perjury, or false swearing in the nature of perjury, can be committed by mere rash and reckless statements on oath; and though my charge, rightly understood, did not authorize the jury to convict the defendant, if the evidence only showed recklessness, yet I am not sure it may not have been understood in that sense. Indeed, I think my own views were not quite distinct upon the point. Mr. Bishop, in his treatise on Criminal Law (3d Ed., vol. 1, § 396), says: "Probably the better opinion is, that perjury is not committed by any mere reckless swearing to what the witness would, if more cautious, learn to be false; but the oath must be willfully corrupt." In a note, he quotes, as opposed to his own opinion, an extract from a report of the penal code commissioners of New York: "An unqualified statement of what one does not know to be true is equivalent to a statement of that which one believes to be false." The latter proposition may be nearly true, so far as the effect of the statement on others is concerned; but it is not a sound legal definition of perjury. I agree, rather, with Mr. Bishop's opinion, that there must be some fact falsely stated, with knowledge of its falsity, before there can be perjury. It has been held, indeed, by an able and learned court, that rash swearing, without any reasonable or probable cause of belief of the fact sworn to, is perjury. Com. v. Cornish, 6 Bin. 249. That was a case in which the defendant had been wounded in a riot, at night, and had sworn to the prosecutor as the person who wounded him. The doctrine was denied to be law, in an able and careful charge to the jury in the circuit court of the United States, sitting in the same state. U. S. v. Shellmire [Case No. 16,271]. It has been virtually denied in this state, in Com. v. Brady, 5 Gray, 78, where the defendant swore that he saw a man running from a burning building, whom he believed to be A. The judge charged in the language of the court in Pennsylvania, and the ruling was set aside. The court, to be sure, put their decision upon the ground that the defendant only swore to his belief; but personal identity is almost always a matter of belief. An affidavit or statement, that I saw a certain person, does not usually import any thing more than that I saw some one whom I believed, and still believe, to be that person. If I saw no one, or if I believed the person to be different from him I have named, it is perjury; but not otherwise. If any material circumstance is falsely stated, such as that the witness was present, and heard a certain conversation, it has been held to be perjury if he were not present, though the conversation really occurred. People v. McKinney, 3 Parker, Cr. R. 510. In such a case, the materiality of the circumstance would be the only question. Granting the materiality of the fact, whether it be a statement of knowledge, or of information or belief, or a simple statement of a fact, if the witness knows that the fact is not so, or that he has no such information, or no such belief, he is guilty. But if he only swears rashly to his belief of a matter of which he does not profess to have personal knowledge, the jury cannot be permitted to decide on the reasonableness of his belief, except as tending to show whether he did believe. In short, perjury is always of some matter of fact; and belief may be a fact. In this case, the only questions of fact put in issue by the indictment and by the law are: Was the statement false? and, Did the defendant know it to be false? In this respect, it is like the offence of passing a counterfeit note, knowing it to be counterfeit. Proof of reasonable cause of belief may warrant a jury to find knowledge; but it is not the legal equivalent of knowledge.

It was proved that the defendant made oath to the statement set out in the second count; but it does not expressly appear by the paper itself that he professed to have personal knowledge of the fact. If he only intended to state his belief, there were some circumstances sworn to, which, whether satisfactory to the jury or not, were proper to be considered by them on the question of

[2] [Also reported as part of Case No. 14,474.]

belief. There was some evidence that the fragment of the note was picked up in the street on St. Patrick's Day, and that the father of the boy who found it gave it to the defendant, and suggested to him that perhaps the note had been torn up in a riot or street fight that took place then and there. In the case of U. S. v. Atkins, ubi supra, the false oath was, that a certain shipping paper was the original agreement with the crew; and the evidence tended to show that the defendant knew nothing whatever about it personally. The form of the oath, as in this case, was positive, without saying any thing about knowledge, or means of knowledge or belief. Judge Sprague, in charging the jury, said: "Did the defendant, by swearing positively, mean to swear that he had personal knowledge that it was the original agreement? The defendant could not swear that it was the original agreement, unless he was present when it was made. All else would be information and hearsay. The question is: Did he mean to make the collector understand that he had knowledge it was the original contract; or did he merely mean to swear that it was such to the best of his knowledge and belief? The matter for you to decide, gentlemen, is, whether you are satisfied that the defendant, in order to deceive the collector, wilfully and intentionally swore to what he knew was false, either as to the agreement being genuine, when he knew it was not, or to his knowledge of the fact, when he was conscious he had no such knowledge." Now, this ruling is undoubtedly sound in the abstract, and it is what I told the jury; but the difficulty in my mind is, that there was no sufficient evidence in the case from which they could infer that the defendant did state the destruction of the note to be within his personal knowledge; and therefore I should not have brought that secondary fact to their notice at all. And here I differ from the charge in Atkins' Case. The ruling in that case, with all the limitations and qualifications which it appears that Judge Sprague put about it, would probably do no harm; but I must say that in my opinion the learned judge should have ruled, on an affidavit wholly in writing, that it did or did not, as matter of law, import a statement of personal knowledge, and not have left that question to the jury. In that case the jury were unable to agree. In the similar case of U. S. v. Smith [Case No. 16,336], they acquitted the defendant. The court and jury in those cases agreed that an affidavit to a fact does not necessarily include an affirmation that the affiant has personal knowledge of the fact; and my own observation of the conduct and opinion of men in general in this matter agrees with that view. I consider the affidavit in this case ought not to be held to import such a statement, none such being expressed, and the fact not being one which was personal to him. The true question, therefore, for the jury was the one which the indictment points out: Did the defendant swear to this fact, knowing it to be false? I do not mean to say that there was not evidence from which the jury might have answered this question in the affirmative; but, as I cannot say how they would have answered it, I feel it to be my duty to grant a new trial.

New trial ordered.

Case No. 15,804.

UNITED STATES v. MOORE.

[7 Reporter, 198;[1] 11 Chi. Leg. News, 140.]

Circuit Court, W. D. Alabama. Nov. Term, 1878.

STATUTES—REVISION OF THE LAWS OF THE UNITED STATES.

The enactment of the Revised Statutes by act of congress, was not the enactment of a body of laws as original legislation, but was simply the enactment of a more convenient expression of the law as it existed on December 1, 1873; it does not enact or re-enact anything as law which was not the law on that date.

[Cited in The Marine City, 6 Fed. 414.]

The indictment in question was found at the present term of the court. The plea in abatement briefly stated is, that one of the persons composing the grand jury which found the bill was disqualified to act as such grand juror, because that without duress and coercion he took up arms against the United States and served in the armies of the Confederate States. This presents the question as to whether section 820, Rev. St. U. S. is now in force as a part of the law of the land. On demurrer to plea.

C. E. Mayer, U. S. Dist. Atty.

D. Clopton, E. W. Pettus, W. L. Bragg, and D. S. Tray, for defendant.

BRUCE, District Judge, in delivering the opinion of the court, said: It is admitted that this section was not the law on the 1st day of December, 1873, and it appears that it was section 1 of an act approved June 17, 1862 [12 Stat. 430], and was repealed by section 5 of an act approved April 2, 1871 [17 Stat. 15]. It is claimed that it was re-enacted by the adoption of the Revised Statutes of the United States. Section 5595 of the Revised Statutes provides: "The foregoing seventy-three titles embrace the statutes of the United States, general and permanent in their nature, in force on the 1st day of December, 1873, as revised and consolidated by commissioners appointed under an act of congress, and the same shall be designated and cited as the Revised Statutes of the United States." It certainly cannot be maintained that this language enacts or re-enacts anything as law which was not the law on the 1st day of December, 1873. The seventy-three titles were supposed to embrace the laws of the United States, general

[1] [Reprinted from 7 Reporter, 198, by permission.]

and permanent in their nature, but if they contained anything which was not law on the 1st day of December, 1873, its introduction into the Revised Statutes, be it by mistake or otherwise, cannot, and does not, make it the law. The test of the matter is, was it the law on the 1st day of December, 1873? If not, this language does not re-enact it, [for the adoption of the Revised Statutes is the adoption of the work of the commissioners appointed under an act to provide for the revision and consolidation of the statute laws of the United States approved June 27, 1866 [14 Stat. 74]. By the first section of this act the president of the United States by and with the consent of the senate was authorized to appoint "three persons learned in the law as commissioners to revise, simplify, arrange and consolidate all statutes of the United States, general and permanent, in their nature which shall be in force at the time such commissioners may make the final report of their doings." The report was made and acted upon at the 1st session of the 43d congress and is entitled (see 1st page, Rev. St.) "An act to revise and consolidate the statutes of the United States in force on the first day of December Anno Domini one thousand eight hundred and seventy-three." This act was approved June 20, 1874 [18 Stat. 113], and the result was the book, comprising 73 titles, which congress in section 5595, quoted supra, declared "shall be designated and cited as the Revised Statutes of the United States." When it is said that congress adopted and enacted the Revised Statutes by act approved June 22, 1874, if it is meant by the use of the words "adopt and enact" that congress enacted the 73 titles as the law, that is an error; for congress does not use the word "adopt," or "enact," in the section quoted, but says that the 73 titles embrace the statutes of the United States, general and permanent in their nature, in force on the 1st day of December, 1873. The statutes of the United States had become numerous; many old laws had been repealed and superseded, and others had become absolute, so that the law on many subjects could not readily be ascertained.][2]

The object was to consolidate and simplify the law, and the enactment of the Revised Statutes was not the enactment of a body of laws as original legislation, but it was the enactment of a more convenient expression of the law as it existed on the 1st day of December, 1873. To determine how and in what mode the law shall be designated and cited is a very different thing from enacting laws, and the language shows that it was not the latter but the former which congress did when it adopted the Revised Statutes.

[Repealed laws and superseded laws, any portion of which are embraced in any section of the revision, are, by section 5596 of the revision, expressly repealed, and "the section applicable thereto shall be in force in lieu thereof," and the last clause of this section is: "All acts of congress passed prior to said last named day (Dec. 1st, 1873,) no part of which are embraced in said revision, shall not be affected or changed by its enactment;" so that it is a mistake to suppose that all acts of the congress not in the revision are repealed, or that the sections contained in the revision were enacted as laws, if they were not such on the 1st day of December, 1873. This matter is put in a clearer light by reference to an act to provide for the preparation and publication of a new edition of the Revised Statutes of the United States, approved March 2, 1877 [19 Stat. 268]. Rev. St. (2d Ed.) Append. p. 1092. The 4th section of said act provides that when said 2d edition shall have been printed and promulgated as therein provided, "the printed volume shall be legal and conclusive evidence of the laws and treatises therein contained in all the courts. * * *" But before the 2d edition was printed and promulgated, as appears by the same book in which it is printed and promulgated (Rev. St. Append. [2d Ed.] p. 1093), an act was passed by congress to answer an act entitled "An act to provide for the publication of a new edition of the Revised Statutes of the United States," approved March 2d, 1877; approved March 9th, 1878 [20 Stat. 27]. This act consists of but one section and it amends the act of March 2, 1877, by striking out the words "and conclusive." The purpose of this act of March 9, 1878, is too plain to require comment. Congress saw the error into which it had fallen in the act of March 2d, 1877, in making the 2d edition of the Revised Statutes conclusive evidence of the laws therein contained, and corrected it by act of March 9th, 1878, and the correction appears with the error. It is proper to remark that the act providing for the publication of the 1st edition of the Revised Statutes of the United States provided, as the law cited supra now does for the 2d edition, that, "the volume shall be legal evidence of the laws, * * *" and does not make it conclusive.][3]

The conclusion is that section 820 of the Revised Statutes, not being the law on the 1st day of December, 1873, was not re-enacted by being carried into the Revised Statutes, and that the juror was not disqualified by reason of the fact that he had without duress and coercion taken up arms and served in the armies of the so-called Confederate States of America. Demurrer sustained.

[2] [From 11 Chi. Leg. News, 140.]

[3] [From 11 Chi. Leg. News, 140.]

Case No. 15,805.

UNITED STATES v. MOORE.

[Wall. Sr. 23.] [1]

Circuit Court, D. Pennsylvania. May 14, 1801.

CONTINUANCE—CRIMINAL PRACTICE—WITNESSES—COMPULSORY PROCESS.

A party charged with a crime, even before indictment found, may have compulsory process for his witnesses; but his omitting to use it is not such negligence as will deprive him of a continuance, if his witnesses be absent, though it will justify the court in imposing terms upon him.

An indictment was, in this term, found against the defendant for manslaughter, committed on board the ship Connecticut, lying in the river La Plata, in South America.

Milnor & Hopkinson, moved to put off the trial until the next court, on an affidavit, stating that Capt. Miller, of the United States ship Connecticut, and three other persons by name, who were on board at the time of the homicide, were material witnesses for him: that Miller and Flannery, two of the witnesses, had sailed from Philadelphia about ten days before: that the others, Dixon and Rush, had also gone on voyages, and that he expected to have their attendance at the next term. They further stated, that it had been proposed by them to the district attorney, to have the depositions of Miller and Flannery taken by consent before they sailed, which he declined. They then drew the depositions, and sent drafts, requesting him to cross-examine; which he also declined.

Mr. Dallas, U. S. Dist. Atty., said it was strictly right that the defendant should not be put upon his trial, if material evidence could be had at another time, and he had used due diligence without effect, to procure it at this time. But all these witnesses were in this city on the 3d May previous to the sitting of this court, and after the information lodged against the defendant, and his being committed on the charge of murder. He ought, therefore, to have taken out process against his witnesses, and had them bound over to appear at this term. He further stated that a number of the sailors, witnesses for the United States, had been committed and remained in gaol several months, for want of bail to testify on the traverse; and if the trial goes off, they must remain in imprisonment, though perfectly innocent, until next October, as they cannot procure bail for their appearance.

In Ratcliffe's Case, Fost. Crown Law, 41, though he swore to the absence of two material witnesses, one at Brussels, and the other at Saint Germains; and that he believed they would attend the trial if a reasonable time was allowed, yet the court refused to put off the trial, and that was in a capital case, and the prisoner hung.[2]

Before TILGHMAN, Chief Judge, and BASSETT and GRIFFITH, Circuit Judges.

GRIFFITH, Circuit Judge.—Mr. Dallas, can you show that before indictment found the person committed or bound to appear, and answer, &c., can have a capias against his witnesses to compel their attendance?

Mr. Dallas.—This is understood in practice in the criminal courts of the state, to be a matter of right, and is allowed; and by the 8th article of amendments to the constitution of the United States, it is provided, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Milnor & Hopkinson replied.

BASSETT, Circuit Judge, to the counsel for the defendant.—Would you object to the terms of taking the depositions of the sailors, in custody, de bene esse, on the part of the United States, as a condition of our granting your motion?

Mr. Hopkinson.—We think the affidavit and facts entitle us to a postponement of trial unconditionally. We have great objections to the depositions of these sailors. We wish to examine them in court and before the jury. We have good reason to suspect a conspiracy among them, to fix this crime on the defendant. They have evinced the greatest heat and resentment towards him. A viva voce examination before the jury is necessary to our safety. On depositions, though we cross-examine, we shall lose the manner, appearance, temper, &c., of the witnesses, so important in weighing their credit.

THE COURT made some inquiry from Lewis and Ingersoll, gentlemen of the bar, whether it was understood to be the right of the person accused, before indictment, to have compulsory process from a magistrate or the court, for his witnesses. They answered, that it had been so practised in the state courts, and upon an idea that it was of right; but that no adjudication had been given on the point.

GRIFFITH, Circuit Judge.—Upon principle it struck me, that a person merely charged with an offence before a magistrate and previous to indictment found, and issue joined, could not of right have compulsory process for his witnesses; and I am not satisfied, that the 8th article of amendments to the constitution of the United States, makes any alteration of the previous law. I think that

[1] [Reported by John B. Wallace, Esq.]

[2] It was on the mere issue of identity, and not on the principal offence of treason, of which he had been before convicted and attainted, and made his escape from the tower. It will be seen from the case that it was a mere pretence to delay execution, and is no way to the point.

the "time when" he may demand compulsory process, is left in that article where it stood before; as it merely provides for his being confronted with the opposite witnesses, and that he is "to have compulsory process for witnesses in his favour." Reading it with the eye of a lawyer, all these provisions would seem to look to the situation of a person or offender already indicted, and having pleaded to the country. Then only, perhaps, within the legal construction of the words, can it be entitled a "criminal prosecution wherein the accused shall enjoy, &c." But I give no opinion on this point, because, however it might have been the right of the defendant, previous to the indictment found against him, and as soon as he was taken upon the charge of murder or manslaughter, to have obtained process to secure the witnesses on his behalf who are named in the affidavit; yet I do not think for the purpose of enabling him to put off the trial for their absence, the omission of taking out such process, before an indictment found, can be considered as negligence, or want of due diligence, so as to deprive him of the full benefit of his affidavit proving their departure and absence at this time. In my opinion, it is sufficient for him to show, that after an indictment found, he has used due diligence, and cannot procure his testimony; and if he bring his cases within the usual requisites, it is matter of right to postpone the trial. Many reasons may exist to induce a party upon a mere charge of an offence, to decline any expense or labor in procuring witnesses. He may feel conscious of innocence, and believe that no bill will be found. He cannot always know precisely the nature of the accusation, nor foretell what will be the future presentment of the grand jury. He may, therefore, if he will, safely wait, without having laches imputed to him, till a bill is actually found, and he pleads to it; and from that time only is he legally bound to use diligence in preparing for trial. I am therefore of opinion, that the defendant is within the general rule, and is entitled, as of right, to a postponement of the trial; and being so, we ought not to annex a condition to it which may subject him to disadvantages, perhaps little short of proceeding to trial in the absence of the witnesses. As to the situation of the sailors who are in custody as witnesses, with my consent they shall not be imprisoned longer on that account. If they cannot get bail, their own recognizances ought to be accepted. It is contrary to the first principles of natural justice, to imprison men who are innocent, merely because they are too poor and friendless to find bail for their appearance as witnesses. If the United States may imprison witnesses, so may the party accused, and a whole ship's crew might lay in gaol for six months or a year.[3]

BASSETT, Circuit Judge.—The defendant was charged with this offence and committed for it, some months ago. He had counsel employed; he knew the nature of the prosecution; his witnesses were all in Philadelphia within a few days past; and in my opinion, he might have had process to secure their attendance at this court, before the indictment found. He knew of their being about to depart also, just before the court. For these reasons, I think there appears a want of due diligence in the defendant, in securing his testimony in the event of a bill being found. At the same time, I do not think this omission, being antecedent to an indictment, is of a nature to deprive the defendant of the benefit of a postponement of the trial, upon the grounds stated in his affidavit, of due diligence having been used since the indictment, and the absence of his material witnesses. But as he might have taken out process for the witnesses (though perhaps not strictly bound to prepare for his trial before an indictment) and the witnesses might have been detained, I am of opinion that this was such negligence, as will authorize the court to annex the condition proposed. I shall therefore be for allowing the motion on the terms of taking the depositions of the witnesses on the part of the United States, who are in gaol, before one of the judges, with leave on the part of the defendant, to cross-examine.

TILGHMAN, Chief Judge.—I am of opinion that the defendant should take his motion, but subject to the terms mentioned by his honor, Judge BASSETT. I ground myself upon the construction of the eighth article of amendments to the constitution of the United States; and I wish to have it understood as my decided opinion, that a party charged with a crime, and bound to answer, or committed for it, may have compulsory process for his witnesses, in that stage of the prosecution. It is a "public prosecution," and is instituted and commenced when the party, by process, or otherways, is brought before a court or magistrate, and on information or proof is held to answer. The subsequent indictment is but a continuation of the prosecution so begun. Any other construction would seem to me against the letter of the article, and very injurious to the party under the prosecution. He ought to be on equal ground with the prosecutor. Witnesses, at that stage, may be bound over, or brought in on process for the United States, and why not for the accused? Many cases might be put to illustrate the hardship of the contrary construction. A

[3] It has been the practice in Pennsylvania to commit to prison such witnesses for the commonwealth as cannot find security for their appearance at court to testify, in cases where the justice does not think their personal recognizance sufficient; but I find no authority for it. By the statutes of 1 & 2 Phil. & M. c. 13, and 2 & 3 Phil. & M. c. 10, the justice has power to bind the witnesses by recognizance or obligation to testify, and if they refuse to be bound, to commit them for contempt. The same power is said to be virtually included in their commissions; but it is no where said that they may be compelled to find security, or be committed. See 2 Hale, P. C. 52, 282.

man is accused of murder, and brought before a magistrate of the United States, and committed for trial. He sees a person present who can prove his innocence, an alibi, or that the homicide was se defendendo. He knows this person is to depart from the United States for a foreign country, and that he is never expected to return. In such a case what should we say, if he had no means to secure the evidence of this witness? Still, however, I agree, that to the purpose of postponing the trial, the affidavits are sufficient; but because there might have been process to have kept these witnesses, that will authorise us to put the defendant under equitable terms. Take your motion, upon consent to examine the witnesses for the United States de bene esse.

This was done; the sailors examined and discharged.

Case No. 15,806.

UNITED STATES v. MORAGA.

[Hoff. Land Cas. 103.] [1]

District Court, N. D. California. Dec. Term, 1855.

MEXICAN LAND GRANT—AUTHENTIC CLAIM.

The validity of this claim undoubted.

Claim for three leagues of land in Contra Costa county, confirmed by the board, and appealed by the United States.

[This was a claim by Joaquin Moraga for the Rancho Laguna De Los Palos Colorados. Granted by Juan B. Alvarado to Joaquin Moraga and Juan Bernal. Claim filed February 15, 1853; confirmed by the commission January 23, 1855; containing 13,318.13 acres.]

S. W. Inge, U. S. Dist. Atty.

Bates & Lawrence, for appellee.

HOFFMAN, District Judge. The claimants in this case petitioned on the thirtieth of August, 1835, for the place called "Laguna De Los Palos Colorados." The petition was referred to the Ayuntamiento Del Pueblo De S. José Guadalupe, and also to the Rev. Padre, for their reports. On receiving these reports, which were favorable, José Castro, primero vocal of the assembly and political chief, ad interim, made his concession on the tenth of October, 1835, and directed that when the departmental assembly should have approved the grant the corresponding title should issue. On the twelfth of October, 1835, the concession was approved, but the "title" does not seem to have issued until the thirty-first of July, 1841. All the foregoing facts appear from the expediente on file in the archives of the former government.

The claimants have also produced the original title delivered to them, which bears date on the tenth of August, 1841, to which is attached a map or diseño certified by Jimeno, secretary of the government, to be a copy of that accompanying the expediente. The translation of this certificate seems to be omitted. There also accompanies this document the certificate of approval by the departmental assembly, and a note or record of an arrangement between Moraga and Candelario Valencia, who seems to have been a colindante or coterminous owner, fixing their common line and providing for the use in common of an ojo de agua or spring of water which is on the land.

The authenticity of all these documents is fully proved, and it is shown that in 1836 the parties went upon the land, built houses, corrals, and placed cattle upon it, and cultivated a considerable portion. The boundaries of the tract are given with some precision in the original grant, and it appears in evidence that the limits of the rancho are well known to those residing in its vicinity. The claim was confirmed by the board, and we think their decision should be affirmed.

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

UNITED STATES (MOREHEAD v.). See Case No. 9,792.

Case No. 15,807.

UNITED STATES v. MOREL.

[Brunner, Col. Cas. 373; [1] 13 Am. Jur. 279.]

Circuit Court, E. D. Pennsylvania. 1834.

FEDERAL JURISDICTION — CRIMES COMMITTED IN FOREIGN COUNTRY.

The courts of the United States have not jurisdiction of crimes committed on board of an American vessel within the jurisdiction of a foreign sovereign; nor will the fact that a person stealing goods in a foreign port, brings them upon the high seas in an American vessel, give this jurisdiction to the federal courts.

[Approved in U. S. v. Seagrist, Case No. 16,245. Cited in dissenting opinion in U. S. v. Rodgers, 14 Sup. Ct. 116, 150 U. S. 268.]

The defendant [John Peter Morel] was charged in four bills of indictment, as follows: (1) For having, on the 26th of December, 1832, on board of the sloop Charles William, belonging to three citizens of the United States, while lying in Great Harbor, in Long Island, one of the Bahama Islands, within the jurisdiction of the king of Great Britain, carried away, with intent to steal, certain goods of the master, and receiving and buying them, knowing them to be stolen; and in other counts charging the offense on the high seas. (2) The same as the first bill, omitting the counts for buying and receiving stolen goods, and in the second count, laying the offense as committed on the high seas. The two other bills varied the charge by describing the offense as a taking of the goods with intent to steal, and for receiv-

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

ing and concealing them, knowing them to be stolen.

After the indictments were read, and the prisoner had pleaded (not guilty and a former acquittal), the court suggested a question as to the jurisdiction, growing out of the language of the fifth section of the act of congress of the 3d of March, 1825 [4 Stat. 115], with a view to which the indictments were framed, namely, that it only embraced offenses against the person, and not such as were charged in the indictments. The testimony of the master and boy of the vessel were, however, heard, which seemed to prove the fact of the commission of the offenses charged, and described precisely the place where committed, when the court desired the counsel to speak to the question of jurisdiction.

Mr. Gilpin, U. S. Dist. Atty., and Mr. Troubat, for the United States.

G. M. Wharton, Mr. Hazelhurst, and D. P. Brown, for prisoner.

BY THE COURT. The indictment charges in the first count that the defendant, on the 26th day of December, A. D. 1832, at the district aforesaid, and within the jurisdiction of this court, on board of a certain vessel, to wit, a sloop called the Charles William, belonging to citizens of the United States, while lying in a place, to wit, Great Harbor, in Long Island, one of the Bahama Islands, within the jurisdiction of a certain foreign sovereign, to wit, the king of the United Kingdom of Great Britain and Ireland; the said defendant being a person belonging to the company of said vessel, with force and arms, did then and there feloniously take and carry away, with an intent to steal and purloin, certain personal goods of the said Samuel P. Watkins, to wit (enumerating the articles taken). The second count charges the offense to have been committed "on the high seas, out of the jurisdiction of any particular state, and within the jurisdiction of this court."

The district attorney having given the evidence on which he relies for the description or designation of the place where the offense was committed, the counsel for the defendant have excepted to the jurisdiction of the court, and the further progress of the trial was suspended until the opinion of the court could be taken on this question of jurisdiction. It has been fully argued, and will now be decided. It depends upon whether the place at which the fact was committed is a place over which the criminal jurisdiction of this court extends, according to the intent and meaning of the acts of congress, by which the jurisdiction is given, and by which it must be governed and limited. By the testimony of Samuel P. Watkins, the captain of the sloop, and owner of the property taken, it appears that, at the time the fact was committed, the sloop was lying at anchor in a place called the Great Harbor of Long Island, one of the Bahama Islands. He called it a locked harbor, which he says is where a vessel cannot get to sea, being land-locked by shoals or reefs. He describes it to be an indentation in the main land; that from the mouth or chops of this indentation to the bottom is about a mile; that it is about half a mile wide at the chops, and continues of the same width; that the sloop was about half a mile within the chops, and about midway between the shores, that is, about one fourth of a mile from the land on each side; that outside of this harbor, at the distance of about two miles, there are reefs and bars, over which the tide does not flow, and upon which the sea or ocean breaks; that the passage from the harbor out is narrow and difficult, and that you do not get to sea for about two miles. Such was the position of the sloop when the defendant took possession of her, and of all on board of her, and committed the fact charged in the indictment. Was it done on the high seas, within the meaning of the act of congress? The indictment is founded on the fifteenth section of the act of April 30, 1790 [1 Stat. 116]. This section enacts "that if any person within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas, shall take and carry away, with an intent to steal and purloin, the personal goods of another," etc. The taking and carrying away in this indictment is charged to have been done on the high seas; was it so? Was the place where the fact was done the high seas in the general and legal meaning of the term, or as they are used in the act of congress?

Writers of high authority on this subject make a clear distinction between the main sea or the high sea, and roads, harbors, and ports, and we shall see that congress had these distinctions in view in framing the act in question. Lord Hale, in the fourth chapter De Jure Maris, says "that part of the sea which lies not within the body of a country is called the main sea or ocean." In the second chapter of second part he describes a road to be "an open passage of the sea," which, "though it lies out at sea, yet in respect of the situation of the land adjacent, and the depth and wideness of the place, is a safe place for the common riding or anchoring of ships." "A haven is a place of a large receipt and safe riding of ships, so situate and secured by the lands circumjacent that the vessels thereby ride and anchor safely, and are protected by the adjacent land from dangerous and violent winds." "A port is a haven, and somewhat more," that is, for arriving and unlading ships, etc. We see here a clear and reasonable distinction taken between the main sea or ocean, and such parts of its waters as may flow into places so situate and secured by the circumjacent land as to afford a harbor or protection for vessels from the winds,

which make the sea dangerous. The open sea, the high sea, the ocean, is that which is the common highway of nations, the common domain, within the body of no country, and under the particular right or jurisdiction of no sovereign, but open, free, and common to all alike, as a common and equal right. Mr. Webster, in his argument of Bevans' Case [Case No. 14,589], says there is a distinction between the meaning of the terms "high sea" and "sea"; that the high seas import the open, unenclosed ocean without the fauces terræ, and he is not contradicted by the opposite counsel. Certainly ports and harbors which lie within the body of a country are not part of the high seas according to Lord Hale's definitions. This learned lawyer further says, and we think with good reason, that "the common and obvious meaning of the expression 'high seas' is also its true legal meaning. The expression describes the open ocean where the dominion of the winds and waves prevails without check or control. Ports and harbors, on the contrary, are places of refuge in which protection and shelter are sought, within the enclosures and projections of land." So are the high seas distinguished from havens. This appears to us to be a just general view, without meaning to adopt the whole extent to which the force of the expressions might carry us.

The act of congress, so far from weakening, gives a strong confirmation to the definitions and distinctions we have alluded to; and the decisions of the supreme court upon this act entirely uphold them. On turning to the act it will be found that in describing the offenses over which jurisdiction is given to the courts of the United States, a material variance occurs in relation to the place at which the fact is committed, nor does this appear to have been the effect of accident, inadvertence, or caprice; at least no court can be justified in assuming that supposition as the ground of its opinion. Thus it is enacted by the eighth section that "if any person shall commit murder upon the high seas, or in any river, haven, basin, or bay out of the jurisdiction of any particular state," etc. But in providing in the twelfth section for the punishment of manslaughter, in describing the place, the "high seas" only are mentioned, and the words "any river, haven," etc., are omitted. So by the eighth section, robbing or piratically running away with a vessel is punishable by the courts of the United States, if done on the high seas or in any river, haven, etc.; but in the sixteenth section, which punishes the taking and carrying away the personal goods of another, with intent to steal or purloin them, the places within which the offense or fact must be committed must be "under the sole and exclusive jurisdiction of the United States, or upon the high seas," not a word is said about a river, haven, basin, or bay, out of the jurisdiction of any particular state. It would seem, then, that in relation to these "kindred crimes," murder and manslaughter, robbery and larceny, congress has thought proper to make the sphere of jurisdiction in the higher crimes larger than for the lesser, leaving the latter to the courts of the nation within whose jurisdiction a crime was committed. The chief justice in U. S. v. Wiltberger [Case No. 16,738], says: "Congress has shown its attention to the distinction between the 'high seas' and a 'river, haven, basin, or bay,' and can we disregard it, especially under the well-known rule that a penal statute shall be construed strictly? If we were to adopt the construction contended for by the district attorney, there would be little or no difference between the high seas and a river, haven, basin, or bay; for if the ebbing and flowing of the tide, a fresh or salt water, are to make the difference, it is obvious that the high seas will be found to extend many miles into rivers, many miles into the interior of the country, and surrounded on many sides by countries. If all salt water below low-water mark be a part of the high seas, we shall find it where a sloop cannot float, and the water is never ruffled by the wind. If," says the chief justice, "the words be taken according to the common understanding of mankind, if they be taken in their popular and received sense, the 'high seas,' if not in all instances confined to the ocean which washes a coast, can never extend to a river about half a mile wide, and in the interior of a country." He evidently favors the opinion that the terms are confined to the ocean which washes a coast. But is not the case of an inlet or basin, half a mile wide, in the interior of the country, the same in principle as a river of the same description? The position of the water in relation to the adjacent country and the main sea, it being within or without a county or a local territorial jurisdiction, and not a common domain, an open highway for all nations, furnishes the characteristics of the high sea, and not the circumstance of the place being a river or a basin, salt water or fresh, above or within the flow of the tide; I mean in reference to the criminal jurisdiction of the court. As it must be conceded that the act of congress makes a clear distinction between the high seas and a river, haven, basin, or bay, it must follow that a place which falls under either of these descriptions cannot, in the construction of the act, be construed to be the high seas, for that would be to make them the same, and to confound what congress intended to separate. Adverting, then, to the place in which the offense in this case was committed, as described by Capt. Watkins, can we hesitate to say that it falls directly within the description of a haven, basin, or bay? And if so, it cannot be the high sea in the meaning of the act. Can it be called the open ocean, the high seas, according to any of the definitions or opinions we have referred to?

We have quoted Lord Hale's definition of a haven, as it seems to describe very exactly

the place in which the sloop was anchored. It was "a place for the receipt and safe riding of ships, so situate and secured by the land circumjacent that the vessels thereby ride at anchor safely, and are protected by the adjacent land from injurious or violent winds." Was not the "Great Harbor" of Long Island just such a place? Is it not so understood from its name, Great Harbor, to distinguish it from a smaller inlet of water from the sea, at some distance from it? Was the ocean, the high sea, ever called a harbor? If, then, we refer ourselves as the chief justice has done, "to the common understanding of mankind," to the understanding of those who have a particular and practical knowledge of the place in question, and we find them denominating it a harbor, which is a port or haven for shipping, how can we adjudge that this harbor is the high sea, which has forever been distinguished from a port or haven, both in its legal and common signification? To say that the high sea is a port or haven, or that a port or haven is a high sea, would be deemed an absurdity by all who have any knowledge of the terms. If we look to the English lexicographers for the meaning of these terms, "haven," "basin," "bay," we shall find no difference between them and Lord Hale; haven, a port, a harbor, a station for shipping; basin, a part of the sea enclosed in rocks; bay, an opening into the land where the water is shut in on all sides except at the entrance. Either of these definitions fully meets the description of the Great Harbor of Long Island, as given by Capt. Watkins, as well as by the draft or chart that has been shown to the court. If, then, the place in question be a basin, haven, or bay, it is exactly the sort of place mentioned in the act of congress, as distinguished from the high seas, in the same act, and cannot therefore be embraced in the term "high seas," as there used and intended. The place was the haven or harbor of the island, and no part of the high sea.

Some of the decisions of Judge Story are supposed to support the construction of the district attorney. They will not be found to do so. The case of U. S. v. Ross [Case No. 16,196], was an indictment for being present, aiding, and abetting in the murder of a colored man, on board the schooner Pocahontas, on the high seas, near the Cape de Verd Islands. The vessel was at anchor in an open roadstead or bay, near the island of St. Jago, about half a mile from the shore, and a mile from the town of Riga. By adverting again to Lord Hale, we shall see that a road is an "open passage of the sea"; that it lies out at sea; but that in respect to the situation of the adjacent land, and the depth and wideness of the place, it is a safe place for the common riding and anchoring of ships. This is wholly unlike the place in which the Charles William was lying in the harbor of Long Island. Judge Story in giving his opinion of the meaning of the act of 1790, says: "From the language of the act I am of opinion that the words 'high seas' mean any waters on the sea coast, without the boundaries of low-water mark, although such waters may be in a roadstead or bay, within the jurisdictional limits of a foreign government." In the case before us the offense was not committed in waters on the sea coast, nor in a roadstead. By the coast I understand the edge of the land next the sea. In our case there was a bar or reef over which the sea did not flow. Between the sea and the entrance to this haven or basin you had two miles to go, says the captain, to get to sea; by which expression it is clear that the witness did not consider the water between the bar or reef and this basin to be the sea. The sea coast, then, was two miles outside of or beyond the entrance to this place or harbor. We have also shown that it is not a roadstead, and it is thus entirely clear of the opinion of Judge Story in the Case of Ross [supra]. In the case of U. S. v. Smith [Case No. 16,318], the vessel on board of which the crime was committed was lying outside the bar of Newburyport harbor, but within three miles of the shore. The judge thought she was on the high seas, "for it never has been doubted that the waters of the ocean on the sea coast, without low-water mark, are the high seas." The Charles William was lying inside the bar, in the port or harbor of Long Island and not on the waters of the ocean on the sea coast. In U. S. v. Hamilton [Id. 15,290], the judge only says that a ship lying in an enclosed dock in the port of Havre was not on the high seas. That was the case he had to decide. In case of The Abby [Id. 14], the vessel was five miles off Cape Elizabeth, and the judge says that "all waters below the line of low-water mark, on the sea coast, are comprehended within the description of the high seas."

If this indictment cannot be maintained under the law of 1790, it has been argued by the district attorney that it is embraced by the provision of the fifth section of the act of 3d of March, 1825. That section enacts that "if any offense shall be committed on board of any ship or vessel belonging to any citizen or citizens of the United States, while lying in a port or place within the jurisdiction of any foreign state or sovereign, by any person belonging to the company of the said ship, or any passenger, on any other person belonging to the company of the said ship, or any other passenger, the same offense shall be cognizable by the proper circuit court of the United States." It is contended that this provision is not confined to offenses upon or against the person, but extends to any wrong done to one of the ship's company, or a passenger, in his person or property. It appears to us that the obvious and only meaning of the words restricts the jurisdiction here given to the circuit courts to offenses upon the person of an individual, and cannot, by any reasonable construction, be extended to offenses upon or against the property of another. To adopt the construction contended for, we must strike

out these most significant words, or give them no meaning or effect, to wit, "on any other person belonging to the company of the said ship, or any other passenger," for without these words we should have the law precisely as it is said to be, with them by this argument. It is manifest that by omitting these words the section will have the general operation contended for, and that these words limit and restrain that operation, and are doubtless inserted for that purpose. We cannot erase this part of the section, nor refuse to give them their plain and obvious interpretation. We think the case is not embraced by this section.

Another attempt is made to sustain the prosecution; it is said that even if the original taking was in a place not within the jurisdiction of the court, yet that the goods were afterwards taken by the offender upon the high seas, and brought within the jurisdiction, which therefore attached to them, such bringing being in law a new taking and a new larceny; and it is likened to the taking stolen goods from one country into another. We do not see the analogy or agreement between the cases. No case has been shown where goods stolen in a foreign state or jurisdiction and brought into England were held to be within this principle of the common law. In 2 East, 776, after stating the principle that the possession of the goods by a thief is larceny in every country into which he carries them, the author gives the exception to this rule: "As where the original taking is such whereof the common law cannot take cognizance, as of goods obtained by theft or robbery at sea, and afterwards carried into some country; in which case the common law gives no jurisdiction to inquire of the felony." So of goods taken in Scotland, and brought into England. The decisions in the state courts of these United States have differed, upon extending this common law principle to the case of goods stolen in one state and carried into another, although it is adopted as to the counties of the same state. In Massachusetts and Connecticut the courts have recognized the principle in relation to different states; in New York and Pennsylvania the contrary doctrine has been asserted. In the case of Simmons v. Com., 5 Bin. 617, Chief Justice Tilghman gave the opinion of the supreme court. The property was originally stolen in the state of Delaware, and the thief brought it to this city. It was adjudged that he could not be indicted here for the felony. The chief justice considers the priciple even as to counties a subtle one, and does not seem inclined to favor it. As to the convenience of the practice, he says: "I had rather see one hundred culprits escape than extend such jurisdiction a hair's breadth beyond its constitutional limits." We think the prosecution cannot be supported on this ground.

The last effort made by the district attorney to bring the defendant within the grasp of the law, and we think the circumstances of the case, so far as we know them, fully justify all his zeal to punish the offender, is to contend that the offense described in the act of congress is not the technical common law crime of larceny, and therefore not to be judged by the rule which governs that offense, to wit, that it is committed and complete when and where the original taking of the goods is perpetrated; that the act does not speak of a larceny, or of stealing, but simply of taking and carrying away the goods with intent to steal or purloin them. The argument then is, that the carrying this property in or over a place, to wit, the high seas, which is within the jurisdiction of this court, is an offense cognizable by this court. It is to be observed that the carrying the goods is not a distinct substantive offense; the words of the act are, "shall take and carry away," not "or carry away." The crime is therefore complete when the goods are taken and carried the smallest distance from the place from which they were taken. Any further carrying does not add anything to the offense, much less can it create a new one. But to complete the description of the crime, there must be both a taking and a carrying away; and to give this court jurisdiction of it, both must be done in a place over which that jurisdiction extends. In meeting this point in this way, we would not be understood to sanction the opinion that the offense described in the act of congress is not a larceny.

Case No. 15,808.

UNITED STATES v. MORGAN.

[1 Cranch, C. C. 278.] [1]

Circuit Court. District of Columbia. Dec. Term, 1805.

WITNESS — COMPETENCY — INTEREST — GOODS AND CHATTELS — BANK NOTES.

1. A stockholder in the bank is a competent witness for the prosecution, in an indictment for receiving a stolen bank-note, the property of the bank, the witness having released to the United States all his interest in the fine.

2. Bank-notes are not goods and chattels.

Indictment [against Evan Morgan] for receiving a bank-note of the Bank of Alexandria, the property of the President, Directors, & Company of the Bank of Columbia, knowing it to be stolen; against the form of the statute. Act Cong. 1790 (1 Stat. 116). Mr. John Mason, the president of the Bank of Columbia, was offered as a witness on the part of the United States.

Mr. Caldwell, for the prisoner, objected that half the fine goes to the owners, who, in this case, are the Bank of Columbia, in which the witness is a stockholder.

Mr. Jones, for the United States, contra. The section of the act respecting receiving stolen goods does not appropriate the fine, but

[1] [Reported by Hon. William Cranch, Chief Judge.]

only says the punishment shall be the same; the appropriation of the fine is no part of the punishment.

THE COURT was of opinion (nem. con.) that the fine for receiving was to be appropriated in the same manner as the fine for stealing; and that there was such an interest as incapacitated the witness.

He released to the United States his interest, and was again offered as a witness.

It was again objected by Mr. Caldwell, that this would not prevent the bank from receiving the full half of the fine, and the witness would not be estopped from receiving his dividend upon his shares of stock, and, if he did not receive it at the first dividend, yet it would go to increase the general fund. The United States could not claim it, because it is not now in esse; and therefore the release can only operate as an estoppel to him personally, and transfers nothing.

THE COURT permitted the witness to be sworn and examined.

Verdict, guilty.

Motion in arrest of judgment, because the words "goods and chattels," in the act of congress, do not include bank-notes. They are not goods or chattels. Morris' Case, 1 Leach, 468.

CRANCH, Circuit Judge. This is an indictment for a misdemeanor, in receiving a banknote knowing it to be stolen. Bonds, bills, and notes, by the common law, were not held to be such goods whereof larceny could be committed, being of no intrinsic value, and not importing any property in possession of the person from whom they were taken. 4 Bl. Comm. 234; 1 Hawk. P. C. p. 142, c. 33, § 22. The receiving of stolen goods, knowing them to be stolen, was, at common law, only a misdemeanor. But as the stealing of a bank-note was not a crime at common law, the receiving a bank-note knowing it to be stolen, was not even a misdemeanor. The act of congress under which the prisoner is indicted (1 Stat. 116) speaks of "goods and chattels" only. To know the meaning of the expression, "goods and chattels," we must resort to the common law, where we find that neither promissory notes, nor bank-notes, nor money, are included within that expression. Bank-notes, therefore, are not within the act of congress. But it has been contended that the act of Maryland against stealing banknotes, uses the words "other goods," thereby implying that bank-notes are goods. But if that was the case the act was wholly unnecessary, as the preëxisting law was abundantly sufficient for the punishment of stealers of goods. The foundation of the act itself, the evil which the act was intended to remedy, was that bank-notes were not goods in the eye of the law, and therefore it was no offence to steal them. The counsel for the United States relied much upon the case of Rex v. Woods, cited in note to 1 Hawk. P. C. 232 (c. 58, Append. 7), from 3 Select Trials, 195, which case we have not seen. The note of it in Hawkins, seems rather to be an inference of the editor, than an abridgment of the case itself, and this inference is expressly contradicted by the case of Rex v. Morris, in 1 Leach, 468, in which it was decided by the twelve judges that the receiving banknotes knowing them to be stolen, was not a misdemeanor within any of the British statutes. The case then remains upon the common law definition of goods and chattels. The judgment must be arrested.

Case No. 15,809.

UNITED STATES v. MORGAN et al.

[3 Wash. C. C. 10.] [1]

Circuit Court, D. Pennsylvania. April Term, 1811.

EMBARGO LAWS—BOND—UNAUTHORIZED STIPULATIONS.

Where a bond had been taken by the collector, by which the obligor stipulated to reland a cargo, on board a particular vessel, in the United States; although the same might be prevented by the perils of the sea, and stipulating that a certificate of the landing of the cargo should, within a limited time, be delivered to the collector of the port of Philadelphia, to whom the bond had been given; the court held the bond void, the embargo laws not authorizing the insertion of such stipulations.

[Cited in Bank of U. S. v. Brent, Case No. 910. Distinguished in U. S. v. Brown, Id. 14,663. Cited in Jackson v. Simonton, Id. 7,147; Hawes v. Marchant, Id. 6,240.]

[Cited in brief in Inhabitants of Scarborough v. Parker, 53 Me. 253. Cited in State v. Sooy, 38 N. J. Law, 331.]

This was an action of debt, brought upon an embargo bond, dated 24th December, 1807, taken to the United States. The plea, to which there was a demurrer, presented the following objections to the bond, which, it was contended, avoided it: (1) That the collector, and not the United States, should have been the obligee. (2) That the condition of the bond omits to insert the words, "dangers of the sea excepted." (3) That it binds the defendants [Morgan and Farquhar] to deliver to the collector at Philadelphia, where the bond was taken, the certificate of relanding in the United States, within three months from the date of the bond.

Cases cited by the defendants: 3 Vin. Abr. p. 420, pls. 18, 21; 6 East, 110; 3 Mass. 105; Cowp. 26.

WASHINGTON, Circuit Justice. The bond upon which this action is founded, is a statutory instrument, taken to the United States by one of its officers, which the court admits to have been proper. But, as that officer had no authority to take such a bond, but in virtue of a power conferred upon him by

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

the government of the United States, the power should have been, at least, substantially pursued. The embargo law, under which this obligation was taken, does not set out, in precise terms, the form of it; but the material parts of it are clearly prescribed. It is to be in a sum of double the value of vessel and cargo, with condition that the goods shall be relanded in some port of the United States, dangers of the sea excepted. If it be taken in a greater sum than the law directs;—if the condition stipulate a relanding elsewhere than in the United States;—if it stipulate a relanding absolutely, when the law requires it to be done on a certain condition;—or if it bind the obligors to do more than the law requires—it is not the bond which the officer was authorized to take, and all is void. A contrary doctrine might be productive of the most intolerable oppression to the citizen, as well as of detriment to the government. The court will not say, that if such a bond be voluntarily given, it would on that account be valid. But there is no ground for saying that the bond in question was voluntarily given, since the reverse is stated by the defendants, and admitted by the United States.

Applying the above principles to this case, the bond is void.—First, because the condition is to reland the cargo within the United States, although the obligors might have been prevented from doing so, by a peril of the sea; and, secondly, because the condition requires the obligors to return the certificate of relanding to the collector at Philadelphia, within a limited time, whereas the law did not impose upon the obligors the necessity of returning the certificate to that officer at all, much less to do so within any prescribed period.

Demurrer overruled, and judgment for defendants.

Case No. 15,810.

UNITED STATES v. MORIN.

[4 Biss. 93.] [1]

District Court, D. Indiana. June, 1866.

INTERNAL REVENUE — RETAIL DEALER IN CIGARS —PENALTY—HOW RECOVERABLE.

1. No action of debt will lie on the 73d section of the internal revenue law of June 30, 1864 [13 Stat. 223]. The prosecution must be by indictment.

2. When a statute renders an offense punishable by imprisonment, or fine, or both, the district attorney cannot waive the imprisonment, and sue in debt for the fine.

3. Quære, whether debt will lie on a penal statute which does not fix the amount of the penalty.

[Action by the United States against Catharine Morin for a penalty.]

John Hanna, U. S. Dist. Atty.

Fabius M. Finch, for defendant.

McDONALD, District Judge. This is an action of debt to recover a penalty of five hundred dollars against the defendant, for carrying on the business of a retail dealer in cigars without a license. A demurrer has been filed to the declaration; and whether the demurrer ought to be sustained, is the point to be decided. The only question raised in support of the demurrer is this: Does an action of debt lie, under the United States revenue laws, for a failure to take out a license in a case in which by those laws a license is required?

This action is founded on the 73d section of the act of June 30, 1864 (13 Stat. 223). That section is as follows: "That if any person or persons shall exercise or carry on any trade, business, or profession, or do any act hereinafter mentioned, for the exercising, carrying on, or doing of which trade, business, or profession, a license is required by this act, without taking out such license as in that behalf required, he, she, or they shall, for every such offense, besides being liable for the payment of the tax, be subject to imprisonment for a term not exceeding two years, or a fine not exceeding five hundred dollars, or both, one moiety of such fine to the use of the United States, the other moiety to the use of the person who shall first give information of the fact whereby said forfeiture was incurred."

I do not understand the district attorney as insisting that on the words of this section alone, an action of debt would lie for an omission to take out a license. But he argues that, considered in connection with the 41st and 179th sections of the act, such action is authorized.

The 41st section provides that "all fines, penalties, and forfeitures, which may be imposed or incurred by virtue of this act, shall be sued for and recovered in the name of the United States in any proper form of action, or by any appropriate form of proceeding, qui tam, or otherwise."

And the 179th section declares that "all fines, penalties, and forfeitures, which may be incurred or imposed by virtue of this act, shall and may be sued for and recovered, where not otherwise herein provided, in the name of the United States, in any proper form of action, or by any appropriate form of proceeding."

The provisions of these two sections seem to be substantially the same. None of the sections referred to designate, in terms, the form of prosecution to be pursued. But both the 41st and 179th sections indicate two distinct modes of proceeding, namely, "by any action," or "by an appropriate form of proceeding." The word "action" probably here refers to those civil actions known to the common law by the names of debt, assumpsit, &c. The "appropriate form of proceeding" mentioned in these sections may include, not only civil actions at common law, but also indictments and criminal prosecutions. For the phrase is certainly more comprehensive,

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

than the term "action." Considering the whole scope of these two sections, I think they simply mean that whosoever violates the internal revenue law, and thereby incurs a liability to any punishment, the mode of prosecuting which is not distinctly named in the law, shall be proceeded against in such manner as by the common law is the appropriate remedy.

Now, the prescribed punishment in the present case is "imprisonment for a term not exceeding two years, or a fine not exceeding five hundred dollars, or both." The appropriate proceeding in such a case does not appear to me to be the common law action of debt. In this view, I think I am sustained by the following considerations:

1. An action of debt is not the "appropriate proceeding" to enforce the prescribed punishment of imprisonment. Imprisonment is as much the prescribed punishment for the offense in question as a fine is. And if it be said that debt might lie for the fine, it may be answered, that debt will not lie for the imprisonment.

The district attorney, however, insists that he has the right, on the part of the government, to waive the imprisonment, and to proceed for the fine only. But I think he has not that right. I think it is for the court alone to determine whether the delinquent should be imprisoned only, or fined only, or both fined and imprisoned. No one could well determine what sort of punishment ought to be inflicted, till the evidence is heard on the trial. Besides, such a determination involves the exercise of judicial authority; and I am not aware that judicial power is vested in the district attorney.

2. In my opinion, the action of debt is not the "appropriate" remedy for enforcing a "fine," even if the district attorney might waive the imprisonment. The word "fine," as employed in the 73rd section of the internal revenue act, ex vi termini implies a criminal prosecution. This term, I admit, is used in some parts of that act in a vague sense, as meaning, perhaps, a forfeiture, or penalty, or punishment. But, in the 73rd section, on which this action is founded, it is employed in connection with the term "imprisonment;" and when used in that connection, it always supposes a criminal prosecution. Here the rule, "Noscitur a sociis" applies. The common punishment for all misdemeanors is fine and imprisonment; and nobody ever thought of bringing an action of debt in such a case to recover the fine. Moreover, the proper process at common law to collect a fine is a capias pro fine, and not a fieri facias, which is the proper process on a judgment in debt.

3. I much question whether, if in this case a civil action would lie, that action would be debt. I do not, indeed, think that any form of civil action will lie in this case. It seems to me that the only appropriate proceeding is by indictment. Perhaps a criminal information might, according to the English practice, be adopted. But, at any rate, I think the action of debt is inappropriate.

It is true that, at common law, debt is a very comprehensive remedy. It lies on judgments, recognizances, bonds, simple contracts, and penal statutes. But it lies only for a certain sum of money. Within this rule it is, indeed, a maxim that "Certum est, quod certum reddi potest." But in no case will debt lie where the sum claimed can not conveniently and readily be reduced to legal certainty. When a statute creates a penalty in a fixed sum—as in offenses under the stamp law—no doubt debt may be maintained for that sum. Thus, says Chitty, it lies on a statute "whenever the demand is for a sum certain, or is capable of being readily reduced to a certainty." 1 Chit. Pl. 108.

But how is it in the case at bar? The district attorney in his declaration asks "that the said defendant render unto the plaintiff the just and full sum of five hundred dollars lawful money of the United States, which the said defendant owes to and unjustly detains from the plaintiff," because the defendant had been retailing cigars without a license, contrary to the internal revenue act. Now, is that the truth? Even if the defendant has thus violated the law, does she owe to the United States five hundred dollars for the violation? What court can say, a priori, that she does? Is there as yet, even allowing the fact that she has violated the law, any certainty that she owes the United States anything on that account? Even if found guilty, the court might make the punishment imprisonment alone. Is this, then, suing for "a sum certain"? The statute fixes no certain sum. It only says that the offender may be subject to "a fine not exceeding five hundred dollars." It may be one dollar, or one hundred dollars, as well as five hundred. And the district attorney might as well have claimed in his declaration five dollars or fifty dollars to be "the sum certain," as five hundred dollars. In fine, he might just as well have fixed on any sum under five hundred dollars as on that sum, so far as making a good declaration in debt is concerned.

It is clear that the fine contemplated by the 73rd section of the internal revenue act must be wholly uncertain in amount. It is in this respect more uncertain than ordinary claims for unliquidated damages, which every lawyer knows cannot be the subjects of actions of debt. For in all actions of assumpsit, trespass, and case, if the charge is sustained by sufficient evidence, it is certain that some amount must be recovered; but, in proper proceedings in a case like the present, though every material fact were proved or confessed, the sum to be assessed against the defendant would not only be as uncertain as in an action of assumpsit, trespass, or on the case, but, up to the moment of the decision, it would remain uncertain whether any amount at all would be assessed; for the court might punish the offense by imprisonment alone.

I know that there is some authority for holding that debt will lie on a penal statute which does not fix the amount of the penalty. My opinion is that, upon the principles of the common law, it will not. But be that as it may, I think it is very clear that no action of debt can be maintained on the 73rd section of the internal revenue act of June 30, 1864. The demurrer is sustained, and the suit dismissed.

Consult U. S. v. Ebner [Case No. 15,020].

Case No. 15,811.

UNITED STATES ex rel. GARLAND v. MORRIS.

[2 Am. Law Reg. 348.]

District Court, D. Wisconsin. April, 1854.

FUGITIVE SLAVE—ASSAULT ON SLAVE—WARRANT FOR APPREHENSION—STATE PROCESS.

1. The master of a fugitive slave, having him apprehended by the marshal, in pursuance of a warrant, cannot be arrested for assault and battery committed on such fugitive, while making the arrest, in aid and at the request of the marshal, before the final hearing and order of the judge.

[Cited in Ex parte Bushnell, 8 Ohio St. 601.]

2. A warrant for the apprehension of a fugitive slave is in full force until the final hearing and order; and after a rescue, a fresh pursuit may be made by the marshal and owner with the same warrant.

3. The service of process under the United States cannot be interrupted by the arrest of the officer in person aiding him in serving such process; or in any other manner, by means of state process or warrants.

[Cited in Re McDonald, Case No. 8,751; Re Bull, Id. 2,119.]

[Cited in Walker v. Howard (Tex. Civ. App.) 30 S. W. 1096.]

[Suit by the United States, upon the relation of B. L. Garland, against Timothy D. Morris.]

MILLER, District Judge. The relator, a citizen of the state of Missouri, obtained a warrant upon affidavit, for the apprehension of Joshua Glover, whom he alleged to be his slave for life, and as such to owe him service and labor in the state of Missouri, whence he escaped. The warrant was issued to the marshal, who arrested the fugitive, with the aid of the relator, in the county of Racine, in this state, and placed him in the jail of Milwaukie county for safe keeping, until the hearing. The same day of the arrest and imprisonment, a warrant was issued by the mayor of the city of Racine upon the affidavit of one James Clement, against the relator, for assault and battery upon the body of Glover. In the afternoon of the day of the imprisonment of Glover, a mob rescued him by forcing the jail doors; and at the same time the warrant for the arrest of the relator was placed in the hands of the respondent Morris, as sheriff of Racine county for service; and just after the rescue, it was executed by the arrest of Garland, the relator. Before the rescue, a writ of habeas corpus was issued by the judge of Milwaukie county to the marshal, and also the sheriff of Milwaukie county, to produce the body of the fugitive Glover; which writ was not obeyed.

The relator applied to me as the judge of the district court of the United States for this district, for a writ of habeas corpus; which was allowed, and directed to the respondent to produce the body of his prisoner. The respondent made answer to this writ, that he held the custody of the relator, by virtue of the warrant of the mayor of Racine, as above stated.

This writ of habeas corpus was allowed under the act of congress, of March 2, 1833 (4 Stat. 632), which is, "that either of the justices of the supreme court, or a judge of any district court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in cases of a prisoner or prisoners in jail or confinement, when he or they shall be committed or confined, in or by any authority or law, for any act done or committed to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof, any thing in any act of congress to the contrary notwithstanding."

The deputy marshal, who served the warrant for the apprehension of Glover, the fugitive, made return to that warrant, with an affidavit as to the truth of the facts set forth in said return. In that return, he states that in pursuance of the next warrant, he proceeded, with the said B. S. Garland and other deputies, to Racine county, where the said Glover was with difficulty, and after resistance, arrested, with the aid of said Garland and others, as required by me. In making said arrest, no more force was used than was actually necessary, for the resistance by said Glover and others was great. This return was read at the hearing, when the counsel of the relator called this deputy marshal to testify to the facts connected with making the arrest, including the above. The counsel opposed objected thereto, and also declined calling any witnesses on their part, or giving any evidence but the respondent's warrant. I do not deem it necessary to hear the deputy marshal state the facts already sworn to by him, and on file in this court, particularly under the objection. For the purposes of this hearing, I consider the facts above stated sufficiently attested.

Glover, the fugitive, did not make the complaint against this relator, before the mayor of Racine; nor does it appear that he authorized Clement to do so in his behalf, or that Clement had personal knowledge of the matter of the complaint. It is not shown that there was any other cause of complaint by Glover against the relator; nor is it at

all probable that there could be, as the relator resides in Missouri, and came from there here. I view this warrant of the mayor to have been obtained by an officious intermeddler, for the same purpose as the habeas corpus—to effect the rescue of the fugitive Glover. The affidavit of Garland, the warrant for the apprehension of Glover, the return under oath, the rescue, and the habeas corpus from the county court, are sufficient to satisfy me, for the purposes of this hearing, that Garland, the relator, is the master of Glover, and that no more force was used than was necessary to effect the apprehension of his fugitive slave. By the act to amend and supplementary to, the act respecting fugitives, &c. (4 Stat. 462, c. 7): "When a person held to service or labor in any state or territory of the United States, has heretofore, or shall hereafter escape into another state or territory of the United States, the person or persons to whom such labor or service may be due, or his, her or their agent or attorney, duly authorized by power of attorney in writing, acknowledged and certified under the seal of some legal officer or court of the state or territory in which the same may be executed, may pursue and reclaim such fugitive person, either by procuring a warrant from some one of the courts, judges, or commissioners aforesaid, of the proper circuit, district or county, for the apprehension of such fugitive from service or labor; or by seizing and arresting such fugitive where the same can be done without process, and by taking or causing such person to be taken, forthwith before such court, judge or commissioner, whose duty it shall be to hear and determine the case of such claimant in a summary manner." This law gave the relator Garland, the choice to apprehend his fugitive slave either with or without a warrant, and to take him before a judge or a commissioner for hearing. In this case he was aiding the marshal in the service of a warrant, at the officer's request. He was acting under a law of the United States, and also aiding the marshal, or officer, in the service of process of the United States. The relator is clearly a person within the act of the 2d March, 1833, upon which this writ was allowed.

It is too well settled, for me to quote authorities, that the judiciary of the federal and of the state governments, are entirely independent of each other; and that the courts of one government cannot by warrant, injunction, or any other writ, or process, restrain or interrupt the service of the process of the other. The warrant for the apprehension of Glover, the fugitive, had not been fully executed by the arrest merely, and when Garland, the relator, was arrested by this respondent, it was in full force until the fugitive was brought before the judge, or commissioner, and an order made, either to discharge him from custody or to remand him to his master. Glover has been rescued and is now at large, and is liable to be re-arrested upon that same warrant.

The relator and the marshal have a legal right to enter upon fresh pursuit of the fugitive. By the law, the marshal is liable for the full value of this fugitive, in Missouri, to the master, and for this cause he is inclined, no doubt, to retake him; and he has also a right, still to require the aid of this relator. For these reasons, I cannot but consider the imprisonment of the relator, or of the marshal, (who was also prosecuted in Racine,) a greater outrage than the rescue.

The law under which the fugitive was apprehended, is a law of the United States, adopted in pursuance of the constitution, and must be enforced. The judges, commissioners, marshals, or claimants are not to be interfered with, in its administration or execution, by state courts or officers. The process, or warrant, shall be served without hindrance from any quarter; the same as process issued in pursuance of any other law. If our judges and marshals should be permitted to be interrupted, or embarrassed in the performance of their duty under that law, they may be under any other law, or all the laws of the general government, until they become dead upon the statute book. The sovereignty of the government, asserted through the process from its courts, shall not be affected or nullified by resistance, or by the arrest of officers or men engaged in the service of such process. If this proceeding were tolerated, rescues may be made in any case, where the marshal has the custody of a prisoner, by arresting the marshal, and withdrawing him from such duty. While the marshal is serving his process, the person or property seized or arrested, and in his custody, by virtue of such process, cannot be taken out of his custody either directly or indirectly, by means of process of any kind or description from the state courts; nor will I permit the marshal to interrupt, or interfere with the service of process from the state courts. I have directed the marshal to return to sheriffs property he had taken from them by replevin, which they had seized upon execution or attachment. The courts of the two governments are located in the same state, but are independent of each other; and are not to be brought in conflict without endangering the harmony of these governments. The rules adopted by the supreme court of the United States, on this subject, are well defined, and must be adhered to. If this case were in the state court, I have no doubt of the discharge of this relator from the custody of the marshal; as it would be the duty of that court to require the full service of its first process; and I should direct the marshal to comply with such order without delay. The act of congress, of 1833, gives the same power to the federal courts, in this particular, as is vested in the state courts. It is true that, that act does not expressly empower

the judges to hear and determine the matter upon the return of the writ of habeas corpus, but that power is necessarily inferred, from the power to allow the writ.

The relator is ordered to be discharged.

Case No. 15,812.

UNITED STATES v. MORRIS.

[1 Balt. Law Trans. 117.]

District Court, D. Maryland. 1868.

CRIMINAL LAW—DEFRAUDING INSURANCE COMPANY—EVIDENCE OF INTENT.

[1. The fact that a ship is insured by a valued policy, which places her value beyond what the jury believe to be her true value, is no evidence that she was insured and sent out by her owner with the guilty intent to have her cast away so as to obtain the insurance money.]

[2. Two parties were indicted for conspiracy to obtain insurance on a vessel, and then have her cast away or destroyed, and one of them was separately indicted for individually doing the same thing. Both were acquitted of the conspiracy. *Held* that, if the jury could not convict the individual without assuming the existence of the conspiracy of which the parties had been acquitted, then he too must be acquitted.]

Indictment against Theo. A. Morris for fitting out the schooner Montezuma with intent to destroy her, and thereby injure the United States Fire & Marine Insurance Company.

A. S. Ridgely, U. S. Dist. Atty., assisted by W. D. Booth, prosecuting.

Whitney, Giles & Wallis, for the defence.

GILES, District Judge (charging jury). 1st. To enable the jury to find the prisoner guilty under this indictment they must find from the evidence that when he loaded and dispatched the Montezuma in January last he did so with the intention that she should be destroyed on her voyage, and also with the intention of defrauding the United States Fire & Marine Insurance Company of this city, and that he had procured or did subsequently procure a policy of insurance from said company on said vessel and cargo.

2d. And if the jury shall find that the insurance effected by the prisoner on said vessel was for an amount not greater than the value of said cargo then on board said vessel, then the same is not evidence of a guilty intent to defraud said company as charged in said indictment.

3d. And if the jury shall find that the policy on the vessel was a "valued" policy in said company, then, although they may find that in said policy the vessel is valued at a sum greater than the jury may find to have been the true value of said vessel, there is no evidence of a fraudulent intent by the prisoner.

4th. If the jury shall find that they cannot convict the prisoner of the charge upon which he is being tried, without assuming or finding the existence of a conspiracy between him and Pennell to destroy or cast away the Montezuma, with the joint intent to defraud the United States Fire & Marine Insurance Company, then the verdict of the jury must be for the prisoner, both Pennell and the prisoner having been already acquitted of said conspiracy.

5th. And as to evidence of guilty intent to injure the said insurance company, if the jury shall find that the notice and preliminary proof presented by prisoner to said insurance company was false and fraudulent, these circumstances, or either of them, would be evidence from which the jury may infer the said guilty intent as to both fitting out and the intent to injure the said company; but the jury in deciding the question must take into consideration all the evidence in the case, and must be able to find from it the guilty intents aforesaid, before they can convict the prisoner.

6th. Although the jury might find that the prisoner, in shipping the cargo, did so with the guilty intent of defrauding the internal revenue laws, he is not guilty under this indictment, unless the jury shall also find that he did so with the guilty intent stated in the first instruction. And as the prisoner's declaration made at the time he ordered the casks of water to be procured and placed on the Montezuma, have been given in evidence, it is for the jury to say, from these declarations and the other evidence, with what intention he made the said shipment; and if the jury find that he did so for the purpose of perpetrating a fraud on the revenue laws, and with no other intent, he is not guilty under this indictment.

7th. And although the jury may find that the protest given in evidence by the prosecution is false, as to the manner in which the vessel was lost, such false protest is no evidence against the prisoner of a guilty intent, unless the jury shall find that he knew it to be false when he presented it to said company.

The instructions having been given, Mr. Booth, on the part of the prosecution, commenced the argument upon the evidence and the law as expounded by the court. At the conclusion of his argument, which lasted about two hours, the counsel for the defence submitted the case to the jury without reply, and the case was accordingly given to the jury at 2:30 p. m. The jury not having agreed at 3 o'clock, the court adjourned until 4.30 p. m., up to which hour the jury had failed to agree, and wished further instruction. This they received from the court, which shortly afterward adjourned until 8 p. m. At 8 p. m., the court having met, the jury were brought in and delivered their verdict, declaring the prisoner "Not guilty."

Case No. 15,813.

UNITED STATES v. MORRIS.

[16 Blatchf. 133;[1] 7 Reporter, 581; 19 Alb. Law J. 403.]

Circuit Court, S. D. New York. March 29, 1879.

FORGERY—POST OFFICE MONEY ORDER.

An indictment under section 5463 of the Revised Statutes of the United States, which charges a person with having forged a material endorsement on a post office money order, with intent to defraud C., charges what is an offence against the United States.

[This was an indictment against James Morris. Motion in arrest of judgment.]

C. P. L. Butler, Asst. U. S. Dist. Atty.

Henry W. Sackett, for defendant.

BENEDICT, District Judge. The prisoner was indicted, under section 5463 of the Revised Statutes of the United States, charged with having forged a material endorsement upon a post office money order, with intent to defraud C. M. Cady. A verdict of "guilty" was rendered, and now the defendant moves in arrest of judgment, upon the ground, that, inasmuch as the indictment charges the intent to have been to defraud C. M. Cady, no offence against the United States is stated. There is nothing in the point. If the United States has power to issue post office money orders, which has not been doubted, it has, as an incident to that power, authority to protect such orders against fraud. It would, doubtless, therefore, be competent for congress to make it an offence against the United States to forge a money order, whether done with or without an intent to defraud. This statute makes an intent to defraud one of the elements of the offence, but the fact, that, in this instance, the intent charged was to defraud C. M. Cady, does not change the character of the act. It was still an act which the United States has the authority to punish, for the better protection of money orders lawfully issued by the United States. In U. S. v. Shellmire [Case No. 16,271], it is said, that an indictment for forging an order upon the Bank of the United States, with intent to defraud a private person, would lie, in the courts of the United States.

The motion in arrest is denied.

Case No. 15,814.

UNITED STATES v. MORRIS et al.

[2 Bond, 23;[2] 3 Fish. Pat. Cas. 72.]

Circuit Court, S. D. Ohio. April Term, 1866.

PENAL ACTION — UNAUTHORIZED USE OF WORD "PATENT"—PATENTABLE ARTICLE—DECLARATION.

1. Suits for the recovery of the penalty prescribed by section 5 of the act of August 29, 1842 [5 Stat. 544], for affixing the word "patent" to unpatented articles, must be brought in the name of the informer and not in the name of the United States.

2. Although the statute affixes a penalty for placing the word "patent" on an unpatented article, yet it must be construed to mean that such article, if not patented, was patentable.

[Disapproved in Oliphant v. Salem Flouring Mills, Case No. 10,486. Cited in Rosenbach v. Dreyfuss, 2 Fed. 221.]

3. To justify a judgment for a penalty for putting the word "patent" on an unpatented article, the declaration must allege, and there must be proof on the trial, that the article was legally the subject of a patent.

[Cited in Giant Powder Co. v. Safety Nitro Powder Co., 19 Fed. 509.]

4. As the statute is higly penal, it must receive a strict construction, and can not be held to embrace any act which, although within the strictness of its letter, is against reason and common sense.

5. It can not be supposed that congress intended to attach a penalty to placing the word "patent" on any article which was frivolous in itself, and which imported no novelty, or the exercise of any inventive talent, and which could therefore deceive no one.

This was a demurrer to the declaration in an action of debt brought in the name of the United States [against Charles N. Morris and Henry Brachmann] to recover the penalty of one hundred dollars prescribed by section 5 of the act of August 29, 1842, for placing the word "patent" on certain business cards.

R. M. Corwine, U. S. Dist. Atty.

Lyman Walker, for defendants.

LEAVITT, District Judge. The declaration in this case is in debt for a penalty of one hundred dollars, alleged to have been incurred by the defendants, and to be owing to the United States. There is a demurrer to the declaration on several grounds specified, some of which will be referred to hereafter. The question before the court is: Whether, from the averments of the declaration, the United States is entitled to a judgment for the penalty claimed, supposing the facts averred to be true.

The declaration sets out, in substance, that the defendants were publishers, for compensation, of business cards and other printed matter, on pasteboard and paper, at the city of Cincinnati, and that "with the intent and for the purpose of deceiving the public, and without having obtained letters patent therefor, the defendants, in the name of Morris, Pr. Cin.," did knowingly and unlawfully print and publish for sale, and did then and there unlawfully deliver for circulation among the public, to one James Hargan, O. B. Sappington, and R. S. McKee, partners, etc., five hundred business cards of and for said firm, with the word "patent" printed thereon, meaning and intending thereby to pretend to the public that the defendants had obtained the letters patent of the United States giving them the sole and exclusive right to print, publish, and sell said cards. A copy of the

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

[2] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

card is then set out in the declaration, from which it seems to be a card notifying the public that the firm of Hargan, Sappington & Co. are dealers in groceries and sundry articles of produce, at Madison, Indiana. The words "Morris, Printer, Cin. Patent," appear in a corner of the card. It is then averred that this is "contrary to the statute in such case made and provided," and that defendants have thereby incurred a penalty of one hundred dollars.

The action is based on section 5 of the act of August 29, 1842 (5 Stat. 543). The first part of the section prohibits any person from placing or inscribing in any form the name, or any imitation of the name, of the patentee of any invention without consent of such patentee or his assignee or legal representatives; and the section also prohibits any person, not being a purchaser, or not having the consent of, or a license from, the patentee, from putting on the thing patented, in any form, the words "patent," or "letters patent," or "patentee," with intent to imitate or counterfeit the stamp or device of the patentee. Then comes the provision under which this suit is instituted, prohibiting any person from affixing any word, stamp, or device on an unpatented article for the purpose of deceiving the public. The penalty for any one of the acts specified in the section is "not less than one hundred dollars, with costs, to be recovered by action in any of the circuit courts or district courts of the United States having the powers and jurisdiction of a circuit court, one-half of which penalty, as recovered, shall be paid to the patent fund, and the other half to any person or persons who shall sue for the same."

One of the points presented by the demurrer is that suits for the recovery of the penalty provided in the section referred to, must be brought by an informer, and can not be sustained solely in the name of the United States. If this objection is well taken, it is fatal to the present action. The solution of this question depends on the construction to be given to that part of the section of the law above cited, which prescribes the mode of enforcing the penalties incurred. The penalty for each act specified is not less than one hundred dollars, one-half of which is to be paid to the patent fund and the other half "to any person or persons who shall sue for the same." It is not declared, as is usual where an act is prohibited and a penalty is provided, that it shall or may be recovered in the name of the United States, and the absence of such a provision, as applicable to this section, is significant. As to that part of the section imposing a penalty for placing the words "patent," "patented," or "patentee," on a patented article or invention, the patentee or assignee is the person who alone can be materially injured by the attempted deception, and would seem to be the person who ought to sue. And it clearly was not the intention of the statute, that the United States should bring suit for the penalty in its own name without the intervention of an informer. That would be imposing a burden on the government not intended by the statute. The provision in the close of the section that one-half of the penalty shall go to the patent fund and the other half to any person or persons who shall sue for the same, leads clearly to the conclusion that the action must be prosecuted by an informer, or, if the name of the United States can be properly used, it must be in connection with a person, to be named as informer, who shall be responsible, in case the action is not sustained, for costs, or other consequences resulting from its failure. It has been repeatedly held that the United States, or indeed any corporation, can not be an informer where the statute requires a person to act in that character. It is clear, therefore, that this action can not be sustained upon the theory that the United States is the informer. The form of the remedy being pointed out by the statute, must be strictly pursued. Ferrett v. Atwill [Case No. 4,747]. And the requirement that half the penalty shall go to the person or persons who shall sue for the same, means, by the clearest implication, that there must be the intervention of an informer. If this had not been the intention of the law, there would doubtless have been an explicit provision that the penalty may be recovered in the name of the United States.

There is but one reported case within my knowledge of a suit under the section of the statute which has been cited. None of the questions arising on this demurrer were presented in that case, and it is only referred to as showing that the action was prosecuted qui tam. The title of the case is Stimpson v. Pond [Id. 13,455]; and in the case of Ferrett v. Atwill [supra] the suit was brought in the same way, and not in the name of the United States; not under the same, but a similar statutory provision.

I am, therefore, clear in the opinion that the demurrer must be sustained for the reason that this suit is prosecuted in the name of the United States, and not in the name of an informer. But if there is any doubt upon this point, there is another ground on which I must hold the demurrer is well taken. It was not urged in the argument, but it has occurred to me as entirely conclusive.

The declaration avers that the defendants for the purpose of deceiving the public, and not having letters patent therefor, knowingly and unlawfully printed and circulated a business card, with the word "patent" printed thereon, meaning thereby that they had letters patent for the card, and had the exclusive right to print and sell the same. The charge then is, that defendants caused the word "patent" to be printed on the card, for which they had no patent. It is not averred, however, that any other person had a patent for the card, nor is it alleged that the card, as described in the declaration, was legally the subject of a patent. Now although the statute,

without much show of reason on any ground of public policy, affixes a penalty for placing the word "patent" on an unpatented article, yet it must be construed to mean that such article, if not patented, was patentable. As the statute under which this action is brought is highly penal, it must receive a strict construction, and can not be held to embrace any act which, though within the strictness of its letter, is against reason and common sense. It would be doing injustice to the framers of this law to suppose they intended to include in its prohibitions, and to visit with a penalty, the mere act of putting the word "patent" on an article neither patented nor patentable. Novelty and utility are essential elements of every valid patent issued under the laws of the United States. And it is clear to my mind that to justify a judgment for a penalty for putting the word "patent" on an article, the declaration must allege, and there must be proof on the trial, that it was legally the subject of a patent. It can not be supposed that congress intended a penalty to attach to the use of that word on any article which was frivolous in itself, and which imported no novelty or the exercise of any inventive talent, and which could therefore deceive no one. Suppose an individual, as a freak of fancy or even with the hope of profit, should inscribe the word "patent" on the simplest bauble made for the amusement of children, could it be predicated by the act that there was an intention to deceive the public, and that he thereby incurred the penalty provided by the statute referred to? It seems to me no one could hesitate to give a negative response to this question.

Now the thing or article on which the declaration avers that the word "patent" was unlawfully inscribed was a business card in the ordinary form and without peculiar ornamentation or anything to distinguish it from the millions that are in constant use by business men. There may be something novel and patentable in the fixtures or machinery by which the card was printed, and these defendants may have a patent for it; and for this reason may have supposed it proper to put the word "patent" on the cards printed by them. But the question arising on this demurrer does not involve that inquiry. It is simply whether in declaring for the penalty under the statute, it is not incumbent on the plaintiff to aver, and on trial to prove, that the article or thing on which the word "patent" was placed was legally the subject of a patent, to sustain the presumption that it had the qualities of novelty and utility. And I am clear, that as this declaration contains no such averment, it is bad on demurrer.

I am not able to refer to any case in which this point has been judicially considered. I think, however, the conclusion I have reached rests on a firm basis of reason; and I shall continue to think so until my views are repudiated by a higher court.

There were several points made in the argument to which I have not adverted. Those stated, it seems to me, are decisive.

Demurrer to declaration sustained.

Case No. 15,815.

UNITED STATES v. MORRIS.

[1 Curt. 23; 9 West. Law J. 151; 2 Liv. Law Mag. 277; 4 Am. Law J. (N. S.) 241.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1851.

CRIMINAL LAW—JURY—OF WHAT JUDGES—PLEA IN BAR—CHALLENGE—CIRCUIT COURT—SLAVERY.

1. Under the constitution and laws of the United States, the jury are not the judges of the law in a trial for a crime; they are to take the law from the court, and apply it to the facts which they may find from the evidence, and thus frame their general verdict, of guilty or not guilty.

[Cited in U. S. v. Rycraft, Case No. 16,211. Followed in U. S. v. Riley, Id. 16,164; Sparf v. U. S., 15 Sup. Ct. 282, 156 U. S. 74.]

[Cited in Com. v. Anthes, 5 Gray, 237; Rice v. Thayer, 105 Mass. 261; State v. Wright, 53 Me. 334; State v. Hodge, 50 N. H. 522; Copp v. Henniker, 55 N. H. 198; Com. v. McManus, 143 Pa. 97, 22 Atl. 765. Quoted in State v. Burpee, 65 Vt. 22, 25 Atl. 970.]

2. Under the act of congress of August 8, 1846, (9 Stat. 73, § 3,) an indictment for a misdemeanor may be remitted to this court, by an order made at a term subsequent to that to which the indictment is returned, and after the defendant has pleaded, and some proceedings have been had.

[Cited in U. S. v. Riley, Case No. 16,164; U. S. v. Haynes, 29 Fed. 694.]

[Cited in Lapham v. Almy, 13 Allen, 305.]

3. It is not a good plea, in bar to an indictment for a misdemeanor, that the case was once committed to a jury, and withdrawn before verdict by order of the court.

4. Though neither party has a right of challenge after a juror is sworn, it is in the discretion of the court to protect the administration of justice, by investigating, at any stage of the trial, an objection to the impartiality of a jury, and by withdrawing the case from the jury, if any juror is found unfit to sit therein.

[Cited in U. S. v. Riley, Case No. 16,164; Simmons v. U. S., 12 Sup. Ct. 172, 142 U. S. 148.]

[Cited in People v. Wintermute, 1 Dak. 63, 46 N. W. 700. Cited in brief in Ochs v. People, 124 Ill. 405, 16 N. E. 662. Cited in Com. v. McCormick, 130 Mass. 62. Quoted in State v. Ulrich, 110 Mo. 359, 19 S. W. 658.]

5. The question, whether a person was held to service under the laws of Virginia is partly a question of status, and partly a question of property; and in either aspect, evidence that the person was, in point of fact, held and treated as a slave in Virginia, is admissible, and if not controlled, sufficient evidence to require the jury to find that he was held to service under the laws of that state.

An indictment for a misdemeanor was found against the defendant, and returned into the district court [case unreported],

[1] [Reported by Hon. B. R. Curtis, Circuit Justice. 2 Liv. Law Mag. 277, and 4 Am. Law J. (N. S.) 241, contain only partial reports.]

which, having been removed to this court, the defendant filed the following plea:

"Special Plea.—And now the defendant, after the reading of the indictment, says, that the same indictment was returned by the grand jury of the United States to the district court of the United States for this district, at the March term thereof, last past; that he appeared before said court, and was duly arraigned to answer to said indictment, at said term, and did plead thereto the plea of not guilty; that, thereupon, a jury of twelve men was impanelled to try the issue between him and the United States; that each juror answered, under oath, that he was sensible of no bias, and entertained no opinion which would prevent his finding a verdict against the defendant, if the law and the evidence required it; that the case was opened to the jury by the counsel for the United States, and witnesses were examined in behalf of the prosecution; that, thereupon, the district attorney moved the court, that he might be permitted to introduce evidence tending to show that one of the jurors had a bias in the case; that the defendant objected to the right of the court to hear the evidence, but it was allowed, and several witnesses were examined as to the declarations of the juror, and the court ordered the juror to be withdrawn, and the case to be continued to the next term of said court, without the consent of the defendant, and without any necessity for so doing; that at the next term of the said court, to wit, the June term, last past, the judge of said court ordered the indictment to be remitted to this court, by an entry on the docket, that, in the opinion of the court, difficult and important questions of law were involved in the case, and it was so remitted; that no other matters or things were remitted to this court, except the indictment and recognizances; and none of the proceedings in said court were remitted to this court, or appear on record, or on the files of this court. Wherefore, the defendant says, that he ought not to be required to plead to this indictment; and that he ought not to be tried upon this indictment; and that this court ought not to take further cognizance of this indictment. And he prays the judgment of the court in the premises. Robert Morris."

To this plea there was a general demurrer, and joinder in demurrer.

The District Attorney and N. J. Lord, for the United States.

J. P. Hale and R. H. Dana, Jr., for the prisoner.

CURTIS, Circuit Justice. The first point raised by this plea is, whether this indictment has been lawfully remitted to this court, and is now regularly pending here. It is alleged that the district court had not power, under the act of 1846, c. 98, § 3, to remit the indictment to this court, for several reasons, the first of which is, that the order to remit was not made at the term when the indictment was presented. The clause of the statute under which the district court acted is as follows:—"And the said district court may, moreover, in like manner, remit to the circuit court any indictment pending in said district court, when, in the opinion of the court, difficult and important questions of law are involved in the case; and the proceedings thereupon shall thereafter be the same in the circuit court, as if such indictment had been originally found and presented therein." It is argued that the direction to remit "in like manner," refers to the manner of remitting capital indictments, provided for just before, in the same section. Of this there can be no doubt. It is further argued, that the "like manner" includes a direction to remit to the next term of the circuit court, because capital indictments are to be remitted to the next term of that court. If it were admitted, that the authority to remit "in like manner" is an authority to remit to the next term of the circuit court, it would not follow that the remission must be to the term of the circuit court next following the presentment of the indictment in the district court.

The question would still remain, whether the order to remit must be made at the term at which the indictment is presented. The time when such order is to be entered may or may not be considered as part of the "manner" of remitting. Generally, the time of doing an act and the manner of doing an act are distinct things. The phrase, "at such times and in such manner," is one of very frequent occurrence in legal language, and is strictly correct. Still, it may be that, though not naturally included, congress intended to embrace the time of entering the order in the words "in like manner;" and therefore it is necessary to look carefully at the different parts of this statute, and see if such was the intention of congress. When the remission of capital indictments is provided for, the act says, "every indictment for a capital offence presented to the district court, shall, by order entered on the minutes of the court, be remitted," &c. It is not intended that such indictment shall, in a legal sense, be pending in that court which has not power to try them; they are to be presented and then remitted, and the inference is a necessary one, that the order to remit is to be made when presented. But by the clause under consideration, the court has power to remit any indictment pending in that court; from which no such inference, but the contrary, is to be drawn; for indictments are pending only after they are presented, and their pendency continues till finally disposed of. It would seem, therefore, that the words "in like manner" were not intended to embrace the time when the

order is to be entered; for in one case it is to be when the indictment is presented, in the other while it is pending. If we look further at the subject-matter of the enactment, we find that the statute says, any indictment pending in the district court may be remitted, "when, in the opinion of the court, difficult and important questions of law are involved in the case."

The natural meaning of this is, that the order may be made when the court shall have arrived at the opinion that such questions are involved in the case, and if so, there is no limit of time. When that opinion is formed the time is come, according to the statute, to make the order; till it is formed, the time has not come; and whether formed at the first, or any subsequent term, it is equally a compliance with the statute to enter the order.

But it is also contended, that this order must be made before any proceedings have taken place under the indictment, and that to allow a remission after any proceedings would endanger the prisoner's rights, and could not have been intended by congress. It is undoubtedly true that, to deprive a prisoner on trial for a crime of any substantial right, is so contrary to the general system of our law, that the legislative intention must be expressed with great clearness to induce the court to suppose that such was the design. But if, on the contrary, very important rights are secured; if the provision is in harmony with other modes of proceeding, which have been long in use and generally approved; and if the worst that can be imagined is not the loss of any right, but merely some danger of inconvenience in some possible cases, it would be going too far for the court to put a constrained interpretation upon the law, and deny to it its full meaning.

It has already been stated, that the natural meaning of this clause is, that the order to remit is to be made when the court has arrived at the opinion that difficult and important questions of law are involved in the case, and that the act prescribes no limit of time within which such opinion is to be formed. It may be added, that it is a fair, not to say a necessary inference, from the fact, that the remission is to be made as a consequence of the opinion that difficult and important questions of law are involved in the case; that such proceedings are to take place, as in the ordinary course of things are usually necessary to enable the court to form such an opinion, and these would certainly include some judicial investigation of the merits of the particular case, or, if there is a class of cases, of some one of them. It is suggested that the court may examine the indictment, and thus ascertain that important and difficult questions of law are involved; but the act does not confine the questions to the indictment; its language is, "questions involved in the case." Besides, it is no part of the duty of the court, or of its ordinary action, and can scarcely be considered judicial, for the court to inspect indictments to foresee what questions may be raised; and congress cannot be supposed to have legislated for a class of cases to arise out of the formation, by the court, of an opinion, in a way which is entirely out of the usual course of judicial action, and which cases, therefore, could not justly be expected to arise at all. The sound construction of the clause is, that this opinion is to be arrived at, as other judicial opinions are, in the usual course of justice, after an issue is made, and the parties so far heard as to develop the questions which exist. The argument of the defendant's counsel proceeds upon the basis that there are to be no proceedings in the district court, and this assumption is necessary; for if it be conceded that the accused is to be arraigned and plead, the whole basis of the argument must fail. But if there has been no plea, how can the court know that any question whatever is to arise. The defendant may plead guilty, and so there may be no questions at all.

It is suggested, however, that the construction contended for by the defendant ought to be adopted, because any other affects the rights of the accused, and this is in two ways. First, it is urged that the district judge may arbitrarily break off a trial after it has begun, and send the case to another court, perhaps for the very purpose of embarrassing the accused; though any intention of imputing such motive in this case is wholly disavowed. Taking a practical view of this argument, it would seem that a defendant would not be unwilling to get out of a court held by a single judge, who manifested a disposition to oppress him, and whose rulings there is no means whatever of revising; that a judge who had such a disposition would be far more likely to keep the control of the case than to send it to another court. And, taking a legal view of the subject, it is clear that no argument can be drawn from the amount of discretionary authority thus conferred on the judge, because it is in harmony with other provisions of law, and of this very statute, and of the same nature as the powers already possessed by courts of the United States. By the act of 1792 (chapter 66) it is provided, that when the judges of the circuit court are divided in opinion, the question may be certified to the supreme court for decision, and the trial is to proceed or to be broken off, as the court shall determine. Here there is a discretion vested in the court to stop the trial or not, as they shall think the merits of the case require, and that for a reason not unlike the one on which the judge is to act, under the clause of the statute now in question.

In all cases within the jurisdiction of the district court, it is in the power of that court, as it is in the power of the circuit court, even in capital cases, to take the case from

a jury impanelled to try it, whenever, in the opinion of the court, it is necessary, or required by the interests of public justice to do so. The authorities in support of this position will be presently referred to; and although they show that, especially in capital cases, it is a power to be exercised with great caution, yet it exists, and is purely and entirely dependent upon the discretion of the court; and, by the second section of this very act, the district court is empowered, on the motion of the district attorney, to remit to this court an indictment and the proceedings under it, as a mere matter of convenience, and when no questions of difficulty and importance are involved. It seems to me, therefore, not improbable that congress intended to intrust the district court with a similar discretion, to be exercised upon this class of cases;—where, difficult and important questions of law being involved, there is a moral necessity, and the interests of public justice may require that they should go into a higher court, when, if they prove to be so difficult that a real difference of opinion exists between the two judges, they may be sent to the supreme court for a final decision. It is apparent that the prisoner may find great additional security for his rights by this course; and, considering that it is only recently that any criminal jurisdiction was intrusted to the district court, that it now has an entire criminal jurisdiction except in capital cases, that there is no mode whatever of revising its decisions and giving uniformity to them throughout the country, and that congress has by this law intended to make a provision to prevent what might otherwise prove to be a serious mischief, I do not feel at liberty to hold that the law shall apply only to cases where no proceedings have been had, which would in effect render it practically almost inoperative, and shall not apply to cases quæ frequentius accidunt, where the questions have been developed, as questions ordinarily are developed, by hearing the parties upon a formed issue.

It is urged, however, in the second place, that, inasmuch as under this section no proceedings subsequent to the indictment are to come up to the circuit court, it must be supposed that it was intended that no cases should come up in which any proceedings had been had, and that the accused may be injured by having the indictment transferred without the proceedings. This argument is entitled to weight, but it is far from being conclusive. It may well be that congress intended that a case remitted to the circuit court, because it involved questions of law so important and difficult, that the interests of public justice and the rights of the immediate parties required that court not to try and determine it, should be tried in the circuit court de novo from the beginning; this might be an advantage to the prisoner, for it gives him an opportunity to plead anew. But it is suggested that it may, in some cases, be injurious to him, because there may be something on the record below of which he could avail himself by motion, but if the proceedings below do not come up he must plead the matter specially, and thus not only be put in jeopardy of failing upon some technical point, but subjected to a final judgment if he should fail. But, under the laws of the United States, I know of only one matter which must be pleaded specially; that is, a former acquittal or conviction for the same offence; everything else may be given in evidence under the general issue. But if the defendant has been acquitted in the district court, the indictment is no longer pending there, and so cannot be remitted here; and if it were to be so remitted, the court would, upon motion and production of the record of the district court, dismiss it; the defendant would not be put to plead at all. The court has gone much further than this in U. S. v. Collidge [Case No. 14,858]. And if the defendant were convicted in the district court, and the case were one in which a new trial can be had, the defendant can have no cause to complain that he gets one by having the case certified here; and if no new trial can be had in a case of felony, upon which I give no opinion, then the defendant has only to move to dismiss, as in case of acquittal, and he must be discharged.

Lest I should be thought to have overlooked this particular case, in what I have said concerning the necessity of pleading specially, I observe that the subject-matter of this plea could not have been availed of in the district court on motion, any more than here, because the gist of the plea, as put forward by the defendant's counsel, consists of matter of fact not apparent on the record there, viz., that the juror was withdrawn after he had been examined on the voir dire, for a cause of challenge not arising subsequent to the impanelling of a jury, the defendant objecting, and that the case was taken from the jury without necessity. Whatever averments the plea contains as to these matters, would be just as much dehors the record in that court as in this, and of course would have been so in this court if the whole record had come up. I am of opinion, therefore, that the natural meaning of the language of this third section empowers the district court to remit to this court an indictment pending therein at a term subsequent to that when presented, and after any proceedings have been had therein which do not amount to a bar to a future trial; that the subject-matter of the act does not call for a restricted interpretation of its language, and that, therefore, this indictment was properly remitted here, unless the matters contained in the plea amount to a bar to another trial.

Considered as a plea in bar, its substance, as understood by the defendant's counsel, is, that this indictment for a misdemeanor, having been committed to a pury impanelled to try it, was, by order of the court, taken from

this jury, and the case continued without necessity; and that, before this was done, a juror, who had been examined on the voir dire, as to his standing indifferent, and who had so answered that he was sworn and sat on the panel, was withdrawn, by order of the court, upon proof of bias. Supposing this to be just as the defendant's counsel understands it, I should feel it to be quite impossible to come to the conclusion that the plea is a good bar. I know of no authority for the position that, because a trial for misdemeanor has been broken off in a manner which the defendant avers, and offers to prove to the satisfaction of another court, was irregular, therefore there can be no further trial. But I do not pause upon this, because I think it clear that when this plea is examined it fails to show any irregularity in the proceedings of the district court.

The defects alleged consist, first, in withdrawing a juror, and second, in ordering the case to be continued. As to the first, it is contended that the common law does not allow a juror to be challenged after he is sworn, except for causes arising after he is sworn; that here the juror was examined on the voir dire as to his bias, was sworn, and then challenged, and evidence of bias allowed to be given, and that this was necessarily the same cause of challenge inquired into on the voir dire; that bias is a state of mind, and so the evidence must necessarily have applied to the cause of challenge existing when the juror was sworn. It must be admitted that bias is a state of mind, but it does not necessarily follow that the evidence applied to a cause of challenge existing when the juror was sworn. This assumes that the mind cannot change its state or be changed, and that because the juror stood indifferent when he was sworn, he could not become biased afterwards, which is evidently untrue. There is no averment in this plea that the cause of challenge existed when the juror was sworn, nor that the evidence in support of it related to the state of mind of the juror before he was sworn, and, consequently, upon the rule of the common law, as understood by the defendant's counsel, the plea is bad in this particular. It is not known to me what is the truth of the case, or whether, consistently with the truth, the plea could be amended; but as I have a clear opinion upon the merits of this part of the plea, wholly independent of this defect in it, I think it proper to express it.

The rule of the common law, as shown by the authorities cited by the defendant's counsel, is, that neither party has a right of challenge, after the juror is sworn, for cause then existing. But it by no means follows that it is not in the power of the court, at the suggestion of one of the parties, or upon its own motion, to interpose and withdraw from the panel a juror utterly unfit, in the apprehension of every honest man, to remain there. Suppose a prisoner on trial for his life should inform the court that a juror had been bribed to convict him—that the fact was unknown to him when the juror was sworn, and that he had just obtained plenary evidence of it, which he was ready to lay before the court, is the court compelled to go on with the trial? Suppose the judge, during the trial, obtains, by accident, personal knowledge that one of the jurors is determined to acquit or convict without any regard to the law or the evidence, is he bound to hold his peace? In my judgment, such a doctrine would be as wide of the common law as it would be of common sense and common honesty. The truth is, that this rule, like a great many other rules, is for the orderly conduct of business. There must be some prescribed order for the parties to make their challenges, as well as to do almost every thing else in the course of a trial. As matter of right, neither party can deviate from this order. And it is the duty of the court to enforce these rules, which are for the general good, even if they occasion inconvenience and loss in particular cases. But there goes along with all of them the great principle, that being designed to promote the ends of justice, they shall not be used utterly to subvert and defeat it; being intended as a fence against disorder, they shall not be turned into a snare; they do not tie the hands of the court, so that when, in the sound discretion of the court, the public justice plainly requires its interposition, it may not interpose; and it would be as inconsistent with authority as with the great interests of the community, to hold the court restrained.

A very eminent English judge has treated this rule concerning challenges just as I believe it should be treated. Chief Justice Abbott says: "I have no doubt that if, from inadvertence, or any other cause, the prisoner or his counsel should have omitted to make the challenge at the proper moment, the strictness of the rule which confines him to make the challenge before the officer begins to administer the oath, would not be insisted on by the attorney-general, or, if insisted on by him, would not be allowed by the court. Derby Case, Joy, Conf. 220." That is, like other rules of procedure in trials, it is in the power of the court to dispense with it when justice requires. But the interposition of the court may be placed on even higher ground, supported by authority which in this court is decisive. In U. S. v. Percy, 9 Wheat. [22 U. S.] 579, the question came before the supreme court, whether it was in the power of the circuit court to discharge a jury in a capital case, and afterwards put the prisoner on trial by another jury. The distinction between capital cases and misdemeanors, under the provision of the constitution of the United States, cited by the defendant's counsel, is very plain; yet, speaking even of capital cases, the court says: "We think that, in all cases of this nature, the law has invested courts of justice with authority to discharge a jury from giving any verdict, whenever, in

their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject, and it is impossible to define all the circumstances which would render it proper to interfere." That a court would interfere far more readily in a case of misdemeanor there can be no doubt, and it is so asserted in terms by Story, J., in U. S. v. Coolidge [Case No. 14,858]. In U. S. v. Shoemaker [Id. 16,279], and U. S. v. Gibert [Id. 15,204], it will be found that Justices Washington, Story, and McLean, have all acted in their circuits upon these principles. Now, if the court has such a discretion; and if, as the supreme court say, it is to be exercised even in capital cases, where the ends of public justice would otherwise be defeated, what case can be imagined more fit for its interposition than one where the court finds that a juror is so biased, either against the prisoner or the government, that he is unfit to sit in the cause? The truth is, that it is an entire mistake to confound this discretionary authority of the court, to protect one part of the tribunal from corruption or prejudice, with the right of challenge allowed to a party. And it is, at least, equally a mistake to suppose that, in a court of justice, either party can have a vested right to a corrupt or prejudiced juror, who is not fit to sit in judgment in the case. I hazard nothing in saying, that no such right is known to the common law. This disposes of the other allegation in the plea, that the case was taken from the jury and continued without necessity, for, in the language of the supreme court, already cited, if there is no necessity, strictly speaking, yet if, in the opinion of the court, taking all the circumstances into consideration, the ends of public justice would otherwise be defeated, then even a capital case may be taken from a jury, and à fortiori may be a case of misdemeanor.

There is no allegation in this plea, that it did not so appear to the court; and if there were, or even if an absolute necessity ought to have appeared to the court, how can a party be allowed to aver the contrary? The finding of a cause for withdrawing a juror, or taking a case from the jury, is a judicial act; the authority to do it is intrusted by law to that court, and no other court can revise its decision. Suppose the allegation in this plea, that the case was taken from the jury without necessity, had been traversed, and the issue put to the jury; the substance of their finding must be that, in their judgment, there was no necessity. But their judgment has nothing to do with the matter. They are not the tribunal to judge of the existence of the necessity; and, therefore, their finding would be wholly immaterial, even if the party was not estopped, as he clearly is, from averring, that a judicial act was not founded on a finding of the facts necessary to support it. It seems hardly necessary to cite authorities in support of this view; but the cases of Grignon v. Astor, 3 How. [44 U. S.] 339, Philadelphia & T. R. Co. v. Stimpson, 12 Pet. [37 U. S.] 458, and the cases there referred to, are directly in point to show that, where a judicial act is to be done upon proofs laid before the tribunal, and the act is done, it is to be presumed that the necessary facts were proved, and no other tribunal is at liberty to re-examine the question. And, in the case of U. S. v. Haskell [Case No. 15,321], a prisoner being put on trial for piracy, pleaded a special plea, in which he set forth that he had been once put on trial, and the jury were discharged merely because they declared they could not agree, but did not state the true reason which induced the court to discharge them; and the district attorney having demurred to the plea, Judge Washington held that the only course was to demur; that a traverse carrying the issue to a jury, to try whether the discretion of the court had been exercised upon facts affording a proper basis for that discretion, ought not to be taken; that all facts necessary to support the act of the court must be presumed, and that the discharge of a jury, being an act of judicial discretion, could not form the subject of a plea in bar.

It was ingeniously argued, that the averment in this plea is, that the jury were discharged without necessity; that there was one proposition of fact,—not first admitting the fact of the discharge, and then averring it to be without necessity, but characterizing the act itself as an unnecessary discharge, and that so there was no estoppel. As has been already stated, my opinion does not rest on the ground of estoppel, even chiefly. But I think this argument is not sound. It cannot be contended that the meaning of this plea is, that the record of the discharge on its face purports that there was no necessity, and sets that out as the basis of judicial action; and if not, then the substance of this averment is, that the judicial act which the record will show, was done although there was no necessity; that is, the court, in the exercise of its discretion, discharged the jury, and the defendant says it was without necessity. This he is clearly estopped from averring.

It remains only to notice two other objections taken by defendant's counsel,—that evidence was admitted after the juror had been examined on the voir dire, and that a juror cannot be challenged twice for the same cause. What has been already stated, as to the power of the court to interpose, and the distinction between an exercise of this power and the right of a party to challenge, is sufficient answer to this objection. But it may be added, that it is competent for a party to introduce evidence after examining a juror, if the evidence relates to a matter which was unknown to the juror when examined. And it does not appear, from this plea, that the

evidence did not relate exclusively to a state of mind of the juror formed after he was sworn, or that the cause of challenge, if it were to be treated as a challenge, did in fact exist when the juror was sworn.

I have purposely avoided placing this opinion upon the statute law of Massachusetts, because, although the qualifications of jurors, and consequently the causes of challenge, are governed by the law of the state, it does not necessarily follow that the modes and times of making challenges are governed by the same law. I wish to be understood as not giving any opinion on this question, which is an important one, and not necessary to be decided under this plea. But it is so clearly the general policy of the laws of the United States to assimilate the modes of proceeding in the courts of the United States to those prescribed by laws of the states where the courts are held, that it is satisfactory to find that the state has, by express enactment (Rev. St. c. 95, § 29), conferred on parties a right of challenge, after a juror is sworn, for a cause then existing, and even known to him, if the court think it proper to grant leave to make the challenge; and, as a guide for the exercise of the discretion of the district court in Massachusetts, there can be no doubt of its eminent fitness. My opinion is, that the demurrer must be sustained, and the plea adjudged bad.

The district attorney called, as a witness, John Debree, who testified that he resided at Norfolk, Virginia, and Shadrach was his slave; that he purchased him in November, 1849, of John A. Higgins, and he remained in the service of the witness until May, 1850, when he left secretly, and without his consent; that he held him as a slave for life, and had not manumitted him. The district attorney also called, as a witness, John Caphart, who testified that he was a resident of Norfolk, and had known Shadrach about sixteen years. When he first knew him he belonged to the Glen estate, and lived in Norfolk; he knew the persons who were called his mother and father, some ten or twelve years; his mother and father were said to belong to the same Glen estate. He had often heard Shadrach call them mother and father. He afterwards knew Shadrach as the property of Mrs. Hutchins, and he was sold by the sheriff at public vendue, at the door of the court-house, and bought by John A. Higgins. That the witness, as a police officer, had arrested Shadrach for Higgins, and put him in jail; that Higgins employed him in working on the stand as a licensed porter; that he did not know of his doing any act of service for the Glens, but only heard the young Glens speak of him as their slave. Each of these witnesses described Shadrach as being between black and mulatto. This testimony was objected to by the defendant's counsel, as not competent evidence in support of the allegation, in some of the counts, that Shadrach was a person held to service and labor by John Debree, under the laws of Virginia. It was contended that, by the law of Virginia, no person is a slave except persons who were so in 1785, and the descendants of the females of them, and persons who, being slaves in other states, were introduced into Virginia, under certain regulations contained in the statute law of that state, and the descendants of the females of them; that although there is a presumption there that negroes are held to service as slaves, that presumption did not obtain in reference to persons who had some white blood, as Shadrach is testified to have had, and that, consequently, the only mode of proving that Shadrach was held to service under the laws of Virginia, is to trace back his descent, through the maternal line, to some maternal ancestor who was a slave in 1785, or to some slave introduced into Virginia from another state; that this alone would, in Virginia, show that he was held to service under the laws of that state, and that this alone would be admissible evidence of his status on this trial.

CURTIS, Circuit Justice. The first four counts in this indictment contain the allegation that Shadrach was held to service and labor by John Debree, under the laws of the state of Virginia. To maintain these counts it is necessary to prove this allegation; but unless some substantial distinction between this allegation and other similar allegations in indictments can be shown, it is to be proved by such evidence, and upon such principles, as would be applicable in other criminal cases. The principal distinction relied on is, that the allegation concerns the freedom of Shadrach; and it is urged that, in Virginia, such evidence would not be admissible. Conceding this, I am not able to perceive that it decides this question; because this is not a suit for freedom, nor can a judgment either way have any effect upon the right of either the alleged master or slave. It is said, however, that the cases cited show that, in Virginia, such evidence would not, in any case, be competent to prove that one man, not a pure negro, was the slave of another. I have examined these decisions with care, because, if I had found such to be the law of Virginia, I should certainly have hesitated to decide that a different rule should be held here; though I am not prepared to admit that, on the trial of an indictment in this court, the rules of evidence are the same as in Virginia, even where the fact to be proved is the status of a person in Virginia. The general principle is certainly otherwise, rules of evidence being part of the law of the forum. Still, inasmuch as, in Virginia, common-law rules form the basis of their law of evidence, an application of those rules to a peculiar class of cases, of frequent occurrence there, and depending, here as well as there, so far as touches the right, upon their local law, would have great weight in my mind. And therefore, as I have said, I

have looked carefully into all the cases cited by the defendant's counsel, and do not find they support the position assumed. They show satisfactorily that, in suits which directly involve the freedom of one of the parties, length of possession is not a bar to the claim for freedom; and that in some states, in such a suit, possession affords very feeble evidence of a legal state of slavery. But they go no further. They are all cases which directly involved the freedom of one of the parties.

The case in 1 Hen. & M. 133, was a suit for freedom, and a decree for the freedom of the complainants was made by the chancellor, and confirmed by the court of appeals. The other case, in 1 Tayl. (N. C.) 165, put in issue, on the record, the freedom of the plaintiff, the defendant claiming him as her slave, and I cannot doubt that both parties were bound by the verdict on this issue. The case itself settles only that there is no presumption of slavery from color alone, in Virginia, unless the party is a negro. 8 B. Mon. 621, which is a very strong case, was a suit for the freedom of the complainant, as was that in 1 Mart. (La.) 184, which affirms the doctrine in 1 Tayl. (N. C.) 165. The courts, not only of Virginia, but of other slave states, seem to have treated suits for freedom as a distinct class of cases, not controlled by some of the rules which are ordinarily administered, but entitled to a kind of favor, not extended to any other legal proceeding. Vaughan v. Phebe, Mart. & Y. 5; 1 Hen. & M. 134.

But I have looked in vain for cases tending to show that whenever the fact of slavery, under the law, is put in issue, in a proceeding other than a suit involving freedom, any rules of evidence are administered anywhere, except such as are applicable to similar facts in cases at the common law. The absence of any such evidence affords, in my judgment, very strong reasons for the belief that no such distinction between evidence to prove legal slavery, and evidence to prove any similar fact, exists in Virginia; and this for two reasons. There is a very considerable number of penal laws in that, as well as other states, which would require indictments and actions framed upon them to allege the fact that one person was the slave of another; of course this allegation must be proved. Many cases are reported in which questions have grown out of this allegation. Now, if it were necessary, in support of such allegation, in every case where the alleged slave was not a negro, to trace back his pedigree to 1785, it is hardly possible that numerous questions of law should not have grown out of so peculiar a state of things, and found their way into the books. In the next place, the enormous inconvenience of this rule, viewed practically, is a reason for not expecting to find it. One is indicted for selling intoxicating liquor to a slave, or trading with a slave, without license from his master, or for a great variety of other offences created by statute in the slave states, as matters of local police. The fact of slavery under the law must be proved. Is it conceivable that it should be required in such cases to trace a pedigree for upwards of sixty years, or would it be enough for the master to testify that the person mentioned in the indictment was his slave? On the other hand, it is settled, by the supreme court of the United States, that, even in a suit for freedom, the same rules of evidence are administered as in other cases, and there is highly respectable authority, that where the fact of slavery is to be proved, under an indictment, penal action, or other proceeding, the same presumptions are allowed as the law deems applicable to other similar facts.

The case of Mima v. Hepburn, 7 Cranch [11 U. S.] 295, was a suit for freedom. Chief Justice Marshall, in delivering the opinion of the court, says: "However the feelings of the individual may be interested on the part of a person claiming freedom, the court cannot perceive any legal distinction between the assertion of this and of any other right, which will justify the application of a rule of evidence to cases of this description, which would be inapplicable to general cases in which a right to property may be asserted. The rule, then, which this court shall establish in this cause will not, in its application, be confined to cases of this particular description, but will be extended to others, where rights may depend on facts which happened many years past." Johnson v. Tompkins [Case No. 7,416], was a penal action for a rescue. Mr. Justice Baldwin says: "On a question of slavery or freedom, the right is to be established by the same rules of evidence as in other contests about the right to property [Mima v. Hepburn] 7 Cranch [11 U. S.] 295; quiet and undisturbed possession is evidence of ownership, and cannot be disturbed by any one who has not the right of property, and the burden of proof rests on the one who is not in possession." In Township of Chatham v. Canfield's Ex'rs, 3 Hals. [8 N. J. Law] 52, the question was, whether the executors were bound to support a pauper, as the slave of the testator, and it is treated as a question of circumstantial evidence. In Miller v. Denman, 8 Yerg. 233, where the precise point was, what would be prima facie evidence of slavery, in a penal action for enticing away the plaintiff's slave, it is held, that the mere fact of possession and claim of ownership is not sufficient to encounter the presumption arising from the usual marks of European descent; but that dark complexion, woolly head, and flat nose, with possession and claim of ownership, do afford prima facie evidence of the slavery and ownership charged.

These authorities compel me to come to the conclusion that, though the fact of slavery, under the law of Virginia, is to be proved, it may, in this case, be proved by such

evidence as, upon the principles of the common law, is competent and sufficient. Upon the principles of the common law, I think this evidence is competent, and, if not controlled, sufficient to establish the fact, that Shadrach was held to service by Mr. Debree under the laws of Virginia. This is a question of status, of his relation to another person. How is such a matter ordinarily proved? Very commonly by showing that the person was treated as standing in that relation. The question arises, whether A is the heir of B. This is a complex question, embracing both law and fact. There must have been a lawful marriage and cohabitation, and B the issue of that marriage. Yet it is competent and sufficient evidence, that B treated A as his son. Berkeley Peerage Case, 4 Camp. 416. This is also a question of property under the law of Virginia; and, by the common law, possession is evidence of property, unless the circumstances accompanying the possession rebut the inference of property.

It is argued, however, that the law requires the best evidence. To appreciate this argument, it is necessary to look a little further, and see what the defendant's counsel consider is the best evidence. Suppose the government were to attempt to trace the pedigree of this man back to 1785. The first step would be to show, by persons who knew them, that some person spoke of and treated him as her son, and that he spoke of and treated her as his mother, or that he was reputed among those nearly connected to be her son, and thus go back to some maternal ancestor in 1785; and, having arrived at that point, the next step would be to prove that that ancestor was a slave; and I suppose it would hardly be doubted that this last could be proved, by showing that she had marks of African descent, and was bought and sold as a slave, and held as such all her lifetime. But, in that case, we should not have evidence of any different nature, or any which the law considers better. Indeed, if a pedigree were to be proved, even hearsay evidence would be admissible; so that we should thus have evidence of the lowest kind, which ordinarily is not competent.

The case of master and apprentice was mentioned; but here a deed is necessary to constitute this relation; and the deed is a higher kind of evidence, and must be produced, or its loss shown and its contents proved. As to the case of a public officer, which has been alluded to as illustrating the argument, it is well settled, that it is not necessary to produce his commission. It is enough, prima facie, that he acted as an officer. 1 Greenl. Ev. §§ 83, 92. The rule which requires the best evidence to be produced, does not seem to me to have any application to this case. The real point of the objection is, not that there is better evidence, but that the government offer evidence that this person was bought and sold and treated as a slave, instead of tracing back his pedigree to some one in 1785, and then offering evidence that that person was bought and sold and treated as a slave. But if the evidence would be competent, in the last case. to prove, prima facie, a state of slavery of the ancestor in 1785, why is it not also competent, in the first case, to prove a state of slavery of Shadrach in 1849? The ancestor in 1785 must be shown to be legally a slave; and if such evidence would be admisssible to prove that, I am wholly at a loss to perceive why it is not equally admissible in this case. Upon the authority of the cases cited from 7 Cranch [11 U. S.] reviewed and confirmed in Davis v. Wood, 1 Wheat. [14 U. S.] 6, and upon the decision of Mr. Justice Baldwin, before referred to, and the principles of the common law of evidence, I think this evidence is admissible, and, if not controlled, sufficient to establish that Shadrach was held to service under the laws of Virginia when he escaped from that state. Certainly, it is merely prima facie, and liable to be controlled by other evidence, tending to show that he was not a slave.

While one of the counsel for the defendant was addressing the jury, he stated the proposition that, this being a criminal case, the jury were rightfully the judges of the law, as well as the fact; and if any of them conscientiously believed the act of 1850 [9 Stat. 462], commonly called the "Fugitive Slave Act," to be unconstitutional, they were bound by their oaths to disregard any direction to the contrary which the court might give them; and he was about to address the jury in support of this assertion, when he was stopped by the court, and informed that he could not be permitted to argue this proposition to the jury; that the court would hear him, and if they should be of the opinion that the proposition was true, the jury would be so informed by the court; and the counsel then addressed the court in support of the position. The opinion of the court thereon was delivered by

CURTIS, Circuit Justice. The constitution of the United States, art. 3, § 2, provides, that "the trial of all crimes, except in cases of impeachment, shall be by jury." The counsel for the defendant maintains that, in every such trial of a crime, the jury are the judges of the law, as well as of the fact; that they have not only the power, but the right, to decide the law; that, though the court may give its opinion to the jury respecting any matter of law involved in the issue, yet the jury may and should allow to that opinion only just such weight as they may think it deserves; that, if it does not agree with their own convictions, they are bound to disregard it, the responsibility of deciding rightly all questions, both of law

and fact, involved in the general issue, resting upon them, under the sanction of their oaths. This is an important question, and it has been pressed upon the attention of the court, with great earnestness and much power of language, by one of the defendant's counsel. I have no right to avoid a decision of it. I certainly should have preferred to have a question of so much importance,—respecting which so deep an interest is felt, such strong convictions entertained, and, I may add, respecting which there has not been an entire uniformity of opinion,—go to the highest tribunal for a decision; but it is not practicable in this case. I proceed, therefore, to state the opinion which I hold concerning it. The true question is, what is meant by that clause of the constitution, "the trial of crimes shall be by jury."

Assuming, what no one will controvert, that the tribunals for the trial of crimes were intended to be constituted, as all common-law tribunals in which trial by jury was practised were constituted, having one or more judges, who were to preside at the trials, and form one part of the tribunal, and a jury of twelve men, who were to form the other part, and that one or the other must authoritatively and finally determine the law, was it the meaning of the constitution that to the jury, and not to the judges, this power should be intrusted? There is no sounder rule of interpretation than that which requires us to look at the whole of an instrument, before we determine a question of construction of any particular part; and this rule is of the utmost importance, when applied to an instrument, the object of which was to create a government for a great country, working harmoniously and efficiently through its several executive, legislative, and judicial departments. It is needful, therefore, before determining this question upon a critical examination of the particular phrase in question, to examine some other provisions of the constitution, which are parts of the same great whole to which the clause in question belongs. We find, in article 6: "This constitution, and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land." Nothing can be clearer than the intention to have the constitution, laws, and treaties of the United States in equal force throughout every part of the territory of the United States, alike in all places, at all times. To secure this necessary end, a judicial department was created, whose officers were to be appointed by the president, paid from the national treasury, responsible, through the house of representatives, to the senate of the United States, and so organized, by means of the supreme court, established by the constitution, and such inferior courts as congress might establish, as to secure a uniform and consistent interpretation of the laws, and an unvarying enforcement of them, according to their just meaning and effect. That whatever was done by the government of the United States should be by standing laws, operating equally in all parts of the country, binding on all citizens alike, and binding to the same extent, and with precisely the same effect, on all, was undoubtedly intended by the constitution; and any construction of a particular clause of the constitution, which would tend to defeat this essential end, is, to say the least, open to very serious objection.

It seems to me, that what is contended for by the defendant's counsel would have something more than a mere tendency of this kind. The Federalist, in discussing the judicial power, remarks: "Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." Federalist, No. 80. But what is here insisted on is, that every jury, impannelled in every court of the United States, is the rightful and final judge of the existence, construction, and effect of every law which may be material in the trial of any criminal case; and not only this, but that every such jury may, and, if it does its duty, must, decide finally, and without any possibility of a revision, upon the constitutional power of congress to enact every statute of the United States which on such a trial may be brought in question. So that we should have, not thirteen, but a vast number of courts, having final jurisdiction over the same causes, arising under the same laws; and these courts chosen by lot among us, and selected by the marshal elsewhere, out of the body of the people, with no reference to their qualifications to decide questions of law; not allowed to give any reasons for their decisions, as will be presently shown, not sworn to decide the law, nor even to support the constitution of the United States; and yet possessing complete authority to determine that an act passed by the legislative department, with all the forms of legislation, is inoperative and invalid. The practical consequences of such a state of things are too serious to be lightly encountered; and, in my opinion, the constitution did not design to create or recognize any such power by the clause in question. Some light, as to its meaning, may be derived from other provisions in the same instrument. The sixth article, after declaring that the constitution, laws, and treaties of the United States shall be the supreme law of the land, proceeds, "and the judges, in every state, shall be bound thereby." But was it not intended, that the constitution, laws, and treaties of the United States should be the supreme law in criminal as well as in civil cases? If a state law should make it penal for an officer of the United States to do what an act of congress commands him to

do, was not the latter to be supreme over the former? And if so, and in such cases, juries finally and rightfully determine the law, and the constitution so means when it speaks of a trial by jury, why was this command laid on the judges alone, who are thus mere advisers of the jury, and may be bound to give sound advice, but have no real power in the matter? It was evidently the intention of the constitution, that all persons engaged in making, expounding, and executing the laws, not only under the authority of the United States, but of the several states, should be bound by oath or affirmation to support the constitution of the United States. But no such oath or affirmation is required of jurors, to whom it is alleged the constitution confides the power of expounding that instrument; and not only construing, but holding invalid, any law which may come in question on a criminal trial. This may all be true; but strong reasons should be shown before it can be admitted.

I have considered with much care the reasons assigned and the authorities cited by the defendant's counsel, and have examined others which he did not cite; and the result is, that his position, both upon authority and reason, is not tenable. I will first state what is my own view of the rightful powers and duties of the jury and the court in criminal cases, and then see how far they are in conformity with the authorities, and consistent with what is admitted by all to be settled law. In my opinion, then, it is the duty of the court to decide every question of law which arises in a criminal trial; if the question touches any matter affecting the course of the trial, such as the competency of a witness, the admissibility of evidence, and the like, the jury receive no direction concerning it; it affects the materials out of which they are to form their verdict, but they have no more concern with it than they would have had if the question had arisen in some other trial. If the question of law enters into the issue, and forms part of it, the jury are to be told what the law is, and they are bound to consider that they are told truly; that law they are to apply to the facts, as they find them, and thus, passing both on the law and the fact, they, from both, frame their general verdict of guilty or not guilty. Such is my view of the respective duties of the different parts of this tribunal in the trial of criminal cases, and I have not found a single decision of any court in England, prior to the formation of the constitution, which conflicts with it. It was suggested at the bar, that Chief Justice Vaughan's opinion, in Bushnell's Case, 5 State Tr. 99, was in support of the right of juries to determine the law in a criminal case; but it will be found that he confines himself to a narrow though, for the case, a conclusive line of argument, that the general issue embracing fact as well as law, it can never be proved that the jury believed the testimony on which the fact depended, and in reference to which the direction was given, and so they cannot be shown to be guilty of any legal misdemeanor in returning a verdict, though apparently against the direction of the court in matter of law.

Considering the intense interest excited, the talent and learning employed, and consequently the careful researches made, in England, near the close of the last century, when the law of libel was under discussion in the courts and in parliament, it cannot be doubted that, if any decision, having the least weight, could have been produced in support of the general proposition, that juries are judges of the law in criminal cases. it would then have been brought forward. I am not aware that any such was produced. And the decision of the king's bench, in Rex v. Dean of St. Asaph, 3 Term R. 428, note, and the answers of the twelve judges to the questions propounded by the house of lords, assume, as a necessary postulate, what Lord Mansfield so clearly declares in terms, that, by the law of England, juries cannot rightfully decide a question of law. Passing over what was asserted by ardent partisans and eloquent counsel, it will be found that the great contest concerning what is known in history as "Mr. Fox's Libel Bill," was carried on upon quite a different ground by its leading friends; a ground which, while it admits that the jury are not to decide the law, denies that the libellous intent is matter of law; and asserts that it is so mixed with the fact that, under the general issue, it is for the jury to find it as a fact.[2] Such I understand to be the effect of that famous declaratory law. St. 32 Geo. III. c. 60. The defendant's counsel argued that this law had declared that, on trials for libel, the jury should be allowed to pass on law and fact, as in other criminal cases. But this is erroneous. Language somewhat like this occurs in the statute, but in quite a different connection, and, as I think, with just the opposite meaning. "The court or judge, before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his opinion and directions to the jury, on the matter in issue between the king and the defendant, in like manner as in other criminal cases." This seems to me to carry the clearest implication that, in this and all other criminal cases, the jury may be directed by the judge; and that, while the object of the statute was to declare that there was other matter of fact besides publication and the innuendoes to be decided by the jury, it was not intended to interfere with the proper province of the judge, to decide all matters of law. That this is the received opinion in England, and that the general rule, declared in Rex v. Dean of St. Asaph, that juries cannot rightfully decide the law in criminal cases, is still the law in England, may be seen by

[2] 34 Ann. Reg. p. 170. 29 Par. His. Debates in the Lords, and particularly Lord Camden's speeches.

reference to the opinions of Parke, B., in Parmiter v. Coupland, 6 Mees. & W. 105; and of Best, C. J., in Levi v. Milne, 4 Bing. 195. I conclude, then, that when the constitution of the United States was founded, it was a settled rule of the common law that, in criminal as well as civil cases, the court decided the law, and the jury the facts; and it cannot be doubted that this must have an important effect in determining what is meant by the constitution when it adopts a trial by jury.

It is argued, however, that, in passing the sedition law (St. 1798, c. 74, § 3 [1 Stat. 597]) congress expressly provided, that the jury should have the right to determine the law and the fact, under the direction of the court, as in other cases, and that this shows that in other cases juries may decide the law, contrary to the direction of the court. I draw from this the opposite inference; for where was the necessity of this provision if, by force of the constitution, juries, as such, have both the power and the right to determine all questions in criminal cases; and why are they to be directed by the court? In Montgomery v. State, 11 Ohio, 427, the supreme court of Ohio, in discussing the question, whether juries are judges of the law, refer to an article in the bill of rights of that state, which is in the same words as this section of the sedition act, and the opinion of the court then proceeds: "It would seem from this that the framers of our bill of rights did not imagine that juries were rightfully judges of law and fact in criminal cases, independently of the direction of courts. Their right to judge of the law is a right to be exercised only under the direction of the court; and if they go aside from that direction, and determine the law incorrectly, they depart from their duty and commit a public wrong; and this in criminal as well as civil cases." There is, however, another act of congress which bears directly on this question. The act of the 29th of April, 1802 [2 Stat. 156], in section 6, after enacting that, in case of a division of opinion between the judges of the circuit court, on any question, such question may be certified to the supreme court, proceeds: "And shall by the said court be finally decided. And the decision of the supreme court, and their order in the premises, shall be remitted to the circuit court, and be there entered of record, and have effect according to the nature of such judgment and order." The residue of this section proves that criminal as well as civil cases are embraced in it; and under it, many questions arising in criminal cases have been certified to and decided by the supreme court, and persons have been executed by reason of such decisions. Now, can it be that, after a question arising in a criminal trial has been certified to the supreme court, and there, in the language of this act, finally decided, and their order remitted here and entered of record, that when the trial comes on, the jury may rightfully revise and reverse this final decision? Suppose, in the course of this trial, the judges had divided in opinion upon the question of the constitutionality of the act of 1850, and that, after a final decision thereon by the supreme court and the receipt of its mandate here, the trial should come on before a jury, does the constitution of the United States, which established that supreme court, intend that a jury may, as matter of right, revise and reverse that decision? And, if not, what becomes of this supposed right? Are the decisions of the supreme court binding on juries, and not the decisions of inferior courts? This will hardly be pretended; and if it were, how is it to be determined whether the supreme court has or has not, in some former case, in effect, settled a particular question of law? In my judgment, this act of congress is in accordance with the constitution, and designed to effect one of its important and even necessary objects—a uniform exposition and interpretation of the law of the United States—by providing means for a final decision of any question of law; final as respects every tribunal, and every part of any tribunal in the country; and if so, it is not only wholly inconsistent with the alleged power of juries, to the extent of all questions so decided, but it tends strongly to prove, that no such right as is claimed does or can exist.

An examination of the judicial decisions of courts of the United States since the organization of the government will show, as I think, that the weight of authority is against the position taken by the defendant's counsel. The earliest case is [Georgia v. Brailsford] 3 Dall. [3 U. S.] 4. Chief Justice Jay is there reported to have said to a jury, that on questions of fact it is the province of the jury, on questions of law it is the province of the court to decide. And, in the very next sentence, he informs them, they have the right to take upon themselves to determine the law as well as the fact. And he concludes with the statement, that both law and fact are lawfully within their power of decision. I cannot help feeling much doubt respecting the accuracy of this report; not only because the different parts of the charge are in conflict with each other, but because I can scarcely believe that the chief justice held the opinion that, in civil cases, and this was a civil case, the jury had the right to decide the law. Indeed the whole case is an anomaly. It purports to be a trial by jury, in the supreme court of the United States, of certain issues out of chancery. And the chief justice begins by telling the jury that the facts are all agreed, and the only question is a matter of law, and upon that the whole court were agreed. If it be correctly reported, I can only say, it is not in accordance with the views of any other court, so far as I know, in this country or in England, and is certainly not in accordance with the course of the supreme court for many years.

In U. S. v. Wilson [Case No. 16,730], which

was an indictment for robbing the mail, the court instructed the jury explicitly, that they had a right to judge of the law, and decide contrary to the opinion of the court; but in U. S. v. Shive [Id. 16,278], which was an indictment for passing a counterfeit note of the bank of the United States, the defendant's counsel, having insisted to the jury that the bank was unconstitutional, the court, with equal explicitness, told the jury they had no right to judge of the constitutionality of an act of congress, and, in the strongest terms, declared, that the exercise of such a power would leave us without a constitution or laws. With great respect for the very able and learned judge, I cannot but think that the criticism of Judge Conkling (Conkl. Prac. 426) is just, when he confesses his inability to discover any difference in principle between these two cases, with respect to the rights of juries to decide the law in criminal cases; and if so, the later opinion of that court was entirely adverse to the right claimed.

It has been suggested, that the articles of impeachment of Judge Chase, and the line of defence adopted by his counsel, have a tendency to support the views of the defendant's counsel. The first article of impeachment does speak of the undoubted right of juries to judge of the law in criminal cases; but I can allow no other force to this, than that it proves that a majority of the then house of representatives thought it fit to make that allegation in that proceeding. And, although the counsel for the accused rested the defence of their client against this charge mainly on a denial of the facts, yet, in the arguments of Mr. Martin and Mr. Harper, will be found a statement of their opinions on this question, marked with that ability for which both were so highly distinguished, and leaving no ground for the assertion, that the right in question was conceded by them. Chase's Trial, p. 182. In United States v. Battiste [Case No. 14,545], Mr. Justice Story pronounced an opinion on this question, during the trial of a capital indictment. He denied that this right existed, and gave reasons for the denial of exceeding weight and force. If we look to the decisions of the courts of the states, I think we shall find their weight in the same scale. The earliest case is People v. Croswell, 3 Johns. Cas. 337. The question was, as to the right of the jury to pass on and decide the intent, under an indictment for a libel. The court were equally divided. As has already been suggested, this is by no means the question raised here; and that by the law of the state of New York, at this day, the jury are not judges of the law, in the sense now contended for, I infer, from the opinion of Judge Barculo, in People v. Pine, 2 Barb. 566; for, in the trial of an indictment for murder, he told the jury that it was their duty to receive the law from the court, and conform their decision to its instructions; and under this ruling the prisoner was convicted and executed.

This question has been very carefully considered, and elaborate and extremely able opinions upon it delivered by the highest courts in Indiana, New Hampshire, and Massachusetts. Townsend v. State, 2 Blackf. 152; Pierce v. State, 13 N. H. 536; Com. v. Porter, 10 Metc. (Mass.) 263. The reasoning of these opinions, so far as it is applicable to the question before me, has my entire assent. The question is not necessarily the same in the courts of the several states, and of the United States, though many of the elements which enter into it are alike in all courts of common law, not bound by some statute or constitutional provision.

It remains for me to notice briefly some of the arguments which are relied on by the defendant's counsel, in support of his position. It is said that, in rendering a general verdict of guilty, or not guilty, the jury have the power to pass, and do in fact pass, on everything which enters into the crime. This is true. But it is just as true of a general verdict in trover or trespass; and yet I suppose the right of the jury to decide the law in those cases, is not claimed. The jury have the power to go contrary to the law as decided by the court; but that the power is not the right, is plain, when we consider that they have also the like power to go contrary to the evidence, which they are sworn not to do.

It is supposed that the old common-law form of the oath of jurors, in criminal cases, indicates that they are not bound to take the law from the court. It does not so strike my mind. They are sworn to decide according to the evidence. This must mean that they are to decide the facts according to the evidence. But if they may also decide the law, they are wholly unsworn as to that, and act under no obligation of an oath at all in making such decision. A passage in Littleton's Tenures (lib. 3, § 368), and the statute of Westminster II. c. 30 (13 Edw. I.), and the commentary of Coke thereon, relating to an assize (2 Inst. 425), have been referred to, as throwing light on this inquiry; but it seems to me enough to say, that the assize was not a jury; that an assize was not a criminal case, but an action between party and party, and that if the statute intended to confer on the assize the right as well as the power to decide the law, it was a strange provision which subjected them to punishment if they decided the law wrong; for it would seem that what was right or what was wrong must be determined by the tribunal having the rightful power to determine it, which is supposed to be the assize itself.[3] That it has been a familiar saying among the profession in this country, and an opinion entertained by highly respect-

[3] For some able criticism on this statute, see the opinion of Gilchrist, J., in 13 N. H. 542; Worth. Jur. 72-94.

able judges, that the jury are judges of the law as well as of the facts, I have no doubt. In some sense I believe it to be true, for they are the sole judges of the application of the law to the particular case. In this sense, theirs is the duty to pass on the law—a most important, and often difficult duty, which, when discharged, makes the difference between a general and a special verdict, which, although they may return, they are not bound to return. They are a coördinate branch of the tribunal, having their appropriate powers and rights and duties, with the proper discharge and exercise of which no court can, without usurpation, interfere; but it is not their province to decide any question of law in criminal, any more than civil cases; and if they should intentionally fail to apply to the case the law given to them by the court, it would be, in my opinion, as much a violation of duty as if they were knowingly to return a verdict contrary to the evidence.

A strong appeal has been made to the court, by one of the defendant's counsel, upon the ground that the exercise of this power by juries is important to the preservation of the rights and liberties of the citizen. If I thought so, I should pause long before I denied its existence. But a good deal of reflection has convinced me that the argument drawn from this quarter is really the other way. As long as the judges of the United States are obliged to express their opinions publicly, to give their reasons for them when called upon in the usual mode, and to stand responsible for them, not only to public opinion, but to a court of impeachment, I can apprehend very little danger of the laws being wrested to purposes of injustice. But on the other hand, I do consider that this power and corresponding duty of the court, authoritatively to declare the law, is one of the highest safeguards of the citizen. The sole end of courts of justice is to enforce the laws uniformly and impartially, without respect of persons or times, or the opinions of men. To enforce popular laws is easy. But when an unpopular cause is a just cause, when a law, unpopular in some locality, is to be enforced there, then comes the strain upon the administration of justice; and few unprejudiced men would hesitate as to where that strain would be most firmly borne.

I have entered thus at large into this important question, in the course of a jury trial, with unaffected reluctance. Having been directly and strongly appealed to, and finding that no judge of any court of the United States had, in any published opinion, examined it upon such grounds, that I could feel I had a right to repose on his decision without more, I knew not how to avoid the duty which was thus thrown upon me. My firm conviction is, that under the constitution of the United States, juries, in criminal trials, have not the right to decide any question of law; and that if they render a general verdict, their duty and their oath require them to apply to the facts, as they may find them, the law given to them by the court.

Case No. 15,816.

UNITED STATES v. MORRIS.

[1 Paine, 209.] [1]

Circuit Court, D. New York. Sept. Term, 1822.[2]

FORFEITURES — REMISSION — INFORMER'S SHARE — PLEADING AT LAW—DEPARTURE—PARTIES.

1. The secretary of the treasury has power, under the act for the mitigation and remission of forfeitures, to remit as well the moiety or share allowed to individuals as the part belonging to the government.

[Cited in U. S. v. Collier, Case No. 14,833. Followed in U. S. v. Hutchinson, Id. 15,431.]

2. And a decree of condemnation or judgment has not the effect so to vest or consummate the rights of individuals, as to secure them against the exercise of this power.

[Cited in U. S. v. Collier, Case No. 14,833.]

3. There is no analogy between this power and the power of the king to pardon in England.

4. And it is a power wholly distinct from the constitutional pardoning power of the president.

5. Its object is to afford merited relief where courts of justice are obliged to inflict the penalty.

6. How far a court can regard the innocence of a party when the facts of a case subject it to the penalties of a statute, and especially of the collection law, quære.

[Followed in U. S. v. Hutchinson, Case No. 15,431.]

7. The word "prosecution," as it is used in the act for the remission of penalties, comprehends all the proceedings in a suit as well before as after judgment, including the execution.

8. As to the period at which the power of the secretary to remit ceases, quære.

[Cited in U. S. v. Collier, Case No. 14,833.]

9. But, it seems, not before the penalty has been collected and distributed.

10. Whether the secretary has the exclusive right to determine at what period he may legally remit, quære.

11. Departure in pleading defined.

12. A judgment had been recovered by the United States for a penalty, which was afterwards remitted. The marshal, to whom an execution was issued, had made a levy, but on being served with the warrant of remission, redelivered the goods to the debtors. An action was thereupon brought against him in the name of the United States for the moiety of the penalty allowed to the officers; but the declaration alleged no interest in them, but only in the United States. The defendant pleaded the remission. The plaintiff replied the interest of the officers. On special demurrer, held to be a departure.

[Cited in Rice v. Thayer, 105 Mass. 261.]

13. Whether an individual who has rights under a judgment of the United States can have a remedy for a violation of those rights, by a suit in the name of the United States, or

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [Affirmed in 10 Wheat. (23 U. S.) 246.]

must resort to an action for consequential damages in his own name, quære.

14. Whether an execution for the sole benefit of an individual, on a judgment of the United States, can be issued into any district of the United States as it might be if it were for their use, quære.

15. Whether an action can, in any case, be brought for an individual in the name of the United States, by any attorney other than the district attorney, he refusing to bring it, quære.

[Cited in Meister v. People, 31 Mich. 102.]

This was an action of trespass on the case, for the misfeasance of the defendant in discharging certain goods from a levy, which he had made as marshal of the Southern district of New York, under an execution issued upon a judgment of the plaintiffs, and restoring the goods so levied upon, to the debtors.

Before the commencement of the action, an order had been obtained from Mr. Justice LIVINGSTON, on an affidavit stating the cause of action, and that the district attorney of the United States for this district had refused to act as attorney in the suit, or allow his name to be used; appointing one of the attorneys of the court to prosecute the action for the plaintiffs.

The declaration stated the recovery by the plaintiffs of a judgment in the circuit court of the United States for the district of Maine, for 22,361 dollars and 75 cents, with costs of suit, at the September term in 1817, against Andrew Ogden, Abraham K. Smedes, and Thomas C. Butler, of New York, and that the same remained unsatisfied to the amount of 11,180 dollars and 87 cents. It was then alleged, that a writ of execution for this sum was issued upon the judgment, directed to the marshal of the district of Maine, or any other district of the United States, and was delivered to the defendant, as marshal of the Southern district of New York, who levied under it, and returned, that the goods levied upon remained in his hands for want of buyers. That, after a second execution had been issued, and a like return made, a venditioni exponas was issued and delivered to the defendant, who might have sold the goods levied upon for a sufficient sum to satisfy the execution, but that, instead of proceeding to sell according to the command of the writ, he re-delivered the goods to the debtors, Ogden, Smedes, and Butler.

The defendant pleaded the general issue, and a special plea, stating the following facts: That after the receipt by him of the venditioni exponas, Ogden, Smedes, and Butler produced and delivered to him two warrants of remission of the forfeiture, for which the judgment mentioned in the declaration was recovered, granted at different times by the secretary of the treasury pursuant to the statute of the United States, entitled "An act to provide for mitigating or remitting the forfeitures, penalties, and disabilities accruing in certain cases therein mentioned," and dated, the one on the 9th of February, and the other on the 17th of December, 1818. The warrants were set forth in hæc verba, and recited a statement of facts and petition which had been presented by Andrew Ogden and others to the district judge of the district of Maine, and by him transmitted, agreeably to the act for the remission of forfeitures, to the secretary of the treasury. The facts stated were, that the brig Hollon and her cargo, imported by Andrew Ogden into the district of Maine, had been forfeited under "An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes," and "An act concerning the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes," and the statute supplementary to the last mentioned act; and that on the seizure of the Hollon and cargo, Ogden, Smedes, and Butler had given their bond for their appraised value, on which a suit had been brought in the district court for the district of Maine. The warrants then proceeded to declare that the secretary of the treasury, having considered these circumstances, did, by the authority vested in him by the act for the remission of forfeitures, "remit to the petitioner, all the right, claim, and demand of the United States, and of all others whomsoever, to the said forfeitures, upon payment of the duties which would have been payable had the importation been lawful, and the costs and charges, and on payment of five hundred dollars to be distributed among the custom-house officers in the proportions prescribed by law." There was also an averment, that the judgment mentioned in the declaration was rendered upon a bond executed by Ogden, Smedes, and Butler to the United States, for the appraised value of the brig Hollon and a part of her cargo, by reason of the forfeiture mentioned in the warrants of remission. The defendant in his plea further alleged, that at the time he was so served with the warrants of remission, Ogden, Smedes, and Butler paid him the five hundred dollars therein specified, and the costs of the writs, which he, at the return of the venditioni exponas, paid into the registry of the district court for the district of Maine, and that the said Ogden, Smedes, and Butler had previously paid to the person authorized to receive the same, the duties required to be paid by the warrants of remission. That they thereupon demanded of him, that the said goods should be discharged from the levy, and restored to them; and that he did accordingly restore them, free from such levy, as he was bound to do. The plea then recited the return made by the defendant to the venditioni exponas, in which all the facts before stated in the plea were set forth in full.

To this plea the plaintiffs replied as follows: "And the said plaintiffs, as to the said

plea of the said defendant, say, that they ought not to be barred, &c. because, they say, that although true it is that the said William H. Crawford, as such secretary of the treasury of the United States, did make and issue the said warrants of remission, as in the said plea of the said defendant is alleged, yet for replication in this behalf, the said plaintiffs in fact say, that heretofore, to wit, at the time of the recovery of the judgments in the said declaration mentioned, and at the times of the issuing of the several executions thereon, and of their delivery to the said defendant, in said declaration mentioned, and at the times of the seizure, forfeiture, and condemnation of the brig Hollon, her tackle, apparel, and furniture, together with certain goods and merchandise hereinafter mentioned, and at the time of the making and issuing the said warrants of remission, and at the time of the service thereof on the said defendant, and of the payment to him of the sums of five hundred dollars, and of three dollars twenty-five cents by the said Ogden, Smedes, and Butler; and at the time of the said defendant's paying said two last mentioned sums of money into the registry of the said district court of the said United States of America, in and for the district of Maine; and at the time of the payment of the said duties, costs, and charges, by the said Ogden, Smedes, and Butler, as in the said plea mentioned, Isaac Ilsley was collector of duties on imports and tonnage for the district of Portland and Falmouth, in the said district of Maine, and James C. Jewett was surveyor of the said district of Portland and Falmouth; and the said Ilsley and Jewett being such collector and surveyor, the said Ilsley, under, and by virtue of his said office, on the fifth day of July, 1813, at Portland, in the said district of Portland and Falmouth, and on waters navigable from the sea in vessels of ten and more tons burthen, seized the said brig Hollon, said brig being a vessel of said United States, and owned by a citizen thereof, her tackle, apparel, and furniture, together with certain goods and merchandise, as forfeited to the said United States of America; for this, viz. that on a day prior to the day of seizure aforesaid, viz. on the first day of June, in the year aforesaid, at Liverpool, in Great Britain, the goods and merchandise aforesaid, the same being of the growth, produce, and manufacture of Great Britain, and articles, the importation of which into the said United States by the statutes thereof in such case made and provided then was prohibited, were put on board the vessel aforesaid, with intention of importing the same into the said United States, contrary to the true intent and meaning of the statutes aforesaid: and afterwards, to wit, on the said fifth day of July, the same goods and merchandise were accordingly so imported in the vessel aforesaid into the said United States, contrary to the statutes in such case made and provided as aforesaid. And the said plaintiffs further say, that the attorney for the said United States, in and for the said district of Maine, afterwards, to wit, on the sixth day of July, in the year aforesaid, by the direction of the said collector, commenced a suit in the district court of the United States, in and for the said district of Maine, for the recovery of said forfeiture, by filing an information or libel in said court against the said brig, her tackle, apparel, and furniture, together with said goods and merchandise; and said suit having been so commenced, the said Ogden, Smedes, and Butler, afterwards, viz. on the nineteenth day of July, in the year aforesaid, in consideration of the restoration of said goods and merchandise to Andrew Ogden, the claimant thereof, did execute and deliver to the said United States their certain bond or writing, obligatory in the penal sum of forty thousand dollars, with condition, that if judgment should pass against the said claimant as to the whole of said goods and merchandise or any part thereof, and the said claimant should within twenty days thereafter pay into court, or to the proper officer thereof, the sum of 22,361 dollars and 75 cents, the appraised value of the said goods and merchandise, or such part thereof as should be decreed by law forfeited, with costs of prosecution, then the said bond or writing obligatory to be void and of no effect, but otherwise to remain in full force, power, and virtue. And the said plaintiffs further say, that afterwards, viz. on the twenty-seventh day of May, in the year 1817, it was considered and decreed by the said district court of the United States, in and for the said district of Maine, that the said brig Hollon, her tackle, apparel, and furniture, and the goods and merchandise aforesaid were by law forfeited; and that the said appraised value thereof, viz. the sum of 22,361 dollars and 75 cents should be paid into the said court, or to the proper officer thereof, in twenty days from the date of said decree, together with the costs of prosecution, taxed at 148 dollars and 92 cents. And the said plaintiffs further say, that more than twenty days afterwards, viz. at the September term of said court next following, the said claimants, Andrew Ogden and others, having failed to comply with the terms of the said decree, it was considered, adjudged, and decreed by the said court, that the said United States should recover against the said Ogden, Smedes, and Butler, the sum of 22,361 dollars and 75 cents debt or damage, and costs of suit taxed at 148 dollars and 92 cents, and that execution should issue accordingly. And the said plaintiffs aver, that the said last mentioned judgment, so recovered as aforesaid, is one and the same judgment with the judgment mentioned in the counts of the said plaintiffs' declaration in this suit, and no other. And the said plaintiffs also aver, that at the times of said seizure, forfeiture, and condemnation, and at the time of the rendition of said judgment, there was no naval officer of the United States in and for the district of Portland and

Falmouth aforesaid, and that such forfeiture was not recovered in pursuance or in consequence of information given to said collector, by any person other than the said surveyor of the said district of Portland and Falmouth And the said plaintiffs in fact say, that the said Ilsley and Jewett, collector and surveyor of the said district of Portland and Falmouth as aforesaid, were entitled, by the statute in such case made and provided, after deducting all proper costs and charges, to one moiety of the forfeiture so decreed and recovered as aforesaid, to be divided between them in equal proportions, to wit, to the sum of 11,180 dollars 87 cents. And the said plaintiffs aver, that the writs of execution in the several counts of the said declaration mentioned, were sued and prosecuted out of the said district court, in and for the said district of Maine, solely for the purpose of obtaining and satisfying the said moiety of said forfeiture, to which the said Ilsley and Jewett were entitled as aforesaid; of which the said defendant had notice, to wit, &c. and that at the time of the delivery to the said defendant of the said writs of execution, in the several counts of the said declaration first respectively mentioned, two memorandums in writing were endorsed thereon, the one signed by William P. Preble, Esquire, the attorney of the said United States in and for the said district of Maine, notifying the said defendant that the said execution was for the benefit of the said collector and surveyor of the said district of Portland and Falmouth, and directing the said defendant forthwith to collect the same by their order; the other signed by the said Ilsley and Jewett, as collector and surveyor, requiring the said defendant forthwith to collect the said execution, and deposit the money agreeably to the precept thereof; and notifying the said defendant that the property in said execution was in them, the said Ilsley and Jewett, and requiring the said defendant to receive orders from them, the said Ilsley and Jewett, and from no other persons whatsoever in whatever related to the said execution. And the said plaintiffs in fact further say, that this suit was commenced in the name of them the said plaintiffs, for and on behalf of the said Ilsley and Jewett, and for the purpose of enabling the said Ilsley and Jewett to recover their damages for the injury they have sustained, by reason of the misfeasances of the said defendant in the said declaration mentioned, and not for the benefit, use, or behoof of the said plaintiffs, viz. &c.: and this the said plaintiffs are ready to verify. Wherefore they pray judgment and their damages by them sustained, by reason of the said misfeasances of the said defendant, to be adjudged to them," &c.

The defendant demurred generally to the replication, and also assigned the following special causes of demurrer: "And the said Thomas Morris, marshal as aforesaid, according to the form of the act in such case made and provided, states, and shows to the court now here, the following causes of demurrer in law to the said replication, that is to say, —for that the said replication is a departure from the said first count of the said declaration, in this, that the said first count proceeds upon a cause of action in favour of the United States of America; whereas the said replication proceeds upon a cause of action in favour of the said Ilsley and Jewett, in the said replication respectively named. And for that the said replication discloses no authority for the said Ilsley and Jewett to prosecute the said action against the said Thomas Morris, marshal, as aforesaid, in the name of the said the United States of America; and for that the said replication discloses no lawful and sufficient authority for the said Ilsley and Jewett to prosecute the said action against the said Thomas Morris, marshal, as aforesaid, in the name of the said the United States of America. And for that the said suit is prosecuted in the name of the said the United States of America, by an attorney on record, other than, and different from the attorney of the United States of America, for the Southern district of New York, who is appointed by law to prosecute all suits and proceedings in this court, for and on behalf of the said the United States of America; and for that the said replication is in other respects uncertain, informal, and insufficient," &c.

The pleadings concluded with a joinder in demurrer.

T. A. Emmet and J. Wells, in support of the demurrer, contended:

(1) That the replication was no answer to the plea, because the remission of the secretary of the treasury devested as well the rights of the custom-house officers as those of the United States. The words of the act give the secretary power to remit the whole penalty, without making any distinction between the interest of the United States and of the officers. It is a new power created by this statute, and is not to be governed by analogies, but by the plain words and meaning of the act itself. These are, that the secretary may remit the whole penalty, without fixing any period at which his power shall cease. It is true that the act authorizes him to direct any prosecution that may have been commenced for the penalty to be discontinued; and perhaps it may be gathered from this clause, to what time the legislature meant to limit the exercise of his power of remission. But the inference which is made from the word "prosecution" by the plaintiff's counsel is incorrect. The prosecution is not at an end until the money is collected on the execution and paid into court, and perhaps not until it has been paid over to the party. Until then he has no possession or enjoyment of his right, but is seeking it by the aid of the law, and this is a prosecution of it. In this case, however, no execution had been issued at the date of the first warrant of re-

mission, and at the date of the second a levy only had been made, and the goods remained in the hands of the defendant. The analogy of the king's and president's pardoning power does not apply. It is admitted, that were this a case of pardon, a judgment would have placed the rights of the officers beyond its operation. But the power of pardon exists in the king independently of any act of the legislature. It is a prerogative power, and to be controlled by those rules which have been established to prevent its conflicting with the powers of the legislature. On the other hand the secretary's power of remission is conferred on him by the same legislature from which the custom-house officers derive their rights. They who granted these officers their moiety of the forfeiture, had a right to provide, that under certain circumstances they should be deprived of it, and, in this case, they did so provide before their bounty was bestowed. Besides, the king's pardon is an act of mercy; it proceeds from his free grace, without being called forth by the merits of the offender. But the secretary's power was vested in him for an entirely different purpose. He cannot exercise it unless he is satisfied of the innocence of the applicant. The party who asks for it, is as much entitled to it, if innocent, as he would be to ordinary justice if in a court of law. The secretary of the treasury is constituted a tribunal to proceed on evidence, in a prescribed manner, for the purpose of supplying the defective powers of the courts. His power is analogous to that of a court of equity when revising the proceedings of a court of common law. The cases of Jones v. Shore, 1 Wheat. [14 U. S.] 467, and Van Ness v. Buel, 4 Wheat. [17 U. S.] 74, which are relied on to show that a condemnation vests the moiety of the officers so that it cannot be remitted, are not applicable here, as the interests of the parties there were entirly different. Besides, those cases decide no more than that the inchoate right of the collector, which arises upon seizure, becomes absolute by condemnation: but surely, not absolute so that the penalty cannot be remitted.

(2) The replication is a departure from the declaration. A departure is when the second plea does not contain matter pursuant to the former, and which does not fortify it. Doc. Plac. "Departure," 119; Keb. 124. And where general matter is pleaded at the commencement when the special matter might have been, the party shall not afterwards maintain the general matter with the special matter. Willes, 638; Doc. Plac. 121, 123; 3 Hen. VII. p. 5; 37 Hen. VII. p. 5; Co. Litt. 204a; Com. Dig. "Pleader," F, 8.

(3) The action is in a wrong name. The replication shows that the plaintiffs have no interest, and of course, no right of action. The custom-house officers had no right to sue in the name of the United States. Nor was there any necessity for it. If they have suffered a wrong by the conduct of the defendant, they could have brought an action in their own names for consequential damages.

(4) The statute which allows a writ of execution to be issued into another district, does so only where "the judgment is obtained for the use of the United States."

(5) By Judiciary Act, § 35, it is made the duty of the district attorney to prosecute all actions in which the United States shall be concerned.

J. O. Hoffman, H. Wheaton, and E. Paine for the United States, insisted:

(1) That the secretary of the treasury had no power to remit after condemnation. The words of the act may be considered as conclusive on this point. It authorizes the secretary, when a fine, penalty, or forfeiture shall have accrued, to remit such fine, penalty, or forfeiture, and to direct any prosecution that may have been instituted for the recovery thereof, to be discontinued. Here is a connected phraseology, every word of which applies to a state of things before judgment, but not after. If a judgment has been recovered, the fine, penalty, or forfeiture has become a debt, and is not included within the legal signification of these terms. Nor after judgment, would the word "accrue" be applicable to a forfeiture. The forfeiture has not then merely accrued, it has been recovered. Nor does a prosecution extend beyond the judgment. When that is recovered, the rights of the parties have become fixed and settled; the law ceases to exert itself judicially, and only acts ministerially in the various steps of an execution. Recovery, too, can only mean the recovery of the forfeiture by a judgment. It is a mistake to suppose, that these words, and especially the word recover, are to be undertsood in an ordinary or familiar, in contradistinction to a legal or technical sense. The subject to which they were applied is peculiarly a legal one, and the act is evidently the production of persons familiar with legal language. Such language, too, having a settled and specific meaning, would be preferred to words as used in their ordinary and uncertain acceptation. But the word "recovery" cannot, without violence, be made to mean any thing except a judgment. It is attempted to extend its signification to the act of the parties in receiving the penalty in the money realized under the execution. But this is not English in any sense. In common parlance, this would be called a receipt of the money, and not a recovery. A thing is ordinarily said to be recovered when the possession of it has been lost, but has been regained. And this is its only common signification. But in that sense, it could not have been used in this act. So that we are driven to the adoption of its legal or technical signification. And that can be nothing but the recovery of the judgment. Every subsequent step has its appropriate legal name. When the property is

seized under execution, it is said to be levied upon, but not recovered. When the money is paid into court by the officer, or paid over to the plaintiff, it is so said, but is never called a recovery of it. The connexion, too, of this word with the word "prosecution," proves that it was used in its legal sense. The last word "discontinued" can only apply to a suit before judgment. An execution is said to be stayed. As the power of the secretary, therefore, is conferred by language, which clearly contemplates a certain state of things, that power must cease, when such state of things is determined. But besides this manifest intention of the legislature, the operation of a judgment is such as to vest the rights of parties, and place them beyond the exercise of a power of this description. This has been expressly decided in the circuit court for the First circuit. The Margaretta [Case No. 9,072]; The Hollon [Id. 6,608]. And it has also been decided, as between successive collectors, that the right to the forfeiture becomes vested when judgment is recovered, and before the receipt and payment over of the money. Jones v. Shore [1 Wheat. (14 U. S.) 462]; Van Ness v. Buel [4 Wheat. (17 U. S.) 74]. It is the settled law of England, which must have been familiar to the framers of this act, that a pardon by the king does not affect the moiety of an informer, whose right has become vested by a judgment. 3 Inst. 233; 5 Coke, 51a; 3 Mod. 56; Cro. Car. 357, 358; 1 Salk. 233, 234; 3 Inst. 238; Strange, 1272; 5 Coke, 51b; Cro. Jac. 159; Cro. Car. 199; 5 Co. Litt. 51b; Cro. Car. 47; Parker, 280. So in prize proceedings, the crown cannot release captured vessels after condemnation. 5 C. Rob. Adm. 173. It is contended, not only that these analogies apply to this case, but that the legislature knowing the effect of a judgment in this respect, in the country from which we derive our legal maxims and principles, would, had they intended that such maxims and principles should not be applied, have expressly said so, when they were providing for a power of remission with reference to a pending prosecution.

(2) The causes of special demurrer, all depend on the main question, whether the secretary had power to remit the officers' moiety. If he had not, then that moiety stands exactly as it did before the remission. So much of the judgment of the United States remained unsatisfied, "whereof execution remained to be done." This moiety is, by the acts (Collection Law, §§ 89, 91; Laws U. S. c. 195, § 18; 4 Bior. & D. Laws, 217 [2 Stat. 532]; Laws U. S. c. 264, § 3; 4 Bior. & D. Laws, 306 [2 Stat. 606]) which allow it to the officers, vested in the United States, for the officers' benefit, until distribution be made. Those acts point out the course of its collection and distribution, and give the officers no right to it until that takes place. By the ninety-first section of the collection law, it is provided, that the moiety of the penalty shall be given to the collector, naval officer, and surveyor of the district; or, if there is but one of those officers, then to him; but if there was an informer, he is to have one-half the moiety, and the officers get only the other half. Here are rights to be settled and adjusted. And the eighty-ninth section directs the collector to make the distribution. It is referred to him exclusively, to determine who are the officers of the district, and whether there is an informer. Under these circumstances would not this court, had this action been brought in the names of the officers, have said, "you have no rights so settled that this court can determine what they are, or whether all the proper parties are before it. Perhaps there is an informer who should have been joined with you. Whether there is, is a question for the collector, or at least for the court where the judgment was recovered. The suit should have been brought in the name of the United States, who have the only right which this court can notice." If then, the secretary could not remit this moiety, the United States are not merely trustees for the officers, to obtain it for them, but they have a direct interest that their officers should receive it, as a part of their compensation. If the marshal neglects his duty, and does not levy under an execution upon the judgment, he is liable to those who have the legal property in the judgment, and to them only. The officers, besides, have something more conferred on them than the mere moiety of the forfeiture. They enjoy the right, by the express words of the statute, of having that moiety compounded with that of the United States, to be pursued in their name, and with all their privileges and advantages, until it be finally collected and distributed. The United States were thus bound to commence this action in their own names; the officers had a right to have it so commenced; and they could not have brought one in their own names. The action was, therefore, rightly brought in the name of the United States, and the execution was properly issued into the district of New York.

The cause of demurrer, that the replication is a departure from the declaration, because the latter proceeds on a cause of action, in favour of the United States, while the former proceeds on a cause of action in favour of the officers, is unfounded. The declaration discloses the true and complete cause and right of action, which is in the United States. The replication discloses no right of action in the officers. It merely states a right in them, wholly different from the right of action; to a moiety of the penalty when it shall be collected. The cause of action is the same in both pleadings. It was not necessary, and would have been improper to have stated this right in the declaration, when the cause of action there stated was sufficient without it. It could not then be anticipated that the present defence would necessarily have been

pleaded, even if such defence had been known. It was time enough to reply to such defence when made; and this is the proper and only office of the replication. The plea stated new matter, and the replication contains new matter in avoidance. To maintain this point of the defendant's counsel, they must establish the extraordinary principle, that the declaration should be encumbered with all such facts as are known to the plaintiff, which would be an answer to any possible defence that may also be known to him.

The last special cause of demurrer, viz. that none but the district attorney could bring the action, also depends on the main question. If the officers are entitled to their moiety, notwithstanding the remission, and to sue for it in the name of the United States, they ought not to be dependent on the pleasure of the district attorney, if he chooses to prejudge the case and to refuse to bring an action. In such case they would be remediless. The court must have power in a case of the kind to authorize another attorney to sue. The appearance by attorney, may be properly and safely left to be controlled by the rules and orders of the court. And this shows that this objection cannot be taken advantage of by special demurrer, but should have been made on motion in the early stages of the suit. But there is no law forbidding any attorney to commence a suit, especially such an one as this, in the name of the United States. The act referred to, only declares, that "there shall be a district attorney, whose duty it shall be to prosecute all actions in which the United States are concerned." Here is no prohibition which can support this cause of demurrer. If the court were satisfied, as they were by affidavit, that individuals had a reasonable right to have an action commenced in the name of the United States, they were right in appointing another attorney, on the refusal of the district attorney.

LIVINGSTON, Circuit Justice. This is an action on the case for a misfeasance against the defendant as marshal of the Southern district of New York. The plaintiffs declare, that in September term, 1817, the district court for the district of Maine rendered judgment in their favour against Andrew Ogden, Abraham K. Smedes, and Thomas C. Butler, for 22,361 dollars 75 cents debt or damages, and also for costs, which judgment in part, that is, for 11,180 dollars 87 cents remains unsatisfied. That on the 11th September, 1818, the plaintiffs issued an execution out of said court for this sum, directed to the marshal of either of the districts of the United States, which was delivered to the defendant, being then, and yet marshal of the Southern district of New York, on which he returned that he had seized goods and chattels of the defendants therein named, to the value of the whole sum, which remained in his hands for want of buyers. That on the 28th January, 1819, the plaintiffs issued a second execution, on which the defendant again returned that the same goods and chattels still remained in his hands for want of buyers. That on the 12th August, 1819, they issued a writ of venditioni exponas, which the next day was delivered to the defendant, who instead of selling the goods and chattels which he had seized, delivered them to Ogden, Smedes, and Butler—for which this action is brought.

The defendant pleads—First, the general issue; and secondly, that Wm. H. Crawford, secretary of the treasury of the United States, pursuant to the act to provide for mitigating or remitting forfeitures, &c. on the 9th February, 1818, did remit under his hand and seal to the said Ogden, "all the right, claim, and demand of the United States, and of all others whomsoever, to the forfeitures for which the said judment was rendered, upon payment of the duties which would have been payable if the importation had been lawful, and the costs and charges, and on payment of five hundred dollars to be distributed among the custom-house officers in the proportions prescribed by law." That on the 19th December, 1818, the secretary issued a second warrant of remission, the former being thought defective, of similar import with the first, and on the same terms. That after the receipt, and before the return of the venditioni exponas, to wit, on the 1st September, 1819, these warrants of remission were served on the defendant, by Ogden, Smedes, and Butler, who had complied with all the terms therein mentioned, and did demand of him a restoration of the property mentioned in his returns to the executions aforesaid, which was delivered to them accordingly. The plea contains an averment, that the judgment aforesaid was rendered on a bond given for the appraised value of the brig Hollon, and a part of her cargo, by reason of the forfeitures mentioned and intended in and by the warrants of remission aforesaid.

The plaintiffs in their replication to the second plea admit the issuing of the warrants of remission, but say, that at the times of recovering the judgment aforesaid, of issuing the executions thereon, of the seizure, forfeiture, and condemnation of the said brig and cargo, of issuing and serving the said warrants, and of the compliance with the terms thereof, Isaac Ilsley and James C. Jewett were respectively collector and surveyor for the district of Portland and Falmouth, in the district of Maine. That the former, as collector, on the 5th July, 1813, seized the said brig and cargo as forfeited to the United States, for certain violations of law in the said replication mentioned. That on the next day an information or libel was filed in the district court for the district of Maine, against the same, whereupon the bond aforesaid was executed, and on the 27th of May, 1817, a decree passed, declaring the said brig and cargo "to be by law forfeited," and ordering the appraised value thereof to be paid into court in twenty days from the date of the

decree, with costs. That at the September term of the said court, judgment was rendered on said bond in favor of the United States with costs of suit. That the collector and surveyor (there being no naval officer) were entitled to one moiety of this forfeiture, for the purpose of obtaining and satisfying which moiety the aforesaid writs of execution were sued out, of all which the defendant had notice: and the plaintiffs then aver, that this suit, although in their names, is for and in behalf of the said Ilsley and Jewett, and to enable them to recover damages for the injury they have sustained by the misfeasance of the defendant, and not for the benefit or behoof of the United States.

To this replication the defendant demurs, and for causes shows: That the replication is a departure from the declaration, in this: that the declaration proceeds upon a cause of action in favour of the United States, whereas the replication proceeds on a cause of action in favour of Isaac Ilsley and James C. Jewett, and for that the replication disclosed no authority for them to prosecute in the name of the United States; and also for that by reason of the matters disclosed in the replication, the said writs of execution could not lawfully run or be executed elsewhere than in the district of Maine; and also for that, this action is prosecuted in the name of the United States, by an attorney on record, who is not the attorney of the United States for the Southern district of New York. A joinder in demurrer closes the pleadings.

The expectation of recovering in this action must arise altogether from a supposed want of power in the secretary of the treasury to remit, after sentence of condemnation, such portion of a forfeiture as by law is to be distributed among the officers of the customs. Postponing, therefore, for the present, a consideration of the several causes of demurrer, which have been assigned to the plaintiff's replication, the court will inquire whether, after the remissions stated in the plea, a right of action can exist in any shape for the moiety for which the present one is brought; for if the right, as well of the United States as of the collector and surveyor, be extinguished thereby, it will follow that no action, in any form, or in any name, can be maintained against the defendant for the act here complained of.

It is said, that by a decree of condemnation, a right to a moiety of the value of the goods seized, which before was only inchoate and defeasible, is consummated and becomes so absolutely vested in the custom-house officers, as to place it out of the reach of the secretary of the treasury, whose interference, if it can be exerted at all after such sentence, must be confined exclusively to that part in which the public have an interest. This question is as new as it is important, and it is somewhat extraordinary that it should not have sooner occurred, for it is not known that a decision of it has ever before been necessary in any federal court. It excited therefore some surprise, to hear mentioned among the leading cases, and one which was treated as little short of conclusive, by the plaintiff's counsel, that of Jones v. Shore [1 Wheat. (14 U. S.) 462]. Whatever language may have been used in the opinion given on that occasion, nothing is more certain, than that this point did not even incidentally present itself. There had been no remission, so that the court's attention was not in any degree drawn to an examination of the secretary's power. To have circumscribed it therefore within the limits now assigned to it, without its being called in question and without argument or discussion, would hardly have comported with the decorum due to so high and confidential an officer of the government, and would have been an unnecessary speculation at best, by which even that court would not have been bound, if the same point had afterwards required its decision. All it had to do, was to adjust the conflicting claims between the representatives of a deceased collector who had made a seizure, and his successor who had come into office before judgment, and of course before the money was received. There was no doubt, without reference to any authority, that the forfeiture in that case was consummated; but a difficulty arose under the collection act, whether the proceeds belonged to the collector in office at the time of rendering the judgment, and the receipt of the money, or to the one by whom the seizure had been made. In reference to that question and no other, it was thought best, there being some ambiguity in the act, to consider the time of seizure as fixing the right, if such seizure were afterwards perfected by judgment, whether such judgment were rendered during the life, or after the death of the officer who had made it.

This judgment proceeded, not more on any consideration, than on the hardship of depriving a collector, who had incurred all the responsibility of making a seizure, and had been exposed to much trouble and expense in its prosecution, of the fruits of his labour, at the very moment perhaps, when a termination of the suit was at hand. The decision is a reasonable one, and yet without any disregard of English authorities, a different rule might very well have been adopted under our act; and one which, as a general and prospective one, would have operated just as well and as equitably between collectors in and out of office. So far, indeed, from its being necessary to express an opinion as to the point of time, after which the secretary's control over a forfeiture ceases, (for the money had already been received,) it is admitted by all the counsel, that the penalty or forfeiture might be released at any time before payment to the collector; and Mr. Penlaney, in defining the word "recovered," on which so much emphasis has been laid on the present occasion, says that it means "adjudged and received." The present case then is entirely

different from the one on which these remarks are made, and can therefore, receive no light whatever from it. But although the supreme court has not settled the present question, there can be no doubt that the circuit court for the Massachusetts district has denied, in terms not to be misunderstood, the power of a secretary to remit, after a sentence not appealed from, any portion of the forfeiture given by law to a collector. Although both the cases of The Margaretta and of The Hollon were disposed of on other grounds, it appears to be the expression of a judgment formed on great deliberation, and therefore entitled to the same high consideration in which all the decisions of that court are so deservedly held; and it is said without affectation, that not until after great hesitation, did this court come to a different conclusion.

It will not be denied that where a subject in England acquires title to a thing forfeited for a crime or misdemeanor, to the king, although he may pardon the offence, so as to arrest the punishment of the party, and remove any disability which has been incurred, yet such act of grace shall not operate to the injury of third persons, so as to deprive them of vested rights. And this is in conformity with a maxim of the common law, "Non poterit rex gratiam facere, cum injuria et damno aliorum." This is, and ought to be so, wherever the forfeiture is to the party aggrieved. It may also be the case in a qui tam action, that a pardon does not discharge that portion of the penalty which goes to the plaintiff. So where the law, as in cases of game, divides the penalty between an informer and the poor, the crown having no interest, a pardon is no bar to the filing of an information. And it may be admitted generally, that wherever an individual has an interest in the thing demanded, distinct from that of the crown, whether by the common or statute law, and in many cases whether a suit has been commenced or not, the king has no power over it. So also in cases of prize, a sentence of condemnation may place the title of the captor beyond the reach of prerogative. That these limitations have taken place in England on the power of the crown, and very naturally and properly, may be conceded, and the plaintiff's title acquire no additional strength from the admission. For before there can be any application here of the principles of these decisions, or any analogy can be shown between the cases cited, either from the courts of common law, or from those of prize, and the one now under consideration, it should appear that the title of the plaintiffs and the power of the secretary to remit, bear some resemblance to the private rights mentioned in the books, and the pardoning power of the crown. The rights acquired in England, and which have been so sedulously and so laudably guarded by the courts of that country, are either derived from the positive provisions of a legislative act, not defeasible on any contingency, or in virtue of the common law, or in consequence of captures jure belli; whereas the right to which it is expected that the same protection will be extended here, is derived under an act of congress, which, at the very time of conferring it, holds out an intimation in what manner, and by what authority it may be defeated, and be rendered null and unproductive.

Again, the king's right to pardon is a branch of his prerogative, which is exercised independently of any power conferred on him by the act of parliament which creates the offence. All, which the law does, is to declare the crime; to provide for its punishment; and sometimes it annexes a penalty which goes to an informer, or to the party grieved, or to any one who will sue for the same. In all these cases, the law is silent as to any right of the crown to pardon, or as to the extent to which such power shall be exercised. Whenever, therefore, this prerogative, although inherent in the crown, and inseparable from regal dignity, was interposed in the cases which have been put, it was reasonable and to be expected, that courts would restrain it within such limits, as to prevent its infringing on private rights. But does the same reason exist for a similar restriction on the power of the secretary? The right to any part of a forfeiture in a custom-house officer, it is true, is founded on an act of congress. But the same authority as has just been mentioned declares how it shall be asserted, and in what way it may be defeated; so that it is a right, contingent in its very inception. Nor is it in virtue of the pardoning power vested by the constitution in the president, that these remissions take place, which it might then be proper to restrain within the same limits, if it should be attempted to be so exercised as not only to remit the punishment of the offender, but to defeat any private interest which had attached on commission of the act which was pardoned. These forfeitures, on the contrary, are released in virtue of an authority specially delegated to the officer at the head of the treasury. It is a power not only to remove a disability, consequent on some breach of the statute, but more particularly for the purpose, and for which it is more frequently exerted, of mitigating, and remitting forfeitures. And it is not perceived how any citizen can reasonably object to having such a claim submitted to the same responsible officer by whom those of the United States are to be adjudged.

Instead then of recurring to English decisions, which are predicated of a different state of things, and adapted to a different code of laws, we shall probably be led to a more correct conclusion, by looking only at the different acts of congress which have been passed in relation to this subject, and at the practice, which, from an early period to the present day has been pursued under them, without a complaint being heard from any quarter, until the one which has grown out of the present remissions.

A system of revenue laws must necessarily contain so many and such minute provisions, enforced by a coresponding number of penalties and forfeitures, as frequently to subject to difficulties the most upright and wary merchant, and expose his property to seizure and confiscation. That such cases must occur was early foreseen, and yet it was not thought proper to trust any court with the power of acquittal founded solely on the innocence of the party. See The William Gray [Case No. 17,694]. If the tribunal having cognizance of the fact of forfeiture, might also have inquired into the quo animo, a sentence of confiscation would never have been pronounced, if the innocence of the claimant had been made out; and the present difficulty could not have occurred. And in such cases, if by newly discovered testimony his innocence might be made to appear even after judgment, it is perhaps not saying too much, that a court would not have been unwilling (merely because the right of a collector had thereby become absolute,) to stay proceedings on its own sentence, and to vacate it altogether, if justice required it. At any rate, on an appeal, this testimony would be received, and the first sentence reversed.

The legislature, however, has thought proper, in order to arrive at the same end, to prescribe a different course. If the fact be made out, which, by law, produces a forfeiture, a court is bound to pronounce sentence accordingly. But to have left the system here would justly have exposed the American government to the charge of injustice in making no discrimination between the innocent and guilty. Provision, therefore, was made to rescue property which might innocently become liable to forfeiture from the penal sanctions of the law. By the eighty-ninth section of the collection law, the collector is enjoined to cause suits to be commenced for all penalties, and to prosecute them to effect, and is to receive from the court the sums recovered, and on the receipt thereof, is to distribute the same according to law. The ninety-first section of the same act declares, that all fines, penalties, and forfeitures, recovered by virtue thereof, after deducting all proper costs and charges, shall be, one moiety for the use of the United States, and the other moiety for the collector, and certain other officers of the customs. This act passed March 2, 1799. The first act regulating the collection of duties and containing a similar provision, passed 1st September, 1789 [1 Stat. 55].

Both these laws require of the court, where the prosecution is depending, to hear and determine the cause according to law; which can only mean, that if the fact which works a forfeiture be proved, the court must decide without reference to the innocence of the person to whom the forfeited article belongs. From 1789 until 1797, no mitigating control was vested any where, unless the same resided in the president in virtue of his own constitutional right to grant reprieves and pardons for offences against the United States; and if under this authority these remissions had taken place, it might with reason be contended, even in the absence of any adjudged case that he could not, either before or after judgment, release the shares of the public officers. On the 3d of March, 1797, after the hardships and injustice of the existing system, must have been felt, in leaving liable to sequestration, property whose owner had been guilty of no wilful neglect or fraud, the legislature for the first time, conferred on the secretary of the treasury the power in question. An act which then passed [1 Stat. 506], authorizes him in a mode therein prescribed, to mitigate, or remit altogether, any fine, forfeiture, or penalty, or any part thereof, if in his opinion the same shall have been incurred "without wilful negligence or any intention of fraud, in the person or persons incurring the same," and to direct the prosecution, if any shall have been instituted for the recovery thereof, to cease and be discontinued, upon such terms or conditions as he may deem reasonable or just.

As this act was the first of the kind which had been passed, and not until the law for the collection of duties had been in force for several years, during which period many seizures for forfeitures had been made, it very properly contained a proviso, to prevent its affecting private rights or claims to any part of such forfeitures, in case a prosecution had been commenced, whether judgment were passed or not, before the passage thereof, or of any other act relative to such mitigation. This proviso, while it bespeaks a solicitude in the legislature not to interfere with vested rights, shows that all claims founded on seizures made after the passing of such laws, were to be subject to the secretary's examination, precisely in the same way with those of the United States. This act, which was temporary, was made perpetual by a law passed the 11th February, 1800 [2 Stat. 7].

It is impossible to peruse these acts without assenting at once to the liberality and justice of their provisions; nor can we forbear remarking that no limit is any where prescribed to the secretary's power, as to the time when it shall be exercised, other than that it must be during the prosecution. The legislature thought it a sufficient spur to the interest, and an ample remuneration for the vigilance and labour of the custom-house officers, to leave undisturbed their participation in the fruits arising from every criminal violation of law (if such expressions may be used). But to permit them to divide the property of an unfortunate and innocent merchant, was considered as at war with the first principles of morality and justice. When a claim, therefore, of this nature is asserted, no court can be blamed for

looking at it with more than ordinary jealousy, nor for withholding its sanction so long as a reasonable doubt of its validity shall remain. If goods are unladen from a vessel without a permit, of the value only of four hundred dollars, the vessel, whatever it may be worth, is absolutely forfeited. Now, after the government is satisfied of the entire innocence of the owners, and has remitted the whole penalty under a law in force at the time of seizure, can it be endured that a collector shall be permitted to enforce his title to any part of it, merely because, after a few proclamations, rapidly succeeding each other, a court has declared, which was never disputed, that a forfeiture had taken place? Is it right, is it just, is it honest, that it should be so?

Rather than lay hold of a technical term, which, after all, may not have been used in such sense, in support of a claim which has so little to recommend it, every disposition will be felt to give the law, if it can be done without a palpable violation of duty, such an interpretation as will best promote the benevolent and equitable intentions of the legislature, and will extend relief to every portion of the property, so long as it has not been converted into money, and paid to the collector. It will not readily fetter itself with cases of doubtful application, nor consider a pardon and a remission under this act as convertible terms, nor impose on the latter the same restrictions and limitations which it has been thought proper to prescribe for the former. A pardon, as the very term imports, is an act of mercy and favour, and generally supposes its object guilty. A remission, on the contrary, is an act of justice, and cannot be obtained, until the entire innocence of the petitioner be established, not by testimony taken ex parte, but after full notice to the proper officer of the government, and to the collector who made the seizure.

But it is said, that after a recovery, that is, after sentence of forfeiture, the power of remission may still apply to the share of the government, but cannot be exercised over the part claimed by the collector and his associates. No such distinction is found in the act. If such sentence be a bar to an interference with the share of these officers, it is not perceived why it should not also withdraw the case from the secretary's cognizance, as it regards the interest of the public; for he has no better or larger right to release the latter, than the former. But is the term "recovery," on which so much stress is laid, of so much value and effect, and so very appropriate and inflexible in its meaning, as necessarily and absolutely to be limited in its signification to the time of rendering judgment, and susceptible of no other signification whatever? The court feels no obligation to attach so much importance to this term. In the formal and solemn language of a common law record, it is considered that a party recover, and if the legislature had been speaking of proceedings in courts of common law only, and no light had been afforded by other parts of the act, some argument might have been drawn from the use of that word. But as most of the proceedings to which this power applies are necessarily in rem and in the admiralty, in whose judgments or decrees in such cases this term never occurs, there is no reason for applying to it any other than its popular, ordinary, and vulgar meaning, which is to regain the possession of something which may have been lost or taken away, or to reduce to actual possession something to which we have or may assert a claim. Now a judgment has no such effect; it does not put the party in possession of the thing claimed. Nothing, therefore, is recovered within the meaning of this law, until it is "adjudged and received."

But this is not the only term used by which the secretary's power is to be tested. He is to direct the prosecution to cease and be discontinued. Now a prosecution in legal or common phraseology, is not at an end so long as an execution be necessary to produce the fruits of it. It is the last, but a very important step, and one which must take place if no settlement intervenes, and be actually executed before there is an end of the prosecution. If then the secretary may direct a prosecution to cease, what right can a court have to limit his power to one stage of it, more than to another?

Under the interpretation contended for by the plaintiffs, it would be very difficult in many cases to obtain a remission, however good a title the party might make out, for more than a moiety, and perhaps not even for so much. A court is not bound, on the appearance of a petition, to stay its proceedings on the libel. What then is an innocent man to do? He cannot deny the forfeiture, and if he does, witnesses are at hand to prove it. In this dilemma he presents his petition, but before the facts can be proved, stated, and transmitted to the treasury, or before the secretary has pronounced judgment on them, a sentence passes, after which, if a remission come, he must be content to lose the one half, if not the whole of his property; not because its value has been received by the collector, but because the sentence has ascertained what was admitted from the beginning, that a forfeiture had accrued. In this very case sentence was pronounced, as appears by the decree itself, without even a claim being filed, and while a petition for remission was lying in the secretary's office. But at what epoch, it is asked, is this power to cease? Shall it extend even to the money after it has been received and distributed? When a secretary shall act at so late a period as is here put, it will be time enough to decide whether he has not transcended his authority. If it be admitted that such an exercise of power

would be extravagant and illegal, it will not follow that prior to a receipt of the money, it may not legitimately be exerted over the whole subject.

This view of the act derives much support from the uniform practice of the treasury. It is believed that every secretary has remitted the whole of a forfeiture even after condemnation, and it is not known that his right so to do has, until very recently, been called in question. Considering the character and acknowledged legal talents of the gentlemen who have successively been at the head of this department, a court may acquiesce in an interpretation which they have given to the act, without much danger of falling into error. Nor can such remission be regarded as a mere ministerial act. It partakes much of a judicial character. It cannot be made but on evidence regularly taken, so that his act in deciding on the innocence of the claimant is as much a judicial one, as is that of the court in pronouncing on the fact of forfeiture. Perhaps after all, as the secretary has jurisdiction of the matter, he had better be regarded not only as the proper person to afford relief, but as the sole judge of the extent of it, and of the time after which it cannot be granted.

Upon the whole, the opinion of the court on this part of the case is, that as a seizure is made, with full knowledge in the collector of this power in the secretary, he cannot be regarded as aggrieved by its exercise, so long as the property, or the bond given for its value, remain in possession of the court, and the money has not been received by the collector.

The special cause of demurrer will now be disposed of. The first cause assigned is, that the replication is a departure from the declaration, in as much as the latter proceeds upon a cause of action in favour of the United States, whereas the replication discloses a cause of action in favour of Isaac Ilsley and James C. Jewett. A departure in pleading takes place, when a second plea contains matter not pursuant to the former, and which does not fortify the same,—with perhaps this qualification,—that if a matter be pleaded which could not have been shown or stated in the former plea, such new matter will not always be a departure. It is certain that courts, to avoid multiplicity in pleading, reluctantly admit any matter to be alleged in a subsequent plea, which might have been sooner set forth. Thus, in a præcipe quod reddat, if the tenant plead that the land was devised to him, and the plaintiff reply infancy, the defendant cannot rejoin, that by custom infants may devise; this being a departure; because he ought, as the court say, to have pleaded this matter in the first instance. If performance of covenants be pleaded, and the plaintiff replies that the defendant did not do such an act according to the covenant, the defendant cannot in his rejoinder say that he offered to do it, and the plaintiff refused—for the tender and refusal should have been set forth in the plea. A defendant pleaded in bar a lease for 50 years, made by a corporation, and afterwards in his rejoinder, pleads a proviso in a statute, which makes such leases good for 21 years,—this was also, and for the same reason, adjudged a departure. It is given as a rule in Doctrina Placitandi that if a general matter be pleaded, where the special matter might have been pleaded, the party shall not maintain the general with the special matter. Nor is the rule, which in the case of new matter being alleged, permits the other party also to allege new matter in avoidance of it, at variance with the one just mentioned; for if the new matter here intended, be something which the party against whom it is alleged had no opportunity of knowing before, the one rule will consist and be in harmony with the other. In later times the same rule has been recognised and enforced. In Willes, 639, the defendant in trespass pleaded his taking the cattle, damage-feasant, and in his rejoinder, for a surcharge of common. The court thought this a departure, as the surcharge might have been pleaded at first. In answer to these cases, it is said that an assignee of a chose in action may sue at law in the name of the assignor, and that if an obligor plead a release from the obligee in whose name the action is brought, executed after notice of the assignment, a replication which states such assignment and notice will be good. This may well be, for non constat that the assignee had any notice of the release until it was pleaded; or it may be allowed in this way, to allege a fraud in the defendant, which defeats his bar. Without inquiring whether courts of law would not have done better to leave assignees to the exclusive protection of a court of equity, it is sufficient to remark that the new matter set forth by the plaintiffs in their replication was not only in their knowledge at the time of filing their declaration, but was the very ground on which they expected to render the marshal liable; and that so far from fortifying their declaration, it shows that the United States, who are plaintiffs on record, have not only no interest in the action, but that they have done all they could do to release the same. Nor is this new matter alleged with the view of setting aside the defence on the ground of any fraud in the United States or their officer. The court is of opinion that the first cause of demurrer is good.

The second is, that no authority is disclosed by the replication to prosecute in the name of the United States. It has been attempted to avoid the force of this objection by considering the real plaintiffs in the character of assignees of the judgment, although no assignment is set forth, nor is it pretended that any exists—or by regarding the United States as trustees for the collector and

naval officer, who have, therefore, a right to use their name. It will be going further than has yet been gone, for a court of law to consider persons in the situation of their collector and naval officer as assignees of a judgment, or the United States as trustees for their use, merely because, if the money had been received, they would have been entitled to a share of it. But if the United States were their trustees, and they have released the judgment, it is no reason why the cestui que trust should not be bound at law by such release, as no fraud can be supposed in the government or its officer, nor is any pretended. It is not fit, after such an overt act on the part of the United States, to permit individuals who may think themselves injured by it, to enforce in their name, and that too in a court of common law, a demand which they may suppose themselves to have against the marshal for giving effect to such release. If they have been injured by the officer, for it is against him that a recovery is sought, it is better to force them to sue in their own name, if they have any cause of action, than to embarrass the record with legal and equitable interests, which must always be more or less productive of confusion and embarrassment. Nor should a party lightly be permitted to avail himself of the advantage of suing in the name of the United States, when the action is brought exclusively for his own benefit, and he can sue if his claim be a good one, in his own name. Nor should any facility in a case like this be afforded, if not a matter of strict right, to sue a public officer in the name of the United States, when it appears that the only demand, if there be any, arises out of his obedience to the mandate of an officer designated by law to act in the premises.

Another cause of demurrer is assigned which the court is also strongly inclined to consider a fatal one. It is the one which arises from a disclosure of the fact in the replication that the writs of execution which issued from the district court of Maine, were for the sole benefit of Ilsley and Jewett, and it is therefore asked what right these gentlemen had to direct an execution to any other but to the marshal of that district. Executions on judgments in courts of the United States obtained for their use, may run into any district or territory. This is a high privilege, to enable the government to collect their debts with greater facility than other creditors, and is therefore carefully confined to such cases alone. If then, the court cannot regard the interests of Ilsley and Jewett, so far as to permit them to sue in the name of the United States, they ought not to object to their being considered for every other purpose as the real and only parties whose rights are to be protected; and then, whence is derived their title to send into this district an execution on a judgment obtained elsewhere, and in which at the time of its issuing they admit the public had no interest whatever? In answer, it has been said, that the judgment being originally for the use of the United States, the terms of the act are satisfied. This may be, and being never very solicitous to construe an act by its spirit, where it can be avoided, this point, although not free from doubt, will be left undecided: and yet, if ever an act were done contrary to the manifest intention of the legislature, it is the one we are now examining, and never was there a fitter occasion for applying the maxim of "cessante ratione, cessat et ipsa lex."

The court will also leave undecided the question whether an action will lie for an individual for a tort done to the United States by a marshal, in not executing a writ issued in their favour, because such individual may consider himself aggrieved thereby in consequence of some interest he may have, or suppose himself to have, in such process.

The last cause of demurrer assigned, which the court also considers as a good one, is, that the action is prosecuted in the name of an attorney who is not district attorney, to whom is exclusively confided the conduct of actions in which the government is interested. The only answer we have heard to this objection, which is not a sufficient one, is that non constat that the attorney on record is not the district attorney. The court judicially knows this officer—his commission is shown to it—he acts in presence of the court in all criminal prosecutions, and on all occasions where the interests of the United States are concerned; and whenever he does appear on record, it is in his official character. The court, therefore, can and ought to take notice of such an objection whenever its attention is drawn to the fact; and although it may not in ordinary cases, unless under special circumstances, call for the production of any authority for an attorney of this court to appear in a particular suit, yet knowing that the United States have an attorney of their own, no other should merely at the instance of an individual be permitted to act in his place.

It should be mentioned here, that the gentleman who appears on the record as attorney for the plaintiff, was appointed by the court, under an impression that in some cases an individual might have a right to prosecute in the name of the United States, in which if the district attorney refused to appear, the court might empower some one to act in his stead. Whether this be correct or not, the court is now satisfied that the district attorney was right here in refusing to act, and that the real plaintiffs, if there be any cause of action against the marshal, should have sued in their own names. A suggestion was made, although it did not appear to be relied on, that these very questions, or some of them, had been decided by the district court of Maine and between these same parties. If so, such judgment should have been spread on the record; but

in looking at the proceedings of that court on the petition of Ogden, Smedes, and Butler, it does not appear on what ground the prayer of it was rejected, and most certainly several of the questions which have been made here, could not have occurred on that occasion.

Judgment must be entered for the defendant.

[This judgment was affirmed by the supreme court. 10 Wheat. (23 U. S.) 246.]

Case No. 15,817.

UNITED STATES v. MORRISON.

[Chase, 521.] [1]

Circuit Court, D. South Carolina. June Term, 1869.

POSTMASTER—LIABILITY FOR SURRENDER TO CONFEDERATE GOVERNMENT—COERCION—BELLIGERENT RIGHTS.

1. The policy of the United States requires postmasters and their sureties to be liable in all events: no accident or misadventure will excuse them.

2. The only exceptions are those provided for by the acts of congress; being losses occasioned by the Confederate forces or guerrillas, or such as are occasioned by any other armed forces.

3. No surrender of the property of the post-office department to the Confederate government under any other than the coercion of armed force can excuse a postmaster.

4. The whole existence of the Confederate government was a continued rebellion against the lawful government of the United States; and no one can be protected by the sanction of its authority save in acts of war.

5. The national government conceded belligerent rights to the armies of the Confederate States, and acts of a strictly military character, performed under military authority may be protected by this concession.

Morrison was appointed postmaster of the United States at Winnsboro, South Carolina, and as such executed the proper official bond with sureties, on December 20, 1859. His accounts were settled by the United States post-office department up to May 31, 1861, on which day after allowing him his legal commissions, &c. he was found indebted to the United States in the sum of seven hundred and seventy two dollars and twenty seven cents. In 1867, the United States brought suit against him for this sum, and the cause came on before a jury. After proving the acceptance of the office, the execution of the bond and the statement of the account finding the above balance against him, the government rested its case. The defendant then offered testimony to prove that he had received an order through the mails from the post-office department of the Confederate States, under whom he continued to exercise the functions of postmaster, to forward to Richmond all stamped envelopes of the United States in his possession, and that having stamped envelopes to the amount of fifty one dollars and seven cents, he accordingly did forward the same to Richmond. He further proved that he had carefully kept United States postage stamps entrusted to him while postmaster before the war, to the amount of one hundred and thirty one dollars and sixty two cents, but that soldiers of General Sherman's army, passing through Winnsboro in 1865, had broken into his house and destroyed those stamps. He therefore claimed a credit in his account for these two amounts.

Mr. Corbin, U. S. Dist. Atty.
Mr. Conner, for defendant.

At the conclusion of the argument and previous to the charge of the Chief Justice, Mr. Corbin submitted the following prayer to the court:

The court is requested to charge the jury, 1. That if the defendant Morrison accepted the office of postmaster at Winnsboro, S. C., on December 20, 1859, and bound himself to keep safely all the public money collected by him or otherwise at any time placed in his possession and custody, till the same was ordered by the postmaster-general to be transferred or paid out, ... and faithfully account with the United States in the matter directed by the said postmaster-general, for all moneys, postage stamps, stamped envelopes, &c., &c., which he as postmaster, or as agent and depositary, should receive for the use and benefit of the postmaster department; and if he entered upon the duties of that office, and continued therein up to May 31, 1861, and received the salary and commissions allowed by law therefor, he must be held strictly to the undertaking in his bond; and if the evidence shows that during his continuance in said office, as postmaster, there came to his hands property of the United States to the amount of seven hundred and seventy-two dollars and twenty-seven cents, which he has not accounted for, or paid over, as required by the postmaster-general, then a verdict for said amount, with interest at the rate of six per cent. from the date of the default, must be rendered for the plaintiff.

2. That the defendant Morrison did, in pursuance of the order of the post-office department of the Confederate States, forward to that office at Richmond all or any portion of the property of the United States, to wit, fifty-one dollars and seven cents in stamped envelopes, is not a proper accounting to the government of the United States therefor, and does not bar the right of the United States to recover judgment against said defendant and his sureties for the same.

3. That said Confederate States or government was an unlawful combination of divers persons, engaged in unlawful insurrection and rebellion against the government of the United States, and within the territory thereof, unlawfully usurping the powers of government, and as such it continued to be unrecognized as having any lawful existence,

[1] [Reported by Bradley T. Johnson, Esq., and here reprinted by permission.]

till suppressed by the military power of the United States; hence neither said Confederate government, nor its officers, or agents could originate any legal action, or issue any order which the defendant Morrison was bound to obey.

4. That the surrender of the fifty-one dollars and seven cents, in stamped envelopes belonging to the United States, by defendant Morrison, on the order of the Confederate government, received by him through the agent of the mails, was not a surrender or yielding up of the United States' property under the pressure of irresistible force, but a violation of the condition of his official bond, unauthorized, and contrary to law.

5. That the destruction of the one hundred and thirty-one dollars and sixty-two cents in postage stamps, by the United States' forces, is no defense to this action, unless he, Morrison, postmaster, shows affirmatively:

1. That he was loyal to the government of the United States.

2. That such destruction occurred without his negligence or default.

CHASE, Circuit Justice (charging jury). We shall decline to give the instructions asked for by the counsel for the government, except so far as they are embodied in what we shall now proceed to say. The policy of the government of the United States, in respect to the business of the post-office department, requires that principals and sureties upon the bonds of postmasters shall be held liable at all events. The decisions of the courts have constantly affirmed this doctrine. Neither robbery, nor theft, nor misadventure of any kind, except perhaps, when caused by the action of the government itself, will excuse a postmaster or his sureties. It is admitted, in accordance with this principle, that the present defendants are liable to the amount of three hundred and seventy dollars. But, it is claimed, that the postmaster, and, of course, his sureties also, are relieved, as to certain other liabilities assessed against him by the government. This relief, under the acts of congress, can arise only in two ways either through acts of Confederate troops, or through acts of the national troops. No relief could arise under any authority of the Confederate government. That government was founded in an attempt to throw off the authority of the United States, and establish an independent republic. If that attempt had succeeded, all transactions authorized by the Confederate government must doubtless have been recognized as lawful. But in the absence of success, that government was itself unlawful. Its whole existence was a continued rebellion against the lawful government of the United States. No one could be protected in any action by the sanction of its authority. The only exception to this are acts of war. The National government, in its exercise of a sound discretion, conceded belligerent rights to the armies of the insurgent states during the late civil war; and acts of a strictly military character, performed under military authority, may be protected by this concession. This, however, has nothing to do with the present case. It is not pretended that the postmaster failed to account to the government in consequence of any military orders; nor, indeed, would military orders for such a purpose constitute a defense. But the congress of the United States, sensible of the hardships which must attend the vigorous enforcement of the rule to which we have adverted, against postmasters for defaults occasioned by the late civil war, has thought fit to afford them a certain measure of relief. The act of 1864 [13 Stat. 62] authorizes the postmaster-general to credit postmasters for certain losses occasioned by the Confederate forces or Rebel guerrillas. This relief is confined to loyal postmasters. The act of 1865 [Id. 505] extends the same relief to cases where the losses are occasioned by armed forces other than those of the so-called Confederate States. If you find, therefore, that part of the loss in the present case was occasioned by armed forces other than those of the Confederate States, at the place where this post-office was established, that is to say, at Winnsboro, you will deduct the amount of such loss from the whole amount of the account stated.

The whole law upon the subject may be briefly stated thus: You are bound to take the amount stated in the account furnished from the post-office department as the true amount due from the principal defendant. Neither he nor his sureties are excused from the payment of that amount by any loss through fraud or force, except under the acts of congress referred to. For losses described by these acts, the defendants are not responsible. If you find, therefore, that any part of the loss of the principal defendant was occasioned by the presence of armed forces other than those of the insurgent states, you will deduct that amount from the sum stated in the post-office account, and render a verdict for the balance.

In response to a request of the district-attorney, the chief justice further charged the jury that interest upon the amount found due should be computed from the time of default of payment, that is to say, from June 30, 1861.

The jury retired, and after being out about an hour, the court was informed that one of the jurors had been taken sick. The jury returned into court, when the foreman reported that they were unable to agree upon a verdict. A mistrial was ordered, and the jury discharged.

Case No. 15,818.

UNITED STATES v. MORRISON et al.

[1 Sumn. 448.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1833.

SEAMEN—ENDEAVOR TO COMMIT REVOLT.

1. Where the master directed one of his crew to be punished for gross misbehavior, and the crew interposed and prevented the infliction of the punishment, compelling the master, by acts of violence and intimidation, to desist therefrom; *held*, to be an endeavor to commit a revolt within the act of congress of 1790, c. 36 (9), § 12 [1 Story's Laws, 85 (1 Stat. 115)].[2]

[Cited in Talcott v. Pine Grove, Case No. 13,735.]

2. Neither a previous deliberate combination for mutual aid and encouragement, nor any preconcerted plan, is necessary to bring it within the act.

Indictment [against John Morrison and others] for an endeavor to commit a revolt on board of the ship United States. Plea, not guilty. At the trial the evidence was briefly as follows: On the 8th of August, 1833, Dutton, one of the crew, on account of his gross misconduct, was ordered by Webb (the master of the ship) to be put in irons. The mate attempted to do it, and Dutton made resistance. The mate, however, got Dutton down in the scuffle, and was proceeding to put on the irons. The crew then came aft together, some of them having handspikes in their hands, and others having chisels, knives, or mallets; and said, that the master should not put any man on board the vessel in irons. The master said he would; and they continued to say he should not. The prisoners at the bar were part of the crew, and present, and apparently co-operating with the others. The master then attempted to keep them off; and proceeded to tie Dutton's feet with a line. Murphy (one of the prisoners) cut the line from his feet. Morrison (another of the prisoners), who was at the helm, left it, and another person took it. Morrison then ran towards the master, and struck him. In the mean time the crew dragged Dutton away forward from the mate. And the master, finding the resistance general among the crew, thought it his duty to proceed no farther, and made no more resistance to the rescue of Dutton.

Mr. Parke, for defendants, contended, that the evidence was not sufficient to establish any combination or concerted plan of the crew for mutual assistance in the interference or rescue; and that it was merely a sudden affray without combination or design. He cited U. S. v. Smith [Cases Nos. 16,344 and 16,345].

Mr. Dunlap, Dist. Atty., contended, e contra, that the evidence clearly established the offence charged in the indictment; and he cited U. S. v. Hemmer [Case No. 15,345]; U. S. v. Smith [Id. 16,337]; U. S. v. Haines [Id. 15,275].

STORY, Circuit Justice, in summing up to the jury, said: To constitute the offence of an endeavour to commit a revolt, in the sense of the act of congress of 1790, c. 36 (9), § 12 [1 Story's Laws, 85 (1 Stat. 115)], something more is necessary than bare disobedience or resistance by a seaman to the lawful authority, commands, or proceedings of the commanding officer of the ship. There must be a designed combination or co-operation with others in such disobedience or resistance; or some attempt or endeavour to procure it; or some assistance, aid, or encouragement to others in such disobedience or resistance. In short, there must be some effort to excite, or inveigle, or engage others in such illegal acts; or some aid or encouragement promised or given in furtherance of them. But it is by no means necessary, that there should be any previous deliberate combination for mutual aid and encouragement, or any preconcerted plan of operations to effect the illegal object. However sudden may be the occurrence, or unexpected the occasion, of such disobedience, or resistance, those, who take a part in it, whether by words or by deeds, by direct acts of aid or assistance, or by encouragement or incitement, are in contemplation of law guilty of the offence. Their conduct, under such circumstances, amounts to an endeavour to commit a revolt by overthrowing, pro hac vice, the lawful authority of the commanding officer of the ship. Thus, to apply the doctrine to the present case, if the master of the ship should direct a seaman to be punished reasonably for his misconduct, and the crew should interfere to prevent the infliction of the punishment by attempting a rescue; or by other acts of violence; or by intimidation or threats; such acts would in contemplation of law amount to an endeavour to commit a revolt. They would operate directly to suspend the exercise of the lawful authority of the master on board of the ship. And those of the crew, who should stand by, exciting or encouraging those, who were actually engaged in such illegal interference, would be equally guilty with the immediate actors. The only question, then, in the present case, is, whether the facts bring the defendants, or any of them, within the reach of these principles. It appears from the evidence, that the master directed one of the seamen to be punished for gross misbehavior. The crew interfered, and prevented the infliction of the punishment, and rescued the party. The master was ultimately compelled to relinquish his intention of punishment by the acts of violence, intimidation, and threats of the crew. All the defendants were present, and (as the witnesses say) co-operated

[1] [Reported by Charles Sumner, Esq.]

[2] It is an endeavor to commit a revolt, to combine to force the master of the ship to redress grievances Rex v. Hastings, 1 Moody, Crown Cas. 82.

in the interference and rescue. Such is the state of the evidence; and it is for the jury to say, whether they believe it. If they do believe it, then the court have no difficulty in saying, that in point of law the defendants are guilty of the offence charged in the indictment.

Verdict, guilty.

Case No. 15,819.

UNITED STATES v. MORROW.

[4 Wash. C. C. 733.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1827.

COUNTERFEITING—PASSING THROUGH AGENT—RESEMBLANCE TO GENUINE MONEY.

1. Proof of passing, or attempting to pass counterfeit money by an agent, employed by the defendant for that purpose, is the same as proving the acts to have been done by himself.

[Cited in brief in Biles v. Com., 32 Pa. St. 536.]

2. In a prosecution for passing counterfeit money, the jury should be satisfied that the resemblance of the forged to the genuine piece, is such as might deceive a person using ordinary caution.

[Cited in U. S. v. Bricker, Case No. 14,642; U. S. v. Williams, 14 Fed. 553.]

The prisoner was indicted for forging certain coins in the similitude of the half dollar coins, coined at the mint of the United States, and for passing and attempting to pass the same to defraud one John Sailor; these offences being stated in separate counts. The evidence of Sailor was, that a small boy, eight or ten years old, came to his store and purchased some articles, for which, he offered in payment, one of these forged pieces, being made of pewter; which he instantly detected to be false, and had the boy apprehended, and taken before the mayor. The prisoner confessed that he had employed the little boy to pass the piece, which had been offered in payment to Sailor, as well as other similar pieces, and was, by agreement, to give him one half of the numerical amount of every piece he should pass. The court allowed evidence to be given that the prisoner had, on the same day, caused other forged money similar to that stated in the indictment, to be passed to other persons than Sailor, for the purpose of proving his knowledge of the forgery. 3 Chit. Cr. Law, 810, note W.

Mr. Ingersoll, U. S. Dist. Atty.

Clay & Lausatt, for defendant.

WASHINGTON, Circuit Justice, charged the jury, that if they believed Sailor, the offence of attempting to pass the forged piece was fully made out; as the attempt made by the agent of the prisoner, employed by him, was his attempt; and his contract with the boy, together with the other evidence, was strong to prove that he knew the pieces to be forged. But after all, the jury, before they can convict the prisoner, ought to be satisfied that the resemblance of the piece offered to Sailor to the genuine half dollar of the United States is sufficiently strong to deceive persons exercising ordinary caution. The piece attempted to be put off upon Sailor is of pewter, very light; and as it seems to the court, is, in all respects, a miserable imitation of the genuine half dollar. But the jury must judge for themselves.

Verdict, not guilty.

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

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